



COUNTRY REPORTS ON ADVERTISING, MARKETING & PROMOTION LAW DEVELOPMENTS

GLOBAL ADVERTISING LAWYERS ALLIANCE (GALA)
GLOBAL MEETING
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1. Case Report:	Cervecería y Maltería Quilmes S.A. vs. C.A.S.A.Isenbeck
Topic:	Trademark infringement– Unauthorized use and parody of a third party trademark – Trademark falsification and fraud – Unfair competition
Where:	Federal Court of Appeals for Criminal or Misdemeanor matters of the City of Buenos Aires
When:	March 5 th , 2003
What Happened:	<p>On May 2002, Isenbeck published a print ad on the main argentine newspapers, in which a Brazilian flag was shown and instead of the traditional blue globe, a Quilmes bottle top was placed in the center of the flag. Below the flag, there was a statement that indicated that Quilmes had been sold to the Brazilian and, in small letters, a couple of ironic questions made fun of the selling of the firm to Brahma.</p> <p>A week later, another ad was published with the same spirit, trying to take advantage of the great existing rivalry between both countries in football. Because of that, the plaintiff sued Isenbeck for considering configured the crime of fraudulent imitation and falsification of its trademark, as well as the illegal use of a third party's trademark (section 31.b of the Argentine Trademark Act).</p> <p>The judge rejected the plaintiff's claim, due to the fact that no fraud or falsification had taken place. He considered that the defendant was not "using" the trademark QUILMES as if it was its owner, but it was just using it for giving truthful information to consumers, which was that the company had been sold to a Brazilian competitor. The judge also appointed that the unfair use complaint would have been more appropriate to the case, but the plaintiff did not file for such action.</p> <p>In the end, he ruled that there was no illegal use of trademark and that none of the crimes alleged by Quilmes had been configured. The Court of Appeals confirmed the ruling on the same arguments.</p>

LOS BRASILEROS COMPRARON QUILMES^{S.A.}

AHORA NO PARAN DE INVENTAR CANTITOS.

*Volveremos, volveremos, volveremos
otra vez, volveremos a ser campeones
como en el 86, 58, 62, 70, 78, 94.*

*Argentina es una pasión,
no puedo negar.
Pero Brasil también...
no nos queremos pelear.*

*Esteeeeee es tu sponsor
que apoya y te sigue sin parar,
vamo Argentina y/o Brasil,
con alguno de los dos
la vuelta vamo a dar.*

*Hay que ganar, hay que ganar,
pero no contra Brasil, en ese
caso preferimos empatar.*

SEMPRE EN PARCELA. TAMBEM EM CASA. SEMPRE EM TERMO.

SEMPRE EN PARCELA. TAMBEM EM CASA. SEMPRE EM TERMO.



ISENBECK[®]

Te vendemos una buena cerveza. Y nada más.



LOS BRASILEROS COMPRARON QUILMES.

¿Justo antes del mundial? ¿Cómo se decía vendido en portugués?



Relevant Facts to be Considered:

- _ The plaintiff is the leader firm on the beer business in Argentina and is the owner of the trademark "QUILMES", in Class 32
- _ Isenbeck is a multinational firm, which happens to be one of its main competitors on the same frame of products in Argentina.
- _ The print ads were published on the two most important national newspapers, on times where the 2002 football World Cup was about to start, being the plaintiff one of the official sponsors of the Argentine national team.
- _ There is a great rivalry between Argentina and Brazil regarding sport competitions, specially in football.
- _ Just before this ads were published, the majority of the capital stock of Quilmes was sold to another competitor in the beer market (Brahma) who happens to be a Brazilian multinational firm.
- _ Besides this trial, Quilmes also filed a civil complaint against Isenbeck for the damages aroused from the publication of the ads.

	_ We enclose a copy of the two ads that were published by the defendant.
Comment:	This decision has an interesting outcome, because it meant that the simple mention on an ad of another's trademark could not be understood as a violation to the trademark owner's rights. The Court found improper to claim for falsification in this kind of cases and said that the unfair use complaint would have been the proper claim.

2. Case Report:	C.G.L.M. Vs Saint Denis SRL & L' Donna SRL
Topic:	Binding publicity – Breach of contract – Emotional harm -Indemnification – Obligations related to the ends desired – Joint responsibility
Where:	Commercial Chamber of the City of Buenos Aires
When:	February 18 th , 2003
What Happened:	<p>A woman (later called "CGLM") filed a complaint against two companies (Saint Denis SRL and L' Donna SRL, later called Denis and Donna respectively), claiming for an appropriate compensation for the damages suffered in connection to the deficient depilating service offered by them. The fact that both companies were sued was due to the franchising contract that existed between them, where Denis was the Franchisor and Donna the Franchisee.</p> <p>CGLM had a hormonal problem which provoked the growth of hair on her face. That is why she decided to use the depilating method offered by Donna.</p> <p>The basic argument of the claimant was that, when promoting the product on the commercials, Donna assured the depilation would be definitive and that the method used was infallible. In this sense, the Argentine Consumer Act establishes that every publicity made by any media of a given product or service obliges the offeror and must be considered as included in the contract with the consumer.</p> <p>The defendants argued that they duly informed Miss CGLM about the improbability of obtaining successful results on cases with pathologies like the one she had. They also alleged that their obligations were not related to the ends desired but to the means used to achieve a given end.</p> <p>The judge finally ruled that both defendants were jointly responsible for the damages caused and had to pay the indemnification claimed. He understood that Donna was obliged by the promises made on the advertisements published and that it had failed to comply with the obligations assumed. Besides, he found that the breach of contract configured by Donna produced an emotional harm to the plaintiff. He considered, as well, that if Donna really knew about the inefficiency of the treatment on certain cases, it should have refused to give it to CGLM because of her pathology.</p> <p>Finally, the reason why he decided that the <u>two</u> companies were equally responsible was that the referred Argentine Consumers Act also determines that every participant of the commercialization chain (this</p>

	means producers, distributors, importers, sellers, etc) should respond in cases were a damage is provoked to a consumer due to a defective product or service provided by one of them.
Comment:	The legal relevance of this case is that it affirms the principle that consists on considering obligatory a promise made by advertisers on every kind of ads. This kind of rulings limit the possibility that companies have of deceiving consumers by promoting inexistent qualities or properties of their products or services. Furthermore, it extends responsibility to every participant of the commercialization process, which means that the consumer would simply have to file a complaint against everyone involved and the burden to prove the innocence will be in head of each defendant.

3. Legislation:	Advertising Regulation: Radio Broadcasting emergency executive order
Topic:	Exemption of the prohibition of publicity emission by state-owned local stations
Who	Argentine President and Cabinet Ministers.
When:	January 24 th , 2003
What Happened:	<p>Section 107 of the National Broadcasting Act establishes that the every provincial, municipal or university radio broadcasting station cannot air publicity. This ban includes all kind of ads.</p> <p>The imperious necessity of a modification of said aspect of the Act made the administration issue this executive order, which consists on the exemption of said ban to all the stations involved in the general prohibition stated on the referred section of the Broadcasting Act.</p> <p>This decision was made in order to provide the state-owned stations with the essential means for subsistence. This order has a five year term and happens to be an extension to the one issued on 1998.</p>
Comment:	<p>The legal power of the government branch to issue this kind of emergency measures is given by the Argentine Constitution.</p> <p>The emergency order is important so as to avoid the provincial, municipal or university stations from being out of means to operate normally and fulfill its aims with the proper resources.</p>

4. Doctrine:	Email Marketing and SPAM: VII International Congress on rights arising from damages and injuries
Topic:	Aspects of the legal responsibility of the internet providers for SPAM
Who	Thesis exposed by a group of lawyers on the referred International Congress
When:	October 2002
Relevant Facts of the Thesis:	<p>The thesis outlines the responsibility of the Internet Service Providers (ISP) on the traffic of SPAM by e-mail, as providers of such service.</p> <p>The authors say that, although there is no specific regulation about that matter, ISP would be somehow responsible for the delivery of SPAM through the net, though they have the power to control and avoid the traffic of such non-desired publicity.</p>

	Nevertheless, there is an already developed project for regulating electronic communications that exonerates ISP from responsibility for the simple transmission of SPAM unless they help by any means in the distribution of it.
Comment:	Besides the apparent contradiction between the project and the opinion of the doctrine, the truth is that this is a very new matter of debate in our country, for which we hope to see a case held at Court so as to see the judicial resolution on a SPAM case against the service provider.

5. Legislation:	E-Commerce: Digital Signature Act
Topic:	Electronic and Digital Signature. Validity of digital documents. Digital certificate
Who	Argentine Parliament
When:	December 14 th , 2001
Comment:	<p>This Act was passed to give a big impulse to e-commerce. By giving equal legal value to the digital signature and the written one, this regulation happens to be of great importance for encouraging the trade through the Internet, because digital signatures on digital documents are equally binding as the contracts signed on paper.</p> <p>This kind of regulation surely represent a big deal for advertisers, due to the fact that if the e-commerce grows and becomes a widely used method for doing business, the possibility for advertisers to promote their products or services through the web would be highly increased as well as the results reported by them.</p>

AUSTRALIA



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1. Legislation:	Copyright Amendment (Parallel Importation) Bill 2002
Topic:	Parallel importation and commercial distribution of computer software products, electronic books and print books
Who:	Federal Government of Australia
When:	Introduced March 2002
What Happened:	<p>This Bill will enable parallel importation and commercial distribution in Australia of computer software products, including interactive computer games, books, periodical publications (journals, magazines) and sheet music in <i>electronic form</i>.</p> <p>Provisions to allow parallel importation of books, periodical publications (journals, magazines) and sheet music in <i>print form</i> have been removed from the Bill.</p>
Comment:	The Bill was passed by the House of Representatives in 2002 and debate has recently concluded in the Senate after its 2002 adjournment. The Bill was passed by the Senate, although there was opposition to the provisions relating to books, periodical publications (journals, magazines) and sheet music in print form and accordingly the Bill was amended to satisfy those concerns. The date that the amendments take effect has not yet been determined.

2. Case Report:	Dow Jones and Company v Gutnick [2002] HCA 56
Topic:	Defamation and Publication on the Internet
Where:	High Court of Australia
When:	10 December 2002
What Happened:	<p>The High Court of Australia has held that overseas publishers can be sued in Australia for defamatory statements about Australian citizens which are placed on the internet.</p> <p>The case concerned an internet publication uploaded in New Jersey in relation to dealings by an Australian businessman. The publication was available to subscribers on the internet and was downloaded by a number of subscribers in Australia.</p> <p>The Court held that regardless of where material was placed on the internet, the relevant consideration was where the material was accessed and caused damage to the person's reputation.</p> <p>The decision means that people and organisations anywhere in the world who make defamatory statements about Australians on the internet are liable to be sued in the Australian Courts under Australian defamation</p>

	<p>law.</p> <p>Our arrangements for reciprocal enforcement of judgments mean that in a number of cases a judgment obtained in an Australian court can then be registered in a foreign country and enforced against the maker of the statement. The Court held that it is not unreasonable for internet publishers to give consideration to the defamation laws of Australia if the person being written about has a reputation in Australia.</p>
Comment:	<p>Anyone in the world who places material concerning Australians on the internet which is in any way derogatory should have regard to how Australian defamation law would view such a publication.</p>

3. Case Report:	Philmac Pty Limited v The Registrar of Trade Marks [2002] FC1551
Topic:	Trade Marks – Single Colour
Where:	Federal Court of Australia
When:	13 December 2002
What Happened:	<p>The Applicant applied to register the colour terracotta as a trade mark in relation to “non-metallic rigid irrigation pipe fittings and connectors”. The Registrar of Trade Marks rejected the application on the basis that the mark was not capable of distinguishing the Applicant’s goods as required by Section 41 of the Australian <i>Trade Marks Act</i> 1995. The Applicant appealed to the Federal Court.</p> <p>The Court found that the colour terracotta does not have an inherent capacity to distinguish in relation to these types of goods. The Court reasoned that a single colour trade mark would only be inherently distinctive where:</p> <ol style="list-style-type: none"> 1. the colour does not serve a utilitarian function (e.g.: light reflection or heat absorption) 2. the colour does not serve an ornamental function (e.g.: it does not convey a recognised meaning such as heat, danger or environmentalism) 3. the colour does not serve an economic function (e.g.: it is not the naturally occurring colour of a product) 4. the colour mark is not sought to be registered in respect of goods in the market in which there was a proven competitive need for the use of colour. <p>The Court found that none of the first 3 points applied, however that other manufacturers of similar products may also need to use colours and terracotta would be a natural choice. Nevertheless the Court found that the evidence of use before and at the date of filing showed that the colour did in fact distinguish the Applicant’s goods since no other manufacturer of goods in the same class was using the colour in a manner that would diminish the factual distinctiveness of the Applicant’s fittings. Accordingly the Court ordered that the application be amended and the trade mark registered.</p>
Comment:	<p>This case is important as it is the first ruling by the Federal Court on the issue of single–colour trade marks. The Court held that such a mark if not having inherent capacity to distinguish, may still be registered if has a factual capacity to distinguish at the date of the application.</p> <p>This decision brings the treatment of single colour marks in line with other</p>

	<p>types of trade marks in Australia (words, logos and shapes) recognising that they may be <i>prima-facie</i> distinctive.</p> <p>Cadbury Schweppes has recently appealed against the Registrar's refusal to register the colour purple in respect of chocolate confectionary and 3M has also recently appealed the Registrar's decision to refuse to grant registration of its canary yellow colour with respect to Post-It adhesive stationery products. It will be interesting to see how the Federal Court will rule in relation to these two subsequent cases on appeal in light of the <i>Philmac</i> decision.</p>
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4. Topic:	.au Dispute Resolution Policy
Who:	auDA - .au Domain Administration
When:	Commenced on 1 August 2002
What Happened:	<p>The auDRP was introduced in order to provide a cheaper and speedier alternative to litigation for the resolution of disputes between the registrant of a .au domain name and a party with competing rights in the domain name.</p> <p>Domain name licenses that were issued before 1 August 2002 are not subject to a mandatory administrative proceeding under the auDRP:</p> <ul style="list-style-type: none"> • until the domain name license is renewed; or • unless the registrant voluntarily elects to be bound by the auDRP before their domain name license is renewed. <p>The procedures for filing a complaint under the auDRP is similar to the process for filing a complaint under the Uniform Dispute Resolution Policy (UDRP).</p>
Comment:	<p>The auDRP is largely based on the UDRP administered by ICANN. However, the auDRP addresses some of the practical problems encountered with the UDRP as listed below:</p> <ul style="list-style-type: none"> • The domain name need only be registered <u>or</u> subsequently used in bad faith. Under the UDRP the domain name must be <u>used</u> in bad faith. • A domain name can be identical or confusingly similar to a trade mark, service mark, a trading name or a personal name. • Notice of a complaint occurs upon the serving a letter of demand, and not upon receipt of the official notification of official complaint. • Bad faith is shown where: <ul style="list-style-type: none"> - a registrant attracts users to any website that is not the complainant's website; or - a registrant registers a domain name for purpose of selling it to any other person; or - a domain name is registered primarily to disrupt business of any other person. <p>The aim is that cases decided under the UDRP will provide guidance for decisions under auDRP.</p>

5. Case Report	Australian Drivers Rights Association v Australian Dust Removalists Association (Reference: 2351)
Topic:	The first auDRP decision decided in favour of respondent
Where:	The Institute of Arbitrators & Mediators Australia. Sole Panelist, John Brydon.
When:	3 January 2003
What Happened:	<p>The applicant registered 'adra.com.au' in 1998 but the registration lapsed as a result of the registrar allegedly failing to act on instructions to renew the domain name in July 2002. The respondent subsequently registered the domain name.</p> <p>The applicant argued that the respondent had registered the domain name to prevent it from using its allegedly well-known website, and further that the respondent had requested AUD\$30,000 for the transfer of the domain name, which is evidence of a bad faith registration.</p> <p>The respondent argued that:</p> <ol style="list-style-type: none"> 1. it had no previous knowledge of the applicant and had registered the domain name because it was an obvious acronym of its name (ADRA); 2. it had distributed literature bearing this acronym to municipal councils and others; and 3. its suggestion of an "off the cuff" figure of A\$30,000 for the transfer of the domain name was in response to a letter of demand. <p>The transfer was refused on the following grounds:</p> <ol style="list-style-type: none"> 1. failure to renew a domain name is not consideration under the auDRP; and 2. the respondent had a legitimate interest in the domain name and the domain name had not been registered in bad faith.

6. Topic:	Creation of new geographic 2LDs in the .au domain space
Who:	auDA - .au Domain Administration
When:	14 November 2002
What Happened:	<p>Eight new second level domains (2LDs) will be created for Australian States and Territories – act.au, nsw.au, nt.au, qld.au, sa.au, tas.au, vic.au and wa.au. Their creation is aimed at preserving Australian geographic names for use by the relevant communities.</p> <p>The proposed domain structure is placename.state/territory.au, for example, sydney.nsw.au.</p> <p>The NSW Government has committed to undertake pilot testing in nsw.au, as the first phase of progressive national implementation.</p>
Comment:	Use of these domain names will be restricted to community website portals that will reflect community interests such as local businesses, tourism, historical information, special interest groups and cultural events.

7. Legislation	The Fair Trading Amendment Bill (NSW) 2002
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Topic:	Fair trading, door to door sales, telemarketing contracts
Who:	State Government of New South Wales
When:	December 2002
What Happened:	<p>This bill was introduced in an attempt to update the Fair Trading Act (NSW) 1987 to reflect changes in the way transactions are undertaken and the increasing sophistication of the operations of unscrupulous persons. The most significant proposals include:</p> <ul style="list-style-type: none"> • the creation of an offence where a trader, who has been notified to substantiate a claim or representation fails to do so; • the insertion of direct commerce provisions that will cover both traditional door to door sales as well as telemarketing contracts; • restricting the hours during which unsolicited telephone marketing or door to door sales can occur; • extending the "cooling off period" to a broader range of direct selling transactions but reducing the period from 10 days to 5 business days; • reproducing provisions contained in the federal <i>Trade Practices Act 1974</i> that relate to warranties in consumer transactions and actions against manufacturers and importers of personal or domestic goods; • inserting provisions in relation to country of origin representations; and • extending the limitation period in which action may be taken to recover loss or damage from 3 to 6 years.
Comment:	<p>This Bill repeals the NSW <i>Door to Door Sales Act 1967</i> and the NSW <i>Mock Auctions Act 1973</i> and is seen as a means of amalgamating all the provisions relating to household good and services in NSW into one Act. Several of the amendments (especially those relating to the federal <i>Trade Practices Act 1974</i>) follow on from recent amendments to corresponding federal legislation.</p>

AUSTRIA



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1. Legislation:	Amendment of the Intellectual Property Act
Topic:	Implementation of Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society.
Where:	Austrian Parliament
When:	Probably second half of 2003
What Happened:	The Austrian Ministry of Justice prepared a proposal for an amendment of the Austrian Intellectual Property Act. With this amendment Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society shall be implemented into Austrian law. The implementation shall particularly include the protection of technological measures, designed to prevent or restrict acts in respect of works or other subject matter, which are not authorized by the right holder of any copyright or any related rights. By the proposed amendment, legal protection will be provided against the circumvention of any effective technological measures. In particular, legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services, which are designed to circumvent technological measures. The protection against such circumvention will be provided on the basis of civil law as well as criminal law.
Comment:	According to Article 13 of Directive 2001/29/EC, implementation should have taken place before December 22, 2002. The Ministry of Justice had already prepared the amendment to be enacted in 2002, however due to the general elections in Austria in the autumn of 2002, implementation was delayed. It is expected that the amendment shall be enacted in the second half of 2003.

2. Case report:	
Topic:	Copyright protection of a website
Where:	Austrian Supreme Court
When:	April 24, 2001
What Happened:	A telecommunication company (plaintiff) and a manufacturer in the electrical industry (defendant) had used the same web designer. When designing the website for the defendant, the web designer used the same colours and characteristics, which he had already used for the website of the plaintiff. In particular, very similar graphics were used on both websites.

	<p>The plaintiff sued the defendant and demanded a court order that the defendant shall refrain from using a website, which is very similar to the plaintiff's website. The claim was based on the Intellectual Property Act. The plaintiff argued that a website is a work of art and therefore protected under the Intellectual Property Act. The web designer had transferred all copyrights of the plaintiff's website to the plaintiff.</p> <p>The Austrian Supreme Court admitted the plaintiff's claim and ordered the defendant to refrain from using the similar website. The court approved that a website, under certain requirements, has copyright protection.</p>
Comment:	With this decision the Austrian Supreme Court acknowledged for the first time that a website, as a work of art, may have copyright protection.

3. Case report:	
Topic:	Publication of a judgment in the internet
Where:	Austrian Supreme Court
When:	October 15, 2002
What Happened:	<p>The plaintiff is a famous manufacturer of men's clothing and holds the trademark "Boss".</p> <p>The defendant distributes tobacco products and used the trademark "Boss" for cigarettes. As the cigarettes were distributed via the internet the defendant used the protected trademark "Boss" in order to advertise the cigarettes on its website.</p> <p>The plaintiff was successful in obtaining a court order, according to which the defendant had to refrain from any further use of the protected trademark "Boss".</p> <p>Under the Austrian Act Against Unfair Competition the plaintiff is entitled to have a court judgment published in order to inform the consumers. Usually such publication is made in newspapers. In the present case the court admitted the plaintiff's claim that the publication of the judgment shall take place in the internet on the website of the defendant. The Austrian Supreme Court argued that the trademark infringement took place on the defendant's website, so that it is justified that also the publication of the judgment shall take place on the defendant's website.</p>
Comment:	With this judgment the Austrian Supreme Court for the first time granted to the plaintiff the right to have the judgment published in the internet on the defendant's website.

4. Case report:	
Topic:	Use of a trademark as a metatag
Where:	Austrian Supreme Court
When:	December 19, 2000
What Happened:	Plaintiff and defendant were both distributing machinery. The plaintiff owns the protected trademark "Numtec-Interstahl". Both parties advertise their products on their websites. The defendant was using the trademark "Numtec-Interstahl" as a metatag. The use of the words "Numtec-

	<p>Interstahl" was not visible to visitors of the defendant's website, as they were only used in the source text.</p> <p>The Austrian Supreme Court admitted the plaintiff's claim to stop the defendant from using the plaintiff's trademark "Numtec-Interstahl" as a metatag. Even though the protected trademark does not appear on the defendant's website and is not visible for visitors of this website, the use of the protected trademark as a metatag will influence the results of search engines. "Metatagging" with the use of protected trademarks, therefore, was considered by the court as a violation of the Trademark Protection Act.</p>
Comment:	With this judgment the Austrian Supreme Court stopped "metatagging" using protected trademarks.

5. Case report:	
Topic:	Violation of protected trademarks in the internet: "disclaimer":
Where:	Austrian Supreme Court
When:	October 15, 2002
What Happened:	<p>The plaintiff was the holder of a trademark. The defendant was using this trademark for his products in the internet. On his website the defendant used a "disclaimer", according to which the offer on this website was only designed for consumers in certain states. According to this disclaimer the offer was not valid for consumers in Austria. In contradiction to this disclaimer however, the defendant's products were also distributed in Austria.</p> <p>The Austrian Supreme Court decided that the use of the trademark on the defendant's website establishes a violation of the Austrian Trademark Act. Regardless of the disclaimer, according to which the offer was not valid for Austria, the defendant had also distributed its products on the Austrian market. The disclaimer could therefore not be used by the defendant as an excuse for the trademark violation.</p>
Comment:	A "disclaimer" according to which an offer made with the use of a trademark shall not be valid for Austria, will be of no effect, if the products are actually distributed also on the Austrian market.

BELGIUM



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1. Topic:	Passing-off/copyright infringement for a pay-off or slogan: "The World's Local Brewer" vs. "The World's Local Bank"
Who:	INTERBREW vs. HSBC BANK PLC
When:	26 December 2002
Where:	Court of First Instance, Brussels
What Happened:	<p>The Belgian brewer Interbrew commercialises a multitude of beer brands. In 1999, Interbrew found "The World's Local Brewer" as slogan, applied since 2000. Since 2002, The Hong Kong and Shanghai Banking Corporation HSBC uses the slogan "The World's Local Bank" in advertisements. HSBC finds that this use is not confusing and does not infringe any intellectual copyright.</p> <p>The Court first confirmed the Court of Justice of the EC ruling that copyright can offer larger protection than the protection under trademark legislation that can simultaneously apply.</p> <p>For copyright protection to apply, the slogan has to be original. Originality is the personal print of the personality of the author of the expression of his intellectual effort. HSBC considers that the underlying idea is sought to be protected by Interbrew, rather than the slogan itself. The idea is to oppose notions of globalisation to locality. Also, HSBC finds "World's local" part of the current language, too simple with references to use on the Internet.</p> <p>Interbrew contests that the protection of an idea is sought.</p> <p>The Court considers that the expression of an idea in a particular form is protected if that form is original. Not the originality of the idea is reviewed. The idea of opposing global to local can find expression in different forms. Interbrew had the choice between several forms to express the idea. But this choice does not suffice to confer originality to the form. The importance of the creative work (quantitative) is not relevant for the appreciation of the originality.</p> <p>Further according to the Court, the association of two words that are a priori antagonic is not as such sufficient to grant the expression originality. This association seems to be quite commonly done. Many examples of expressions of "world's local" are found. The slogan therefore is too simple ("banal") to be original.</p> <p>The Interbrew claim therefore was dismissed.</p>
Why This Matters:	Copyright protection of slogans is generally accepted in Belgium and the

	<p>threshold “originality” has been applied in a way that copyright protection is quite easily accepted.</p> <p>This ruling shows that courts will set limits to copyright protection if defendants show in sufficient detail that parts of the slogan are too commonly used to be protected.</p> <p>Interestingly, The Brussels Court of Appeal had equally denied copyright protection to the slogan “so many people, so many shoes”, developed by Saatchi & Saatchi for the shoe chain Brantano. The slogan is an adaptation of the old proverb or saying “so many heads, so many sentiments/feelings” (from the old Latin ‘Quot capita, tot sensus’ or ‘quot homines, tot sententiae’). Brantano sued the Belgian furniture shop Top Mart that launched the slogan “so many people, so many furniture”. The idea to apply an old saying through adaptation to shoes in order to demonstrate the big variety of the offer of shoes was found clever/smart; but the Court of appeals found that this still was insufficient to claim originality on the basis of the personal imprint of the author (Ruling of 21 September 2001 thereby following the decision in first degree of 16 January 2001).</p> <p>The matter of Interbrew vs. HSBC is currently appealed.</p>
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2. Topic:	Misleading Advertisements – Ads for products without sufficient stock
Who:	The Belgian State vs. Carrefour (warehouse)
When:	15 January 2003
Where:	President of the Court of Commerce in Brussels – cease and desist order
What Happened:	<p>Carrefour Belgium advertises in massive scale through all kinds of print media, website and billboards to draw the attention of consumers to exceptionally advantageous sales for a large variety of products over time such as household electronics, wines, software.</p> <p>Many consumers returned disappointed from Carrefour as the advertised products were no longer on stock notwithstanding the promotional period that was still running.</p> <p>Several official protocols were drawn up and finally, the Belgian State accepted the payment of a fine. But complaints persisted: misleading ads for wines that in fact have a different year, television sets that were offered at higher prices than the advertised price, etc. A digital camera was out of stock as from the first day of the promotion.</p> <p>In view of the systematic and recurring nature of the misleading practices, a cease and desist order was pronounced with a very high daily penalty and a publication of the order at the cost of Carrefour in several newspapers.</p>
Why This Matters:	The practice was surprisingly general and persistent. The daily penalty was as high as 50,000 EUR.

3. Topic:	Domain Name "grabbing" between two leading publishers of legal publications
Who:	WOLTERS KLUWER BELGIUM vs. INTERSENTIA
When:	20 January 2003
Where:	President of the Court of Commerce in Brussels – Cease and Desist Procedure
What Happened:	<p>WOLTERS KLUWER is a publisher of legal periodicals and books and started in 2002 with the legal weekly "Nieuw Juridisch Weekblad" (New Legal Weekly-, abbreviated "NJW". The first issue appeared in September 2002.</p> <p>The new name was made public Mid 2002. INTERSENTIA is active in the same field as direct competitor and publishes, i.a., "Rechtskundig Weekblad" ("Legal Weekly"). Intersentia registered "NJW" as domain name ".be" in August 2002.</p> <p>The President of the Court accepted that the registration of the domain name was done in bad faith to damage the business of the competitor, even if the domain name of defendant was the abbreviation "NJW" of "nieuwe juridische wegwijzer" (or, freely translated, "new legal indicator".</p> <p>The President ordered a daily penalty of 15.000 EUR per further infringement through use of the sign as of the third day after notification of the decision and accepted that a short summary of the Court order be published in a publication of Wolters Kluwer at the costs of Intersentia.</p>
Why This Matters:	The abbreviation "NJW" for Wolters Kluwer was totally new; the infringing domain name was for a publication that exists since 70 years, but under a different name (abbreviated "RW").

