



# COUNTRY REPORTS ON ADVERTISING, MARKETING & PROMOTION LAW DEVELOPMENTS

GLOBAL ADVERTISING LAWYERS ALLIANCE  
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## COUNTRY REPORTS

1. ARGENTINA
2. AUSTRALIA
3. AUSTRIA
4. BRAZIL
5. CANADA
6. CHILE
7. COLOMBIA
8. COSTA RICA
9. CZECH REPUBLIC
10. DENMARK
11. FRANCE
12. GERMANY
13. GREECE
14. HUNGARY
15. IRELAND
16. ITALY
17. MALAYSIA
18. NETHERLANDS
19. NEW ZEALAND
20. PORTUGAL
21. SINGAPORE
22. SOUTH AFRICA
23. SPAIN
24. SWEDEN
25. SWITZERLAND
26. TAIWAN
27. TURKEY
28. UNITED KINGDOM  
(LEWIS SILKIN)
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## ARGENTINA



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| <b>1. Case Report:</b> | Ortiz, Miguel Angel vs. La Gaceta S.A.  |
| <b>Topic:</b>          | Intellectual Property – Right to reproduce one's own image - Right to privacy   |
| <b>Where:</b>          | Court of Appeals for Civil and Commercial matters of Tucumán.   |
| <b>When:</b>           | July 3, 2003  |
| <b>What happened:</b>  | <p>In April 2000 the defendant, who is the editor of a major circulation newspaper in the Province of Tucumán, published a scanned photograph of a minor smoking by the door of the National University of that Province.</p> <p>The parents of the boy filed a complaint against the defendant, claiming for an indemnification for the emotional harm suffered by their son for the violation of his privacy. They claimed that the title of article for which the photo was used despised the child.</p> <p>The First Instance Ruling denied the claim for indemnification, on the basis of considering that no tortuous fraud or negligence has been configured. Besides, the judge found that the freedom of the press right has a constitutional hierarchy and could not be limited.</p> <p>The Court of Appeals revoked the First Instance Ruling and fixed an indemnification in favor of the parents of the boy, for considering that the "right to reproduce one's own image" is personal and inalienable, and can only be used by others with the previous authorization of the photographed person, unless it is used for scientific, cultural or general interest purposes. The Court understood that none of these exceptions had been configured, for which decided that the emotional harm caused had to be repaired. The Court also stated that in this case the Freedom of the Press right was opposed to the Right to privacy, both with a constitutional hierarchy, and that the second one had to prevail in this particular case.</p> |
| <b>Comment:</b>        | The importance of this decision is that the emotional harm will always be present in cases as this one, where there is an unauthorized use of a person's own image, for commercial purposes. The Court says that there is no need for the photographed person to prove the damage; if there is no authorization, there is a damage, that must be repaired.  |

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| <b>2. Case Report:</b> | Cervecería y Maltería Quilmes S.A. vs. C.A.S.A. Isenbeck              |
| <b>Topic:</b>          | Comparative Advertising – Disobedience or contempt to Court – Freedom |

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|                       | of expression   |
| <b>Where:</b>         | Federal Court of Appeals for Criminal or Misdemeanor matters of the City of Buenos Aires  |
| <b>When:</b>          | August 7, 2003  |
| <b>What happened:</b> | <p>The plaintiff had filed for an injunction before the Civil and Commercial Court to order the defendant to refrain from publishing any kind of ad in which its main trademark "Quilmes" was mentioned. Said injunction was granted. At the same time, the claimant filed a criminal action before this Criminal Court against Isenbeck for fraudulent imitation, falsification and illegal use of its trademark "Quilmes". Said claim was rejected (see case N° 1 of the April 2003 Argentina Report).</p> <p>After that, Quilmes decided to file a criminal action for disobedience and contempt to a Court order. They claimed that after the injunction was granted, the defendant continued publishing different kind of ads mentioning the trademark "Quilmes".</p> <p>The Court found the claim inadmissible, due to the fact that although there was disobedience from a judge's order, the right to freely express the ideas by any means has a constitutional root and cannot be limited by a censoring governmental act. So, despite the possible future civil claims for damages that could arise from Isenbeck's unfair behavior, freedom of expression is a right recognized by the National Constitution and other International Treaties signed by Argentina, which cannot be subject to censorship.</p> |
| <b>Comment:</b>       | There is a very significant outcome from this ruling, it is that despite the existence of a judicial order forcing someone to do or refrain from doing something, if there is a right to be superior in hierarchy than the one in which the judicial order is based on, then this last right would have preeminence over the judicial order.  |

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| <b>3. Case Report:</b> | Bosso, Claudia and other vs Viajes Ati S.A  |
| <b>Topic:</b>          | Binding publicity – Breach of contract – Consumer's rights – Misleading advertising – Emotional Harm  |
| <b>Where:</b>          | Court of Appeals for Commercial matters of Buenos Aires   |
| <b>When:</b>           | June 30, 2003   |
| <b>What happened:</b>  | <p>The plaintiffs -Claudia Bosso and her husband- signed a contract with the defendant -a travel agency- for the arrangement of a 10 day trip to Paris, including the stay at a hotel in Paris. They paid the corresponding price and, one day before the departure, the agency communicated to them that there were no accommodations at the Paris hotel.</p> <p>Consequently, Bosso and her husband filed a civil complaint, claiming the devolution of the money paid, plus an indemnification for the breach of contract and the emotional harm suffered.</p> <p>They claimed that the agency had published several ads on diverse mass media, in which they assured that by simply paying a down payment of US \$50 per person, plane tickets and hotel accommodations in Paris were guaranteed.</p> |

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|                 | <p>The Court ruled that the content of the ads should be understood as included in the contract with the plaintiffs, due to the rules contained in the Consumer Protection Act, which determine that the offer made to undetermined persons bind the offeror. This Act also determines that there is a legal obligation for the ones who offer products or services to provide consumers with real, sufficient and truthful information. The Court found that the breach of contract was also configured for not complying with such duty.</p> <p>The Court finally said that the obligation assumed was related to the ends desired, not to the means used to achieve a given end.</p> |
| <b>Comment:</b> | <p>This ruling confirms an important principle that jurisprudence has been stating on the last years, in the sense that the information given by any means to consumers must be truthful, and if not, offerors will have to indemnify such misleading information.</p>  |

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| <b>4. Case Report:</b> | O. Marta Beatriz vs Mutual del Personal del Centro Industrial Acindar   |
| <b>Topic:</b>          | Interpretation of contracts in favour of consumers  |
| <b>Where:</b>          | Court of Appeals for Civil and Commercial matters of San Nicolás  |
| <b>When:</b>           | May 13 <sup>th</sup> , 2003   |
| <b>What happened:</b>  | <p>The plaintiff filed a civil action against MPCIA for reimbursement of the money paid for the dental surgery of her daughter. The reason why the surgery had to be practiced urgently is an accident suffered by the child with a bicycle.</p> <p>The counterpart alleged that dental services were not included in the Medical Plan of the plaintiff, which could be verified by reading the contract signed by the claimant when subscribing for said Plan.</p> <p>The