4. Topic:	Media Law - Privacy – Disclosing names by journalists – proper journalistic practices
Who:	Food Dynamics N.V. vs. VTM (television station)
When:	10 January 2003
Where:	Court of First Instance, Brussels
What Happened:	<p>The Flemish commercial television station VTM was ordered to pay an amount of 10.000 EUR damages for improper journalistic practices.</p> <p>In its January 10, 2003 judgment NV Food Dynamics / Vlaamse Media Maatschappij, the Brussels court condemned the television station for bringing a news item in which the plaintiff was mentioned by name in relation to dealing in illegal hormonal products.</p> <p>The news broadcast showed footage of the sale of products, filmed with a hidden camera, in which a farmer was shown while buying some products out of the trunk of a car from an (unidentifiable) representative of the plaintiff. The footage actually was selected from a broadcast of a French television station. The next day the same footage was used and it was stated that the suspect works for the plaintiff and that the plaintiff has ties with trade in hormonal products. It was added that this company denied being part of such trade.</p> <p>The court states that hormonal products as such can be legal, but that</p>

	<p>the way of presenting in the news equated hormonal products with forbidden products.</p> <p>Soon after the incident, the judicial inquiry was stopped and the company was cleared, as the investigation showed that the sold products were only food additives on a herbal basis, in which the company normally trades.</p> <p>The court repeats principles of journalistic behaviour: a journalist must inform the public as objective and complete as possible, and with the most care, modesty, unselfishness and cautiousness as well in searching the news as while distributing it. This sounds very severe. It is added that a journalist must act like any normally careful journalist in the same circumstances. This sounds much less severe.</p>
Why This Matters:	<p>The interesting part is the application of these principles. In this particular case, the broadcasting company should have waited to make these allegations and to give the public a certain impression until it was clear what substances really were traded, certainly if this information could be obtained in a reasonable way. This was the case since a lab report could have revealed the true nature of the traded products.</p> <p>By linking the name of the company directly to the traffic of illegal hormonal products, without reasonable grounds, the news item clearly damaged the reputation of the company.</p> <p>Merely adding that the company denied the allegations, did not take away the impression of the public that the company was guilty.</p> <p>The news item itself was correct when saying that a certain judicial inquiry had been started against a certain company, but the circumstances in which the news item was brought went too far just by showing a "suspicious transaction", by making own comments on hormonal products. These circumstances raised a public impression that the company is actually linked to an illegal traffic without sufficient and reasonable grounds.</p> <p>As a result, the news report was as such not impartial or objective as one could expect from a normal careful journalist. For the court it seemed that the scoop was apparently more important than an objective and complete news report.</p>

5. Topic:	New Self-Regulation – Prior Vetting of all external promotional communication of the Belgian Pharmaceutical Industry
Who:	The Belgian Pharmaceutical Industry Association – AGIM – www.pharma.be
When:	1 April 2003
Where:	Brussels
What Happened:	The Belgian Pharmaceutical Industry Association decided to put in place for all its members a prior vetting system of all external promotional and advertising communication.
Why This Matters:	This is an important step in the development towards uniform industry

	standards for promotional communication, not only through codes of conduct, but also in day-to-day application.
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6. Topic:	New Belgian Council for Journalism
Who:	Council for Journalism
When:	October 17, 2002
Where:	Brussels
What Happened:	<p>The "Raad Voor Journalistiek" (Council for Journalism) has been launched as a self regulatory body for media ethics in Belgium for the Flemish media. Its bylaws were published on October 17, 2002, the excellent website www.rvdj.be was launched and the first decisions are yet to be made.</p> <p>The Council for Journalism is characterised by the following: it is a private initiative; both journalists and media companies participate; external members from outside the profession are added to the Council; preliminary mediation is key.</p> <p><u>1. Private initiative vs. governmental initiative</u></p> <p>The Council for Journalism is incorporated as a private not for profit association and therefore radically chooses for self regulation. Its members are the professional associations of journalists, individual journalists, the professional associations of media companies (newspapers, magazines) and broadcasters and electronic media.</p> <p>Media ethics can be regulated upon governmental initiative or have a statutory basis. The media often prefer self-regulation.</p> <p>Self regulation is to be seen in the light of political pressure that an initiative for more regulation was needed. The media decided to promote self regulation and widen its scope. By lack of initiatives of the sector itself, the public authorities might have taken initiatives themselves, as there is a broad concern about the relationship between politics, society and media.</p> <p><u>2. Participation of journalists and media companies: bi-polar model vs. uni-polar model</u></p> <p>The forerunner of the Council for Journalism was the Council for Journalistic Ethics, which was organised within the professional association of journalists only.</p> <p>In order to obtain a wider platform, now also the media companies themselves are associated. The advantage is that the media companies will better understand the media ethics challenges that their journalists face. Making news is a collective responsibility of journalists and media companies and goes beyond the individual responsibility of an individual journalist.</p> <p>The media companies commit themselves to publish the decisions of the</p>

	<p>Council for Journalism in their own medium if they are concerned, which gives those decisions more weight and impact.</p> <p><u>3. Importance of mediation. Other tasks of the Council for Journalism</u></p> <p>Any person that considers that media ethics are at stake and who was directly involved or concerned by a publication or broadcast can introduce a complaint with the secretariat of the Council for Journalism. There is an obligatory mediation initiative to be taken by the secretary-general before the complaint is actually taken into consideration by the Council for Journalism. If the mediation leads to the end of the dispute, the complaint is no longer pursued.</p> <p>The complaint procedure itself is well organised. A reporting committee is installed for every complaint that the Council for Journalism decides to take into consideration. All parties can be heard. The Council for Journalism can always decide not to deal with a certain complaint if the complaint is not relevant.</p> <p>Finally the Council will also be instrumental in drafting a code, taking into consideration the existing international codes and company codes.</p>
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7. Topic:	Audio-Visual Works – Tax Shelter in Belgium – Fiscal Measures for Stimulating Investment in Audio-Visual Works
Who:	Belgian Parliament (Draft of Act and future Royal Decree)
When:	2003
Where:	Belgium
What Happened:	<p>1. The Belgian Parliament voted fiscal measures and benefits in the form of a tax shelter to encourage investment in Belgian audio-visual works by Belgian companies.</p> <p>Although these measures are mentioned in article 128 of the Program law of August 2, 2002 and officially published on August 29, 2002, they are at this moment still not applicable as there is no Royal Decree stipulating the moment of coming into force.</p> <p>2. Once this Royal Decree is published, a Belgian company investing in a Belgian audiovisual production can receive a tax benefit by which it can deduct 150% of the investment of his taxable profits.</p> <p>The investment however cannot exceed 50% of the company profits, with a maximum set at 750.000,00 EUR.</p> <p>The investing company cannot be itself a production company, nor can the production company be related to any Belgian or foreign television company.</p> <p>3. Investment according to these tax shelter rules can be done in two different ways: one can grant a loan to the production or one can invest/participate in the production (and in the benefits it would</p>

	<p>generate).</p> <p>4. In order to obtain the fiscal benefit, the law imposes obligations.</p> <p>The production budget can only be funded for 50% with tax shelter investment. The other 50% of the budget has to be raised by the production companies themselves.</p> <p>Once the tax benefit is granted, the production company has the obligation to spend 150% of the amount that was contributed by the investor as a participation investment in Belgium in production or exploitation costs.</p> <p>Also, both parties, the investor and the producer, have to agree in advance to a general financing contract for the production. To be in accordance with the tax shelter rules, amongst others, this agreement must include the amount of the investment for each party and a budget plan.</p> <p>5. Investments according to the tax shelter rule can only be done in the production of movies, documentaries or animated movies destined for movie theatres, and animated series or documentaries which are European productions (as stipulated in article 6 of the European guideline 89/552/EEG and changed by the guideline 97/36/EG).</p>
Why This Matters:	<p>This statutory development can constitute a very substantial incentive for investments in the production of movies, documentaries or animated movies destined for movie theatres, and animated series or documentaries which are European productions.</p>

8. Topic:	The Use of Product Images in Publications / Political Publications
Who:	The Publisher "DE BOECK & LARCIER" vs. Vlaams Blok (political party)
Where:	The Court of First Instance
Where:	Brussels – 24 February 2003
What Happened:	<p>Recently an extreme rightwing Belgian political party ("het Vlaams Blok") held a campaign by means of folders and posters concerning the theme of justice and safety. This campaign was held against the Belgian government and showed the opposition of the party against how the Belgian government deals with this theme.</p> <p>Hereto, the campaign folders showed a picture of a person clearly holding a code of law in his hands. However, only a part of the cover was visible and as such only the word "wetboek" (= code of law) was readable on the cover.</p> <p>The company De Boeck & Larcier, as being the publisher of the codes "LARCIER", reacted against this picture because they were of opinion that it was clear to all that one of their publications was used in the picture. As this folder ventilated political ideas, De Boeck & Larcier</p>

estimated that referring to one of its publications was inappropriate and damageable for its reputation now the public would assimilate the ventilated political ideas with the own opinion of the publisher.

Therefore, the publisher started a judicial procedure against the president of the political party, as being the responsible editor, for obtaining an interdiction of circulation of the folder.

The publisher stated that by using a picture showing one of their publications in a political publication of an extreme rightwing party, this would damage its outstanding reputation. Therefore, the political party must be held liable for the possible loss the publisher would suffer because of decreased sales now the public would think that the publisher had given its authorisation for using the publication in the picture.

The Brussels court stated in its judgment of 24 February 2003 that the used code of law could in fact be identified as a publication of De Boeck & Larcier, but that it also was clear that the name "LARCIER", as is normally mentioned of the cover of these codes, was not readable.

Although according to the court, the code could be identified as one of the publications of De Boeck & Larcier, it judged that there never was any danger of assimilation between the ventilated political ideas in the folder and the own opinion of the publisher of the code.

The court based its decision mainly on the fact that the main clientele of the publisher consists of jurists. As such, the court judged that it was clear to all that the goal of the publisher is not to defend certain political ideas and that its reputation is merely based on the scientific quality of its publications. The court continued by saying that these qualities were never doubted by anyone.

Also the court said that since the publisher did not invoke any infringement on copyright or trademark in its complaint, the reproduction of the code used as an illustration in a folder was acceptable, certainly now there is no other Belgian rule protecting the image of a product as such.

Further, now the name "LARCIER" could not be read, there also could not be any damage to one's reputation.

The claim for an interdiction of circulation was therefore dismissed on grounds that no fault was committed by "het Vlaams Blok" and that there was no question of any damage; no prejudice was suffered by the simple and adequate reproduction in the folder.

BRAZIL



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1. Case Report:	Brazilian Self-Regulation Advertising Council vs. Basf and Fabra Quintero
Topic:	Comparative Advertising
Where:	Brazilian Self-Regulation Advertising Council
When:	July, 3 rd , 2002
What Happened:	<p>The Company Tintas Coral ("Coral") filed a complaint with the Brazilian Self-Regulation Advertising Council against the advertisement produced by Suvnil in which the expressions "the best paint in Brazil" "the top-selling paint in Brazil" and "the most efficient paint", were diffused. Coral argued that these slogans were not true and that there were no technical proof thereof.</p> <p>Regarding the slogan "the best paint in Brazil", the Council understood that this expression was too strong and that it could make consumers believe that it was true. Therefore the Council determined the modification of the advertisement.</p> <p>As regards the slogan "the most efficient paint", the Council understood it was a fair use and that did not infringe any advertisement rules, because there isn't a comparison with a specific product.</p> <p>As for the slogan the "top-selling paint in Brazil", the Council comprehended there are sufficient proof that Suvnil's paint is the best selling brand in Brazil and that it could continue to use this expression.</p>
Comment:	<p>According to article 27 of the Brazilian Self-Regulation Advertising Code, advertisements must contain a truthful presentation of the product being offered, and all comparisons relating to facts or objective data shall be capable of being substantiated.</p> <p>Moreover, article 32 establishes that the comparison advertisement shall be capable of being supported by evidence.</p>

2. Case Report:	Brazilian Self-Regulation Advertising Council vs. Nestlé and JW Thompson
Topic:	Animals and children
Where:	Brazilian Self-Regulation Advertising Council
When:	September, 5 th , 2002
What Happened:	The advertisement of a famous chocolate milk shows a dog with its four paws firmly tied up to illustrate the phrase " a lot more strength to your energy". On the footnote of the page, in very small letters, there is a sentence that says "the animal did not receive any bad treats during the

	elaboration of this advertisement. Do not try to do this at home". A consumer protested against this advertisement and the Council determined its suspension in view of the fact that it could incite children to treat animals badly, which could even be considered a crime, depending on the circumstances. Also, the magazine in which this advertisement was published, is destined to children.
Comment:	Article 37 of the Brazilian Self-Regulation Advertising Code determines that advertisements addressed to children and teenagers should not induce them to constrain third parties or to lead them to a socially condemnable attitude, and shall always give special attention to the psychological aspects of the target audience.

3. Case Report:	Brazilian Self-Regulation Advertising Council vs. Estrela and DPZ
Topic:	Children and toys
Where:	Brazilian Self-Regulation Advertising Council
When:	December 12, 2002
What Happened:	<p>Two TV commercials show a doll named Susi normally walking and freely moving in different situations. In fact, there is a lettering pointing out to the fact that the doll makes no movement by herself, but this wasn't enough for a consumer who filed a complaint before the Council, arguing that children could think that the dolls have the ability to move on their own. The target-consumer of the dolls are four to seven-year-old kids. The advertiser argued, in its defense, that even small children would understand that the dolls move due to computer animated effects.</p> <p>The Council determined the suspension of the advertisement on the grounds that it could confuse the consumers, in view of the fact that there are, in fact, dolls that can walk and even swim on their own. Also, the Council understood that the lettering was insufficient to avoid such confusion, because the advertisement is also addressed to children that have not yet learned how to read.</p>
Comment:	In this regard, Article 37 of the Brazilian Self-Regulation Advertising Code establishes that advertisement addressed to children should especially respect their ingenuousness, credulity, inexperience and loyalty feeling.

4. Case Report:	Brazilian Self-Regulation Advertising Council vs. Seagram
Topic:	Alcoholic Beverages
Where:	Brazilian Self-Regulation Advertising Council
When:	May 2 nd , 2002
What Happened:	<p>On the package of Natu Nobilis whisky, there is a slogan saying "the most Scottish of all Brazilians". Allied Domecq, a whisky producer filed a complaint arguing that its product, Wall Street, has the same amount of Scottish malt and that the slogan should be considered abusive.</p> <p>In its defense, Seagram argued that this expression is of common and generic use, and that it is not being used in a comparative way towards the competitor's brand.</p> <p>The Council recommended the media to suspend the exhibition of this</p>

	advertisement, based on the fact that this expression is addressed to the national producers and that it implies a sense of superiority towards the competitor's brands.
Comment:	In this regard, Exhibit A of the Brazilian Self-Regulation Advertising Code established rules of advertisement dealing with alcoholic beverages.

5. Case Report:	Brazilian Self-Regulation Advertising Council vs. Stafford-Miller and Grey Brasil
Topic:	True Presentation
Where:	Brazilian Self-Regulation Advertising Council
When:	May 5 th , 2002
What Happened:	<p>In a toothpaste TV commercial, a man dressed as a dentist, in a scenario that resembles a laboratory talks about the qualities of the product, which is recommended for people with sensitive teeth.</p> <p>The Council voluntarily filed a complaint against this advertisement due to the fact that it could be framed into the Exhibit Q of the Brazilian Self-Regulation Advertising Code, which deals with <u>specialist's opinions</u>. In the TV commercial there is no indication of the name of the dentist, as requested by said exhibit. In addition, the affirmations present in the commercial demand technical proof.</p> <p>The toothpaste manufacturer, in its defense, alleges that it did not intend to confer the condition of a doctor to the character, and that he was meant to look like a company's employee.</p> <p>The Counselor understood that the character could easily be confused as a dentist, reason why he determined the suspension of the TV Commercial.</p>

CANADA



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1.Legislation:	Proposed Natural Health Products Regulations
Topic:	New regulation of natural health products (includes "dietary supplements")
Where:	Canadian Federal Government
When:	28 December 2001
What Happened:	<p>The proposed natural health products ("NHP") Regulations are expected to be passed by July 2003. Those who manufactured, packaged, labeled, imported or distributed NHPs in Canada before publication will have 2 years thereafter to comply. (May be 3 years, when regulations are published). NHPs introduced after publication must comply immediately. NHPs (include herbal remedies, vitamins/minerals etc) will be regulated very much like drugs: Manufacturers must pre-clear NHPs and meet requirements as to product and site licensing, labeling, packaging, good manufacturing practices, record-keeping and reporting systems. NHPs may be pre-cleared either via a "fast track" 60 day approval process if they fit into one of the product monographs being prepared or by providing support in accordance with standards of evidence which are also being prepared. The standards of evidence (generally a more complex process) will vary from traditional references to clinical testing depending on the nature of the claims and associated safety issues. Importers may be able to provide evidence that NHPs are manufactured, packaged, labeled, imported, distributed and stored in accordance with good manufacturing practices or equivalent standards and generally must have a representative in Canada who will be responsible for the sale of the NHP.</p>
Comment:	<p>This is a "heads-up" of the forthcoming NHP Regulations that will have some unique features. For example, NHPs in Canada must make pre-approved "drug"-type claims, namely structure/function claims or risk reduction claims or treatment/cure claims.</p>

2. Legislation:	Food Regulations to the Food and Drugs Act
Topic:	Nutrition Labeling, Nutrient Content Claims and Health Claims
Where:	Federal Government of Canada
When:	12 December 2002
What Happened:	<p>Both domestic producers and foreign food importers must comply with the new food regulations by the end of the 3-year transitional period, namely, December 12, 2005 (or December 12, 2007 for small companies with less than one million dollars of sales per year). During the transitional period companies may comply with either the old regulations (provided they do not make claims under the new regulations) or the new regulations.</p> <p>The Regulations require a Nutrition Facts Table ("table"), permit certain</p>

	<p>nutrient content claims, and, for the first time in Canada, permit 5 specified diet-related health claims. They are very prescriptive as to the content and format of the table, labeling and advertising.</p> <p>The table must: Appear in specified English/French formats and any third language (i.e. Spanish) must appear on a separate table thus complicating North American packaging; Contain % Daily Value (which differs from the US' "Recommended Dietary Allowances", another instance of non-harmonization); Comprise at least 15% of the label's "available display surface".</p> <p>Exempted foods include alcoholic beverages exceeding .5% alcohol, fresh fruit/vegetables etc. However, such products will lose their exemption and must carry a table if they make nutrient content claims, diet-related health claims, carry a health-related logo/name or vitamins/minerals/ sweeteners are added.</p>
Comment:	While these Regulations were designed with the goal of harmonizing Cdn/US food labeling, a number of differences will make North American food labeling a challenge.

3. Case Report:	Personal Information Protection and Electronic Documents Act ("PIPEDA")
Topic:	Privacy legislation
Where:	Federal Government
When:	January 1, 2004
What Happened:	On January 1, 2004, the second phase of PIPEDA will come into force. On that date anyone wanting to collect, use or disclose an individual's personal information, must obtain his/her informed consent. If any personal information was obtained before that date without consent, either the information must be deleted or consent must be obtained to collect, use, disclose the personal information. This represents a change from the previous 3-year transitional period (since January 1, 2001) wherein consent was only required if the personal information was to be transferred outside a province for consideration. Federal undertakings/bodies (i.e. airlines, railways etc), however, have had to obtain consent in any event since January 1, 2001. The federal legislation will not apply where a province has substantially similar legislation. (Likely Quebec will be deemed to be the first of such provinces although this has not been resolved yet).

4. Case Report:	Amendments to Cosmetics Regulations to Food and Drugs Act
Topic:	Cosmetic Ingredients
Where:	Federal Government
When:	Expected in 2003
What Happened:	Health Canada will shortly introduce an amendment to the Cosmetics Regulations to the <i>Food and Drugs Act</i> that will make labeling of cosmetic ingredients mandatory. Publication of the regulation in Canada Gazette I is expected in 2003, followed by a 75 day comment period, then publication in Canada Gazette II with a 2 year implementation period.

	<p>Botanicals must be listed using the Latin genus and species as in Europe and colourants must be listed as in the International Nomenclature of Cosmetics Ingredients ("INCI") dictionary either by CI number or by FDC colour name. While INCI lists about 60 ingredients (called "trivial names") such as "water", "egg" etc) in Latin and English, in Canada, these trivial names must be listed by their Latin name (i.e. "aqua", for water and "ovum" for egg etc). English may also be used only if a French translation is provided.</p> <p>Small packaging will be permitted to be labeled with tags, accompanying leaflet etc.</p> <p>Comments received may result in changes to the requirements to have both the inner and outer label carry ingredient labeling and possibly the inclusion of "flavour/saveur" on the labeling.</p>
Comment:	The introduction of this regulation follows years of discussions among stakeholders and will align Canada more closely with European Union and US requirements.

5. Case Report:	Competition Bureau v. P.V.I. International
Topic:	Substantiation and Misleading Advertising
Where:	Competition Bureau
When:	2001
What Happened:	<p>In March 2001, the Commissioner of the Competition Bureau filed an application claiming that P.V.I. International had engaged in false and misleading advertising and failed to conduct adequate and proper tests to substantiate its performance claims for an alleged gas-savings device called the Platinum Vapour Injector ("PVI"). The Commissioner claimed that P.V.I.'s representations were false or misleading in three respects: that the product could reduce emissions; that using the product could result in reduced fuel consumption; and that P.V.I.'s ads implied that the US government approved the product, when this was not the case.</p> <p>The Tribunal was convinced by expert evidence that P.V.I. was unable to substantiate its performance claims based on adequate and proper tests and that the advertisements gave the impression that the US government had approved the product. So, on all three counts, the ads were found to be false or misleading in a material respect. The Tribunal ordered P.V.I.'s 2 sole shareholders and officers to each pay an administrative penalty of \$25,000 and fined the company \$75,000.</p> <p>The claim of US Government Approval was clearly a stretch, although the nugget behind the claim is of interest. P.V.I. had also been pursued by the Consumer Protection division of the U.S. Postal Service in the U.S., which had imposed a "postal stop order" on the ads, on the basis that they were deceptive. P.V.I. appealed to the U.S. District Court of Massachusetts, however, and the Court issued a preliminary injunction against enforcement of the postal stop order. The Court found that the Postal Service did not have sufficient evidence to show that P.V.I.'s claims were untrue and that the action taken was therefore unjustified. It was that court holding that PVI stretched to supporting a claim for "US Government</p>

	<p>Approval".</p> <p>In Canada, P.V.I. has appealed the tribunal's decision, and the Competition Bureau has cross-appealed, asking the court to force P.V.I. to publish corrective notices. This case now moves to the Federal Court of Appeal.</p>
Comment:	<p>This case reflects Competition Bureau's exercise of its power to review misleading advertising under the "reviewable" matter (civil) provisions rather than as a criminal offence through changes to the law in 1999. The Competition Bureau seems prepared to take fairly bold, independent positions via the civil route.</p>

CHILE



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1. Case Report:	LABORATORIOS RECALCINE S.A. / PFIZER CHILE S.A.
Topic:	COMPETENCE DISPUTE
Where:	Santiago, Chile
When:	March 26, 2003
What Happened:	A constitutional action filed by Pfizer S.A, against the Chilean Public Health Department (ISP) and Laboratorios Recalcine S.A. to prevent the former to concede the latter Permission to commercialise a pharmaceutical product (Ziprasidona) which second use patent had been given to Pfizer by the Chilean PTO. The High Court determined the necessity to clarify the competences of each of these Offices, stating the ISP does not have attributions to determine the scope of an Industrial Property right for this ascription belongs to the Chilean PTO or to the Ordinary Courts. Therefore, Laboratorios Recalcine S.A. was granted permission to commercialise its product Ziprasidona.
Comment:	This case makes a clear distinction between the faculties of these two Offices, by ascertaining the operative domain of the ISP, which works independently from the Chilean PTO and the rights granted by a Patent registration given by it.

2. Topic:	UNFAIR COMPETITION AND MISLEADING ADVERTISING
Who:	GLAXOSMITHEKLINE FARMACEUTICA LIMITADA / LABORATORIOS RECALCINE S.A.
When:	March 2002
What Happened:	The Antitrust Committee decided GLAXOSMITHEKLINE FARMACEUTICA LIMITADA (GLAXO) was infringing Antitrust law and competing unfairly in the market. LABORATORIOS RECALCINE S.A. (RECALCINE) operating in the same market, was promoting a pharmaceutical product among the medical profession. This advertising campaign was made by spreading out a report prepared by Universidad de Chile's Chemist Study Centre, comparing RECALCINE's drug with the homologous GLAXO drug. GLAXO responded to this campaign by creating alarm, distributing propaganda describing RECALCINE's drug as dangerous, saying the report did not have a scientific basis and that patients might be at risk should they consume it. RECALCINE's denounced this conduct to the Antitrust Committee, body which decided that GLAXO was deliberately distorting the market by making affirmations aim to produce alarm among consumers, thus trying to prevent the intake of the said drug.
Comment:	The Committee established that the purpose of GLAXO, when warning not to use RECALCINE's drug was clearly to discredit the Laboratory and distort the market, for if its intention had been to really warn the medical profession, GLAXO would have directed its concerns to the National

	Health Authority, or if it had thought RECALCINE's promotion of its product was not truthful or objective, it should have directed a complain to the Antitrust Committee itself in the first place.
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3. Case Report:	CYW ALIMENTOS LTDA. / CREPES & WAFFLES S. A.
Topic:	Arbitrary judgment on domain name.
Who:	Santiago, Chile
When:	April 3rd, 2003
What Happened:	An arbitrary trial to determine the assignation of the <i>domain name</i> "crepes&waffles.cl" between a Chilean company and Crepes & Waffles S.A. –with the trademark registered in seven countries, but not in Chile– and which one has the right to be assigned the domain name. The Arbitrary Judge determined that the principle that must have priority for this case is the title ownership either in Chile or internationally, over the principle of geographical location of the project and the rest of the known principles. Therefore the domain name was granted to the opposition party, Crepes & Waffles S. A.
Comment:	The Arbitrary Trials for the assignment of a <i>domain name</i> are not subject to determined norms to solve the conflict but by doctrinarian and International principles, in reference to which the judges have given higher importance to the ownership of trademark brand over other principles.

4. Topic:	COMPETITION
Who:	ONEILL INC- JORGE HALABI
When:	September, 2002
What Happened:	O'NEILL INC. (USA) was allowed to freely commercialise its products bearing the trademark ONEILL in Chile. This, notwithstanding the fact a local company HALABI, had previously registered the trademark ONEILL for similar goods. O'NEILL's Chilean representative denounced HALABI to the Antitrust Committee, arguing HALABI's registration constituted a reproduction of O'NEILL INC.'s trademark. This USA company, established 40 years ago, owns ONEILL's trademark registrations in more than 90 countries, and is clearly well known worldwide. The Antitrust Committee granted O'NEILL INC. the right to freely import, distribute and commercialise its products in Chile by itself or through an agent.
Comment:	The Committee has confirmed its already well established jurisprudence in the sense that the faculty to look after competition belongs to it, despite other attributions given by law to different organisms (in this case the Chilean Patent and Trademark Office) that may sometimes overlap with those corresponding to the Committee in caring for fair trade.

5. Case Report:	ADMISSIBILITY OF THE SYSTEM OF ACCUMULATION OF RED-MAX POINTS, BY PURCHASES IN SALCO BRAND PHARMACIES.
Topic:	Fidelity of the Clients. Origin of the Agreement about the Aspects of Intellectual Property related to the Market (ADPIC-TRIPS). The ideas, procedures, methods and concepts by themselves, do not enjoy Copyright protection, but are subject matter of Industrial Property regime. Redmax system is not a Piramidal system, but a system of accumulation of points acquired by purchases.

Where:	Santiago, Republic of Chile
When:	August 12, 2002
What Happened:	<p>On 2001-07-31, Inversiones Cal Limitada presented a complaint against SyB Farmacéutica S.A., today Salcobrand S.A., for infringement of article 79 letter a) of the law 17.336 on Intellectual Property, in conjunction with article 473 of the Criminal Code. Inversiones Cal Limitada argued that the system of accumulation of Redmax points, used by Salcobrand S.A. was plagiarism, because of the previous existence of an identical system named "Circle in Chain" registered under the name of the plaintiff. On August 2002, The crime Court declared temporarily closed the case, considering the Redmax system constituted a legitimate system for Salcobrand to generate greater loyalty of its clients and also increase the number of consumers.</p> <p>According to the established by the Court, the referred system of Redmax that is based on programs of promotion of an old and well-known world-wide origin, did not harm the rights of intellectual property of the plaintiff, in as much as this system was initiated by Salcobrand prior to Inversiones Cal Limitada , as well as according to the Agreement on the Aspects of Intellectual Property related to Marketing (ADPIC-TRIPS) the ideas, procedures, methods and concepts themselves, do not enjoy Copyright protection</p>
Comment:	The fidelity system of Red Max is not a pyramidal system, but it is framed within a group system of accumulation of points acquired by purchases.

COLOMBIA



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1. Legislation:	Acuerdo 002, January 27 th , 2003
Topic:	Starting March 2003, tele-sales, infomercials and telemarketing programs are prohibited in Colombian television channels
Who:	National Television Commission (NTC)
When:	January 27 th , 2003
What Happened:	<p>Home Shopping sales that were broadcasted as "TV programs" (30 mins. Duration) on national public and private television channels, - publicly known by the name of "infomerciales" – short for commercial information, have been prohibited. For the National Television Commission, a TV Program as defined by law is an audiovisual televised unit that has the objective of forming, educating, recreating or informing in a healthy way; a unit which includes an average limited time for advertising of 7 min out of a 30 minute time.</p> <p>The NTC decided that starting March 2003, "infomerciales" are not allowed on TV in Colombia because they are not TV programs; they are advertisements.</p>
Comment:	Public television channels were funded primarily with Tele-sales, infomercials or telemarketing done by Home Shopping advertisers. This will generated further financial constraints to the National Public Television channels.

2. Doctrine:	Agency doctrine – File No. 02099307
Topic:	Advertising with incentives
Where:	Superintendence of Industry and Commerce (SIC)
When:	16 th December 2002
What Happened:	Article 16 of Decree 3466 / 1982 states that advertising with incentives cannot induce to error to the consumer in relation to good's value, quality, or suitability. In opinion of the Superintendence, when incentives are not granted within the time offered, advertisements stating those incentives could eventually be considered deceptive, a situation subject to penalties by the Superintendence.
Comment:	This is an important doctrine because it sets some definitive arguments for consumers whose incentives were not granted during the time offered by the advertiser.

3. Legislation:	The Andean Community (CAN) country rules of competition to be harmonized with European Union assistance in the next 3 years.
Topic:	Competition Law Harmonization at CAN

Who:	The Andean Community Secretariat
When:	March 3, 2003
What Happened:	<p>The Andean Community Secretariat and the European Community presented the Competition Project that will make it possible, over the next three years, to improve and harmonize Bolivian, Colombian, Ecuadorian, Peruvian, and Venezuelan legislation on competition and support the institutions responsible for its control and application. The aim of the project is to improve the region's legislative, administrative and judicial context for competition law, support the Andean institutions responsible for the application and control of provisions on the subject, and promote a culture of competition.</p> <p>The Competition project is among the European Union's Cooperation priorities, which include support for the Andean Community's institutional efforts in this area.</p>
Comment:	The project will help the CAN to move ahead firmly towards the target of establishing the Andean Common Market in 2005. It highlights the importance of having rules of competition to ensure the free play of market forces and boost economic efficiency and, above all, reinforce the economic integration of the CAN countries.

COSTA RICA



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1. Legislation:	Law 8346 –Ley Orgánica del Sistema Nacional de Radio y Televisión Cultural (SINART) (Organic Law of the National System of Cultural Radio and Television)
Topic:	Subsidy to State owned media
Where:	Legislative Assembly
When:	February 6, 2003
What Happened:	<p>This law is a thorough reform that transfers the State owned media Network to a newly formed State owned company, named SINART. This network (previously dependant of the Ministry of Culture) currently comprises a TV channel and a Radio Station, but may legally extend to any other type of media.</p> <p>In addition to regulate the operation of this company, compels all Public Institutions, both governmental and autonomous, to devote at least 10% of their marketing budget to place ads in media belonging to this network.</p> <p>Additionally, all these ads must necessarily be placed through “RTN Publicidad”, which is an advertising agency owned by Sinart and created by the same Law.</p>
Comment:	<p>The purpose of this law is to provide funds to the state owned media, whose financial condition is critical. However, by doing so, the Law is diverting to this network a part of the market that would normally be subject to competition.</p> <p>This Law imposes then a subsidy in favor of a particular company, by reducing the size of the available market. All other networks and advertising agencies are forced to sacrifice a portion of their potential income, which is now unavailable to them.</p> <p>This form of regulation, typical of the 1970's, creates distortions in the market, since it assigns a part of market output for reasons different than efficiency.</p> <p>Although the effects of this Law are yet to be seen, it is anticipated that it will limit the growth of the advertising business.</p>

2. Case Report:	Loría v. OCNP
Topic:	Regulations based on morality
Where:	Costa Rican Office for Control of Advertising
When:	January 2003

What Happened:	<p>Based on some claims received by offended viewers, the National Office for the Control of Advertising (OCNP) analyzed an ad for paints where certain parts of the female body were used in combination with the phrase "Let your imagination Fly".</p> <p>Shifting away from its previous decisions, OCNP rejected the complaint, stating that even if stereotyped images of the female body were used, and some indirect reference to sexual implications were made, the ad was not rude nor offensive.</p> <p>Hence, even if the ad may be considered by some people to be of bad taste, it cannot be considered that infringes the laws that protect women against indecent uses of their image.</p> <p>The decision was confirmed at the appeal level.</p> <p>Some recent decisions by the same authority banned similar ads on identical grounds to those rejected in this particular instance.</p>
Comment:	<p>The importance of this decision is that it shifts away from reiterated decisions that prevented almost any use of female images in advertisement. This decision clearly states that limitations to freedom of speech must be always interpreted restrictively.</p> <p>This decision also illustrates the great deal of influence of particular criteria of regulators in the interpretation of the Law. Similar cases get judged differently depending on the personal convictions of the persons in charge on making the decisions.</p> <p>Even if most of the advertising sector hopes that this case will be a sign of a new trend of criteria, it is still expected to find some inconsistency of decisions taken by different regulators and law enforcers.</p>

3. Case Report:	INPUB v. Colegio de Periodistas
Topic:	Advertising Tax
Where:	Supreme Court of Justice, Constitutional Hall
What Happened:	<p>National Advertising Institute (INPUB), a non-for-profit organization of Advertisers, agencies and media, filed a complaint against the Organic Lay of the Professional Association of Journalists. Specifically, the complaint attacks a tax imposed on all ads placed in news journals, both in printed and in television.</p> <p>This specific tax benefits the Professional Association of Journalists, which is thereby created by the same Law. This Professional body regulates the exercise of that profession, but not all journalists are members since a few years ago when the Interamerican Court of Human Rights banned the mandatory affiliation.</p> <p>INPUB considers this tax to be an unjustified restriction on the right of commercial free speech, reason for which it should be eliminated. Additionally, the fairness of this tax is questioned since it is imposed on the advertisers, but it benefits the exercise of journalism. Hence, the payer of</p>

	<p>this tax is paying for the particular benefits of certain sector.</p> <p>The amount collected in the year 2001 is close to US\$400,000.00</p>
Comment:	<p>The upcoming judgment of the Constitutional Hall is highly expected by the sector. If the decision is favorable to INPUB this will definitely be a big step towards the protection of Commercial Free Speech in the Country.</p>

4. Case Report:	Fallas v. PROAGRO, S.A.
Topic:	Unsupported claims
Where:	National Commission for Consumers (CNC)
When:	February 2003
What Happened:	<p>The Commission imposed a fine to the manufacturer of a drink based on soy. The product made some claims in its label, affirming that it was a "natural" product, and also a "source of nutrition and energy". However, claimant found some additives listed among the ingredients, and also the energy content was not significant (4.3% of daily recommendation).</p> <p>During the hearing, Defendant argued that the word "natural" refers to the flavor. Additionally, it argued that the energy content disclosed in the label calories provided by the product was disclosed in the label, so it was not misleading.</p> <p>The Commission rejected these arguments, and agreed with claimant that the form in which the claims were made are misleading. In its decision, the Commission analyzed not only the texts of the claims, but also their context, and concluded that the way the word "natural" was used it referred to the ingredients of the product as a whole, rather than its flavor (as opposed to the phrase "naturally flavored" which was not but could have been used). In addition, the phrase "source of..." should be used only when the product provides a relevant amount of the claimed feature as compared to the recommended intakes.</p>
Comment:	<p>This decision is consistent with many others issued by the Commission, in which claims in advertising must be supported with objective data, and taking into account the context in which the claims are made.</p>

5. Case Report:	Cable Tica and Amnet TV v. Law 7440
Topic:	Control of the content of Cable Television
Where:	Supreme Court, Constitutional Hall
When:	September 2002 / March 2003
What Happened:	<p>In late March 2003, the Constitutional Hall of the Court of Justice clarified the reach of a decision taken last September. This decision rejects to a petition filed by the two main Cable Television operators. Petitioners requested the Court to consider that a program transmitted by Cable TV was not a public spectacle, so it could not be regulated nor censored as such.</p> <p>Law 7440 creates an administrative office in charge of rating every public spectacle, and regulating their schedules. The purpose of this law is to protect the family, and particularly the under age population against</p>

	<p>moral damages caused by shows not suitable for their view.</p> <p>Applicants considered that Television broadcasted by Cable fall into a different category than public shows, and therefore did not fall under this regulation.</p> <p>The Court disagreed with applicants, stating that the means by which the spectacle is transmitted is irrelevant when determining whether or not the regulations are applicable.</p> <p>This decision finishes a procedure that took over six years, during which the penalties established for breach of the law were temporarily suspended.</p>
Comment:	<p>It is still uncertain how ratings will be applied and enforced over the programming of Cable channels, which is mainly defined overseas. Another unclear issue is how this law will apply to music videos, live shows, and others beyond the reasonable control of local operators.</p>

6. Self Regulation:	Commission of media analysis
Topic:	Research on use of media and ads placement
Who:	Instituto Nacional de la Publicidad (INPUB)
When:	March 2003
What Happened:	<p>National Advertising Institute (INPUB), a non-for-profit organization of Advertisers, agencies and media, created a commission to aid its members in the research on the use of different media and the placement of ads.</p> <p>Internal regulation of this commission was issued in late 2002, and ratified in March 2003. This commission is in charge of collecting data from the market, and provides an objective source of information to all members of the Association.</p>
Comment:	<p>By the creation of this regulation, the industry takes a firm step towards the increase of transparency and efficiency in the industry. This independent body is meant to provide objective information that equally helps all decision-makers in the industry.</p>

CZECH REPUBLIC



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1. Case report:

Topic:	Price shown in ads must be also available in shops
Who:	Self- regulation body, Prague trade commission
When:	Autumn 2002
Where:	Czech Republic
What Happened:	The home appliances retailer "electrocity" advertised excellent prices for several items but, when people came to his stores, they were always "sold out". Competitors and consumers claimed this to be misleading advertising and the advertiser was punished by the Self- regulation body and also by a fine of Euro 30.000,-by the Prague trade commission.



2. Case Report:	
Topic:	Comparative advertising
Who:	The Court
When:	Spring 2003
Where:	Czech Republic
Comment:	<p>Heinz was comparing milk for babies with Nutricia's product. From the ad it was cleared that Nutricia contains no "milk fat". This was not true, but Heinz said, that no content of milk fat is expressed on Nutricia's product label. The court decided, that this is a misleading comparative ad, because Nutricia in fact has the milk fat. The question, if Nutricia is misleading its consumers is different one.</p> 

3. Case report:	
Topic:	Parasiting promotion
Who:	The court
When:	Spring 2003
Where:	Czech Republic
What Happened:	<p>McDonald's organised the promotion with discount vouchers for next visit. KFC reacted, saying "we accept McDonald's vouchers, too !" The court decided, that this is parasiting and therefore illegal.</p> 

DENMARK



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1. Case Report:	The Consumer Ombudsman vs. Dansk Præmieinvest ApS
Topic:	Misleading advertising – criminal action
Where:	Supreme Court of Denmark
When:	January 2003
What Happened:	<p>Dansk Præmieinvest marketed the sale of certain types of premium bonds as “a good investment” even though the purchase price was higher than the value when selling the bonds. They furthermore indicated that the sale was approved by the Danish Financial Supervisory Authority. Finally the company did not inform the consumer about the real value of the premium bond in the advertisement.</p> <p>The company also gave out free gifts in connection with the sale of the bonds and also conducted illegal competitions.</p> <p>The Maritime and Commercial Court of Copenhagen held that all the activities mentioned should be considered illegal and ordered the payment of the largest fine so far seen in Denmark by ordering Dansk Præmieinvest to pay DKK 3.000.000 (approx. US \$ 430.000), but the Supreme Court lowered the fine to DKK 2.000.000 (appr. US \$ 285.000).</p>
Comment:	The merits of this case are not surprising. What is surprising is however the size of the fine, which is a significant increase.

2. Case Report:	The Consumer Ombudsman vs. Interessebank Danmark
Topic:	Consent to online marketing
Where:	Maritime and Commercial Court of Copenhagen
When:	March 15, 2002
What Happened:	<p>Interessebank Danmark (ID) introduced a system whereby it asked a large amount of private consumers if they would consent in advance to receive e-mails from advertisers whom they had had no direct contact with in the past. ID would then sell a database of prospect customers to on-line advertisers: The Consumer Ombudsman considered the arrangement in breach of the Danish Marketing Practices Act art. 6a, which prohibits spamming, since he found necessary that the customer knew in advance who the consented to receiving e-mails from.</p> <p>The court did not find it necessary, that the consumer knew in advance who the gave their consent to and found the overall set up legal with some minor changes, that made the business idea behind the setup more obvious to the consumer.</p>
Comment:	The decision is one of the first to interpret the ban on unsolicited e-mail advertisement but a peculiar one. The result is probably not surprising but

	favourable considering the very strong language in the Danish Law as well as in the underlying EC directive.
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3. Case Report:	The Consumer Ombudsman vs. Bilka Lavprisvarehus A/S
Topic:	Limitation on purchase of goods in retail outlets
Where:	Maritime and Commercial Court of Copenhagen
When:	April 8, 2002
What Happened:	<p>Bilka advertised beer in boxes for sale at extremely low prices. At the same time the limited the amount of boxes to be purchased at the advertised price to two items per consumer. If the consumer wanted to buy more boxes, he would have to pay full price.</p> <p>The Consumer ombudsman considered the advertisement in breach of the Marketing Practices Act art. 7, which prohibits quantitative limitations on the amount of products a consumer may purchase at a priced advertised.</p> <p>The Court held against the Consumer ombudsman in saying that there were no limitations on the amount of boxes the consumer could buy only restrictions on the price he would have to pay for the boxes.</p>
Comment:	The decision is a landmark decision since it almost takes all the teeth out of the quantitative restrictions covered by the act. Now retailers have started to advertise all goods at a certain low price for the first 1-2 items and a higher price for any additional purchases. Art. 7 has therefore become virtually without any relevance.

4. Topic:	Online Marketing
Who:	The Four Nordic Consumer Ombudsmen
When:	October 2002
What Happened:	<p>The four Nordic Consumer ombudsmen (Denmark, Sweden, Norway and Finland) united in an official standpoint on online advertising laying out a large amount of restrictions on on-line advertising.</p> <p>The Standpoint will at least in Denmark be considered part of the general clause in the Marketing Practices Act art. 1 as laying out the terms for fair marketing practice.</p> <p>The standpoint is a comment to the fact that at least in Denmark it has not been possible to negotiate a set of rules for good marketing practice for on-line advertising.</p>
Comment:	The Standpoint is a significant set of rules regulating online advertising and should be studied carefully as the only document so far addressing the particular issues of online advertising in Denmark.

5. Topic:	Advertising to Children
Who:	The Consumer Ombudsman
When:	April 2002
What Happened:	The Danish Consumer ombudsman issued new guidelines for advertising

	towards children. The guidelines are fairly broad and puts specific emphasis on children.
Comment:	The Standpoint is an important set of rules regulating marketing towards children.

6. Legislation:	Services in the Information Society (Public Law No. 227/2002)
Topic:	Aspects of Electronic commerce
Who:	Danish Parliament
When:	22. April 2002
What Happened:	The Danish Parliament implemented the EC directive on E-commerce (dir no. 2000/31/EC).
Comment:	<p>The curious part is that the Danish Parliament "forgot" to put in enforcement provisions in the act which means that the only remedies are injunctions and damages for lost profits.</p> <p>The act clarifies the status of law for complicity in illegal activities on the web. In general the hostmaster will not be liable unless he has been notified of the criminal content.</p> <p>Furthermore the act codifies the principal of the sender country as the choice of law when reviewing the legal compliance.</p>

FRANCE



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1. Legislation:	
Topic:	Draft law on the digital economy
Who:	French Parliament
When:	February 26, 2003
Where:	France
What Happened:	<p>On February 26, 2003, the French Parliament (the <i>Assemblée Nationale</i>) voted a bill on the digital economy which aims at strengthening the freedom of communication and the users' trust in e-commerce and which also aims at fighting unsolicited commercial communications and cyber-criminality. The bill implements in particular the E.U. e-commerce Directive dated June 8, 2000.</p> <p>The bill addresses various major issues in the field of Internet communications and information technologies, among which :</p> <ul style="list-style-type: none">- <u>Spamming</u> : the bill provides that commercial communications via e-mail are prohibited unless the Internet user has given his/her prior consent (opt-in). However, this only applies to individuals, as opposed to companies which are registered.- <u>Encryption</u> : the bill provides for a liberalization of the use of encryption tools, whereby the supply and the transfer (import and export) of encryption tools are only subject to an obligation of prior declaration to the French authorities. In case of a violation of the applicable rules, the sanctions provided by the bill are stricter than those which were previously applicable.- <u>Liability of online merchants</u> : online merchants will be subject to a "global liability", <i>i.e.</i>, they will have to ensure that no problems arise at any stage, from the order until the delivery of the goods or services. A one-year period of time should be granted in order for the online merchants to adapt their practices to these new requirements.- <u>Liability of Internet service providers</u> (access and hosting providers) : the liability of such providers may be sought as soon as they have "effective knowledge of the illicit nature of online materials". They will then have to react promptly in order to remove these materials or make it impossible to access such materials. Moreover, a much criticized provision of the bill states that it will be possible for a judge to order that access to the Internet be filtered, for instance in the case of copyright infringement. The AFA (<i>Association Française des Fournisseurs d'Accès et de Services</i>

	<p><i>Internet</i>, the French association of Internet access and service providers) considers that this provision of the bill is pointless because, at the present time, no technology allows such filtering operations.</p> <p>- <u>Control body</u> : the bill considers that online public communication belongs to the category of audio-visual communication and that, as such, it should be controlled by the CSA (<i>Conseil Supérieur de l'Audiovisuel</i>) which already deals with all television- and radio-related matters.</p>
Comment:	<p>It is important to note that this is a bill, which still has to be voted by the <i>Sénat</i> before it becomes effective, and that a number of amendments are expected from the representatives of the economic sectors involved. According to the schedule, the bill should be presented to the <i>Sénat</i> between April and June 2003 and is expected to be passed, and thus become enforceable, by the summer or in September.</p>

2. Legislation	
Topic:	Draft bill on copyright (<i>droit d'auteur</i>)
Who:	French Parliament
When:	March 2003
Where:	France
What Happened:	<p>As you may know, French copyright regulations provide for an exception to copyright protection if a reproduction of a work of art is made for private purposes only.</p> <p>Further to an EU directive of May 2001, a draft law was issued in order to implement the directive into French law. Among other provisions, the draft law challenges the private copy exception insofar as it provides that "<i>the author of a work of art other than a software program, the interpreting artist, the producer of audio or video pieces of art, the audio-visual communication company, may set up technical measures aiming at the protection of their rights</i>".</p> <p>This provision thus gives legal ground to the mechanisms installed on CDs and DVDs against illegal copying, since these mechanisms currently have no legal ground under French law.</p> <p>A number of hackers have already managed to get around these mechanisms, but it is interesting to note that the draft law provides that such operations which aim at invalidating the protective mechanisms are deemed to be copyright infringement.</p>

3. Legislation:	
Topic:	Law on the national safety
Who:	French Parliament
When:	<i>Loi n° 2003-239 pour la sécurité intérieure</i> March 18, 2003
Where:	France
What Happened:	<p>This law was recently passed in order to modify the safety regulations applicable in France. The law has a wide scope of application on day-to-</p>

	<p>day life and the power of the police, but a number of its provisions also apply to the information technologies and in particular :</p> <ul style="list-style-type: none"> - the law modifies police searches on computers and provides for access to data by the police. - the law provides the applicable regulations on the retention of network telecommunications data for security purposes.
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4. Legislation:	
Topic:	TV advertising for specific economic sectors
Who:	French Government
When:	December 2002
Where:	E.U., France
What Happened:	<p>In our previous report, we referred to the French decree of March 27, 1992 which imposes restrictions on TV advertising for certain sectors such as the press, distribution, the cinema and literary edition.</p> <p>We indicated that, further to the European Commission requiring that the restrictions be modified, the new French Minister of Culture and Communication, Jean-Jacques Aillagon, had announced that the government would consider an "adaptation" of the decree and that the government would launch a dialogue with the sectors concerned.</p> <p>During this dialogue, the government faced intense lobbying from a number of professional organizations concerned, while the EU's threat became more serious, since a complaint before the European Court of Justice might be filed against France in the early days of April.</p> <p>The main issue arises from the distribution sector, which constitutes a substantial part of the income of the local and national press. If it became possible for the distribution sector to advertise on TV, the press is concerned that it would lose a large part of its income.</p>

5. Legislation:	
Topic:	Abusive provisions in the Internet Service Providers' terms and conditions
Who:	<i>Commission des clauses abusives</i> (French Governmental agency acting against abusive provisions)
When:	February 2003
Where:	France
What Happened:	<p>The <i>Commission</i> issued a recommendation presenting 28 types of abusive provisions which were found in the Internet Service Providers' terms and conditions.</p> <p>In particular, the Commission considered that the following provisions were abusive :</p> <ul style="list-style-type: none"> - The jurisdiction clause giving competence to the <i>Tribunal de Commerce</i>, which normally only deals with disputes between

	<p>businesses instead of disputes between consumers and businesses.</p> <ul style="list-style-type: none"> - The provision according to which if the Internet user does not comply with the Netiquette, he/she will lose his/her Internet access, whereas the terms and conditions did not provide what precise rules constitute the Netiquette. - The provision allowing an ISP to transfer its customers' personal data to third parties, without granting its customers a right of opposition.
Comment:	<p>While the <i>Commission</i> recommends that all these provisions be removed from the ISPs' terms and conditions, it is important to note that the <i>Commission's</i> recommendation are not legally binding.</p> <p>Further, the <i>Commission's</i> recommendation was criticized insofar as it based its research on older versions of the ISP's terms and conditions, whereas most ISPs' terms and conditions have now been modified for a long time.</p>

6. Case Report	
Topic:	Trademarks and domain names
Who:	Christiane L. c/ S.A. L'Oréal
When:	<i>Cour d'appel</i> of Paris, January 8, 2003
Where:	France
What Happened:	<p>The company L'Oréal owns the trademark "<i>L'Oréal, parce que je le vauz bien</i>" (meaning : L'Oréal, because I am worth it). A third party registered a large number of domain names using the terms "<i>parce que je le vauz bien</i>" and the translation of these terms into five languages.</p> <p>The court considered that there was no trademark infringement <i>per se</i>, on the ground that, since the third party's web sites were not operational, it was impossible to determine whether or not the registered domain names related to the classes in which the trademark was registered.</p> <p>However, the court considered that the terms "<i>parce que je le vauz bien</i>" have a strong distinctive power and that these terms may benefit from the level of protection granted to the notorious trademark (the whole sentence "<i>L'Oréal, parce que je le vauz bien</i>") because the terms "<i>parce que je le vauz bien</i>" are notorious in themselves. As a consequence, the court ordered that the domain names be transferred to L'Oréal.</p>

7. Case Report	
Topic:	Trademarks and freedom of speech (continued)
Who:	Greenpeace v/ Esso and v/ Areva
When:	<i>Cour d'appel</i> of Paris February 26, 2003
Where:	France
What Happened:	<p>These decisions were handed down in appeal further to the two decisions mentioned in our previous country report of September 2002. The court of appeal considered in both instances that the freedom of speech was to prevail and that, as a consequence, Greenpeace was allowed to</p>

	criticize, on its website, the environmental and health damages caused by certain industrial activities. The two appeal decisions are also based on the fact that Greenpeace did not seek to create any confusion regarding the identity of the author of the communication.
Comment:	These decisions have been rendered in summary proceedings, and a procedure on the merits is currently taking place on the grounds of trademark infringement.

8. Case Report	
Topic:	"False" comparative advertising
Who:	Alain Afflelou v/ Visual
When:	<i>Tribunal de Commerce de Paris</i> January 17, 2003 and <i>Cour d'appel de Paris</i> , February 7, 2003
Where:	France
What Happened:	<p>In January 2003, the optical company Visual broadcast an advertising campaign with the following catch line : "When you are offered two pairs of glasses for the price of one, are you always certain of the quality of the lenses ?". The ad showed lenses being cut from any type of glass, e.g., the windscreen of a broken-down car, an old bottle or even a dirty toilet rim. The ad did not expressly refer to Alain Afflelou's company, which, however, felt that it was directly concerned by the ad campaign because Afflelou's commercial offer of two pairs of glasses was easily recognizable.</p> <p>Alain Afflelou won in summary proceedings when the first instance tribunal considered that the ads were disparaging and ordered that the broadcast of the ad be stopped. However, Visual appealed the decision immediately and won in appeal : the court considered (i) that the campaign was a caricature and (ii) that almost all optical companies offer such "2 for the price of 1" promotions. The court concluded that the ads were not disparaging against Afflelou, who could not be identified with certainty.</p>
Comment:	As indicated in our previous reports, the EU directive on comparative advertising was implemented into French law in 2001. Since then, practices of comparative advertising have been developing slowly in France. However, the possibilities are still fairly limited by strict regulations and the advertisers seem to try and get around these limits by producing advertising campaigns which do not expressly refer to their competitors.

9. Self-regulation	
Topic:	Advertisement against AIDS-related discrimination
Who:	BVP (<i>Bureau de Vérification de la Publicité</i>)
When:	December 2002
Where:	France
What Happened:	The <i>Association des Elus Locaux Contre le Sida</i> (an association of local representatives acting against AIDS) created a TV ad. The ad showed a mayor requesting that an HIV-positive person, who was looking for a job, leave the mayor's office.

	<p>The advertising campaign aims at increasing the public's awareness regarding both private and state owned companies which do not comply with the 6% hiring quota applicable in favor of disabled and/or HIV-positive persons.</p> <p>The BVP issued a recommendation requiring that the ad be modified because the BVP considered that the ad caused a prejudice against the image of the State. The ad, consequently, could not be broadcast as such on terrestrial TV channels, including TF1 which was about to offer free space for the spot.</p>
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10. Self-regulation	
Topic:	Sexist advertising campaign
Who:	La Meute (an international feminist network acting against sexist advertisements, http://lameute.org.free.fr/index/)
When:	Winter 2002-2003
Where:	France
What Happened:	Nestlé has decided to withdraw a new advertising campaign for ready-made frozen meals which presents, on posters, two young women (a blond one and a dark-haired one) along with the catch-line "Seven minutes of intelligence per day" (seven minutes being the time necessary to cook the meal). The feminist network La Meute considered that the ads were sexist.
Comment:	While Nestlé withdrew its ads on posters, it did not, however, stop the broadcasting of the TV campaign, which was based on the same idea.

11. Self-regulation	
Topic:	Should the Internet Service Providers control the downloading of music by their customers ?
Who:	AOL and other French ISPs
When:	March 2003
Where:	France
What Happened:	<p>In March 2003, certain AOL users received a message from their Internet access provider referring to their use of peer-to-peer systems allowing them to provide and to receive infringing material to and from third parties.</p> <p>AOL insists on the fact that it did not act spontaneously but upon a request received from complaining companies, which searched networks such as Kasaa, noted the users' IP address and requested that AOL sends a warning message to its users. AOL therefore did not provide its users' personal data to third parties.</p> <p>However, the CNIL (<i>Commission Nationale de l'Informatique et des Libertés</i>, the French agency in charge of controlling the use of personal data) considers that the IP addresses themselves are personal data and that, as a consequence, IP addresses may not be collected without their holders' prior information.</p>

	<p>French regulations require that the Internet service providers identify the Internet users when such information is requested by the police. However, they may not do so without of a judicial request.</p> <p>This course of action has been much criticized by the ISPs, because the draft law on the digital economy provides that the ISPs may be held liable on a civil and/or on a criminal ground if they have not taken the necessary steps to prevent access to illicit material as soon as they have effective knowledge of the illicit practice (see above, Legislation n°1).</p>
Comment:	<p>In order to co-operate with the music industry, the French ISPs are considering the creation of a legal offer for the downloading of music on the Internet, in order to fight against the illegal systems which currently exist.</p>

GERMANY



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1. Case Report:	The Constitutional Supreme Court of Germany
Topic:	Bundesverfassungsgericht (BVerfG) defines freedom of advertising
When:	March 2003
What Happened:	<i>The Italian Manufacturer Benetton published a picture of a naked male person with the stamp "HIV" on his backside. Several court instances found this as "against good manners" and stopped the campaign. .</i>
Comment:	The decision is a basic one since it gives advertising constitutional protection and widens the rights of advertisers significantly. The decision is a confirmation of a prior decision regarding a similar Benetton case. These decision lift up contrary decisions of the BGH (= Bundesgerichtshof > The German Supreme Court of Civil Law)

2. Topic:	Legislation: Draft for a new law against unfair competition
Who:	Germany
When:	March 2003
What Happened:	<p>The German government presented a draft for a new "Gesetz gegen den unlauteren Wettbewerb" (Unfair competition) , the basic law for advertising in Germany. The draft suggests a clause by which the profit an advertiser gets by an unlawful ad can be skimmed off (= "Gewinnabschöpfungsklausel").</p> <p>This clause is an unique one and very complicated. It is extremely difficult to find out which part of a profit was made because a special ad.</p>

3. Legislation:	Draft: The German design protection act (Gebrauchsmustergesetz) shall substitute the existing 125 years old design protection law
Topic:	Design as such is not protected by law now. The law implements the EU -Design protection Directive
Who:	Germany
When:	March 2003
What Happened:	The period of protection will be lengthened about five years from twenty years now to twenty five years then.

HUNGARY



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1. Topic:	Kodak – Misleading Advertising
Where:	Economic Competition Council
When:	Budapest, 17 January 2003
What Happened:	<p>Kodak's "Kodak Ultra" TV advertising stated as an advantage of Kodak products that using Kodak Ultra "up to 25% more successful photos" can be obtained.</p> <p>In the Audience held on 16 January 2003, the Competition Council decided that the above mentioned advertising transmitted to consumers the message that Kodak Ultra products, against all other products, are able to reach the mentioned result. Such statement was found to be not true.</p> <p>The advertising information was able to mislead consumers, as it didn't specified against which product the 25% more successful result could be reached.</p> <p>The Competition Council imposed a fine of 1.000.000 HUF (near 4.100 Euros) to Kodak.</p>

2. Topic:	Deception of Consumers – Competition Law Infringement
Where:	Economic Competition Council
When:	Budapest, 6 February 2003
What Happened:	<p>Electro World Magyarország Kft. accepted orders from consumers, against payment of the full price, of products it didn't had in its store nor in its warehouses at the time of accepting the orders.</p> <p>In some cases the products could be obtain after several weeks of having paid the full price.</p> <p>The Competition Council found that Electro World failed to inform consumers that the time of delivery of the orders was uncertain.</p> <p>The Competition Council ordered Electro World to stop immediately such conduct and fined Electro World with 2.000.000 HUF (near 8.200 Euros)</p>

3. Topic:	"Mókus Luca Tanodája" – Sales promotion
Where:	Economic Competition Council
When:	Budapest, 20 February 2003

What Happened:	<p>During November 2001, Marshall Cavendish Magyarország promoted its "Mókus Luca Tanodája" promising a Mókus Luca figure to consumers who gather and send the coupons of 12 editions (within the 15 editions published).</p> <p>Actually, only the first consumers who sent the coupons got figures similar to the ones present in the publications, while the consumers who later on sent the coupons got very different figures (substantially different regarding its external appearance, color, material and size).</p> <p>According to the Competition Council such promotion influenced consumers decision, encouraging consumers to buy more editions. The company was not properly prepared to deliver the figures promised in the promotion.</p> <p>Although the conduct infringes economic competition, the Competition Council considered that its influence in economic competition was small and no fine was imposed.</p>
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4. Topic:	Deception of Consumers – Infringement of Competition Law
Where:	Economic Competition Council
When:	Budapest, 27 February 2003
What Happened:	<p>The information given by Magyar Távközlési Rt (MATÁV, the biggest telephone company of Hungary) about its "Ritmus 100" package in the Internet, in printed materials and by phone was found to be incomplete, and/or erroneous.</p> <p>For example, it did not inform consumers that it is only possible to quit from the fixed-period contract free of charge during a determined period of time (if the consumers decide to quit not during such period, they have to pay 24 times the monthly fee). Other restrictions concerning the transfer of the property of the phone line, and the possibility to choose other service providers, were omitted.</p> <p>The Competition Council decided that MATÁV infringed economic competition rules, ordered MATÁV to discontinue the advertisement and imposed a fine of 5.000.000 HUF (20.500 EUR).</p>

5. Topic:	Deception of Consumers
Where:	Economic Competition Council
When:	Budapest, 27 February 2003
What Happened:	<p>Hírpressz Kft, while advertising its "Hírpressz" daily (specialized in classified advertisements) drafted assertions misleading to consumers.</p> <p>Such assertions were the following:</p> <ul style="list-style-type: none"> - "now, more than 10.000 copies reach our readers"; - "the cheapest classified advertising daily"; - "the cheapest national advertising daily" <p>The company was not able to prove that such assertions were true, while</p>

	<p>some were proved to be false.</p> <p>Considering the small importance of the assertions, the Competition Council decided that the conduct infringes economic competition but no fine was imposed.</p>
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6.Topic:	Vodafone - Misleading Advertising
Where:	Economic Competition Council
When:	Budapest, 23 January 2003
What Happened:	<p>Vodafone R.A.M. Rt. popularized its "Rock `n` Roll Fix" subscription package in TV.</p> <p>The Competition Council considered that the TV ads transmitted 2 messages to consumers:</p> <ul style="list-style-type: none"> - that in the case of "Rock `n` Roll Fix" subscription, it is possible to call for 9 HUF day and night to all fix numbers of the chosen zone, - the global effect of the ad states that by means of the above mentioned property, "Rock `n` roll Fix" package, regarding the chosen zone, is in every case more advantageous to consumers than fixed phones regarding the chosen zone. <p>This last assertion was found to be untrue by the Competition Council and able to mislead consumers.</p> <p>Vodafone assumed the obligation to stop the TV ad and not to make any reference to it in other ads.</p> <p>The Competition Council, taking into consideration the small effect in competition suspended the proceedings for 1 month. After such period it will examine if Vodafone fulfilled the obligation it assumed.</p>

7. Topic:	Trademark infringement
Where:	District Court
When:	February 2003
What Happened:	<p>Ringier sued Híd Rádió for trademark infringement claiming the style and design of Híd Rádió's tabloid daily, Szines Mai Lap, imitated those of Mai Nap. The court ruled that U.S.-owned Híd Rádió did indeed violate Ringier's rights to the Mai Nap trademark.</p> <p>Szines Mai Lap was launched by former editorial staff of Mai Nap. They had just lost their jobs owing to Ringier's decision to close down Mai Nap shortly after buying it.</p> <p>The latest ruling concerns only one of two lawsuits that Ringier filed against Híd Rádió (prior to the copyright infringement suit, Ringier initiated legal proceedings based on the Competition Act and the Competition Council also ruled in Ringier's favor).</p>

INDIA



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1. Case Report	Re. Durga Electronics
Topic:	Advertisement Scheme
Who:	National Commission
When:	19 th February 2002
Where:	India
What Happened:	<p>Advertisements announcing a scheme whereby anyone purchasing an "Akai" CTV model 2167 of 21" or CTV model 2107 of 21" was promised an "Akai" 14" CTV free.</p> <p>Durga Electronics went back on its promise. The National Commission directed that having made an offer to the consumers Durga Electronics is bound to honor the same.</p>
Comment:	If one makes an open offer to the public at large through advertisements for promotion of his goods, there is no room for going back on the offer.

2. Case Report	
Topic:	Amendments to Consumer Protection Act
Who:	Parliament of India
When:	11 th March 2002
Where:	India
What Happened:	<p>The Consumer Protection (Amendment) Bill, 2001 was introduced in the upper house of Parliament (Rajya Sabha) on 26th April 2001. After certain amendments the Consumer Protection (Amendment) Bill, 2002 was passed by the Rajya Sabha at its sitting held on 11th March, 2002 and was referred to the lower house (Lok Sabha). At its sitting held on 30th July 2002, the Lok Sabha passed it with certain amendments. The Bill so passed was returned to the Rajya Sabha with those amendments for its consideration of them. The Bill could not be taken up for consideration on 6th August 2002, as the House stood adjourned that day without transaction of any business. The Bill may now be moved before the Rajya Sabha only during its next session.</p> <p>The Consumer Protection (Amendment) Act will read the same as the Bill stands today unless some very ardent legislators have serious objections to its present arrangement. The Bill makes sweeping changes in the law of consumer protection in India. These amendments range between procedural and substantive law and have a bearing on the functioning and composition of the consumer courts.</p> <p>As per the proposals Complaint may be filed against a trader as well as service provider for adopting deceptive practices in provision of services.</p>

	<p>A claim also lies against the trader who charges in excess of the price fixed by or under any law, displayed on the goods or package containing goods, displayed on price list exhibited by him or agreed between the parties. It appears that parties will now be able to bring claims for prices agreed to even orally. There is also nothing to exclude bargain prices (or reasonable price based on advertisements, etc.)</p> <p>However, the consumer courts will not look into the actual pricing of goods and services. There are ample legislations that deal with the malady of monopolistic pricing and fair prices for essential goods and commodities, the governments have also set up commissions to monitor the pricing of goods and services.</p> <p>The proposals empower the district forum to order corrective advertisements by persons who issue misleading statements and promises.</p> <p>This is in addition to the usual cease and desist orders. Not only do misrepresentations stop as concerns the product, manufacturers must undergo considerable embarrassment over the adverse public opinion.</p> <p>An instance in India was the toothpaste manufacturer who made claims that the paste actually adds on calcium to the gums, this claim was grossly exaggerated and instead of the advertisement simply going off air, the effect on the public mind would have been significant had the manufacturer corrected the claim.</p>
Comment:	The new competition bill has specific provisions pertaining to advertisements in order to check false, deceptive and misleading advertisements.

3. Case Report	Smithkline Beecham Pharmaceutical (I) Ltd. Vs. Paras Pharmaceuticals Limited
Topic:	Ad Campaign
Who:	Monopolistic & Restrictive Trade Practices Commission (MRTPC)
When:	13 th April 2002
Where:	India
What Happened:	<p>Paras who is engaged in manufacture of back pain medicine under the name "MOOV", in its ad campaigns represented that bottled products are ineffective. Smithkline is also engaged in the manufacture of back pain medicine under the name "IODEX" which is packed in bottles.</p> <p>The MRTPC held that the advertisements of Paras has an element of misleading the buyer by using tricky language and visual image against the product "IODEX" of Smithkline, and therefore is an unfair trade practice.</p>
Comment:	While one is allowed to puff its product and claim to be one of the best in the market, it cannot belittle the other by a mere statement which is bound to have effect on the gullible customers watching the television, which has become more or less a household gadget.

4. Case Report	
Topic:	Permission from Reserve Bank for advertisements on foreign television
Who:	Reserve Bank of India
When:	14 th May 2002
Where:	India
What Happened:	It has been clarified that before making any remittance for advertisement on foreign television on behalf of residents who do not require any prior permission from the Reserve Bank, authorised dealers should obtain a certificate from a Chartered Accountant certifying that, applicant exporter satisfies the criteria of having export earning of more than Rs. 10 lakhs during each of the preceding two years, and the advertisement for which foreign exchange is being remitted will be broadcast by the foreign television company in foreign countries and not in India alone.
Comment:	Now for any Indian Company to advertise in a foreign television channel a Chartered Accountant's certificate certifying that the Company has generated export income of more than Rs.10 lakhs during the last two years is required to be furnished.

5. Case Report	
Topic:	Consumers to pay only for channels they want
Who:	Ministry of Information & Broadcasting
When:	May 2002
Where:	India
What Happened:	<p>Ushering in a new era of freedom of choice for the cable TV subscribers, the government has accepted the joint industry and ministry of information and broadcasting task force recommendation on conditional access system (CAS), which allows the consumer to pay only for those channels which he wants to subscribe to.</p> <p>As per the recommendations the government would prescribe the price charged by cable operators for the basic tier of the bouquet of free to air channels. The report recommended that while the government should not have any role to play in determining the subscription fees for pay channels and value added services offered by a cable operator or multi-system operators (MSO), there must be adequate transparency and accuracy in the pricing and billing system to protect the interests of the consumers.</p> <p>The joint industry and ministry of information and broadcasting task force headed by I&B joint secretary Rakesh Mohan had recommended that all pay channels be routed through a set top box (digital or analog) to give a consumer the choice to pay only for those which he wants to subscribe to.</p> <p>The recommendations of the task force, which had representation from the government, cable operators, MSOs, broadcasters and consumers, are expected to form the basis for amendments to the Cable Television Networks (Regulation) Act 1995. The government is expected to move the amendments in the next session of the Parliament.</p>

	<p>The report had recommended that all encrypted channels be defined as 'subscription based channels' while the unencrypted, or free to air channels, need not be routed through the set-top box.</p> <p>The report says that the cost of the set-top box, which is likely to be between Rs 5000 and Rs 6000, should be left to the market forces as long as the consumer was made fully aware of the availability and capability of the equipment</p>
Comment:	With the kind of stakes involved in the cable TV industry, the Government is moving in a direction to lay down ground rules for the operators.

6. Case Report	
Topic:	Surrogate Advertisements
Who:	Parliamentary Consultative Committee
When:	August 2002
Where:	India
What Happened:	<p>Advertisement as a popular medium of paid communication has drawn public ire time and again for moving away from truth and the consumers 'right to know' to providing false images.</p> <p>Now the new concept of surrogate advertisements is in vogue. In this the brand owners resort to the advertisement of their negative items in the garb of an innocent item totally unrelated to their negative products like tobacco and liquor.</p> <p>For instance, the Haywards 5000 darting kit, Mera No 1 Mc Dowell's packaged drinking water, ditto for the Kingfisher 'king of good times' beer going the packaged water way, the Wills Lifestyle, ITC-GTDs' (Greeting Cards Division) Expression Greetings cards and the Red & White Bravery Awards from the tobacco wing.</p> <p>Brand managers call it leveraging on the existing equity of the brand, agencies define it as an exercise in brand recall of products on the negative list, while the government comes down heavily on the intriguing concept of surrogate advertising.</p> <p>With the anti-tobacco lobby going strong worldwide, every country has a negative list of products.</p> <p>A parliamentary consultative committee on surrogate advertisement, headed by Additional Secretary Anil Bajjal, was set up recently to deliberate on the determination of advertisements that would fall under the surrogate bracket. The committee observed that Mc Dowells and Gilbeys Green Label were the cases of surrogate advertisement since there was clear recall of the actual product, which is liquor in each case following which the I&B ministry sent show cause notices to television channels quoting the Cable Television Networks Rules Act 2001 according to which 'no broadcaster is permitted to show advertisement which promotes directly or indirectly the promotion of alcohol, liquor or other intoxicants...' (Rule 7(2) of the Cable Television Networks Rules Act) and calling for a ban on such commercials. And this fresh ban on the airing of</p>

	<p>the surrogate advertisement Aristocrat Apple juice and the likes on the Indian airwaves - STAR, Sony and Zee TV networks has got the talking heads get into the debate over society versus financial figures. With celebrity endorsements, the face of surrogate advertising has been ever improvising.</p> <p>One essential function that surrogate advertising does is that of brand recall and not necessarily an exercise in increasing sales. Commodities such as tobacco and cigarettes are habit-forming with a high degree of brand loyalty and rely on word-of-mouth product information. Thus, a strong convincing logic is needed to convert the consumer to the brand over a sustained period of time, consequently the strong ad appeal.</p>
Comment:	<p>When the license to set up the industry, manufacture and sale is given, it would be suicidal for the authorities to take a high moral ground and stop the advertisement. The tobacco and liquor industry provide a major chunk to the exchequer in the form of the Central and State excise and under other tax heads. The government is keen that surrogate advertising does not advertise liquor; to that extent the surrogate advertising is wrong.</p>

7. Case Report	
Topic:	Coke, Pepsi Under Fire for Painting Rocks in India
Who:	Supreme Court
When:	August 2002
Where:	India
What Happened:	<p>Coca-Cola and Pepsi, are under fire in India for colorful advertisements that were painted onto rocks in the ecologically fragile Himalayas.</p> <p>The Supreme Court of India recently served legal notices to the companies, charging them with violation of environmental laws, specifically the Forest Conservation Act of India. The notices refer to the damage caused by advertisements painted on eco-fragile rocks.</p> <p>The Coke and Pepsi ads, painted in the bright colors associated with the two brands, appear on rocks along a road in the Himalayan state of Himachal Pradesh in northern India.</p> <p>The legal action came in response to a recent news report in <i>The Indian Express</i> that brought the ads to the attention of officials, environmentalists, and the public.</p> <p>According to the newspaper, the soft-drink ads were painted—along with local advertising—on rocks dotted all along a 56-kilometer (33-mile) stretch of road between Mandli, a popular hill resort in Himachal Pradesh, and Rohtang Pass.</p> <p>Scientists have voiced concern that the paint may have destroyed the mini-ecosystems of microbes and mosses that live on the rocks.</p> <p>The advertising daubed on the rocks has made a number of people angry, and not only because of possible ecological damage. For many</p>

	<p>people there is aesthetic damage caused by the brightly colored advertisements, marring the beautiful landscape of the Himalayas.</p> <p>The Chief Justice of India, B.N. Kirpal, headed the three-judge panel that issued the legal notices to the parent companies of Coke and Pepsi. The Supreme court had taken note of the newspaper report while hearing a case involving forest conservation in India, saying that the companies responsible should be "made to pay" for damage caused to India's environment. The CJ also mentioned in court that the painting of advertisements on rocks in forest areas was disturbing.</p>
Comment:	<p>Indian courts are becoming more and more environmental conscious. Slightest of breach of environment is quickly frowned upon and the courts can go to any length to take action against the culprits.</p>

8. Case Report	Re. Colgate Palmolive (India) Limited
Topic:	Advertisements for contests for sales promotion
Who:	Supreme Court
When:	20 th November, 2002
Where:	India
What Happened:	<p>Colgate Palmolive (India) Limited inserted an advertisement in several newspapers announcing a contest known as 'Colgate Trigard Family Good Habits Contest'. 'Trigard' is the name of toothbrush manufactured by the company. As a condition precedent to participating in the contest prospective participant was required to send two upper portions of the cartons in which the Trigard toothbrushes were sold. Obviously this necessitated the purchase of two Trigard tooth brushes by a prospective participant. A number of consolation and early bird prizes were offered in this contest. The early bird prizes only considered the first fifty entries and prizes were given irrespective of whether the questions were answered correctly or not.</p> <p>The Monopolistic and Restrictive Trade Practices Commission initially held that the early bird prize scheme was in the nature of lottery and caused loss to the participants. It did not give any finding on the actual loss suffered by the consumers. The Supreme Court however, reversed the said decision on the ground that in absence of proof of actual loss caused to the consumer the said early bird prize scheme cannot be held to be an unfair trade practice.</p>
Comment:	<p>For establishing a trade practice as unfair trade practice it is necessary that such trade practice and the advertisement should have caused actual loss or injury to the consumers of goods or services.</p>

9. Case Report	Article
Topic:	Overstatements in the Advertisements
Who:	The Hindu Business Line
When:	December 9 th 2002
Where:	India

<p>What Happened:</p>	<p>An ad appeared in the <i>Asian Age</i>, Mumbai Edition, by Dr Ibrahim Sirkhot titled 'Stop Dialysis'. When the complaint was received by CCC from a consumer, which claimed the dialysis is not needed when homeopathy treatment is followed, the vice-chairman of CCC took up the matter with the advertiser and the media. Neither responded.</p> <p>Fair Pharma, through their advertising agency Rank Advertising, released a series of advertisements in <i>Malayala Manorama</i>, despite an earlier ruling by the Mumbai High Court. The advertisement used the word cure, as their medicines were declared as cure for cholesterol, arthritis, etc. There was no response from the advertiser or media.</p> <p>National Dairy Development board is also amongst the list of companies making tall claims. It advertised that their packaged milk is better than <i>dudhwala's</i> (milkman's) milk. When the CCC asked for a clarification, the advertising agency promised a review but never got back. Is NDDDB so desperate to broadcast an advertisement, which is not true, and when the consumer cannot differentiate between the buffalo and cows milk as both are processed together? No dairy in India processes buffalo milk and cow's milk separately.</p> <p>Bajaj Auto, advertising their Bajaj Saffire, claimed in their advertisement that the vehicle gives a 'consistent mileage of 50 kmpl'. When the CCC wrote to them questioning the claim and asking them to prove, the Bajaj Auto representative mentioned that it did so under standard test conditions. Unfortunately, this word did not appear anywhere in the advertisement.</p> <p>Spectrum Magazines, publishers of <i>Design Digest</i>, announced huge gifts for subscribers of <i>Design Digest</i> and <i>A&M</i> magazines. This is a notorious campaign. When CCC questioned the claim, there was no response.</p> <p>Jagatjit Industries used a subterfuge to promote their 'Aristocrat' liquor. This advertisement appeared with the same logo and bottle as black apple juice. CCC wrote to the advertiser Zee television, where it appeared and the advertising agency quoting their rule, 'Advertisements for products whose advertising is prohibited or restricted by law or by this code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this code'.</p>
<p>Comment:</p>	<p>What is most surprising is that the regulator — in this case the CCC does not have any power to impose restrictions. It is difficult to understand why there is hesitation from the Government in bringing some kind of a regulatory authority. Perhaps, the best source of regulation is in the hands of the media, which, instead of rushing to accept any kind of advertising for the sake of improving the performance of the advertising department and the revenue to the media, should discipline itself.</p> <p>By the time the misclaimed and unethical or an improper advertisement appears and a complaint is tendered against it, there is a lapse of time. By the time the CCC receives the complaint, processes it and writes to the advertiser, agency, and the media further time is lost. Also, most</p>

	<p>product advertisements come with a premium offer or a scheme limited to a period of time. By the time the advertiser agrees to withdraw, the scheme is over and the damage done.</p> <p>Coming back to the responsibility of the media, there was an announcement in one of the national dailies published from Mumbai that the publisher and the publishing house was not responsible about the claims made by the advertiser or its agency. This is a debatable and questionable statement. Perhaps, the time has come to test the responsibility of the media, when they carry untruthful over-claimed advertisements of products and services.</p>
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10. Case Report:	S M Dyechem Vs. Cadbury India Limited
Topic:	Trademark infringement - Piknik Vs. Picnic
Who:	Supreme Court
Where:	India
What Happened:	S.M.Dyechem filed a trademark infringement suit against Cadbury India alleging that there has been infringement of its trademark PIKNIK by Cadbury's use of similar sounding PICNIC trademark in advertisements, both identifying chocolate products. Though the High Court initially granted an injunction in favour of S.M.Dyechem the same had been vacated subsequently. S.M.Dyechem appealed to Supreme Court arguing that the misspelling in its PIKNIK trademark was an essential feature and Cadbury's PICNIC trademark was phonetically and visually similar and adoption of even one essential feature by Cadbury would infringe its rights. The Supreme Court dismissed S.M.Dyechem's appeal holding that in trademark cases, attention must be paid to the "comparable strength" of the contesting parties apart from balance of convenience and the relative strength of the case was in favour of Cadbury.
Comment:	It was considered all along that in injunction cases the court necessarily considers balance of convenience and prima-facie case. Thus a new twist has been given in trademark cases i.e. "comparable strength" of the case.

11. Case Report	Kouni Travels India Limited Vs, Thomas Cook India Limited
Topic:	Advertisement – Tours and Travels
Who:	MRTPC
When:	2002
Where:	India
What Happened:	<p>Thomas Cook published an advertisement in one of the leading newspapers containing false statement and misrepresentation regarding the price at which Kouni Travels offered tour packages to Europe and USA. Thomas Cook also made false claims in respect of its own tour prices thereby showing that Kouni Travels charges much more than what Thomas Cook charges, thus disparaging the tours and services of Kouni Travels.</p> <p>MRTPC injuncted Thomas Cook from carrying out such advertisements.</p>
Comment:	Advertisement is an expression of commercial speech and is guaranteed

	under freedom of speech under Article 19(1)(a) of the Constitution of India. Therefore, the same should not be false, deceptive and misleading.
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12. Case Report	
Topic:	Ban On Advertising Of Tobacco Products
Who:	Government of India
When:	2002
Where:	India
What Happened:	<p>When the Advertising Standards Council of India (ASCI) withdrew its code to regulate tobacco products, consumer activists were concerned over the impact of the move.</p> <p>The issue has taken a new twist with the Central Government deciding to ban tobacco companies from sponsoring sports and cultural events. Similar curbs have been enforced on advertising of liquor products. Apart from a ban on smoking in public places, sale of tobacco products to minors will be prohibited, once the proposed bill is passed.</p> <p>However, experts believe that the ban won't work, firstly - because it is not clear how surrogate advertising will be checked and secondly because the agencies, which can implement these measures, including NGOs, lack enough teeth.</p> <p>The ASCI, even while admitting the sensitivity of the issue, feels the government has overreacted. A couple of years ago, when the strong tobacco lobby opposed the Council guidelines, it had hastily withdrawn them inviting activists' ire. They felt that the ASCI virtually surrendered to the whims of the industry by abdicating its responsibility and allowing manufacturers to resort to unfair advertisement techniques, sans any checks. According to them, India has failed to initiate a comprehensive tobacco-control strategy in keeping with the World Health Organisation (WHO) guidelines.</p> <p>Tobacco Institute of India (TII), the representative body of tobacco farmers, exporters, cigarette manufactures and ancillary industries, contended that it would stick to its own code. A watchdog body, comprising experts from all fields, was to overview its observance. Curiously, the code bore resemblance to the ASCI code. The industry showed scant respect for it and it was violated often, an ASCI member reveals. Contrary to the provisions, a cigarette manufacturer featured a leading film star in its campaign with a slogan 'Red & White smokers are one of its kind'.</p> <p>Before the ban on advertising and on smoking in public places, various approaches have been adopted to address these concerns, ranging from legislation of varying degrees of severity to voluntary codes and self-regulation, but they have seldom worked.</p>
Comment:	Ban on advertisement of tobacco products is on cards. No amount of self regulation, guidelines will serve the purpose since the industry is a competitive one and sales target are the bottom-lines for the players.

	Only drastic steps on the part of the Government may yield desired results.
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IRELAND



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1. Legislation:	Public Health (Tobacco) Act, 2002
Topic:	Tobacco advertising, marketing and sponsorship
Who:	Department of Health, Cigarette Companies
When:	January 2003
Where:	High Court, Ireland
What Happened:	In our report in June 2002 we provided details of new legislation being introduced by the Department for Health and Children on tobacco advertising. This legislation was subsequently challenged by several cigarette companies and the matter was heard before the High Court in January 2003. The court upheld the challenge due to the fact that the legislation had not been duly notified to the EU under the EU Transparency Directive. The cigarette companies also intended to claim that a total ban on cigarette advertising and any law restricting cigarettes from view to customers would be anti-competitive as customers would be less aware of new products and less able to choose from a range of different products. As the Department voluntarily withdrew the legislation conceding that it had not notified the EU as required, the court did not consider these other points. It is understood separate legal challenges on these points are currently underway.
Comment:	Tobacco advertising is heavily restricted in Ireland and limited to some in store ads. The Department for Health sought an outright ban and is now stating that it will re-draft the legislation with EU approval and again seek an outright ban. In the interim the challenges of the cigarette companies are winding their way through the courts.

2. Legislation:	European Communities (Requirement to Indicate Product Prices) Regulations 2002
Topic:	New Pricing Regulations for Retailers
Who:	Department of Enterprise and Employment
When:	March 2003
Where:	Ireland
What Happened:	New legislation has been introduced in Ireland which states that from 01/03/03 almost all products on sale to consumers must show a selling price in Euro and if sold by weight or volume must show a unit price in Euro. The unit price must be shown as the price in Euro per kilo, per litre, per metre, per square metre or per cubic metre. Wine and spirits are exempt from this. There are also a number of other exceptions such as where the selling price is not related to the quantity of the product e.g. fruits sold by a fixed price, pre-packaged products weighing less than 50 grams or 50mls e.g. small packets of sweets, products reduced due to

	deterioration e.g. fresh food products sold cheaper towards the end of the day, multi-packs of different products e.g. hampers of goods etc. The selling price and unit price must be either on the product or on a shelf edge label or wall chart close to it. Penalties for non-compliance by retailers are fines of up to €3,000 for each offence.
Comments:	The idea of the new regulations is to give consumers a better deal by making it easier to compare the prices of different brands and sizes. The Director of Consumer Affairs is responsible for enforcing the regulations and we await the outcome of her annual report for details of any prosecutions.

3. Topic:	Poster Advertisement
Who:	Advertising Standards Authority of Ireland
When:	October 2002
Where:	Ireland
What Happened:	Advertising posters for an energy drink "Shark" were the subject of objections. One poster showed the upper torso of a man lying on his front and turned away from the camera. A headline was on the poster which stated "Shark Victim Ethan Ford, Devoured Kinsale 31/08/02" and the poster also contained the line "Bring out the Beast". A second poster showed the upper torso of a naked woman lying with her face towards the audience and the heading "Shark Victim Naomi McDermott ravaged Malahide 24.08.02" and again a heading underneath "Bring out the Beast". Complainants claimed the ads were offensive and contained suggestions of rape or violent attack. The advertisers responded that they were merely trying to show "Shark" as an alternative to other energy drinks and humour was an integral part of the campaign.
Comment:	The complaint was upheld . The Code on Advertising Standards requires that ads contain nothing likely to cause grave or widespread offence. The Committee stated that advertisers should take into account public sensitivities and avoid the exploitation of sexuality. Provocative copy should not be used merely to attract attention.

4. Topic:	Financial Advertising – TV, Radio and Print
Who:	Advertising Standards Authority of Ireland
When:	February 2003
Where:	Ireland
What Happened:	<p>An advertisement and promotion by the Educational Building Society has been the subject of much controversy in Ireland in recent months. The "Family First" promotion allows parents of a first time house buyer to leverage the equity in their own home to provide the first time buyer with the 10% deposit necessary to purchase a new home in Ireland. Some people felt that this put undue pressure on parents to lose their own financial stability by helping out their children.</p> <p>The particular ad in question featured a son asking his father for €20,000 for a deposit on a house followed by a statement that there were no legal fees and no repayments on the deposit for three years. Complainants felt that was offensive to parents, placed undue pressure</p>

	on them and it only added to the cost of purchasing a house. The advertisers claimed they were merely creating an awareness of the different options open to first-time buyers. Research had shown that the majority of first-time buyers received some form of financial assistance from their parents. They were merely dealing with a reality that exists in the current housing market in Ireland, even if it was a painful one. The advertisement had also been approved by the national broadcaster RTE and by the ITC in the UK.
Comment:	The complaint was not upheld . The Complaints Committee did not feel the advertisement was misleading. The fact that the product was offensive to some people was not sufficient basis for objecting to an advertisement for the product. The Committee stated that complaints of pressure on parents or emotional blackmail were directed at the product itself and not the advertisement in question and since the ads were not offensive the committee could not comment on the product.

5. Topic:	Press Advertisement
Who:	Advertising Standards Authority of Ireland
When:	February 2003
Where:	Ireland
What Happened:	Aer Lingus objected to advertising for a sale promotion by Ryanair which advertised "Free flights from Ireland" and then indicated in a footnote that taxes and charges were payable. Aer Lingus complained that the term free flights was clearly misleading particularly as the amount of the taxes and charges was not stated. The respondents pointed out that the ad clearly indicated the consumer had to pay taxes and charges. It noted the provisions of the ASAI Code which stated that an offer should be described as "free" only if the consumer pays no more than the current rate of postage and the actual cost of freight and delivery. They stated that they felt the actual cost of freight and delivery could be construed as Government Taxes and airport charges all of which were incidental costs imposed by third parties.
Comment:	The complaint was upheld . The ASAI Code requires that ads should not mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise. The Code also has specific rules on "free" promotions as described above. The Code provides that the price quoted to a consumer should include VAT, taxes, duties or other inescapable costs to the consumer. Since the advertisement did not give the costs of the taxes etc it did not comply with the Code of Advertising Standards.

6. Legislation:	European Communities (Directive 2000/31/EC) Regulations 2003
Who:	Department of Enterprise and Employment
When:	February 2003
Where:	Ireland
What Happened:	New regulations have now been enacted in Ireland to bring into effect the provisions of the EU Electronic Commerce Directive. From an advertisers point of view the new regulations require people sending unsolicited commercial emails to ensure that these are clearly identifiable as such by the recipient. The Data Protection Commission will be

	responsible for enforcing the new regulations. Anyone found guilty of an offence such as not clearly identifying their unsolicited commercial email as such can be fined up to €3,000 and/or sentenced to six months imprisonment.
Comment:	The Minister for Enterprise and Employment is currently in discussions with the Irish Direct Marketing Association regarding the above regulations. An agreement may be reached whereby such emails include the letters "ADV" (advertisement) or "UCE" (unsolicited commercial email) in the subject line of any email.

ITALY



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1. Self - Regulation	
Rules	
Topic:	TV: New Self-Regulation Code for Children.
Who:	Broadcasting Companies
When:	November 2002
Where:	Italy
What Happened:	<p>Following the guidelines issued by the Ministry of Communications, on 29th November 2002, all Italian broadcasting companies have undersigned a new Ethic Code aimed at protecting children when accessing TV programs. Said Code contains:</p> <p>a) <u>Rules of Behaviour:</u></p> <ul style="list-style-type: none">- <i>Participation of children to TV programs.</i> The broadcasting companies undertake to ensure that such participation will always take place with the highest protection of minors' person, avoiding any risk of exploitation of their age and naivety. Furthermore, they will not involve minors in dealing with delicate subjects as well as addressing them questions concerning their intimacy.- <i>Target.</i> There are two distinct reference periods: TV programs for all (aired between 7.00 am and 10.30 pm) that must take into account the needs of viewers belonging to all ages. Programs specifically targeted to minors (aired between 4.00 and 7.00 pm), dedicated to a "protected" broadcasting, i.e. peculiarly controlled as to content, trailers, promos and commercials diffused.- <i>Advertising.</i> Broadcasting companies are called to control advertising's content in order to avoid any commercial or promo which might impair physical, mental or moral development of minors. On that purpose, protection of minors from advertising's harmful effects shall be granted through three different levels:- I) <u>General protection:</u> provided for any airing time. Ads shall comply with the following requirements: a) they cannot show minors in dangerous situations; b) they cannot depict minors consuming alcoholic beverages, tobacco products, drugs; c) they cannot exhort minors to buy a product by exploiting their inexperience or credulity; d) toys' ads shall not induce minors in error with respect to the nature, dimension and characteristics of the advertised product.- II) <u>Strengthened protection:</u> provided for airing time where the minors' audience is supposed to be particularly high, but with the support of an adult's presence (from 7.00 am to 4.00 pm and from 7.00 to 10.30 pm). Any advertising, expressly addressed to minors, able to damage

	<p>their psychological and moral balance, shall be banned during said periods.</p> <ul style="list-style-type: none"> - III) <u>Specific protection</u>: provided for airing time where the minor's audience is supposed to be not supported by an adult (from 4.00 to 7.00 pm and during programs directly addressed to minors). All advertisements must be well recognizable and distinguishable during the broadcasted program. Advertisements concerning: a) alcoholics, b) entertainment phone's services; c) condoms (except so called "social campaigns") are not allowed. <p>b) The Broadcasting companies undertake to diffuse the Ethic Code through TV ads and to illustrate its content.</p> <p>c) A special Committee, formed by 15 members representing those broadcasting companies that have undersigned the Code, is competent to supervise the respect of the Code and to check any eventual infringement.</p> <p>Infringements of the mentioned rules are punished with a fine ranging from € 5.000 to € 20.000. In case of non compliance with a decrease order, the sanction could raise from € 10.000 up to € 250.000. Particularly or repeated infringement may induce the Committee to order the revocation of the broadcasting license.</p>
Comment:	Through the new Ethic Code, the minors' protection will be significantly improved. Broadcasting companies, by undersigning the Code (and exposing themselves to sanctions), are likely to become more sensitive towards a vulnerable audience.


2. Self - Regulation	
Case Report:	
Topic:	Parody in Advertising
Who:	The Jury of the Institute for Self Regulation in Advertising
When:	December 2002
Where:	Italy, Milan
What Happened:	<p>A famous Italian wine and alcoholic beverages' producer (A) diffused, during year 1999, three TV commercials aimed at promoting his sparkling wine, named K. All the ads showed a bottle that kept out from an ice bucket and was uncorked during an elegant party. After this, the cork runs away and, in the first ad, after the world's tour, arrives on the navel of a very famous fashion model, exclaiming: "<i>K, there's a party</i>"; in the second, the cork flies in the space and reaches a spacecraft where two astronauts are exclaiming "<i>K there's a party</i>"; in the third, the cork arrives at Hollywood in the hall where the Oscar Awards Ceremony is taking place and enters in the envelope with the winner's name, into a famous actresses hands, exclaiming on her behalf "<i>There's a party</i>". Finally, during 2000-2002, another commercial presented a well known actor showing up at a party empty-handed. The lady of the house, noticing that the new guest didn't bring anything, slams the door right in his face exclaiming "<i>No K, no party</i>".</p> <p>During last Christmas, another famous Italian wine and alcoholic</p>

	<p>beverage company (B) started a campaign meant to promote its own sparkling wine. The commercial showed a party where a guest takes in his hands a glass (similar to that used by A in its ads), uncorks the bottle, kept out from an ice bucket (similar to that used by A's ad) and the cork runs away hitting the guests in a way to make evident their covered defects (one loses his dental plate, one his wig and so on). Finally, a girl brings the cork back to the guy who had uncorked the bottle. Then, the party, boring at its beginning, gets lively and becomes a happy dancing party, while a voice is exclaiming "<i>More feste (that is Italian word for informal party), less party</i>".</p> <p>A called the competitor B before the Jury of the Institute for Self-Regulation in Advertising and claimed that the campaign was infringing several provisions of the Advertising Code (article 13, "<i>Imitation, Confusion and Exploitation</i>", since the ad unfairly imitates the idea and the peculiar elements characterizing the previous campaign and, by doing so, resulted in unfair exploitation of someone else's renown, trademark, name and image; article 14, "<i>Denigration</i>", as B's ad, being a parody of A's campaign, denigrated A's trademark; finally, article 15, "<i>Comparison</i>", since the commercial resulted directly comparative, without founding the comparison on the objective and essential features of the two products, taking therefore undue advantage of A's renown brand).</p> <p>The Jury agreed to hear the case and argued that the claimed commercial uses the idea and the atmosphere of the A's party in such a way to clearly evoke the campaigns diffused by A, turning them into a joke. In fact, through the personages' derision, the ad sets a cool and happy party against another one, presented as affected and pompous. Even if the two contexts showed in the ads are not so similar, the used pay off "<i>More feste, less party</i>" confirms such allusive/denigrating intent. Therefore, the Jury stated that the claimed ad was infringing art. 13 and 14, being an unfair exploitation of A's renown and image, aimed to denigrate its trademark and products. The Jury, instead, dismissed the claim for infringement of art. 15, declaring that the ad did not realize any undue comparison between the considered products. On these grounds, the Jury ordered the company B to cease the claimed campaign.</p>
Comment:	The Jury's verdict appears interesting as it fixes limits and restrictions to the use of parody in advertising. According to the Jury's opinion there is liability for exploiting someone else's ideas, even if the aim is not to imitate, but to denigrate and turn over contents.

3. Topic:	A never ending story: "Sex and advertising"
Who:	Jury of the Institute for Self-Regulation in Advertising
When:	February 2003
Where:	Italy, Milan

Advertisement:	
What Happened:	<p>A magazine recently published an advertisement of a well-known fashion house. It showed a young boy knelt before a clean-shaven female pubes representing the letter "G".</p> <p>The Review Board of the Institute for Self-Regulation in Advertising considered the ad as infringing articles 9 and 10 of the Code (aimed at protecting good taste and human dignity) and brought it before the Jury.</p> <p>The fashion house reacted by arguing that it only represented an innocent game of seduction and a joke about the climax of a woman's sexual pleasure. The Jury rejected those arguments on the grounds that the ad clearly intended to attract the consumer's attention by obscenely exploiting the human body. Anatomical parts were used in a scandalous way in order to draw the public's attention. Moreover, the capital letter on the woman's pubes had to be considered particularly outrageous because the human body was compared to any recognizable manufacturer's product on sale. The cheap image was even more despicable because it showed no relation to the advertised trademark. The creative strategy was only justified by the purpose of the most shocking impact on the public. Therefore, the Jury stated that the message infringed article 1, too. The ad, indeed, was likely to discredit advertising as a whole. Therefore a decess order was issued.</p>
Comment:	<p>Referring to the use of the female body in advertising, the Jury recalled that consumers might be driven by desire and oneiric imagination to buy. Therefore, the exploitation of eroticism and nakedness in advertising is unbearable when they are meant to suggest the satisfaction of sexual desire after an act of consumption. As a consequence, the enslavement of the human body to the product must be banned.</p>

4. Self-Regulation:*	
Topic:	Sex again: Shame on the Media!
Who:	Jury of the Institute for Self- Regulation in Advertising
When:	November 2002
Where:	Italy, Milan

Advertisement:	
What Happened:	<p>On initiative of the Review Board the Jury banned an ad published by a company with a famous trade mark, manufacturing garments with respect to the provisions set by articles 1, 9 and 10/2 of the Advertising Code. The message implied by the ad was considered as a vulgar, violent and aggressive representation and as extremely offensive as far as human dignity is concerned.</p> <p>The double-page spread showed a boy and a girl embracing each other. The black lingerie worn by the woman revealed the rear part of her body while the boy grabbed the girl's back with his hands. According to the Board, the violent and rude gesture of the man hurt the sensibility of consumers. It was meant to express possession, aggressiveness and indifference to the woman who, on the contrary, was portrayed as fragile and weak.</p> <p>Moreover, there was no evident relation to the advertised trademark. The ad was only aiming at having the most shocking impact on the public.</p> <p>According to the Jury, however, the media were partly responsible for the publication of such messages.</p>
Comment:	<p>The Jury directly stressed the point that the media must be held morally and contractually responsible for the messages they send out in order to stop this way of publicizing goods.</p>

5. Self regulation:*	
Topic:	Label Advertising NOT covered by the Advertising Code!
Who:	The Jury the Institute for Self- Regulation in Advertising
When:	January 2003
Where:	Italy, Milan
What Happened:	A campaign aimed at promoting a bitter (= sour drink) was claimed before the Jury as misleading and unfair comparative advertising. The campaign was diffused both through the press and through the labels put

	<p>on the drink's bottle.</p> <p>The Jury dismissed the case on the merits; in addition it stated that part of the issues at stake was not covered by provisions of the Advertising Code.</p> <p>The case, devoid of interest on the merits, assumes relevance as to the prejudicial question raised up by the Jury. In fact, the Jury challenged its own competence as to the message diffused through the product's labels, stating that it was not falling under the Code's regulation. The Jury pointed out that the special clause of acceptance of the Code - inserted into the contract signed by the producer and the advertising agency - bounds the advertiser to apply the Code only with respect to the advertisement provided by the contract; it cannot be automatically extended to any other forms of advertising. On these premises, the Jury has accepted his competence only with respect to the press ad.</p> <p>The Jury explained that in certain cases the clause of acceptance may even provide that all advertisement that shall be diffused by the advertiser through whatever means, during a certain period, are falling under the Code's regime. But the Jury stressed that such circumstance must be expressly provided by the contract and cannot be presumed.</p> <p>However, the Jury also stated that the above-mentioned principle does not apply when the advertisements diffused through means that provide such clause and means that do not provide it, are substantially identical. This occurs when an advertisement, clearly evoking another message (falling under the Code's regime), results as a "functionally related communication", as it is aimed at the same commercial promotion.</p> <p>The Jury declared that in the considered case, such circumstance could not be found. The claimed label, even if its content was partially similar to that of the press ad, had been diffused considerable time before the press campaign claimed by the competitors. Therefore, the label ad couldn't be considered as "functionally related communication". The standard acceptance clause signed by the parties made clear that only the press campaign was falling under the Code's application.</p>
Comment:	The considered case assumes great relevance, as it deals with the limits to the Jury's competence in supervising advertising campaigns. The context of the case also illustrates the relevance of contractual agreements in the advertising sector.

6. Case Report:*	
Self regulation:*	
Topic:	No misleading, miraculous promises in ads for weight losing products
Who:	Review Board of the Institute for Self- Regulation in Advertising
What Happened:	The Review Board banned an ad publicizing pills to loose weight for infringing articles 2, 12/2, 18, 23/bis and 24 of the Advertising Code. The Board noted that the promises made by the ad were absolutely exaggerated and were based on no scientific evidence.
	The reference to therapeutic effects was deceiving. The reference should

	have been properly made to weight control. The ad also promised astonishing results from the very first week. Such statements were equally considered deceiving towards those consumers who are particularly attentive to physical and aesthetic problems. The ad also made reference to statements and recommendations of medical nature. The Board also stated that this ad infringed article 18 of the Code because it didn't mention cancellation or return clauses. Therefore a decease order was issued.
Comment:	Recently the Advertising Self-Regulation system has become particularly sensitive towards campaigns promoting health care and fitness products as well as cosmetics.

7. Case Report:*	
Topic:	Wizards' Business
Who:	Competition Commissioner (i.e. independent authority competent on misleading advertising)
When:	November 2002
Where:	Italy
What Happened:	<p>A Consumers' Association required action from the Authority for Market and Competition (competent on misleading ads), claiming as misleading advertising, the message diffused on a magazine, promoting prophetic consultations and mail order selling of magician rites and talismans.</p> <p>The claimed message consisted in a print tabular providing information for the following advertised "services/products": a) mail order sale of a "numeric table" containing the personal number provided by the Venerable Master, aimed at being used in lotteries or gambling for achieving good results; the message read "<i>who asked once for the table, usually asks for it again</i>" b) awarding of a degree (certificate or doctorate) at the end of a special training course in magic; c) consultation given by the famous wizard "X" by mail, phone or directly at his offices placed in Milan, Paris, Rome, Turin; d) a book entitled "<i>The Third Millennium's Magic</i>" providing advices for analysing dreams and winning at gambling. Finally, the message provides consumers only with the mailbox to which purchase orders can be addressed.</p> <p>The Consumers' Association argued that the message, failing to provide consumers with any detail referring to the seat and the identity of the wizard, as well as of the agency, where the promoted services/products may be achieved, results indeed to be misleading. Furthermore, it promotes rites, amulets, and magic courses, particularly expensive and it is clearly aimed at abusing of people easy to get impressed.</p> <p>The Authority admitted the claim stating that the message was misleading as far as it tries to play on a rational point of view (i.e. the chance of winning at gambling through the personalized numbers, the book's advices...), inducing consumers to make purchase orders. Moreover, the promoted training courses result to be misleading as well, since the awarding degree lacks of any academic value. On these grounds the Authority ordered the advertising agency to cease the diffusion of the claimed promotional message.</p>

Comment:	<p>Modern wizards are used to promote their products, their (supposed) divinatory qualities and their services through any kind of marketing and communication tool. After press ads and participation to TV programs, wizards are now quite familiar with Internet! The Web features a significant number of sites specialized in supplying cartomancy's and astrology's services. Consumers may get in touch via e-mail or a chat line, they can pay the offered services, greatly expensive, by credit card on line.</p> <p>Such use of the Internet, quickly growing up, and difficult to control, makes it hard to protect consumers/users (and their wallets) from fraudulent or misleading attacks to their credulity.</p>
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8. Legislation:*	
Topic:	E-commerce Directive close to be implemented: new rules for spamming
Who:	Italian Parliament
When:	March 2003
Where:	Rome
What Happened:	<p>The Italian Parliament has agreed on the text of the Law by Decree, which will be published in some days and is thought to implement European Directive n. 2000/31 on Electronic Commerce.</p> <p>Main aspects of the new implementing provisions:</p> <p>a) <u>Commercial communication on line:</u></p> <ul style="list-style-type: none"> - all commercial communication must be clearly presented as such and the sender's identity must be immediately identifiable, - to <u>unsolicited commercial communication</u> apply the provisions concerning personal data protection in telecommunications and distance contracts. Therefore, consumers shall be preliminarily informed as to the purposes and the modalities of their personal data's processing and their prior consent to such treatment is required. Moreover, all communications must inform the consumer that he may opt for not receiving in the future any other communication of such kind (opt-out system). The implementing law is not going to make use of the faculty (offered by the Directive) of obliging providers to conduct a preliminary check on so called "black list". <p>b) <u>Information to be provided:</u></p> <p>Consumers shall be provided with:</p> <ul style="list-style-type: none"> - general information aimed at clearly identifying the person on behalf of whom the commercial communication is made; - contractual information (prior to the order sending) as to: - procedural steps for the purchase contract's conclusion; - the technical means for identifying and correcting input error prior to the placing of the order; - the disputes settlement's provisions. <p>c) <u>Provider's liability:</u></p> <p>The providers are not generally required to monitor the transmitted or stored information. However, if providers should be aware about illegal activities performed through the net, they must promptly inform the competent public authorities providing them with all known information, enabling to identify the subjects involved. If the provider fails in such cooperation, he shall be held liable.</p>

	<p>d) <u>Administrative sanctions:</u> Administrative fines up to € 10.000 shall punish any infringement of the rules concerning the information to be provided as well as the commercial communication.</p>
Comment:	<p>The new implementing provisions affect the phenomenon known as "spamming", and establish an "opt-out" system, highly preferred by all companies active in the sector of marketing.</p>

MALAYSIA



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1. Topic :	Malaysian Advertising Update
Where:	Malaysia
When:	30 th March 2003
What Happened:	<p>A Malaysian Minister was quoted as saying that the Malaysian advertising industry should brace itself against globalization, hinting that Malaysia may adopt an 'open sky' policy. The Minister was further quoted as saying that only a strong sense of national patriotism will steer the local advertising industry into the future against challenges brought about from external forces.</p> <p>A possible conclusion that could be drawn from the Minister's statement is that the electronic media may then be allowed to run commercials that are produced abroad. Currently, commercials that are produced abroad are not allowed to be advertised in the Malaysian media because of the long-standing 'Made in Malaysia' ruling requiring that all commercials that are to be advertised in Malaysia, be locally produced.</p> <p>Through the 'Made in Malaysia' ruling, the local advertising industry has been protecting and prioritizing the local production industry against global multinational companies. The main reason for this was so that the local industry could develop itself. This has resulted in an overnight creation of a local film and video production industry.</p> <p>The downside of adopting the so called 'open sky' policy would mean that with multinational companies will have a bigger advertising budget to spend in the local media and thus resuscitate some vibrancy in the local media.</p> <p>On the bright side however, if local production companies are allowed to compete with foreign production companies on an equal footing, this would then spur creativity in the local advertising industry to higher levels and also persuade the local production industry to reassess its costing to make it more competitive against foreign production companies.</p>

Comment:	The Ministers comment augurs well for the Malaysian advertising industry. This indicates that Malaysia is heading in the right direction, as the only way to develop and enhance the local advertising industry is to compete among foreign production companies on an equal footing. The Malaysian advertising industry has long been a protected child and therefore the time has come for it to go global.
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2. Topic :	New Guidelines on Beer & Liquor Advertisements
Where:	Malaysia
When:	14 th April 2003 (to come into effect 3 months after)
What Happened:	<p>A local state authority has issued new guidelines on beer and liquor advertisements. The new guidelines indicate that beer advertisements on a restaurant' signboard should not take up more than 30% of the advertising space and can only be placed at the side walls of the establishment rather than front of the shops.</p> <p>The guidelines further indicate that advertisements of this nature are allowed on refrigerators in restaurants but should also not exceed 30 per cent of the advertising space. Advertisements in back-lit boxes are not allowed, and existing ones must be removed. The local authority has given a period of three months to owners of the affected business premises to comply with the latest set of guidelines failing which action will then be taken against errant operators.</p> <p>Banners and buntings with beer or liquor logos can be put up for a specified period but only with the prior permission of the local state authority.</p>
Comment:	As Islam is the official religion in Malaysia, the guidelines highlight the seriousness of the state authority in upholding the values of Islamic teachings that basically prohibits the consumption of alcoholic beverages, taking into account also the sensitivity of Muslims that make up the majority of the Malaysian population. The guidelines however do not ban beer and liquor consumption to the population other than non-Muslims.

NEW ZEALAND



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1. Case Report:	Commerce Commission v ANZ Bank
Topic:	Misleading advertising
Where:	Wellington District Court
When:	16 January 2003
What Happened:	ANZ Bank was fined \$7,500 plus costs in the Wellington District Court for breaching the Fair Trading Act by a promotion offering nearly 10,000 of its existing customers an ANZ MasterCard with a pre-approved \$5,000 limit. In addition to the fine the Judge acknowledged that the bank had to write-off \$2.3 million as a result of the campaign.
Comment:	Non-compliant advertising jeopardises the brand owners investment and can impose important indirect costs apart from the Court imposed fine.

2. Case Report:	Commerce Commission v Daewoo Automotive Australia Pty Ltd, trading as Daewoo Automotive New Zealand
Topic:	Misleading advertising "new" vehicles
Where:	Wellington District Court
When:	17 December 2002
What Happened:	The Court convicted Daewoo Automotive New Zealand for breaching the Fair Trading Act for selling vehicles as new when they were manufactured two years earlier. A Commerce Commission investigation revealed that 52 "new" Daewoo Nubira vehicles were sold through the company's nationwide road shows in 1999 but were in fact manufactured in 1997 and had been sitting in storage in Korea. Consumers were misled into believing they were buying a new vehicle.
Comment:	This case may prompt Parliament to define the term "new" for the purposes of motor vehicles to require disclosure of manufacture date.

3. Case Report:	Commerce Commission and Rio Beverages Limited
Topic:	Fruit juice health claims
Where:	Auckland District Court
When:	14 August 2002
What Happened:	The Auckland District Court fined Rio Beverages Limited \$22,600 for false and misleading claims about juice products. Rio marketed cranberry, orange, pink grapefruit and red grape products emphasising their health benefits with the labeling of the product highlighting the inclusion of Echinacea and its ability to assist in warding off winter colds and flues. Analysis indicated that a person would have to drink as much as 177

	litres per day of the beverage to obtain any of the claimed health benefits of Echinacea. The Court commented that although there is debate as to which substances are accepted as providing therapeutic benefit in any event the amount of Echinacea in the juice would need to be substantial. This was a classic case of the public and rival traders being grossly misled by inaccurate labeling.
Comment:	Juice product claims continue to be an issue for consumers in New Zealand.

4. Case Report:	Anheuser Busch Inc v Budweiser Budvar National Corporation
Topic:	"Budweiser" trade mark
Where:	Court of Appeal
When:	19 September 2002
What Happened:	Anheuser Busch Inc which has registered the trade marks "Budweiser" and "Bud" in New Zealand was granted an injunction restraining Budweiser Budvar National Corporation from advertising and selling by reference to the name "Budweiser" where the name "Budweiser Budvar" was printed on bottle labels. The plaintiff was entitled an enquiry as to damages or an accounting of profits.

NIGERIA



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1. Topic:	Ban on cigarette and alcohol adverts
Who:	Advertising Practitioners Council of Nigeria (APCON)
When:	With effect from January 1, 2004
Where:	Nigeria
What Happened:	<p>In 2001, APCON, the regulatory body for advertising practitioners in Nigeria, announced its decision to ban the advertisement of cigarette and tobacco products within the Nigerian media with effect from January 1, 2002.</p> <p>Pleading undischarged commitments to and contracts with their clients, practitioners successfully made a case for an extension, which APCON granted. Thus, the ban is to become effective 1st January 2004.</p> <p>While allowing the manufacturers of these products to continue their promotion of fairs, carnivals and sport activities, the ban will restrict them to displaying only their brands and not their products at these events. APCON's main reason for the ban is to discourage the 'disturbing habits' formed as a result of the consumption of these products.</p>
Comments:	<p>Currently, there is no law banning the advertisement of cigarette and tobacco products in Nigeria, but APCON's ban would fall within the powers granted by its enabling law.</p> <p>The legal issue arising from APCON's decision is that statutorily, APCON can only regulate the activities of individual practitioners while advertising contracts and commitments are invariably made with agencies. Any sanctions that APCON can impose may only be imposed against the practitioners in their individual capacities.</p> <p>However, although the ban is yet to become effective, there has been a noticeable shift from product advertising to brand promotion in all media by alcohol and tobacco manufacturers.</p>

POLAND



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1. The issue:	Dishonest advertising, advertising in breach of good practice
The parties:	Federation of Consumers v. "Clou" Spółka z o.o.
Place:	The Court of Appeal in Gdańsk, case file no: I ACr 839/96
Date:	November 11, 1996
Facts and judgment of the court:	<p>On November 6, 1996, the Court of Appeal in Gdańsk, having examined the claims filed by the Federation of Consumers with its registered seat in Warsaw, against "Clou" Sp. z o.o. for prohibition of unfair competition acts, i.e. dishonest advertising, as a result of the appeal of the plaintiff against the verdict of the Regional Court in Gdańsk dated May 30, 1996, reversed the appealed verdict and transferred the case to the Regional Court in Gdańsk in order to re-examine the case.</p> <p>By the appealed verdict the Regional Court in Gdańsk dismissed the claims filed the Federation of Consumers, demanding that "Clou" refrain from the dishonest advertising.</p> <p>The mail-order company trading under the name "Clou", in order to promote its activity and products, provided potential customers with advertising forms and information regarding the contests organized by Clou. As soon as Clou received the order placed by the customer, it registered the personal data of the customer in its computer database. Each customer was provided with a control number, which allowed him/her to take part in lotteries named "Prize of the month" and "Prize of the year". The defendant's leaflets were clear and readable, however information regarding the prize in the amount of 30,000 PLN were less clear and only a careful analysis of the contents allowed one to notice that the customers' applications allowed them only to take part in the drawing of the prize, and not to obtain the prize together with the ordered goods.</p> <p>The Federation of Consumers received a large number of complaints regarding the activity of the defendant.</p> <p>The first instance court took Article 16 of the Act of April 16, 1993 on suppression of unfair competition as a legal ground of its verdict. The court stated that the advertisement of the defendant, in the part regarding the information on the "Prize of the year", was not dishonest, due to the fact that it was true in the sense that careful reading of the leaflet allowed one to realize that the customers to whom it was addressed did not acquire the right to the prize, but merely were allowed to take part in the drawing of the prize. The court did not examine the activity of the defendant in terms of good practice. In the opinion of the Court of Appeal, the omission in the appealed verdict of the issues related to good practice meant that</p>

	the mentioned verdict infringed the law, in particular Article 16 of the Act on suppression of unfair competition.
Comments:	In the opinion of the Court of Appeal, a dishonest advertisement (including the advertisement in breach of the good practice) is an advertisement which by the use of the gullibility of the addressees justified by the circumstances and the average inability to associate facts and draw a conclusion on the basis of the presented text which sets forth the statements desired by the advertiser, gives the average addressee the impression that some particular facts exist (when in fact they do not) and as a result leads to the addressee feeling that he/she has been let down, deceived or slighted. In conclusion, the placement of true information in the advertisement does not mean that the advertisement is honest and in compliance with good practice.

2. The issue:	Admissibility of the cigarettes promotion lottery
The parties:	P.M. Polska S.A. and the Minister of Finance
Place:	The Supreme Administrative Court in Warsaw, case file no: II SA 1016/00
Date:	April 4, 2001
Facts and judgment of the court:	<p>Company P. M. Polska S.A. filed an application with the Minister of Finance for permission to organize a promotional lottery between February 1, 2000 and July 12, 2000. The aim of the lottery was to promote the cigarettes produced by this company. The company intended to promote the goods, among others, in the periodical that should be treated as belonging to the youth press, under the name "M".</p> <p>By the decision dated January 5, 2000, the Minister of Finance rejected the application on the basis of Article 24 Section 1 of the Act of July 29, 1992 on lottery games and reciprocal bets. As the legal basis of its decision the Minister gave Article 8 Section 1 in conjunction with the Article 2 Section 7 of the Act on November 9, 1995 on protection of health from the results of nicotine and the use of nicotine products. Article 8 Section 1 prohibits the promotion and advertisement of nicotine products. The lottery constitutes this kind of a promotion. As a result of the party's application, the Minister of Finance re-examined the case, and on February 17, 2000 decided to uphold the decision.</p> <p>P.M. S.A. filed an appeal with the Supreme Administrative Court against both above-mentioned decisions. In the appeal, P.M. SA applied for them to be overturned on the grounds that they were issued in breach of Article 8 Section 1 Item 2 in conjunction with Article 2 Section 7 of the Act on protection of health from the results of nicotine and the use of nicotine products, and the Article 7 of the Code of Administrative Procedure by inexact explanation of facts (passing over the circumstances that the character of the participation in the lottery was not public – personal correspondence).</p> <p>The Supreme Administrative Court dismissed the appeal. In the justification of its verdict the court stated that in accordance with the Article 1 of the Act on protection of health from the results of nicotine and the use of nicotine products, the administrative government departments are obliged to undertake actions aimed at protection of health from the</p>

	results of the use of nicotine products. Moreover, each promotion and advertisement shall be treated as public activity, as it is addressed to the large number of addressees and it is aimed at convincing them to purchase nicotine products.
Comments:	The general prohibition on cigarettes and nicotine product advertisement covers the prohibition of cigarette promotion lotteries as well.

3. The issue:	Prohibition of advertising and promotion of the products taking advantage of similarity to alcohol beverages
The parties:	The Polish Confederation of Private Employers
Place:	The Constitutional Tribunal, case file no: K 2/02
Date:	January 23, 2003
Facts and judgment of the court:	<p>The Polish Confederation of Private Employers filed a motion with the Constitutional Tribunal for a declaration that the provisions of Article 13¹ Section 3 and 4 of the Act of October 26, 1982 on education in sobriety and suppression of alcoholism and Article 45² of this Act that includes the penal provisions that are incompatible with the Constitution. Article 13¹ Section 3 prohibits advertising and promotion of the products and services, whose name, trademark, graphic shape or packaging takes advantage of a similarity to or is identical to the mark of an alcohol beverage or any other symbol objectively related to an alcohol beverage. Section 4 prohibits the promotion of business entities and other entities which use in the advertisement image the name, the trademark, the graphic shape or packaging related to an alcohol beverage, its producer or distributor. In the opinion of the Confederation, the appealed provisions infringed the following constitutional rules: the specification of the penal provisions, the protection of property, the freedom of business activity and the equality to the provisions of law. Moreover Article 13¹ Section 3 and 4 and Article 45² infringed Article 10 of the Convention for the protection of human rights and fundamental freedoms.</p> <p>In its motion, the Confederation claimed that the prohibition on advertisement and promotion of products and services specified in the Article 13¹ Section 3 and the prohibition of advertisement and promotion of the business entities specified in the Article 13¹ Section 4 restricts the right to the use of the trademark to the extent to which in fact, as a result, is tantamount to the deprivation of the right to the trademark. This is in breach of Article 21 of the Constitution. By restricting the freedom of the advertising and promotion of the goods and services, the provisions of Article 13¹ interfered in the freedom of business activity. The Confederation stated that the prohibition on the advertisement of non-alcoholic beverages infringes the freedom of commercial speech, and as a result infringes Article 10 of the Convention for the protection of human rights and fundamental freedoms.</p> <p>The Constitutional Tribunal stated that Article 13¹ Section 3 and 4 of the Act on education in sobriety and suppression of alcoholism - regarded as provisions which do not prohibit advertising and promotion taking advantage of the advertising image which is accidentally similar to the advertising image appropriate for the products or alcohol beverages - does not infringe Article 20, 21, 22, 31 Section 3, Article 32 and Article 64 of</p>

	<p>the Constitution and Article 10 of the Convention for the protection of human rights and fundamental freedoms. Moreover, Article 45² of this Act in conjunction with Article 13¹ Section 3 and 4 in the meaning mentioned above does not infringe Article 2 or Article 42 Section 1 of the Constitution. The Constitutional Tribunal stated that Article 13¹ Section 3 and 4 to the extent that it applies to the entities which initiated the activities described in the provisions after the appealed provisions came into force does not infringe Article 2 and 64 of the Constitution.</p>
Comments:	<p>In the opinion of the Constitutional Tribunal, the appealed provisions do not apply to the entity that in the advertisement of a different product uses an advertising image accidentally identical, similar or related to the alcohol beverage or its producer. In the opinion of the Tribunal such person does not commit a crime.</p> <p>The Constitutional Tribunal ruled that the appealed provisions restrict the constitutional freedom of business activity proportionally by taking into consideration the general interest, i.e. protection of public health.</p> <p>Regarding the restriction of the rights to the trademark, the Constitutional Tribunal did not agree with the opinion of the Confederation that the appealed provisions are aimed at depriving the entrepreneurs of their rights to the trademark. The Constitutional Tribunal stated that the rights to the trademark are not connected only with its advertising function and that the trademark may be still used by the entitled person in order to distinguish the products. This last standpoint of the Constitutional Tribunal seems to be controversial.</p>

4. The issue:	Advertising misleading the consumers
The parties:	U.(...)D.(...) Inc – Sp. z o.o. v. D.(...)E.(...)P.(...) Sp. z o.o.
Place:	The Supreme Court of the Republic of Poland, case file no: I CKN 52/96
Date:	January 14, 1997
Facts and judgment of the court:	<p>In June 1992 the plaintiff U.(...)D.(...) Inc., Sp. z.o.o. and D(...)H.(...)GmbH with its registered seat in Frankfurt – commercial agent of the concern trading under the name D. (...) with its seat in Europe – concluded a settlement by which the company D.(...) H.(...) GmbH confirmed that the products D.(...) E.(...) C.(...), which used to be sold to the plaintiff under this trademark since 1992 will not be sold in Poland without the prior consent of the plaintiff within the following 2 years, under the condition that the plaintiff in the first year will make an order for the total value of 3,000,000 USD and 10 % larger order in the second year. The plaintiff fulfilled that condition. In 1993 the defendant was registered in the commercial register, as the limited liability company trading under the name D.(...) E.(...) P.(...). D.(...) E.(...) C.(...) Ltd with its seat in Korea – the producer of electronic devices in the scope of the concern D.(...) – was its only shareholder. In accordance with the decision of the Management Board of the mentioned shareholder, the defendant gained exclusive rights to distribute audio-video and electronic devices produced by D.(...)E.(...)C.(...) Ltd. Thus, the defendant placed in the periodic "Life Video" and the newspaper "Gazeta Wyborcza – Gazeta Telewizyjna" information regarding the equipment produced by D.(...)E.(...)C., and to the effect that the defendant is the exclusive distributor of this equipment</p>

in Poland;

The plaintiff filed for: a prohibition on the defendant from further advertising of the company as the exclusive distributor of equipment produced by D., obliging the defendant to remove the consequences of its advertisement within the territory of Poland and to place a press corrective statement and adjudication of the compensation. As the legal grounds the plaintiff invoked the provisions of Act on suppression of unfair competition, claiming that the promotional activity of the defendant, presenting it as the exclusive distributor of the equipment produced by D.(...) within the territory of Poland, undermines the credibility of the plaintiff as the distributor of mentioned equipment. The Plaintiff cited the agreement concluded by it and D.(...) H.(...)GmbH in Frankfurt, which guaranteed it the exclusive rights to the equipment delivered by the contracting party.

In 1996 the Regional Court dismissed the claim regarding the plaintiff's demand that the defendant be ordered to place the press corrective statement in the form to be determined in the course of the proceedings. The court stated that under the settlement dated June 1992 the plaintiff is entitled only to the sale of the equipment produced by D.(...) in Poland and the company under the name D.(...) H.(...)GmbH agreed not to sell such devices to any others entities in Poland. The German company had no right to entitle, in the name of concern D. (...), the plaintiff to be the exclusive distributor. Such conclusion follows from the statement of the President of the Management Board D.(...) E.(...) C.(...) Ltd., which was not challenged by the plaintiff. The Court of Appeal has upheld this verdict.

The plaintiff filed a cassation against the verdict of the Court of Appeal. In the cassation the plaintiff claimed that the court breached the provisions of law by a wrong interpretation of a declaration of will (Article 65 of the Polish Civil Code), by the assumption that the plaintiff was only the seller and not the distributor of the goods produced by D.(...), and that the court breached Article 16 Section 1 Item 2 Act of April 16, 1993 on suppression of unfair competition by the assumption that the advertising activity of the defendant did not constitute the act of unfair competition and did not infringe the rights of the plaintiff.

In the opinion of the Supreme Court, the cassation could not be allowed. The courts that resolved the case correctly interpreted the provisions of the settlement dated June 1992 concluded between the plaintiff and the company trading under the name D.(...) H.(...)GmbH with its seat in Frankfurt. The content of the settlement cannot lead one to the conclusion that D.(...) H.(...)GmbH acted on behalf of D.(...)E.(...)C.(...), the producer of the D. products, which gave the plaintiff the right to the exclusive distribution of the equipment, excluding the right of the producer. The settlement concluded between D.(...)H.(...)GmbH and the plaintiff did not include provisions typical for contracts on distribution. In the opinion of the court the allegation concerning an act of unfair competition with regard to advertising was erroneous as well. The Supreme Court stated that the concept of advertisement was not defined by the Act. However, it shall be noted that the doctrine briefly

	<p>defined the concept of advertisement as the “dissemination of information about services and goods aimed at influencing demand”. In addition, the intention to evoke a particular reaction on the part of customers (the addressees of the advertisement) constitutes the substantial element of the advertisement. The main criterion that shall be taken into consideration in order to establish if in a particular case such intention existed shall be the opinion of the average consumer. Such opinion of the customer should reveal if he treated such transmission as the encouragement to the purchase of such goods or services. The message addressed to the potential purchaser should concern the goods or services that are offered. Information included in such message that refers to the company that offers goods or services is secondary, and remains beyond the scope of the concept of “advertisement”. This is confirmed by Article 14 of the Act on suppression of unfair competition, which consists in an act on unfair competition in the form of dissemination of untrue or misleading information about one’s own or another business entity or enterprise in order to benefit from it or to cause damage. In the circumstances of the examined case, i.e. in the situation in which the defendant disseminated information that it is the exclusive distributor of particular goods, only the infringement of the Article 14 of the Act on suppression of unfair competition may be considered.</p> <p>In the opinion of the Supreme Court, the activity of the defendant did not constitute advertising, and so all the more did not constitute an act of unfair competition in the scope of advertising. The allegation is completely mistaken concerning the infringement of Article 16 Section 1 Item 2 of the Act on suppression of unfair competition, according to which an act of unfair competition in advertising is advertising which misleads the customer and thus potentially influences his decision as regards acquiring goods or services.</p>
Comments:	<p>The verdict of the Supreme Court is worth attention, amongst others, due to the fact that it stresses the difference between advertisement and some particular forms of information. The dissemination by the business entity of the information that it is the exclusive distributor of particular goods does not constitute the act of the unfair competition with regards to advertising, in particular advertising misleading the consumers. (Article 16 Section 1 Item 2 of the Act on suppression of unfair competition).</p>

5. The issue:	The advertising of beer, indirect advertising, advertising in breach of good practice.
The matter:	Okocim Brewery
Place:	The Supreme Court of Republic of Poland, case file no: III CKN 213/01
Date:	September 26, 2002
Facts and judgment of the court:	<p>Due to the prohibition on the advertisement of alcoholic beer, Okocim Brewery used to advertise non-alcoholic beer. The advertised non-alcoholic beer had the same name, packaging, label (except for a small postscript “non-alcoholic beer”) as the alcoholic beer. Moreover, the commercials regarding non-alcoholic beer presented situations typical for the drinking of alcoholic beer.</p> <p>The Supreme Court decided that such advertisement constituted indirect</p>

	advertising – Okocim Brewery by advertising non-alcoholic beer, was in fact advertising alcoholic beer. Such advertising breaches good practice (Article 3 and Article 16 Section 1 of the Act of April 16, 1993 on suppression of unfair competition) and impairs the interest of another business entity or customer (Article 3 of the Act on suppression of unfair competition), and in consequence constitutes an act of unfair competition.
Comments:	The indirect advertising of alcoholic beer constitutes an act of unfair competition. The main issue is to define the concept of good practice, due to the fact that the breach of good practice constitutes the indispensable premise for classifying the advertising activity of the business entity as an act of unfair competition. The Supreme Court decided that although the concept of “good practice” included in Article 16 Section 1 Item 1 of the Act on suppression of unfair competition has a more narrow scope than the meaning of this concept included in Article 3 of the Act on suppression of unfair competition, the two understandings of this concept may not be opposed to each other.

PUERTO RICO



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1. Topic:	TRADEMARKS
What Happened:	Puerto Rico's Trademark Office ratifies the use of the last classification issued under the Nice Treaty, Version Eight (8), Year 2002

2. Topic:	COPYRIGHTS
What Happened:	The rights of the Puerto Rico creative community can afford protection from two legal statutes: the Federal Copyright Act and the Puerto Rico Intellectual Property Law. In addition, the Puerto Rico Civil Code acts as a supplementary body of law, except when incompatible to US federal preempting legislation in this matter. In Puerto Rico, the intellectual rights over a work are formed by the seam of two rights, separate in nature, that is, the moral rights , which shelter the author's personal bond to his/her creation and the patrimonial rights , which afford the author the exclusive economic exploitation of his work. The first may be redeemed in the Puerto Rico courts, while matters pertaining the latter must be claimed within the Puerto Rico federal court system.

3. Topic:	TELECOMMUNICATIONS
What Happened:	Puerto Rico's Digital Signature Law (3 L.P.R.A. §1031 et sec) regulates the creation, licensing and obligations of private entities serving as certifying authorities and data banks, responsible for the issuance and recording of identifying passwords for digital signatures. The law also establishes the evidentiary presumptions of law surrounding the use of digital signatures, as well as the penalties and remedies for negligent, intentional and fraudulent use of the certificates and digital signatures.



4. Topic:	DECEITFUL ADVERTISING
What Happened:	Puerto Rico's Regulation for the Prevention of Deceitful Advertisements , requires, <i>inter alia</i> , that any person or entity in the business of promoting--directly or through an agent--a product or service for sale, must be in a position to sustain and prove all said claims and offers prior to publication. The regulation recognizes that falsity in an advertisement may result not only from direct statements but also from reasonable inferences made from such statements, as well as from the omission and obscurity of relevant information. To this effect, an advertisement may be deemed deceitful when taken as a whole, even when each statement taken separately may be truthful. The regulation emphasizes prohibitions within extends to children's toys, drug, health, food and nutritional products and services, among other. Various prohibited practices are defined and

	enumerated (<i>numerus apertus</i>) in the regulation, and fines are established in up to US\$10,000 per violation. Non-local promoters are required to post bond prior to advertising in Puerto Rico. Official interpretations of facts, acts and situations that may constitute deceitful advertisements according to this regulation constitute additional binding precedents
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SINGAPORE



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1. Case Report :	Civil Appeal No. 43 of 2002A	
Topic :	Trademark Infringement	
Where :	Singapore	
When	2002	
What Happened:	An innocuous newspaper advertisement seeking to inform the public that the Appellants (Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd, hereinafter "BCH") and the Respondents (Fragrance Foodstuff Pte Ltd, hereinafter "Fragrance") were not related companies, culminated in a copyright and trade mark infringement suit in the High Court and thereafter, the Court of Appeal.	
Comment:	<p>Trade Mark/Copyright Infringement</p> <p>Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd v. Fragrance Foodstuff Pte Ltd</p> <p>BCH markets its products under the Chinese character "Xiang" which means "fragrant". The Chinese character is depicted as though it is written with a Chinese brush.</p> <div style="display: flex; justify-content: space-around; align-items: center;"> <div style="text-align: center;">  <p>Defendant's Trade mark</p> </div> <div style="text-align: center;">  <p>Plaintiff's Trade Mark</p> </div> </div> <p>Fuelled by the confusion, BCH published an advertisement in the local English and Chinese dailies on 2 and 3 February 2002. The advertisement reproduced both BCH's "Xiang" trade mark and Fragrance's "Xiang Fragrance" logo and contained statements that the former was a registered trade mark belonging to BCH and that the latter was Fragrance's trade mark. The advertisement also stated that BCH and Fragrance were not related companies.</p> <p><u>The Action</u></p>	<p><u>Facts</u></p> <p>BCH and Fragrance are in the business of manufacturing and selling sweet barbecued meat snack.</p> <p>BCH commenced business in 1930, while Fragrance in 1990.</p>

Fragrance commenced an action in the High Court for copyright and trade mark infringement and concurrently applied for an *ex partes* injunction. The application was eventually heard *inter partes*.

Further to BCH entering its appearance to the action, Fragrance applied for summary judgment in respect of the alleged copyright infringement.

The High Court judge heard the *inter partes* injunction application and summary judgment application together. She allowed Fragrance's application for summary judgment and issued an injunction restraining BCH from infringing Fragrance's copyright in the work. The High Court judge did not order an interim injunction in respect of the alleged trade mark infringement.

The Appeal

It was not in dispute that:-

- a. Fragrance owned the copyright in the "Xiang Fragrance" logo;
- b. BCH had published the "Xiang Fragrance" logo without Fragrance's consent; and
- c. BCH had *prima facie* infringed Fragrance's copyright in the "Xiang Fragrance" logo.

BCH appealed to the Court of Appeal on the basis that while there was *prima facie* infringement, BCH was entitled to defences under S. 27(6) of the Trademarks Act and S. 37 of the Copyright Act.

S. 27(6) Trade Marks Act

S. 27(6) provides that the unauthorised use of a registered trade mark does not constitute trade mark infringement if the use is "*for the purpose of identifying goods or services as those of the proprietor or a licensee, but any such use other wise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark*":

The Court of Appeal made no affirmative finding on S. 27(6), but gave the following comments:

- i. The High Court judge had rejected BCH's argument that the reproduction of the "Xiang Fragrance" logo came within S. 27(6) as it was for the purpose of identifying the goods or services of Fragrance.

The High Court judge had examined BCH's motive for publishing the advertisement, and concluded that the advertisements contained "... a subtle suggestion that BCH's goods had been confused with those of Fragrance's which were inferior to BCH's, that Fragrance was responsible for such confusion and, that Fragrance copied BCH's logo."

The High Court judge had, in Court of Appeal's view, read too much into the advertisement. It was clear to the Court of Appeal that the advertisement merely attributed each trade mark to its owner, stated that the two marks are not the same and clarified that the two companies are not related.

The Court of Appeal went on to say that if one were to look into BCH's motive, then BCH should be permitted to be cross-examined instead of merely relying on affidavit evidence.

ii. The Court of Appeal also stated that it was arguable that the "Xiang Fragrance" logo was published to identify the goods of Fragrance.

iii. BCH had also argued that if they were afforded a defence against trademark infringement under S. 27(6), then it would flow that there was no copyright infringement. The rationale was that it could not have been Parliament's intention to sanction an act under S. 27(6) of the Trade Marks Act which would infringe a related right; and the corollary would be that Fragrance had granted an implied license for others to use the "Xiang Fragrance" logo within the confines of S. 27(6).

As there was a dearth of case authority, the Court of Appeal acknowledged that the issue "deserves fuller ventilation".

S. 37 Copyright Act

This Section provides that a fair dealing with *inter alia* an artistic work "shall not constitute an infringement of the copyright in the work if it is for the purpose of, or is associated with, the reporting of current events in a newspaper, magazine or similar periodical..."

The Court of Appeal made the following comments:

i. The High Court judge had wrongly concluded that S. 37 does not apply to an artistic work.

ii. The fair dealing defence only applies where public interest is involved. However, the High Court judge had decided that the reproduction of the "Xiang Fragrance" logo in the advertisement was only of interest to the parties and not the public. The Court of Appeal considered that this point required further examination by way of additional evidence.

iii. The High Court judge felt that the incidents of confusion in 1998 and February 2002 did not qualify as current events. The Court of Appeal however pointed out that "current event" is not defined in the Copyright Act. The Court of Appeal then went on to say that public confusion could constitute a "current event", especially since one of the incidents of confusion relied on by BCH took place in January / February 2002.

	<p><u>Conclusion</u> While emphasizing that no authoritative ruling was being made under S. 27(6) of the Trade Marks Act and S. 37 of the Copyright Act, the Court of Appeal held that there were questions of fact and law which were not suitable for summary judgment. The Court of Appeal allowed BCH's appeal and granted unconditional leave to defend.</p>
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2. New Intellectual Property Academy

SINGAPORE, 11 September 2002 – Senior Minister of State for Law and Home Affairs, Associate Professor Ho Peng Kee announced that Singapore is setting up an Intellectual Property Academy to groom a new generation of intellectual property (IP) practitioners for Singapore and to be a think-tank for IP matters.

The new IP Academy will have two main components. Firstly, it will provide continuing education and lifelong learning opportunities for IP professionals, businesses and research organizations in Singapore and the region. Secondly, it will establish research programmes, to keep the IP Academy's training, and, on a broader scale, Singapore, at the forefront of IP developments. The output of the Academy will therefore extend beyond education programmes, into research on current and emerging issues in IP.

The IP Academy will work to identify gaps in IP education and expertise, draw in strategic local and overseas partners in IP education and research, and co-ordinate IP education and research programmes with local and overseas partners.

The IP Academy is envisaged to be the focal point of IP education and training. It will provide basic and continuing education for IP professionals, businesses and research organizations in Singapore and the region. For the IP professionals in particular, in light of increasing demand for professionals with cross-disciplinary knowledge and skill-sets, the IP Academy will serve as an add-on to the existing competencies of the various professional disciplines.

The target groups for the Academy include CFOs and CEOs, investment bankers, inventors, marketing strategists, financial analysts, venture capitalists, engineers, R&D directors, money managers, IP engineers, patent agents, trademark agents, technology transfer brokers, licensing & franchising brokers, IP portfolio managers, business development managers etc.

3. New Intellectual Property Court

SINGAPORE, 19 September 2002 – It was announced by the Singapore Supreme Court that a special Intellectual Property (IP) Court would be set up in Singapore to meet the growth in commercial disputes at both a domestic and international level.

Judges or judicial commissioners who have expertise in IP law will be assigned to hear IP cases.

The introduction of specialist commercial courts is seen as an important move to position and promote Singapore as a leading jurisdiction of choice in both domestic and international commercial disputes.

SPAIN



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1. Legislation:	GENERAL ADVERTISING ACT
Topic:	UNLAWFUL ADVERTISING
When:	MAY 2002
Who	ADVERTISING SELF-REGULATION ASSOCIATION
Where:	SPAIN
What Happened:	<p>BACARDÍ ESPAÑA, S.A. is the party responsible for an advertising campaign through posters placed in public streets. The first poster, placed on bus shelters, showed a bottle of advertised rum, the logo of the trademark in the top right-hand corner with the following message: "conspire with the night" superimposed on the bottle.</p> <p>The second poster, placed on billboards, showed a picture of a mermaid with the message "shy people dance alone", as well as the word "Bacardí" in the lower right-hand corner.</p> <p>The last poster, placed on bus shelters and billboards, showed a flying bat and the following message "sleep when you are dead". On the ads placed on bus shelters the logo of the trademark appeared in the top right-hand corner, whereas on billboards the word "BACARDÍ" appeared in the lower right-hand corner.</p> <p>The claimant alleged that the advertising campaign infringed article 8 of the Advertising self-regulation code of conduct of the federation of alcoholic beverages (FEBE). According to this article, the advertising of alcoholic beverages should not suggest that their consumption contributes to overcome shyness nor that it is the only solution to solve this problem. The claimant also asserted that articles 6 and 7 of FEBE's code of conduct were infringed Article 6 provides that visually perceptible advertising must inform clearly on the alcoholic content of the beverage. The claimant was of the opinion that this did not happen in the case of the billboards due to the fact that they were situated very high and could not be adequately read.</p> <p>Article 7 provides that the advertising of alcoholic beverages should include a clearly legible message stating that moderation constitutes a basic premise for a responsible consumption. The claimant considered that this message was not clearly readable on the posters posted on the billboards.</p> <p>The panel considered the first poster in breach of art. 8 b) of the code of conduct of the FEBE. This article lays down that advertising of alcohol should not suggest that its consumption can help to achieve sexual or</p>

	<p>professional success, to increase sexual appeal or to overcome shyness. The panel concluded that the ad in question established a clear parallelism between the consumption of alcohol and the overcoming of shyness.</p> <p>The second slogan "sleep when you are dead" was considered in breach of art. 8 d) of the code of conduct of FEBE. The panel understood that from the slogan it could be deduced that the consumption of the advertised rum would help to maintain a night's festive activity, overcoming physical and mental tiredness caused by staying awake.</p> <p>The panel considered that the slogan "conspire with the night" did not infringe the code of conduct of the FEBE.</p>
Comment:	Once again, the advertising of alcoholic beverages should not connect ideas like success, superiority, strength, etc. with consumption of alcoholic beverages.

2. Legislation:	GENERAL ADVERTISING ACT
Topic:	UNFAIR ADVERTISING / DENIGRATION
When:	JULY 2002
Who	ADVERTISING SELF-REGULATION ASSOCIATION
Where:	SPAIN
What Happened:	<p>The soft-drinks company BEBIDAS PEPSICO, S.A. (Pepsico) published an advertisement in the sports press with the following message: "How many goals did the goalkeeper say he was going to score? Spain 3 – Paraguay 1". The word "Spain" appeared written with the characters of the Pepsi trademark, while the word "Paraguay" appeared with the typical print of Coca-Cola. Under this messages, the words "Pepsi official soft drink of the Spanish national football team" and "Coca-Cola official soft drink of the Paraguay national football team" could be read. In the lower part of the ad the following sentence could be read: "Congratulations to our national team. Take the World Cup!</p> <p>Coca-Cola considered the advert unfair due to an unjustified use of its trademark (Coca-Cola), the taking of an illicit advantage of its reputation, and for being denigratory.</p> <p>The panel declared that the advert infringed articles 20 (illicit use of distinctive signs of third parties) and 21 (denigration) of the Code of Conduct published by the self-regulation association. In the opinion of the panel, the advertiser used the trademark Coca-Cola only to compare it with his own trademark, highlighting that the first is the sponsor of the Paraguay national football team, which, the day before had lost the match against Spain.</p> <p>Taking into account all of the circumstances the panel considered that PEPSICO's advert made an unlawful use of a distinctive sign of a third party and therefore was in breach of article 20 of the Code of Conduct:</p>

	<p>Article 20: illicit use of distinctive signs of third parties Advertising must not contain either express or implicit accounts of characteristic marks of other advertisers, except for cases which are legally permitted, contractually admitted or amount to acceptable comparative advertising.</p> <p>According to the panel, article 21 of the Code of Conduct was also infringed.</p> <p>Article 21: denigration Advertisers must not implicitly or expressly denigrate or denounce other companies, activities, products or services. Exact, truthful and pertinent advertising claims are not considered denigratory. At no time should a competitor be mentioned with reference to one's personal circumstances or those of one's company.</p>
Comment:	Even when the messages of an advert are exact and truthful, they could be considered denigratory.

3. Legislation:	GENERAL ADVERTISING ACT
Topic:	UNLAWFUL, UNFAIR AND COMPARATIVE ADVERTISING
When:	JULY 2002
Who	COURT OF FIRST INSTANCE No. 11 OF MADRID
Where:	SPAIN
What Happened:	<p>The Swedish company TELE 2 ran a spot on TV, comparing the price of its single rate for long-distance calls of six minutes with the price of the basic rate of Telefónica during normal hours without informing that Telefónica also had other price rates.</p> <p>The Court of First Instance Number 11 of Madrid decided that the advertising was unlawful and unfair. In order to establish a case of unfair advertising, two requirements provided in articles 2 and 3 of the Unfair Competition Law must be complied with. The unfair act must be directed at the market and the purpose of same must be the advertising of one's own products or services or those of a third party. The Court also declared that the advertising was comparative, so that it was necessary to analyse if the comparison was in under good faith. Article 6 c) of the General Advertising Act provides that "comparative advertising is unfair if it is not based on essential, similar and demonstrable characteristic marks of the products or services compared or when different goods or services are compared".</p> <p>The court found in favour of Telefónica and ordered not only the cessation of TELE 2's advertisement due to the violation of the General Advertising Act, but also required the defendant to carry out an advertising spot rectifying the position and informing clearly that its competitor Telefónica also had other cheaper rates.</p> <p>At the request of the claimant in January 2003, the court issued a new decision extending and clarifying the former and indicating that the rectifying advertisement must run on the same TV channels as those on which the illicit advertisement was shown, at prime time (21:00-22:00</p>

	hours), two days a week during six weeks, with a duration of between 30 and 60 seconds, on working days excluding Sundays and holidays, so that the audience could be adequately informed on the rectification.
Comment:	Usually, cessation is not enough to correct the Damaging effects of illicit advertising and therefore a rectifying advert is necessary, even though normally it does not reach the intended audience.

4. Legislation:	GENERAL ADVERTISING ACT
Topic:	ILLEGAL INCENTIVES CAMPAIGN
When:	OCTOBER 2002
Who:	ADVERTISING SELF-REGULATION ASSOCIATION
Where:	SPAIN
What Happened:	<p>A group of pharmaceutical laboratories filed a claim against the incentives campaign carried out by Laboratorios Cinfa, S.A.. The incentives campaign consisted of the delivery of 3, 4 or 5 free units for the purchase of CINFA products made directly by chemist retail outlets from the laboratory or through pharmaceutical wholesalers.</p> <p>The claimants (Bayvit, S.A, Laboratorios Géminis, S.A., Laboratorios Normon, S.A., Mabofarma, S.A., Laboratorios Alter, S.A., Ratiopharm España, S.A., Merck Genéricos S.L., Industrial Farmacéutica Cantabria, S.A. and Bexal Farmacéutica, S.A.) alleged that the incentives campaign infringed article 10.1 of the Spanish Code of Good Practice for the Promotion of Medicines. They also considered as applicable a communication dated June 2002 from the Health and Consumer Ministry, stating that the delivery of free units for purchases made by chemist retail outlets would not be covered by the exception contained in article 17 of Royal Decree 1416/1994, due to the fact that the value of the free units was significant and the practice professionally relevant.</p> <p>Article 10 of the Spanish Code of Good Practice for the Promotion of Medicines states that, "no free gifts, economic benefits or benefits in kind may be offered, promised or given to health professionals and administrative personnel involved in the prescription, dispensation or administration of medicines aimed at encouraging the prescription, dispensation, supply or administration of medicines, save where the gifts are not of much value and related to medical or pharmaceutical practice. Therefore, the delivery of gifts like instruments for professional use or office materials is acceptable if they are of minor value.</p> <p>The panel was of the opinion that under the legislation referred to, the incentives campaign in question was in breach of article 10 of the Spanish Code of Good Practice for the Promotion of Medicines.</p>
Comment:	This case is of great importance in our country due to the substantial financial amounts involved in such practices.

5. Legislation:	GENERAL ADVERTISING ACT
Topic:	UNLAWFUL ADVERTISING / TRAFFIC ACT
When:	DECEMBER 2002

Who	ADVERTISING SELF-REGULATION ASSOCIATION
Where:	SPAIN
What Happened:	<p>Ford España, S.A. was the party responsible for a newspaper advert advertising the new Ford Fusion. The central picture of the advert showed a view-point from which the city of Barcelona could be seen together with a youth sitting on a bench. The youth, rather than looking at the city, was looking at his car which was parked on the pavement, and the following message could be read: "Change your point of view. New Ford Fusion." In the lower part of the picture the following text was printed: "We present you the new Ford Fusion. A new concept in motor vehicles. Upwards for better visibility, stronger to dominate the city. With the new Ford Fusion you will enjoy a different driving sensation. Once you get used to it you will always look for it in all that surrounds you. Information and test drive 902 442 442 or www.ford.es. Get the new Ford Fusion from 11,400 Euros. New Ford Fusion. Designed for fun, made to last". On one side of the picture the Ford logo appears.</p> <p>The claimant considered that the advert was in breach of art 52 of the Traffic Act 19/2001 due to the fact that the advertised car was parked on the pavement, a place for the exclusive use of pedestrians.</p> <p>Furthermore they alleged that Ford's advert infringed rules 2, 7 and 9 of the Advertising Code of Conduct. In particular, the picture of a car parked on the pavement was in breach of the Traffic Act, encouraged a behaviour which is dangerous for pedestrian, and against the law.</p> <p>Rule 2 of the Advertising Code of Conduct establishes that the advert must observe the law for the time being in force and in particular the values, rights and principles laid down in the Constitution. Furthermore, rule 7 of the Code establishes that advertising should not encourage illegal behaviour. Article 52 of the Traffic Act provides that an advertisement featuring motor vehicles in such a way as to encourage the use of excessive speed, driving without due care and attention, creating dangerous situations or any other circumstance that encourages behaviour against the principles of the Act is illegal.</p> <p>The panel was of the opinion that from this advertisement a consumer could not deduce that he was being encouraged to break the law, due to the fact that the principal and most important part of the picture was the view of the city of Barcelona and not the place where the car was parked.</p> <p>Therefore the panel considered the advertisement legal.</p>
Comment:	Some traffic offences are not considered sufficient to infringe article 52 of the Traffic Act.

SWEDEN



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1. Case Report	
Topic:	Misleading of commercial origin
Who:	Santa Maria ./ Sven P matkompaniet
When:	2002- 11-19
Where:	Market Court; Stockholm, SWEDEN
What Happened:	<p>The claimant is one of the major producers of Mexican food in Sweden, such as taco bread, sauces, taco mixes and spices etc. Santa Maria uses for its taco bread a wrapping with a special design. The wrapping and design are well known among the Swedish public.</p> <p>The defendant markets meat products. It markets minced meat biscuits (!) in wrappings with a design that is very similar to the Santa Maria design.</p> <p>Among other things, the claimant argued that the defendant misleads of the commercial origin of said meat products.</p> <p>The court concluded that the packages were confusingly similar. However, the products could not replace each other, i.e. you do not chose meat instead of bread, there could not be any mislead of commercial origin.</p>

2. Case Report:	
Topic:	Discreditable information
Who:	Scandinavian Copper Development association./ HSB
When:	2002- 12-20
Where:	Market Court; Stockholm, SWEDEN
What Happened:	<p>The claimant is an association for the Swedish copper industry.</p> <p>The defendant is an economical organisation with interests in housing.</p> <p>The defendant had distributed a brochure at two different fairs. In the brochure HSB stated that it wanted to built houses for a healthy living and reduce the use of poisonous chemicals in the building trade, for example of copper. The brochure also contained some marketing information for HSB.</p> <p>The claimant argued that the brochure carried commercial information. It was used with the intent to increase the market share of HSB. It continued to argue that the information regarding the toxic effects of copper was not correct. Hence HSB discredited the whole copper industry.</p>

	The court said that even though the brochure will give the reader a positive image of HSB, the specific texts referring to the problems with copper and other chemicals are presented in general words, without intent to sell any of HSB's products or services. All in all, the court concluded that with the brochure HSB had the intent to create a public opinion for healthy houses. The Marketing Practises Act was not applicable.
Comment:	This case shows again the complex border between freedom of speech and commercial messages. You may believe that a certain message is excluded from the marketing Practises Act just because you do not market a specific product, but be aware. The message may still contain something that a third party regards as commercial. And "Oops" you are in court.

3. Case Report	
Topic:	Misleading use of the word "cider"
Who:	Kopparbergs Bryggeri ./. Krönleins Bryggeri
When:	2003- 02-12
Where:	Market Court; Stockholm, SWEDEN
What Happened:	<p>The defendant marketed the beverage "Halmstad Cider" and advertised that it was made out of "the finest fruit wine".</p> <p>The claimant asked the court to prohibit the defendant to market an alcoholic beverage with a level of alcohol higher than 2,25 % as "cider" unless it is shown both that the beverage contains principally fermented must from apple and pear and that the alcohol originates from the fermentation process.</p> <p>The court came to the conclusion that since there is no officially accepted definition of "cider" , the defendants use of that word could not be considered as misleading.</p> <p>The defendant had not shown that the cider was principally made out of fruit wine and thus the court regarded that statement as misleading.</p>
Comment:	<p>1. Before you use words that may have specific meanings in advertisements, it might be worthwhile to investigate whether the public or the trade confirm your suspicions.</p> <p>2. It is not sufficient to read the words of an intended advertisement. The court may very well still get the impression that the words mean something else. It might be wise to try out the advertisement in a survey before you launch it.</p>

4. Case Report	
Topic:	Advertising for alcoholic beverages
Who:	Consumer Ombudsman :/: Gourmet magazine
When:	2003-02-25
Where:	Market Court; Stockholm SWEDEN

<p>What Happened:</p>	<p>The Current Law: Sweden has long had a tradition of being very restrictive domestically in relation to the sale of alcohol. Indeed, it's not so long ago that Sweden had a quota limiting how much wine and spirit a consumer was entitled to purchase each month! The rationale behind this policy is general concern as to the damage that alcohol can cause to public health. In order to limit the potential damage resulting from alcohol consumption, Swedish law contains heavy restrictions on how wine and spirits can be marketed. Advertising for alcoholic beverages is prohibited in certain media and as a general rule, must be moderate and not encourage its consumption. Strong beer, wine and spirits are only sold at state-owned stores called "Systembolaget" and wine and spirits adverts are seen only at the Systembolaget, in restaurants and bars and in specialist press. It is however permitted to send advertising material to persons requesting such.</p> <p>The impact of EU law: The position has been changed by a decision of the Market Court, (Marknadsdomstolen). In the case the Consumer Ombudsman v. Gourmet, the Swedish prohibition on advertising of alcoholic beverages in the printed press (i.e. publications protected by the Freedom of the Press Act) has recently been challenged as being in violation of community legislation.</p> <p>Facts: A Swedish food and beverages magazine published advertisements for spirits. These advertisements were challenged by the Consumer Ombudsman who filed an action against the magazine for violation of the provision prohibiting advertisements promoting alcoholic beverages found in the Alcohol Act.</p>
<p>Comment:</p>	<p>The main issue in the case was whether or not the Swedish advertising prohibition was an acceptable restriction on the free movement of goods and services. When balancing the prohibition's positive effects on public health against the negative effect that such prohibition might have on community trade, the Court found that the prohibition was too far reaching and not proportional from a community law perspective. The Court therefore found that it was prevented from applying the advertising prohibition of the Alcohol Act.</p> <p>The Future: Following this decision, there will most likely be an increase in the number of adverts promoting beer, wine and spirits in Swedish magazines and newspapers. However, the Swedish government favours a restrictive alcohol policy and there may well be proposals to limit the possibilities to advertise wine and spirits. The likely scenario is that the current prohibition will be substituted with a prohibition targeted at advertising for spirits only. This type of limited prohibition has been previously addressed by the Market Court and accepted by the European Court of Justice</p>

<p>5. Case Report</p>	
<p>Topic:</p>	<p>Misleading use of the word "cider"</p>

Who:	Kopparbergs Bryggeri ./. Krönleins Bryggeri
When:	2003- 02-12
Where:	Market Court; Stockholm, SWEDEN
What Happened:	<p>The defendant marketed the beverage "Halmstad Cider" and advertised that it was made out of "the finest fruit wine".</p> <p>The claimant asked the court to prohibit the defendant to market an alcoholic beverage with a level of alcohol higher than 2,25 % as "cider" unless it is shown both that the beverage contains principally fermented must from apple and pear and that the alcohol originates from the fermentation process.</p> <p>The court came to the conclusion that since there is no officially accepted definition of "cider" , the defendants use of that word could not be considered as misleading.</p> <p>The defendant had not shown that the cider was principally made out of fruit wine and thus the court regarded that statement as misleading.</p>
Comment:	<ol style="list-style-type: none"> 1. Before you use words that may have specific meanings in advertisements, it might be worthwhile to investigate whether the public or the trade confirm your suspicions. 2. It is not sufficient to read the words of an intended advertisement. The court may very well still get the impression that the words mean something else. It might be wise to try out the advertisement with

SWITZERLAND



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1.	Jurisdiction
Topic:	Sale of goods in combination with a prize competition (direct mail channel)
Who:	Public prosecutor Kt. of Thurgau vs. Private company
When:	March 2002
Where:	Swiss Federal Court Lausanne
Published:	SIC 10/2002 page 697 ff.
What Happened:	<p>A Swiss company sent out advertising for goods via direct mail. On the envelopes it was printed "you have won...." to convince the receiver to open the envelope. The prize competition was sometimes depending on the purchase of goods. Under these circumstances it was an illegal lottery. In addition the company (It's official organs) got fined for "very aggressive advertising" (Art. 3 lit. h of the Swiss Law on Unfair competition).</p> <p>The federal court held that the "assurance" of winning a prize was considered a <i>performance</i> in the sense of this article and even more so, the sending of a unsolicited invitation to order goods via direct mail was considered a <i>method of sale</i> and not only an advertising measure.</p>
Comment:	Be careful when combining your advertising for the sale of goods with a prize competition (sweepstake or similar), since it may not only be regarded under the Lottery Law but also in the sense described above

2.	Jurisdiction
Topic:	Protection of Personality (use of picture) after the death
Who:	District Court of Zurich
When:	24. Sept. 2002,
Published:	SIC 2/2003, page 127ff.
What Happened:	<p>A company selling sausages was using old Swiss movies with famous actors for a campaign. One of the actors sued the company. While the court case was running, the actor died and his heirs took his position as plaintiff. The defendant asked the court to dismiss the case because the protection of personality would extinguish with the death. The court held that the right to stop the use of the picture cannot be inherited by the heirs of the actor, but the right to claim damages remains with them. So the heirs were allowed to continue the case and were awarded compensations for damages since the actor had not agreed to the use of this material for advertising.</p>
Comment:	The Swiss law sticks to the principle that the right of personality only applies to living people. The heirs of famous persons can claim a breach of the right of personality if the deceased's picture is used but only if this would mean a breach of their own right of personality (e.g. if they would be mentioned in the context of misuse of the deceased personality).

3.	Jurisdiction
Topic:	Trademark protection: not for common words
Who:	Swiss Federal Court
When:	29. Aug. 2002
Published:	SIC 1/2003, page 32ff.
What Happened:	The owner of the registered trademark "Premiere" (used for TV and Radio programs) wanted to stop the use of the registered trademark "Paris Premiere". The court held that the word "Premiere" ("opening" in French and in German) was part of the common property and has no right to be protected despite the registration. However the preceding decision did not investigate whether the trademark could still be registered because of acceptance (assertion) by the market so the appeal was rejected to the precedent court to undertake this investigation.
Comment:	<p>If the lower court finds out that the trademark "Premiere" has not penetrated the market enough so that one could speak of a common acceptance as a mark, "Premiere" will completely lose trademark protection in Switzerland.</p> <p>Be careful before you start a claim. Check out the level of protection of your clients trademark.</p>

TAIWAN



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1. Topic:	Inappropriate advertisement damages national image
Who:	Diageo
When:	January 2003
What Happened:	British spirits group Diageo, the owner of famous brands such as Johnnie Walker and Guinness beer, displayed ads for its Smirnoff Vodka in London Underground railway stations. The ads showed a half-opened gift box bearing a warning label that said "This gift will break down on Christmas morning. Replacement parts available from service center. Box No. 260 Taiwan. Allow 365 working days for delivery." The ads defamed Taiwan as a maker of shoddy goods with poor after-sales service and immediately attracted criticism from the government and the people of Taiwan. Diageo removed all the posters and formally apologized for the campaign and announced that it will display ads which positively promote the image of Taiwan. However, Taiwan's legislature still passed a resolution calling on the government to respond by imposing a one-year ban on sales of Diageo products. It also called for a defamation lawsuit against the British firm to claim damages.
Comment:	While the legislature's resolution is not binding and is opposed by the Ministry of Foreign Affairs, the final effects of the ads on Diageo's business in Taiwan are still to be seen. Firms should be careful not to defame any persons, either natural or juristic, when they pursue advertising effects. The content of ads should avoid any prejudicial means of expression. Transnational firms or firms which conduct sales in more than one country should especially avoid problems caused by prejudice based on grounds of race, language, nationality and religion.

2. Topic:	Exception to disclaimer for tobacco trademarks
Who:	The Intellectual Property Office
When:	October 2002
What Happened:	According to the Enforcement Rules of the Trademark Law, in case a trademark design contains words or drawings which are descriptive or non-distinctive but deletion of such portion will make the design become incomplete and the applicant claims that said portion is not for exclusive use, such a trademark design may apply for registration. However, the Intellectual Property Office promulgated the Principles in Handling Trademark Applications for Tobacco Products on 14 October 2002, holding that descriptive words such as "light", "low tar" or other words that may mislead consumers into believing that smoking is not hazardous to health are not registrable as part of a trademark even with a disclaimer of non-exclusive use, based on consideration of the public interest.

Comment:	<p>Apart from restrictions on the promotion of tobacco products prescribed by Article 9 of the Tobacco Hazards Control Act, tobacco companies now are further restricted from acquiring relevant intellectual property rights. From now on, tobacco companies are not allowed to file trademark applications with respect to designs which contains words such as "light", "low tar" or other words that may mislead consumers into believing that smoking is not hazardous to health.</p>
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3. Topic:	Dispute resolution with respect to domain names
Who:	Science and Technology Law Center ("STLC")
When:	February - December 2002
What Happened:	<p>It is very common nowadays that famous trademarks or business names are registered as domain names before trademark or business owners try to do so. However, traditional means of dispute resolution cannot match the pace required to resolve this kind of dispute. Therefore, Taiwan Network Information Center ("TWNIC") promulgated the Uniform Domain Name Dispute Resolution Policy ("UDRP"). In March 2001, STLC became one of the earliest Domain Name Dispute Resolution Service Providers ("DNDRSPs") approved by TWNIC. STLC handles approximately 90% of all disputes.</p> <p>Since 2002, 9 out of 10 disputes that have been referred for resolution have resulted in either a transfer or a cancellation of the disputed domain names, and the remaining 1 out of 10 represents a withdrawal by the complainant. Approximately half of the cases involve registration by so-called "cybersquatters", i.e., registrants who do not actively utilize the registered domain name and who might try to sell it for a premium. For example, Microsoft filed a complaint regarding xbox.com.tw, Manulife filed a complaint regarding manulife.com.tw and Bosch filed a complaint regarding bosch.com.tw. Some of the remaining cases involve registrants who are business entities related to the complainant and who registered the complainant's brand or business name with the intention to invoke the complainant's goodwill. For example, Synnex Technology International Corporation's registered trademark "Lemel" was registered by its distributor as a domain name and Sony's top-selling gaming product "ps2" was registered by a TV game accessory manufacturer as a domain name too.</p> <p>There are 3 situations in which DNDRSPs grant a cancellation or a transfer of the registrant's registered domain name:</p> <ol style="list-style-type: none"> 1. The domain name is identical or confusingly similar to a trademark(s), mark(s), personal name, business name, or other emblem(s) of the Complainant; 2. The registrant has no rights or legitimate interests in respect of the domain name; 3. The registrant has registered or used the domain name in bad faith.
Comment:	Decisions with regard to cases processed by DNDRSPs are only binding upon TWNIC and do not prevent the complainant from pursuing other

	traditional remedies, e.g., litigation or filing complaints with the Fair Trade Commission. However, litigation is very time-consuming, and DNDRSPs normally render their decision in approximately 1 to 2 months. Moreover, the majority of the decisions rendered by DNDRSPs favor the complainant, and it represents a very good means of dispute resolution for businesses whose trademarks or business names are registered by others as a domain name.
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4. Topic:	Provisional disposition sought against advertisement
Who:	Procter & Gamble Taiwan, Ltd. ("P&G")
When:	January 2003
What Happened:	Namchow Chemical Industrial, Ltd. and its distribution affiliate Chao-Chu Trading Corp. (jointly "Namchow") produced two TV ads in May 2002 for the product Rice Cracks crackers. The said ads respectively portrayed a fire disaster caused by burning potato chips and a female worrying about her greasy face after eating potato chips, implying that potato chips contain more fat than crackers. P&G contended that the said ads implicitly refer to its product Pringles potato chips and filed a complaint with the Fair Trade Commission alleging that Namchow violated the Fair Trade Law. P&G thereafter applied to the district court for a provisional disposition order to suspend the broadcast of the said ads. The High Court overruled the provisional disposition order against Namchow's ads in July 2002, and the Fair Trade Commission also rendered a decision in October 2002 holding that the said ads did not violate the Fair Trade Law. Namchow thereafter filed a lawsuit against P&G in January 2003 claiming for the loss caused by the fall in Rice Cracks' sales during the suspension of the said ads and for incidental damages.
Comment:	With regard to ads that compare products and imply or indicate the products of competitors are shoddy or not as good, several disputes have led the Fair Trade Commission to impose a penalty. In this dispute, however, the Fair Trade Commission decided in the end that the ads did not violate the Fair Trade Law, and Namchow filed a lawsuit claiming for damages. Therefore, apart from being cautious when producing ads that make a comparison, firms suspecting that their product is being compared should take a prudent view in determining whether the ads contains false information, or it may become responsible for damage that it may cause to others.

5. Topic:	Taiwan has no plan to extend the copyright protection term in the near future
When:	October 2002
What Happened:	The U.S.A. requested that Taiwan extend the term of protection of copyrights from 50 to 70 years during discussions on the Trade and Investment Framework Agreement (TIFA). Taiwan declined such request because it intends to comply with the provisions of TRIPS and there are disputes within the U.S.A. as to the constitutionality of extending the copyright protection term. Due to lobbying efforts by the affected industries, the U.S. Congress passed the Sonny Bono Copyright Term Extension Act ("CTEA") in 1998, extending the copyright protection term to 70 years after death for natural persons and to 95 years for juristic

	persons. This Act caused disputes as to its constitutionality; however, the Supreme Court rendered a decision in January 2002 holding that the Act is not unconstitutional.
Comment:	Even though there is no plan to extend the copyright protection term in Taiwan, whether such term would be extended in the future is yet to be seen, as it requires the government's assessment and evaluation of the effect of making such an extension, and it is likely to be influenced by pressure from the U.S.A in trade negotiations.

6. Topic:	Inclusion of "temporary reproduction rights" within the scope of protection under the Copyright Law
When:	October 2002
What Happened:	Taiwan and the U.S.A. reached a consensus in the Trade and Investment Framework Agreement (TIFA) conference for Taiwan to include the protection of "temporary reproduction rights" within the scope of the amendment to the Copyright Law. Temporary reproduction refers to reproduction made by personal computers or servers through which data transfer takes place, with the use of Random Access Memory ("RAM"), when one browses the WWW through a web browser or when data is transferred through servers. This caused wide public concern, as the end result would put everyone at risk of violating the law.
Comment:	Even if temporary reproduction rights are not expressly protected by the law, it could arguably be interpreted as being within the scope of reproduction under the current legal framework. Therefore, if the result of the said negotiation is reflected in the next amendment, it would be seen as a solution to the dispute that is inherent within the current legal framework. More importantly, the design of relevant provisions for fair use should be the focus of this issue.

7. Topic:	Improper comparison in comparative advertisement
Who:	Chunghwa Telecom, Ltd. vs. Chunghwa Communication Net
When:	April 2002
What Happened:	<p>The "099 e-number", a special Personal Number service, was introduced to the market by Chunghwa Telecom. The customer is provided with his own personal number, allowing him to place a call from any telephone, and the cost of the call is billed to his personal number. The customer can also receive calls from any telephone.</p> <p>The "0951 e-number" was then introduced by Chunghwa Communication Net. The function of the "0951 e-number" is similar to that of a pager, with wireless service. A customer with a mobile phone can be connected at the same time when receiving messages. A customer without a mobile phone has to take a pager with him, and when he receives a message, he has to search for communication devices to contact the original message-sender. Thus, it is obvious that the coding format and function of the "099 e-number" and "0951 e-number" are different.</p> <p>In its comparative advertisement, Chunghwa Communication Net concluded that the "0951 e-number" was superior to the "099 e-number".</p>

	<p>Chunghwa Telecom filed a complaint with the Fair Trade Commission, which found Chunghwa Communication Net had improperly used comparative advertising. The advertisement compared these two products on different terms, such as the method of use, communication coverage, applicable systems and functions. It thus constituted an act of deceptive or obviously unfair conduct that impeded fair trading order and effective competition in the market.</p>
<p>Comment:</p>	<p>In a comparative advertisement, an enterprise may violate the Fair Trade Law if comparison is made to a product or service which is of a different standard, or comparison is made not on the same terms or bases, or an insignificant difference is emphasized; part of the product's advantage is portrayed as complete superiority; a trading counterpart is misled to believe its product or service is superior to others by misleading measures, such as deceptive information or concealment of important information; or a competitor is left without any chance in the transaction.</p> <p>The above are all acts that impede fair trading order and effective competition in the market.</p> <p>Therefore, in a comparative advertisement, an enterprise should pay special attention that the advertisement does not constitute an act of deceptive or obviously unfair conduct that is sufficient to affect trading order. To make a comparison, the same basis or term should be applied, especially when comparing products or services with different qualities and functions.</p>

UNITED KINGDOM



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1. Proposed Legislation:	The Communications Bill
Topic:	The Creation of the Office of Communications
Where:	British Parliament
When:	March 2003
What Happened:	<p>The Communications Bill, which completed its passage through the House of Commons on 4 March, proposes to merge the functions of five existing broadcast regulators, including the Independent Television Commission ("ITC"), the Broadcasting Standards Commission ("BSC") and the Radio Authority into one: the Office of Communications ("OFCOM").</p> <p>Uncertainty continues to surround how broadcast advertising will be regulated under OFCOM. On the one hand, the Communications Bill suggests that a self-regulatory system will be set up for broadcast advertising – but on the other hand, the Bill refers to the development of "industry co-regulation".</p> <p>The Advertising Association, representing the whole advertising industry, has started work on a self-regulatory model for broadcast advertising. OFCOM must decide whether to implement it, and how, by the end of 2003. But will the industry's model of "self-regulation" be compatible with the government's concept of "co-regulation"?</p>
Comment:	<p>There is certainly much to be gained by reform of broadcast advertising: the removal of regulatory double jeopardy between the ITC and BSC; a single regulator for a converging sector; greater industry responsibility for drafting advertising codes and handling complaints; even an end to uncertainty created by the ITC reversing decisions of the Broadcast Advertising Clearance Centre ("BACC"). Given the government praise for the workings of the Advertising Standards Authority ("ASA") (the regulatory body responsible for supervising non-broadcast advertising), those goals should be achievable.</p> <p>Despite the warm words for self-regulation, there is a suspicion that the Government does not intend to surrender its sharp incisors yet. The ASA's codes are written by the industry. Complaints are investigated and sanctions applied on the same basis. And yet the policy narrative to the Bill says the formal delegation of powers to set and enforce advertising standards is not envisaged, "but this will not impede the further development of industry co-regulation." Oh yes it will, unless the truth is that by "co-regulation" the Government means no more than preserving statutory control by another name, and shifting the costs from tax-payers and broadcasters on to advertisers.</p>

2.Topic:	The British Codes of Advertising, Sales Promotion and Direct Marketing
Who:	The Committee of Advertising Practice
When:	4 March 2003
What Happened:	On 4 th March 2003 the Committee of Advertising Practice (“ CAP ”) released a revised edition of the British Codes of Advertising and Sales Promotion – the rules applying to non-broadcast advertising, direct marketing and sales promotions in the UK. Amongst other things, the rules have now been re-named the “British Codes of Sales Promotion and Direct Marketing” (now shortened to the “ Code ”).
Comment:	<p>5 key changes of interest:</p> <p>Sanctions: Under the heading ‘Pre-publication vetting’ there is new clause 61.8 which states that persistent offenders may be required to have some or all of their marketing communications vetted by the CAP Copy Advice Team until they are satisfied that future communications will comply with the Code. This reflects the language often used in ASA adjudications. But what right does the ASA have to impose this ‘requirement’, and is it enforceable? As the next clause describes the <i>mandatory</i> pre-vetting that can imposed following adjudications against posters that cause serious or widespread offence, or are socially irresponsible, compliance with the ‘requirement’ in other circumstances remains voluntary.</p> <p>Testimonials: The requirement in clause 14.1 of the old Code that testimonials can only be used with permission has been deleted. One of the most frequent complainants under this clause was the Consumers’ Association, objecting to the use in advertising of favourable conclusions from its publication, ‘Which?’ magazine. Make of that what you will!</p> <p>Parodies: Another deletion from the Code is the prohibition on the unfair use of the goodwill in the advertising campaign of any other organisation, suggesting that parodies of other companies’ advertising may now be permissible, subject to all the other remaining constraints.</p> <p>Viral Marketing: Most viral marketers honour the relevant laws and regulations more in the breach than the observance. And now they have some new regulations to ignore, although these really just reflect changes in the law brought in by the Electronic Commerce (EC Directive) Regulations 2002. The new Code clarifies that it applies to e-mails and text transmissions specifically (see clause 1.1a). It also states that unsolicited e-mails must be identifiable as marketing communications without being opened, i.e. from the subject line, (see clause 22.1), and that explicit consent is needed before marketing by e-mail or SMS text transmissions.</p> <p>Children and Sponsorship: Welcome clarification has been added concerning the definition of a child in the context of advertising, not just sales promotions. This is now harmonised as someone under 16 for all purposes under the Code, and in line with the rules for broadcast advertising. The Code also now clarifies that it does not apply to sponsorship. But life is never simple: the New Portman Code has recently</p>

	introduced restrictions on sponsorship by brewers of events that have a significant number of children among the audience, spectators or participants.
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3. Topic:	Alcohol Promotion
Who:	The Portman Group
When:	4 March 2003
What Happened:	<p>Bears in general, and teddy bears in particular, are known for doing two things in woods, only one of which is having tea parties. But if you go down to the woods today, you're in for a big surprise. From now on, the teddy bears' picnic is strictly TT.</p> <p>Why? Because the Portman Group, self-regulatory body for the drinks industry, has a new Code of Practice that extends the existing rules on naming and packaging to other forms of promotion, including point of sale materials, websites, sponsorship deals, press releases, branded merchandise, advertorials and sampling. Advertising remains controlled by the ITC and ASA, giving rise to some curious anomalies.</p>
Comment:	Particular products and names, such as "Hard Core" cider and "Spiked Ice" alcoholic lollies are now endangered species. The Code of Practice may also have a sobering effect on certain football clubs and their sponsors, as events or activities should not sponsored by brewers if 25% or more of the participants or spectators are aged 18 or less. And time has definitely been called on certain branded merchandise, such as toy bears wearing football strips emblazoned with the name of the alcohol brand that sponsors the club, such as Liverpool/Carlsberg.

4. Topic:	Advertising Regulation
Who:	The Committee of Advertising Practice (" CAP ")
When:	1 January 2003
What Happened:	<p>Football fans know that local derbies are rarely classics, but they do have a certain edge. And so it is with competitor complaints to the ASA. Particularly in the long running repeat fixture between the competing retail outlets, Homebase and B&Q. Statistics, such a vital part of the modern game, show that Homebase is ahead overall, with 3 out of 5 complaints upheld against B&Q, compared with a disappointing 2 out of 3 for its rival in the return fixture.</p> <p>But in January 2003 the spoilsports at the Committee of Advertising Practice put the whole future of the contest under threat by releasing its revised Guidelines for price comparisons. Though not binding themselves, the Guidelines help advertisers comply with the British Code of Advertising, Sales Promotion and Direct Marketing (the "Code"), the rules applying to press, print and poster advertising. And as they are based on previous ASA decisions, they tackle the adverts that fall foul of the Code and which are likely to receive a red card.</p>
Comment:	In fact, CAP has only introduced a few new rules. Advertisers must now state the time and place of the price check in adverts comparing prices; ensure that promotional prices are clearly described; and only compare

	<p>prices from the same sales channel. So online prices must be compared with other online prices, and in-store prices compared with other in-store prices.</p> <p>As Homebase and B&Q will confirm, comparing your prices with those of your competitor is a risky marketing technique. But if advertisers stick to the guidelines, they may avoid an endless fixture list at the ASA.</p>
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5.Topic:	Using People in Advertising
Who:	The Broadcast Advertising Clearance Centre and the Independent Television Commission
When:	December 2002
What Happened:	<p>The pre-Christmas debacle surrounding the banning of the TV commercials for the satirical cartoon show, 2DTV, was almost as amusing as the show itself.</p> <p>In one commercial, President Bush is seen opening a copy of the video, exclaiming "my favourite - just pop it in the video player". But instead, he puts it in a toaster, where it duly goes up in smoke. In the other, David Beckham turns to Posh and asks, "Victoria, how do you spell DVD?"</p> <p>The BACC initially banned the commercials because they contained unauthorised references to living individuals. But the ITC took a different line. "The rule itself is a good one, which is designed to prevent the exploitation and/or humiliation of living figures for commercial gain. However, common sense would dictate that in the case of a cartoon making light-hearted fun of the U.S. president, promoting the sale of a humorous programme, the letter of the rule should not necessarily apply."</p> <p>"That's not the answer they gave formally two weeks ago when we asked this question," came the BACC retort. "We asked if could we interpret the code in this instance and the ITC said emphatically no. So we were left with no choice."</p>
Comment	<p>The producers of 2DTV were apparently told they could not even refer Osama Bin Laden. The case therefore exposes problems with US style personality rights, concerning free speech and protection for rogues, although the Bush commercial may have been allowed in the US, as first amendment free speech rights can trump politicians' personality rights.</p> <p>But any connection between this case, and the continuing debate about the future regulation of TV advertising is purely coincidental.</p>

6. Topic:	Tobacco Advertising
Where:	British Parliament
When:	14 February 2003
What Happened:	<p>Marlboro man finally rode into the sunset as the Tobacco Advertising and Promotion Act 2002 came into force this Valentine's day. The Act bans all advertisements whose purpose or effect is to promote a tobacco product, although "Advertisement" is not defined, and it is not clear how the "effect" of an ad will be measured. Sanctions apply to everyone involved in the creation or publication of tobacco ads, including</p>

	<p>agencies, advertisers and publishers. Directors of such companies may be personally liable if their connivance or neglect has led to the breach.</p> <p>The ban will also apply to most forms of sponsorship in the near future. But a fag end of legitimate activity will remain for tobacco sponsorship of certain global events such as Formula 1. Brandsharing - the placing of tobacco names and emblems on non-tobacco products - will also be subject to strict regulation.</p>
Comment:	<p>Not much has escaped extinction, although ads aimed solely at the tobacco trade or responding to individual requests for product information are not banned, yet. Further regulations are promised specifying the circumstances in which point of sale or online advertising will be permitted. This may leave scope for some continuing promotion of cigarettes. But with a 2-year jail term and unlimited fines for breaches of the Act, and enforcement officers having the right to enter premises and obtain information from suspected miscreants, now may be a good time to quit, once and for all.</p>

UNITED KINGDOM



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1. Topic:	Promotion marketing
Who:	Abcaz Holidays and Travel and the Advertising Standards Authority
Where:	Middlesex
When:	October 2002
What Happened:	<p>On-line promotion and follow-up email offered a free weekend break to anyone registering with the advertisers to receive future promotional material. The headline ran "Fancy a free weekend break? Stay at one of 200 plus UK hotels for free – when you register with Abcaz". Under this was a link to terms and conditions and these stated that dinner and breakfast would have to be paid for. The subject box of the email that was sent out to any individual that did register included in the subject box the phrase "Your free holiday". Again there was a link to the terms and conditions which made it clear that dinner and breakfast would have to be paid for separately.</p> <p>A complaint was received by the Advertising Standards Authority that this was misleading because consumers had to pay for dinner and breakfast to take advantage of the offer. In defence of their case, Abcaz emphasised the easy link to the terms and conditions which did make the extent of the free offer clear. This did not mollify the Advertising Standards Authority. The ASA felt there was still a strong risk that individuals who did not click on the link to the terms and conditions would be under the misleading impression that the entire weekend would be free of charge. The complaint was therefore upheld and Abcaz required to amend the promotional copy and email accordingly.</p>
Why this Matters:	<p>It is interesting to contrast the ASA's approach in this case to the recently introduced E-Commerce Regulations. These are directly applicable to exactly the sort of communication dealt with here and also have particular provisions which emphasise the importance of clarity in promotional terms and conditions. The Government's guidance note on these regulations indicates that in an SMS/text context, it will be sufficient to provide the detailed terms and conditions for a promotion by way of a link to a website. In the context of material already on an Internet site or in an email, however, the regulations are not so clear, but the suspicion has to be that the enforcement approach under the E-Commerce Regulations is not likely to be very different to that of the ASA in this case. In other words, fundamental conditions placed on a promotional offer such as this should be clearly stated in the principal message, not left to terms and conditions which are a hyperlink click away.</p>

2. Topic:	Brands
Who:	Societe Des Produits Nestlé SA -v- Mars UK Limited
Where:	Chancery Division of the High Court, London
When:	December 2002
What Happened:	<p>Since 1957 Nestlé had been using the phrase "Have a break" in connection with advertising for its Kit-Kat product. A 2002 survey showed that 98% of Britons would respond to "Have a break" with "Have a Kit-Kat" and it was the combination of these two phrases, in slightly differing forms, which had been the subject of UK registered trade marks since 1978. In 1995, however, Nestlé filed an application to register only the words "Have a break" as a UK trademark. Mars opposed this.</p> <p>Mars reminded the Court that to be registrable, a trademark had to have either innate or acquired distinctiveness. This had to be capable of taking it out of the realms of a purely descriptive, generic English phrase and into the category of a branding device which was distinctive in the minds of the public of a product from one particular manufacturer. There was no innate distinctiveness in the phrase "Have a break", the court agreed, and Nestlé were not able to produce enough evidence of independent use of the words "Have a break" (in isolation from "Have a Kit Kat") to establish that distinctiveness had been acquired by usage. As a result, and subject to any appeal by Nestlé, Nestlé were denied their registration of "Have a break" in respect of "chocolate, chocolate products, confectionery, candy and biscuits" and, at least so far as possibly conflicting trademark registrations were concerned, the way was clear for Mars to launch its own planned "Have a break" bar.</p>
Why this Matters:	<p>Apart from the seven years it took this case to get to court, another aspect of interest here is that at first glimpse, the decision appears perverse. Compare it with the recent European Court of Justice decision that the phrase "Baby-dry", when used in connection with nappies, was innately distinctive and therefore did not even have to be shown to have acquired distinctiveness to be registrable as a community trademark. However, the registration authority has to look at the words on the page when considering a trademark application, and although one might say "Baby's dry" in relation to the product in question, it is far less easy to envisage an individual saying or writing "baby-dry" in this connection. "Have a break" on the other hand is obviously a well used colloquialism, and this decision underlines the requirement that if a word or connection of words is not innately distinctive, clear evidence of independent branding use of a trademark, without any other suffix, prefix, or logo, has to be shown to the satisfaction of the Court.</p> <p>However, this may not be the end of the story. Nestlé will no doubt be considering not only whether to take its case to the Court of Appeal, but whether it might still have a case against Mars' projected "Have a break" product in "passing off". But this, as they say is (or might be in 2003), another story.</p>

3. Topic:	Prices
Who:	Committee of Advertising Practice
Where:	Torrington Place London WC1

When:	January 2003
What Happened:	<p>With the Advertising Standards Authority handling three B&Q/Homebase spats in quick succession over comparative price claims (one of which is reported elsewhere on marketinglaw), the Committee of Advertising Practice's brand new "Helpnote on Retailers' Price Comparisons" is nothing if not timely.</p> <p>Legalistic in content and tone, the Helpnote (available on www.cap.org.uk) says it does not "constitute new rules." However, after relevant extracts from the existing CAP code and a helpful reprise of applicable laws and other relevant regulations and Codes (including the 2000 amendments to the 1988 Control of Misleading Advertisements Regulations extending their ambit to comparative advertising and the often overlooked but still not superseded 15 year old "Code of Practice for Traders on Price Indications") there is a useful "Additional Guidance" section which will no doubt be wheeled out by the ASA against future transgressors who come before them.</p> <p>Here there are some useful golden rules which retailers would do well to bear in mind when advertising in all media, not just the non broadcast channels covered by the CAP Code.</p> <p>Highlights include:</p> <ul style="list-style-type: none"> • Retailers should not claim that their prices are lower than those of their competitors for all products when they are lower only for selected products • If there is a claim that prices are generally lower, the basis of the comparison e.g. a typical weekly shop, should be stated and the advertising retailer must be able to demonstrate that in context this is a "fair and suitable basis" for a general savings claim • Price comparisons should only be made with retailers in the same locality unless it can be shown that for example because of a national pricing policy operated by the retailer in question, location makes no difference • Ads should not exaggerate the length of time that their prices have been lower • If competitors are likely to change their prices quickly in response to others' advertising, media with a short shelf life such as leaflets and daily newspapers should be used • So far as possible products of the same or very similar quality should be compared e.g. own brand with own brand • Multiple pack prices should not be compared with competitors' single product prices multiplied by the relevant number • Ads should state clearly if prices featured in comparisons are promotional prices e.g. short term special offer prices. If such prices are quoted, these should normally only be compared with competitors' promotional prices. If not, the ad should make it clear that promotional prices are being compared with normal prices.
Why this Matters:	In recent months there has been a steadily rising number of complaints in this area coming before the Advertising Standards Authority. The need for this new guidance is neatly given justification by the most recent case involving B&Q complaints over a national press ad for Homebase

	<p>headlined "Homebase better deals, better prices (sorry B&Q)".</p> <p>Homebase cannot be criticised of course for breaching the new Helpline as the ad was devised and published months before the Helpline's launch. Nevertheless the ad makes a pretty good fist of breaching an impressive number of the "Additional Guidance" points highlighted above. CAP Chairman Andrew Brown says the new Helpline has been designed to deal with what has become a "very tense area." It is to be hoped also that the Helpline inspires retailers to re-focus on legal and code compliance in an increasingly competitive marketplace</p>
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4. Topic:	Comparative Advertising
Who:	B&Q plc and Homebase Limited
Where:	The Advertising Standards Authority, London
When:	January 2003
What Happened:	<p>Homebase Limited objected to a national press ad for a B&Q store. The ad was headlined "Homebase lowered their higher prices on these products to compare them to ours. The next thing they did was to put them up again". Also in the ad were parts of an earlier Homebase advertisement showing the two paint products in question and the "before and after" prices for the products charged by Homebase and B&Q.</p> <p>Homebase complained about the ad to the Advertising Standards Authority on three counts. First of all, they complained that it misleadingly implied they had increased prices immediately after they published the ad mentioned by B&Q. Secondly, they complained that the B&Q ad denigrated them because it implied that they had used "unfair trading practices". Thirdly, they complained that the B&Q ad misleadingly implied that Homebase had reduced the price of Crown Breatheasy paint only to compare it with the advertised price and not, which in fact was the case, part of a general "one third off" sales promotion.</p> <p>Homebase's complaints were upheld on all three counts. B&Q produced evidence to the Advertising Standards Authority that Homebase's price for Crown Breatheasy paints had fluctuated over a period of months, but Homebase's own evidence clearly showed that the one third off price (which B&Q suggested Homebase had immediately put back up again to the full price after the relevant ad appeared) had in fact continued to apply for some 5 weeks after publication of the advertisement.</p> <p>On the third complaint (that the B&Q ad misleadingly implied that the only reason Homebase had reduced its Crown Breatheasy paint price by one third was to compare it with B&Q's higher price) Homebase produced evidence that the one-third off reduction was in fact part of a wider "one third off" sales promotion covering a number of products. B&Q not surprisingly said that they were unaware of this and quite reasonably came to the conclusion that they did as to the reason for the "one third off" reduction. The Advertising Standards Authority upheld the complaint and told B&Q to refrain from assertions like this unless they were sure of their facts.</p>

Why this Matters:	<p>The B&Q ad complained of here was pretty strong stuff. In the light of this, it is perhaps surprising that pre-publication, the factual basis was not apparently researched as well as it might have been. Particularly since the advent of statutory controls on comparative advertising by way of the 2000 changes to the 1988 Control of Misleading Advertisements Regulations, advertisers indulging in careless knocking copy can expect little indulgence from the regulators and commensurate care with clearance procedures therefore has to be the best policy.</p> <p>The wider point coming out of this is that it is much less surprising than it would have been five years ago that Homebase went to the Advertising Standards Authority over this as opposed to a court of law.</p> <p>Over the 3½ years of marketinglaw's life, we have repeatedly reported on failed attempts to sue comparative advertisers in the courts, whilst the self-regulatory Advertising Standards Authority continually takes a much more restrictive view of what should and should not be permissible by way of knocking copy.</p> <p>In order to bring this complaint before the Advertising Standards Authority, Homebase will have had to give an undertaking not to issue legal proceedings against B&Q over the ad during the period in which the Advertising Standards Authority processed the complaint. As a result of opting to use the self-regulatory process, however, Homebase has clearly won out in terms of getting a relatively quick and (for it) satisfactory result, which has received a far amount of national press publicity.</p>
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5. Topic:	Games of chance and skill
Who:	Birmingham Broadcasting Ltd t/a BRMB
Where:	Broad Street, Birmingham
When:	January 2003
What Happened:	<p>After causing a furore in 1999 when it joined Carla Germaine and Greg Cordell in matrimony in a blind wedding ceremony, Birmingham-based commercial radio station BRMB's latest stunt to boost its listening figures turned out to be even more painful.</p> <p>In August 2001, the radio station subjected contestants to the challenge of who could sit on dry ice for as long as possible. The "Coolest seat in town" competition required contestants to sit on solid carbon dioxide (dry ice) at a freezing temperature of -78°C (-108°F). The competition was held in the heart of Birmingham in Broad Street, and the prize was tickets to a music festival.</p> <p>Ground breaking stuff. Unfortunately it was also literally brass monkeys stuff, since three of the contestants ended up being sent to hospital for treatment, where they remained for between 8 and 10 weeks.</p> <p>As a result, Birmingham Broadcasting Limited, trading as BRMB, was charged with breaching the Health and Safety at Work Act 1974, which requires employers to ensure that they do not expose those not in their employment to risks to their health and safety.</p>

	The case was heard late January 2003 at Birmingham Magistrates' Court. BMRB admitted that a breach of health and safety law had occurred and was fined £15,000. Civil claims by the three for personal injury damages are still proceeding, with £30,000 in interim damages already having been paid out.
Why this Matters:	As we often stress on marketinglaw, promotional stunts such as these require full consideration of all potential pitfalls. BRMB's competition terms and conditions (posted on its website) contain warranties that participants are generally in a good state of health and will take all reasonable steps to ensure their own health and safety and stipulations that all activities in respect of the competition are undertaken at the participant's own risk. Unfortunately, these may not exonerate BRMB from liability if a competition ends up in personal injury or death of the participants. Apart from anything else, it is not possible in the UK to exclude responsibility for death or personal injury caused by negligence, whatever the small print might say.

6. Topic:	Selling on-line
Who:	The Consumers' Association
Where:	London
When:	January 2003
What Happened:	<p>The Consumers' Association announced that it was closing its "Which? Web Trader" on-line consumer confidence building scheme after 3½ years. The scheme had worked well and was recognised to be the first of its kind that really worked. Backed by a well-monitored code and a kitemark, the system achieved a sufficiently high profile to attract over 8,000 applications from e-traders for the membership which brought with it an entitlement to fly the Which? Web Trader kitemark. 2,700 of these applications were vetted and accepted and over the 42 months of the scheme's operation over 2,000 disputes have been resolved on behalf of consumers.</p> <p>However, the operation of the scheme has not been without cost, which the Consumers' Association has not felt able to defray by way of seeking payment for membership from traders who have registered with the scheme. To seek such payment, the Consumers Association said, would have compromised its independence. Without those payments, however, the cost has become "significant" and one which the Consumers' Association felt it could no longer live with. As a result, Which? Web Trader will close on 31 January 2003 and the logos will be withdrawn from traders' sites.</p>
Why this Matters:	<p>Depending on which way one looks at this, this is either a huge blow for consumer confidence in buying on-line, or a sign that we have reached the end of the beginning for e-tailing, because with statutory regulation of the area burgeoning, the need for voluntary schemes of this kind has gone.</p> <p>Marketinglaw's take on digital sales codes has been that there have been far too many jostling for attention, which has led to more consumer confusion rather than more confidence in the e-tailing process. Having</p>

	<p>said this, the Which? Web Trader scheme was the first scheme to qualify under the Government's "Trust UK" umbrella on-line consumer confidence scheme launched with a muted fanfare in 2000. The idea of this scheme was to set a benchmark code against which all schemes such as Which? Web Trader should be judged, so that only those which passed the test qualified for the Government's "Trust UK" kitemark. Since that scheme's launch there has been little further publicity given to the initiative. At present marketinglaw is unclear whether any other on-line consumer confidence schemes have sought or achieved the "Trust UK" seal of approval since the initial schemes which qualified (Which? Web Trader, the DMA on-line code and the Advertising Standards Authority's Admark scheme). If so, this development must inevitably put a very large question mark over the initiative's future.</p> <p>So does this mean the beginning of the end for voluntary on-line consumer confidence schemes/codes/kite marks? Our suspicion is that it does, but much may depend on the ability and resources of the enforcers of the statutory obligations now applicable to this sector (e.g. the Consumer Protection (Distance Selling) Regulations 2000 and the Electronic Commerce (EC Directive) Regulations 2002.</p>
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7. Topic:	Self-regulation
Who:	Yahoo! Personal Finance, The ITC and The Advertising Standards Authority
Where:	UK
When:	January and February 2003
What Happened:	<p>Statutory TV ad regulator the Independent Television Commission (ITC) and the self-regulatory non broadcast ad watchdog The Advertising Standards Authority have in the space of the last few weeks perfectly made the case for a unified system of ad regulation in the UK.</p> <p>The ad in question was for Yahoo! Personal Finance. It was a commercial for TV and cinema in which, after a stag night, a man finds himself in the cold light of morning naked and tied to a tree in a park. "A "Quentin Crisp" type character approaches, casts an admiring look at the reveler and they exchange nods and, in the case of the "stagger", nervous smiles, while the voiceover continues "You can't trust the kindness of strangers".</p> <p>In respect of the TV broadcasts of the ad, complaints were received by the ITC that it displayed homophobic tendencies, even suggesting a threat of criminal male rape and the ITC agreed, ordering the ad off-air. Indeed it is now fulminating against some broadcasters for failing to stop broadcasts of the ads promptly after the adjudication.</p> <p>So far as cinema screenings of the ads were concerned, by a quirk in the regulatory system, the relevant watchdog was not the ITC, but the Advertising Standards Authority.</p> <p>Here, in response to the same complaints, Yahoo! argued that the lack of "kindness of strangers" to which the ad was referring was not lack of kindness on the part of the "Quentin Crisp" type character and his attitude to the stagger, but the lack of kindness of the stagger's chums in leaving</p>

	<p>him in that condition in the park. The advertisers did not deny that the "Quentin Crisp" character appeared fairly flamboyant and camp, with a maroon hat, patterned scarf and glasses hung round his neck, but in tests with qualitative groups, no one had apparently seen the sequences as anything other than light-hearted.</p> <p>In its refreshingly enlightened adjudication, the ASA took the view that although some of the gay community objected to such a camp presentation of their sexuality "this was a matter of opinion and style and not a matter of widespread or serious offence". Also, they did not descry from the action (contrary to the findings of the ITC) that there was any indication from the Quentin Crisp character's reaction to the naked man that he intended to sexually assault him.</p>
Why this Matters:	<p>Whatever one's view as to the rights or wrongs of the ITC and ASA decisions on this, and marketing law certainly favours the more relaxed view of the ASA. the fact remains that a single piece of advertising has been accepted for dissemination in one mainstream UK medium without even a movie certification "watershed", whilst another medium has ordered that it be totally banned from the airwaves.</p> <p>In last month's marketinglaw we reported on an ITC U-turn in respect of an ad showing a George Bush cartoon character. We commented there that this only added further justification to the impending OFCOM blanket approach to the regulation commercial communications across most media. So far there appears to be no suggestion that the OFCOM regime will imminently extend to cinema advertising, but there seems little justification for screen and TV ads being differently regulated.</p>

8. Topic:	Digital marketing
Who:	The Committee of Advertising Practice
Where:	London
When:	March 2003
What Happened:	<p>The brand new, eleventh edition of the British Code of Advertising, Sales Promotion and Direct Marketing ("CAP Code") has been launched. The new code contained something of a bombshell for digital marketers in the UK.</p> <p>Why?</p> <p>For some months now, marketinglaw.co.uk has been reporting on the build-up towards implementation in the UK of the EU "Communications Data Protection Directive" ("CDPD"). This has a lot to say about the regulation of digital marketing in Europe, and in particular seeks to harmonise the regime for marketing e-mail and SMS/text.</p> <p>Perhaps most importantly, it introduces, with just two exceptions, a blanket "not without prior consent" rule for unsolicited commercial e-mail/SMS.</p> <p>The two exceptions are e-mails sent in the context of an existing relationship between sender and recipient (so-called "soft opt-in") and</p>

digital marketing sent in a situation where the subscriber receiving the e-mail is a legal, not a natural person (where the regime will be "opt-out").

Such changes were clearly going to have considerable impact on digital marketers in the UK, who were also far from 100% clear as to (1) the exact meaning of "prior consent" (2) the precise extent of the "soft opt-in" exclusion and (3) how the exception to prior consent in respect of "non natural person" subscribers was going to work.

So as of the beginning of March 2003, UK marketers and their advisers were eagerly awaiting publication by the DTI of the draft regulations by which the CDPD was to be transposed into UK law.

Following the draft, trailed for late March 2003, the DTI was determined to stick to a three month consultation period. This would just give it time, it hoped, to introduce the final regulations so that they could be in force by the EU deadline of 31 October 2003.

Against this backdrop, it came to many as a complete bolt from the blue when the Committee of Advertising Practice decided to anticipate these regulations by four months, before even the draft regulations had been published.

It did this by attempting to include them in the new CAP Code. To make matters worse, the CAP was seeking to bring them into force on 4 March 2003 (although complaints received up to 4 June 2003 will still be considered under the old code), way before the industry was expecting to have to live with the new legal rules, and way in advance of any further clarification being available from the DTI on the key three points mentioned above.

As for the wording of the new digital marketing provisions of the CAP Code, all might have been forgiven if these offered to shed more light on points (1)-(3). Well, here are the provisions:-

"The explicit consent of consumers is required before:.....b) marketing by e-mail or SMS text transmission, save that marketers may market their similar products to their existing customers without explicit consent so long as an opportunity to object to further such marketing is given on each occasion".

So what help does this give us on our key questions (1)-(3) above?

On question (1) it is interesting that the phrase "prior consent" in the directive becomes "explicit consent" in the CAP Code.

"Explicit consent" is the phrase used in the Data Protection Act 1998 to describe the highest level of consent required, for instance before processing "sensitive personal data". In practical terms, it is accepted that no such data can be used at all without the relevant individual clearly requesting that this should occur. In other words express "opt-in".

	<p>Contrasting "explicit consent" in the CAP Code with "prior consent" in the directive, if the directive had intended it to be "explicit consent", one wonders why it did not say so. Maybe it is more likely that "prior consent" was intended to introduce a slightly lower barrier.</p> <p>For instance, if one has had an on-going commercial relationship with a consumer over a period of months or years before the new law comes into force, perhaps it could be argued that even though there has not been a prior sale to that individual allowing "soft opt-in" under the new regime, there is still a situation in existence where it is perfectly fair and reasonable to regard the individual as having given his or her implicit "prior consent" to receiving unsolicited marketing SMS/E-mail in future. As it is, however, the CAP Code appears to close the door to this interpretation and requires that outside of "soft opt-in", no unsolicited marketing SMS or e-mail can be sent without there being a record of a prior explicit request from the recipient that this should occur.</p> <p>On key point (2) the CAP Code provides precious little further clarification on the exact meaning of the soft opt-in exception. Under the CDPD, this applies where marketer A has obtained the digital co-ordinates of consumer B "in the context of a sale of a product or a service" by A to B. In those circumstances it will be quite legal for A to send further unsolicited marketing email to B, provided A is marketing "similar" products to those in question when B first provided an e-mail address and provided also that on each such occasion the recipient is given a clear and easy to use chance to opt-out of receiving such communications in the future.</p> <p>Much controversy surrounded the exact meaning of "similar products", while others wondered if an actual purchase had to be concluded for the email supplied to be usable on an opt-out basis. Might it be sufficient, for example, if product information has very recently been supplied at B's express request?</p> <p>On both aspects, one might have hoped that the CAP Code would provide more guidance, but on both counts it fails. On the first aspect, the directive's requirement that B's digital details must have been obtained previously in the context of a purchase has been streamlined in the CAP Code to a simple requirement that the messages have to be sent to "existing customers". This closes the door on any argument that a concluded sale is unnecessary.. On the second "similar products" aspect, there is no further clarification provided over and above the wording of the directive.</p> <p>So what about the apparent exception to "prior consent" offered by point (3) above? This does not appear at all.</p>
<p>Why this Matters:</p>	<p>Marketinglaw.co.uk has no less than four fundamental concerns with this development.</p> <p>First of all, the CAP Code is arguably for the very first time wandering into areas of "delivery" as opposed to content. One might have expected the Committee of Advertising Practice to have consulted more widely and</p>

	<p>openly on this radical departure from its historical practice before taking the plunge. The move brings the code firmly and uncomfortably within the areas which have previously been the domain of stakeholder industry body codes such as the DMA Code as well as statutory regulators such as the Information Commission.</p> <p>Secondly, by anticipating fundamental changes to the regulatory landscape for digital marketers in the UK, at a point when they were just beginning to get to grips with the possible changes coming their way in Autumn, the CAP has unjustifiably jumped the gun and made life even more difficult and challenging for UK marketers.</p> <p>Thirdly, the wording of the relevant parts of the new CAP Code offers no further assistance on issues which are currently unclear from the terms of the directive.</p> <p>Fourthly, where the Code does seem to be drafted in clearer terms than the directive, it appears to be arguably tougher on marketers than the directive required.</p> <p>Altogether, not an ideal state of affairs to say the least, and one has to question whether those concerned with the Code drafting process fully thought through the implications of what they were about.</p>
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8. Topic:	Environment
Who:	Ecos Paints and Green Building Store/Erinvale Natural Skincare/Good Earth Catalogue Company/The Green People Company/Logona Cosmetics
Where:	The Advertising Standards Authority
When:	February 2003
What Happened:	<p>The Advertising Standards Authority reached a "complaint upheld" finding in respect of no less than 5 complaints lodged with the ASA by just one company based in Cumbria. The company was Ecos Paints and all of the complaints were in respect of "natural"/"organic" claims made in respect of certain products.</p> <p>The Green Building Store advertised "the natural paint collection", Erinvale headlined its advertisements "Erinvale Natural Skincare "and went on to promote" a full range of products using 100% natural ingredients", the Good Earth Catalogue Company advertised its "Natural Hair and Skincare" products "without the use of artificial fertilisers, chemicals and pesticides," The Green People Company promoted its "Organicbabies" baby body care products using the phrase "free your children from synthetic chemicals," and Logona Cosmetics advertised its body care products with the words "Natural organic affordable body care for all the family," and "Say no to synthetics."</p> <p>Ecos Paints complained that all five ads were misleading in that synthetic ingredients were in fact used in the manufacture of some products in all five ranges advertised.</p>

	In many cases the advertisers defended on the basis that consumers must be aware that in the case of products like paints and soaps, there would inevitably have to be some synthetic ingredients in the manufacturing process. The ASA's response to this each time was that although consumers might be aware of these matters, the fact was that a claim to be a "natural" product should only be made in respect of something that was made without the use of any synthetic ingredients whatsoever.
Why this Matters:	In some of these cases, the non-natural ingredients were tiny in comparison with the remaining naturally occurring constituents and only cropped up in one or two of a wide product range. Nevertheless these decisions make it clear that the ASA will continue to take a very tough line on claims of this kind. Accordingly advertisers contemplating making claims in this category should only do so after first of all conducting a rigorous examination of the manufacturing process and the ingredients used in it.

9. Topic:	M-Commerce
Who:	The Independent Committee for the Supervision of Standards of Telephone Information Services ("ICSTIS") and Polo Limited of the British Virgin Islands
Where:	UK
When:	March 2003
What Happened:	<p>Polo Limited, based in the British Virgin Islands, sent unsolicited text messages to the mobile phones of thousands of UK consumers. These described the recipient as a "valued customer". They also suggested that the recipient had won a £150 prize and invited them to use their mobiles to call a premium rate number to claim it.</p> <p>After receiving 143 consumer complaints, the UK premium rate telephone line watchdog ICSTIS investigated and found that its Code of Practice had been breached on at least 5 counts.</p> <p>These were (1) the use of the phrase "valued customer" which misleadingly suggested that the message had been sent by the recipient's own mobile phone network, thus giving it an air of legitimacy which was quite inappropriate (2) not giving an adequate description of the "£150 prize" (3) using the word "win" to describe something which everybody who received the message appeared eligible to claim (4) failing to indicate the likely additional cost of calling the service from a mobile phone and (5) not giving any information as to the total cost and duration of the service.</p> <p>Polo did not respond to the allegations and was fined £15,000, with access to its service banned for one year.</p>
Why this Matters:	<p>In its latest annual report, ICSTIS expressed serious concern about the number of complaints being received in respect of reverse-billed premium rate text messages of this kind, where the recipient's return message can cost up to £1.50 per message.</p> <p>Without "explicit consent", this practice will also be contrary to the new CAP Code from 4 June and contrary to UK law from late 2003 courtesy of</p>

	<p>the up and coming implementation of the EU Communications Data Protection Directive. Under existing UK law, depending on who one consults, the practice may be regarded as illegal unless recipients have either previously "opted in" to receive such messages or "opted out" of receiving them by registering with the Statutory Telephone Preference Service. However, none of the bodies enforcing these rules and regulations have anything like the mind-concentrating fining powers of ICSTIS, which will undoubtedly continue to be the biggest enforcer on the block in the m-commerce space for the foreseeable future.</p>
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1. Topic:	Connecticut Tax on Advertising, Public Relations and Direct Mail Creative Materials
Where:	State of Connecticut
When:	Effective April 1, 2003
What Happened:	The state of Connecticut passed an emergency funding bill, which includes a 3% tax on advertising, public relations and direct-mail creative materials (such as layout, art direction, graphic design, mechanical preparation and production supervision). The tax does not apply to media buys. The tax applies through the end of the fiscal year. It is uncertain whether it will stay in effect thereafter.
Comment:	A state tax on advertising and promotional materials can create competitive disadvantages for agencies whose clients can turn to competitors in states that do not impose such taxes.

2. Case Report:	State of Missouri v. American Blast Fax, Inc.
Topic:	Unsolicited Faxes
Where:	United States Court of Appeals, Eight Circuit
When:	March 21, 2003
What Happened:	<p>In reversing a lower court's decision which had struck down a federal ban on unsolicited fax advertisements as unconstitutional, the Court of Appeals held that the Telephone Consumer Protection Act (TCPA) did not violate the First Amendment. The Court found it reasonable for Congress to work toward a goal of "restricting unsolicited fax advertisements in order to prevent the cost-shifting and interference such unwanted advertising places on the recipient." The decision supported the TCPA's effort to end the advertising "cost-shifting" that occurs because the recipient must pay for the ink, toner and paper used when receiving the unsolicited fax.</p> <p>The TCPA prohibits sending a fax that "advertises the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." Such faxes are lawful if there is a pre-existing business relationship between sender and recipient. State attorneys general can sue violators in state or federal court (as in this case) and private citizens can sue in state courts only, where recipients can collect damages of \$500 per fax, or up to \$1,500 where violations are shown to be willful or</p>

	knowing.
Comment:	The Eighth Circuit's decision supports restrictions on commercial faxes using an anti- cost-shifting analysis. This rationale could be applied to support of the constitutionality of a future federal law prohibiting unsolicited e-mail, which shares many of the same characteristics as unsolicited faxes. Although clearly annoying, the time devoted to deleting unsolicited e-mail as well as the cost of receiving such email is relatively minimal compared to that for an unsolicited fax. Thus, it is not clear that a court would apply the reasoning in the Eight Circuit's decision to unsolicited e-mail.

3. Case Report:	Victoria's Secret v. Victor's Little Secret
Topic:	Trademark Dilution
Where:	United States Supreme Court
When:	March 4, 2003
What Happened:	<p>Lingerie-mega-marketer Victoria's Secret filed a lawsuit against a small adult shop in Kentucky named "Victor's Little Secret", alleging its name diluted the Victoria's Secret trademark. Under the Federal Trademark Dilution Act, dilution is defined as the "lessening of the capacity of a famous mark to identify and distinguish goods or services."</p> <p>The Court held that although Victoria's Secret had an interest in protecting its famous trademark, federal trademark law required it to present evidence that the defendant actually caused harm to its trademark. The Court then unanimously found that Victoria's Secret did not present sufficient evidence that its trademark was harmed.</p> <p>The court also held that famous brands, such as Victoria's Secret, need not demonstrate lost sales or profits to win. Instead plaintiff trademark holders must show at least circumstantial evidence of "actual dilution" of their trademarks, which demonstrate the lessened capacity to identify and distinguish their goods or services.</p>
Comment:	The United States Supreme Court narrowed brand owners' abilities to win lawsuits against those who usurp some or all of the words that comprise their trademarks. This decision is likely to chill trademark enforcement by famous brands on small enterprises (or domain name holders) now that every dilution action will require brand owners to endure the difficulty and expense of compiling evidence, such as consumer surveys, to determine the extent to which their trademark has been harmed. As a result, such actions may become prohibitively expensive, if not impossible, to win.

4. Case Report:	Eldred v. Ashcroft
Topic:	Length of Copyright Protection
Where	United States Supreme Court
When:	January 15, 2003
What Happened:	By a 7-2 vote, the United States Supreme Court upheld the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act, which extended copyright protection by 20 years -- from life plus 50 years to life plus 70 years for most works.

	<p>The case was brought by an online publisher of public domain materials. The plaintiff argued that the proposed extension violated the copyright clause, which grants Congress the power to grant copyright protection for "limited times," and the First Amendment. The Court rejected the copyright clause argument, viewing copyright power as a "bargain" between Congress and writers and authors. The Court also rejected the First Amendment argument, pointing out that the expression sought by the plaintiff amounted to the right to reproduce the expression of others.</p>
Comment:	<p>Clearly, this decision supports the rights of copyright owners, who will be able to protect and license their copyrights for any additional twenty years. Not surprisingly, the decision was praised by corporate intellectual property holders, which stood to lose copyright ownership of older intellectual property. Users of copyrighted materials must pay licensing fees for another twenty years.</p>

5. Topic:	Telemarketing Sales Rule (TSR)
Where:	Federal Trade Commission (FTC)
When:	Most provisions are effective as of March 31, 2003. The Do-Not-Call List is expected to be effective sometime in the Fall of 2003. The Caller ID provisions will be effective January 30, 2004.
What Happened:	<p>The FTC amended its TSR to implement a National Do-Not-Call List, which will allow consumers to place their telephone numbers on a registry to prevent solicitation calls from telemarketers except those with which the consumer has an established business relationship or has entered into a written agreement to receive such calls. Consumers can sign up to be on the list for free, while telemarketers will be charged a fee to access the list. Telemarketers will be required to compare their consumer lists against the National Do-Not-Call List every 3 months. Fines of up to \$11,000 may be imposed for each violation.</p> <p>The amended TSR requires various disclosures to be made under certain circumstances, such as: (a) at the outset of the telemarketing transaction; (b) prior to obtaining the consumer's billing information and consent thereof; (c) for upsells (sales made on top of the original call's purpose) on both outbound and inbound calls (calls where either the telemarketer or the consumer initiate the call); and (d) for negative option feature (transactions in which the consumer's silence or failure to take affirmative action to reject goods or cancel the agreement is deemed acceptance of the offer, including free-to-pay conversion offers, continuity programs and other automatically renewing membership clubs) offers.</p> <p>Sellers are now prohibited from submitting billing information for payment without consumers' express informed consent, that is, consumers affirmatively and unambiguously articulated their consent to the charge and received all required disclosures under the TSR. Telemarketers must transmit their telephone number and name to any caller ID service.</p>
Comment:	<p>The National Do-Not-Call List could severely limit the telemarketing industry's ability to sell goods and services via the telephone. About 25% of Americans are expected to sign up for the National Do-Not-Call List. Some argue that such a list will make telemarketing more efficient,</p>

	because telemarketers will no longer waste their time on consumers who do not wish to receive calls. On the other hand, less telemarketers will be needed at call centers, thus, placing many telemarketing jobs at risk.
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6. Case Report:	Federal Trade Commission (FTC) v. Garvey
Topic:	Celebrity Endorser Liability
Where:	Federal District Court for the Central District of California
When:	October 31, 2002
What Happened:	<p>The FTC filed a complaint in federal court, alleging that baseball legend Steve Garvey and his management company were liable for allegedly unfair and deceptive advertising claims based on Garvey's endorsement of "Fat Trapper" and "Exercise in a Bottle," two weight-loss dietary supplements marketed by Enforma Natural Products, Inc. The FTC claimed that Garvey was not merely a paid actor but had participated in the production enough to realize that the claims he made were so outrageous that they couldn't possibly be true and, thus, to create personal liability. The FTC sought the return of approximately \$1 million in royalties received by Garvey and his company from sales.</p> <p>The court refused to hold Garvey or his company liable for unfair and deceptive advertising practices in the advertising and marketing of the products. The court held that the FTC had failed to prove that Garvey had actively participated in Enforma's allegedly fraudulent marketing scheme. The court also held that Garvey's verbal claims about the products were based on scripts over which Garvey had little or no input.</p> <p>The court further held that Garvey had acted as a consumer endorser, as opposed to an expert endorser, and that Garvey lacked sufficient scientific background to qualify as an expert endorser. Expert endorsers are required to conduct an independent evaluation of a product prior to endorsing it, whereas consumer endorsers are merely required to have used the product and state their belief that it worked for them. A consumer endorsement is considered valid absent evidence that the endorser's statements were either knowingly false or made with reckless disregard for the truth. Relying on Garvey's testimony that he had used the product and believed it worked for him, the court determined that Garvey was a bona fide consumer endorser of the Enforma products.</p> <p>In January 2003, the FTC announced its intention to appeal the decision.</p>
Comment:	It is interesting that the FTC appealed this case shortly after it announced that it is going to review its long-standing "Guides Concerning Use of Endorsements and Testimonials in Advertising." The appeal could be a signal that the FTC intends to take an aggressive line with paid endorsers and may want to revise the Guides to avoid another defeat in court.

VENEZUELA



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1. Case Report:	Distribuidora Samtronic de Venezuela vs. Samsung Electronic CO., LTD
Topic:	Unfair Competition. Dominion Position Abuse
Where:	Bolivarian Republic of Venezuela
When:	October 29, 2002
What Happened:	<p><i>Distribuidora Samtronic de Venezuela, C.A.</i> company denounced <i>Samsung Electronics CO., LTD</i> company for acting against the regulations established in articles 5 and 13 ordinals 1, 3, 4, 6 y 17 of the Statute for Promoting and Protecting the Practice of Free Competition (Ley para Promover y Proteger el Ejercicio de la Libre Competencia), alleging the existence of a contract of exclusive distribution signed between <i>Distribuidora Samtronic de Venezuela, C.A.</i> and <i>Samsung Electronics Latinoamérica (Zona Libre), S.A.</i></p> <p><i>Distribuidora Samtronic de Venezuela, C.A.</i> company indicates that Samsung Corporations Grup Grupo has incurred in a Dominion Position Abuse by using its condition of provider and title holder of the trademark SAMSUNG to impose to <i>Distribuidora Samtronic de Venezuela, C.A.</i> the obligation of carrying out duties of technical services and after sales guarantee for all of the products entered through parallel market, pointing out that otherwise they would activate their own services net, losing this way the investment they made, without having imposed, additionally, this obligations to the companies that integrate the parallel market. Also, <i>Distribuidora Samtronic de Venezuela, C.A.</i> alleges that there is Abuse of Dominion Position given that the previously denounced company, has denied to provide spares for technical service purposes. To decide, the Superintendence for Promoting and Protecting the Practice of Free Competition (Superintendencia para la Promoción y Protección de la Libre Competencia PROCOMPENTENCIA) indicates that it would take, for this to represent a problem of Dominion Position Abuse, for the company that commits it, to actually detain the Dominion Position, and to the actually carry out a practice that's abusive.</p> <p>Following this order of ideas, after analyzing the pleadings of both parts denouncing and denounced, the Superintendence for Promoting and Protecting the Practice of Free Competition (Superintendencia para la Promoción y Protección de la Libre Competencia PROCOMPENTENCIA) concluded that <i>Samsung Electronics Co. LTD</i> company does not detain dominant position, and there's not an anti-competitive conduct, and therefore there's no violation of ordinals 1st, 3rd and 4th of article 13 of the Statute for Promoting and Protecting the Practice of Free Competition (Ley para Promover y Proteger el Ejercicio de la Libre Competencia).</p>

Comment:	<p>In this resolution, the Superintendence for Promoting and Protecting the Practice of Free Competition (Superintendencia para la Promoción y Protección de la Libre Competencia PROCOMPENTENCIA) indicated "Contracts of Exclusive Purchases are similar to those contracts or agreements celebrated between a distributor and his provider, in which the distributor compromises to buy certain products to be re-sold, exclusively from the provider"</p> <p>Also, it has been indicated that "...if joined to the previous situation, the provider imposes <u>the obligation</u> to the distributor of buying the products identified in the contract exclusively from him; it would be considered as a simultaneous contract of both distribution and exclusive purchase".</p>
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2. Case Report:	Kraft Foods Venezuela C.A. v Procter & Gamble de Venezuela C.A. (NutriStar)
Topic:	Unfair Competition. False and deceptive advertising.
Where:	Bolivarian Republic of Venezuela
When:	September 26, 2002
What Happened:	<p>KRAFT FOOD VENEZUELA, C.A Company. (as KRAFT from now on) petitioned the opening for an administrative sanctioning process before the Superintendence for Promoting and Protecting the Practice of Free Competition (Superintendencia para la Promoción y Protección de la Libre Competencia) against PROCTER & GAMBLE DE VENEZUELA, C.A. company (as PROCTER & GAMBLE from now on) for considering that they had carried out actions against free competition, by promoting their product named NUTRISTAR using false and deceptive information, being this practice prohibited by article 17 of the Statute for Promoting and Protecting the Practice of Free Competition (False and deceptive advertising).</p> <p>KRAFT indicates that PROCTER & GAMBLE incurs in false and deceptive advertising by:</p> <ul style="list-style-type: none"> - Saying that the investigations that support the statements made in their promotions were done on a product with the nutritional contents and the characteristics of NUTRISTAR without proving it; - Affirming that this product contributes to a better mental redemption of children; so: - There would be a different answer from the consumers if the information contained in the statements was actually truthful; - The advertising used by PROCTER & GAMBLE for promoting and marketing their product NUTRISTAR would cause a displacement of the demand. <p>Analyzed the allegations made by both parts in the conflict, the superintendent indicates that attributing to the product NUTRISTAR the effects obtained from a powdered fruit flavored drink that contains "Creciplus" does not imply false or deceptive advertising, even though it could erroneously be seen this way. Also, given the wide scientific documentation contained in the file, that supports the statements made on how NUTRISTAR and its component "Creciplus" permit children to grow taller, stronger and smarter, its advertising, again, couldn't be considered</p>

	<p>as false nor deceptive.</p> <p>Regarding to the affirmation made by KRAFT on how the studies of the product made in Tanzania and the Philippines would not apply to the Venezuelan market, the Superintendent decided in its resolution, through several analysis, that the studies do apply to the Venezuelan market, and that it would not represent false advertising to use the results of clinical studies made in other countries in Venezuela.</p> <p>For all of the reasons explained previously, the Superintendencia for Promoting and Protecting the Practice of Free Competition (Superintendencia para la Promoción y Protección de la Libre Competencia) concluded the actions carried out PROCTER & GAMBLE DE VENEZUELA, C.A. company for the advertising of their product NUTRISTAR, does not represent false or deceptive advertising, nor Unfair Competition.</p>
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3. Case Report:	Mattel Inc. Vs. Distribuidora Toy Center
Topic:	Counterfeiting and piracy pertaining to Trademarks and Copyrights
Where:	Caracas, with the assistance of Direction of National Protection of the Cooperation Armed Forces, 56 th Division.
When:	October 16 th 2002
What Happened:	<p>Mattel Inc claiming the infraction of pertaining to trademarks rights and copyrights on some of their designs, and presuming contraband and tax evasion practices, denounced before the 56th Division of the Nacional Guard, acting as the instructor committee of penal investigations.</p> <p>The normative base was Decision number 486 of the Andean Community, the Copyrights Statute and the Customs Statute. The infraction specifically consists on the non authorized application of trademarks and designs to office supplies that identify with the family of trademarks "Barbie" that enter the country in significant amounts. The police investigations agency kept preventively more than 127.400 pieces, estimating that the damage to Mattel and its licensees overcomes US\$ 200.000, not only according to its cost, but for the esteemed damage caused to the licensees and the legal distribution of products net existing in the country.</p> <p>It is important to emphasize that the retained products are forgeries made without the direct application or use of the trademarks Mattel and Barbie, but they induce to the confusion of consumers through the designs and figurative marks that pretend to give the idea that the products have their commercial origin in Mattel.</p>
Comment:	This is one of the biggest confiscations carried out in Venezuela regarding to pertaining to Trademarks rights infractions.

4. Case Report:	Tommy Hilfiger Licensing Ltd. V. Distribuidora Lady Modas
Topic:	Counterfeiting and piracy pertaining to Trademarks and Copyrights
Where:	Puerto Cabello. With direct cooperation from the General Prosecutor's Office in Caracas, National Guard and Custom Authorities

When:	Several raids between August and September 2002
What Happened:	<p>As an order from the Prosecutor N° 18 in Caracas, customs authorities in Puerto Cabello (the most important Port in Venezuela) secured a total of 50.000 pairs of shoes identified with the trademark "Tommy Athletics", under the presumption that they do not corresponds with original products, based on the results of a formal examination conducted by the Authorities with evidence provided by the legal representatives of Tommy Hilfiger Licensing.</p> <p>At this moment the products are secured, under the custody of the National Guard, and the criminal trial will formally begin in order to determine the responsibilities of the importation of this counterfeited products.</p>

5.-Legislation:	Special Statute Against Information Technology Crimes
Topic:	Ecommerce/Information Technology Crimes
Who:	National Assemble of the Bolivarian Republic of Venezuela
When:	Published in Venezuela's Official Gazette number 37.313, on October the 30st 2001 and got into force on December the 1st 2001
What Happened:	<p>The statute's normative body is composed by a first section that establishes the statute's objective as "the integral protection of the systems that use information technology, so as the prevention and punishment of the crimes committed against those systems or any of their components; or the crimes commuted by the use of those technologies", fastened to the terms established specifically by the statute.</p> <p>Having the legislator the aim of offering an explanation of key words and phrases present within the statute's normative body, we can find a glossary of the following terms: "Information's Technology", "Data System", "Information, Document", "Computer", "Hardware", "Firmware", "Software", "Program", "Data and information's processing", "Security", "Virus", "Intelligence card", "Password", and "Datas's Message".</p> <p>This statute contains principal sanctions (deprivation of freedom penalties and fines), so as accessory penalties (confiscation of equipment, tools, material or any other object bonded to the crime; community work; disqualification for practicing public labors or duties among others).</p> <p>The type of crimes contained in the Special Statute Against Information Technology Crimes can be summarized like this:</p> <p><u>CRIMES AGAINST:</u></p> <p>a) Systems that use Information's Technology. They are the following:</p> <ul style="list-style-type: none"> - Undue access to a system, penalized with one (1) to five (5) years of prison and fine of ten (10) to fifteen (15) tributary units (TU); - System's sabotage or damage including any action that disturbers its functional process, penalized with four (4) to eight (8) years of prison and fine of four hundred (400) to eight hundred (800) tributary units (TU), that will increase to five (5) to ten (10) years of prison and fine of five hundred (500) to a thousand (1000) tributary units (TU), if there's use of virus or any analogous method

	<p>to commit the crime.</p> <ul style="list-style-type: none"> - Possession of equipment or rendering of services for the acquisition of sabotage activities, penalized with three (3) to six (6) years of prison and fine of three hundred (300) to six hundred (600) tributary units (TU); - Information Technology espionage which includes obtaining, spreading and revealing information, facts or concepts contained in a system, penalized with three (3) months to six (6) years of prison, and fine of three hundred (300) to six hundred (600) tributary units (TU). This penalty will increase from a third to a half of the previous penalty if the author of the crime commits it for his own benefit, or for the benefit of others. <p>b) Property. They are the following:</p> <ul style="list-style-type: none"> - Larceny through the use of Information Technologies, with the aim of taking possession of a good or a tangible or intangible value of patrimonial type, subtracting it from its holder through the access, interception, interference, manipulation or use of a system that utilizes Information Technologies, with a penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred (600) tributary units (TU); - Fraud by carrying out any manipulation on systems or any of their components done through the undue usage of Information's Technologies, with penalty of three (3) to seven (7) years of prison, and fine of three hundred (300) to seven hundred (700) tributary units (TU); - Undue obtainance of goods or services through the no authorized use of intelligence cards, with penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred (600) tributary units (TU); - Fraudulent handling of intelligence cards, or creation, duplication or undue incorporation of data to registries, consumption list or similar, with penalty of five (5) to ten (10) years of prison and fine of five hundred (500) to a thousand (1000) tributary units (TU); - Undue take of possession of intelligence cards, with penalty of one (1) to five (5) years of prison and fine of ten (10) to fifty (50) tributary units (TU). Who ever receives or acquires this card will get the same punishment. - Undue provision of goods or services using an intelligence card, knowing that this instrument has expired, has been falsified, has been illegally obtained; with penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred (600) tributary units (TU); - The possession of equipment for falsification activities, with a penalty of three (3) to six (6) years of prison and fine of three hundred (300) to six hundred (600) tributary units (TU). <p>c) People's privacy and communications. They are the following:</p> <ul style="list-style-type: none"> - Violation of the privacy of data or information of personal type contained in a system that uses Information Technologies, with a penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred (600) tributary units (TU); - Violation of communication's privacy, with a penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred
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	<ul style="list-style-type: none"> - (600) tributary units (TU); - Undue revelation of data or information obtained through the ways described in the previous two crimes, with a penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred (600) tributary units (TU); <p>d) Children and adolescents. They are the following:</p> <ul style="list-style-type: none"> - Spreading or exhibition of pornographic material without the proper warning for the restriction of the access to minors, with a penalty of two (2) to six (6) years of prison and fine of two hundred (200) to six hundred (600) tributary units (TU); and - Pornographic exhibition of children or adolescents, with a penalty of four (4) to eight (8) years of prison and fine of four hundred (400) to eight hundred (800) tributary units (TU); <p>e) Economical Order. They are the following:</p> <ul style="list-style-type: none"> - Undue taking of possession of intellectual property through reproduction, spreading, modification or copy of a software or any other work obtained through the access to any system that uses Information Technologies, with a penalty of one (1) to five (5) years of prison and fine of one hundred (100) to five hundred (500) tributary units (TU); - <p>Misleading offer of goods or services through the use of Information Technologies, with a penalty of one (1) to five (5) years of prison and fine of one hundred (100) to five hundred (500) tributary units (TU);</p>
Comment:	<p>CRITICISMS TO THE STATUTE: It's been pointed that the use of terms in the English language is not correct; so as the use of terms like "Program", and "Data's Message" also, since they don't match with their meaning in other preexistent statutes.</p> <p>Another observation would be that the statute does not establish as a crime, and doesn't grant any sanction to infractive behaviors against security, integrity and registry of electronic signatures, losing this way, the opportunity to penalize this infraction and give a wider support to the Electronic Signatures and Messages Statute.</p> <p>Also, it is been said that the legislative dispersion does not help the suitable, quick and right application of the statute, given that the judge is obligated to have a wide knowledge of the content and range of the several statutes.</p> <p>Although there are several opinions about the juridical technique used for the creation of this statute; and even about the dispersion of the types of crimes, which makes special penal law even wider, we consider that, in front of the previous express normative lack of several of the mentioned supposition facts, this statute represents an instrument that will allow the tutelage of many rights that didn't have legal support before.</p>

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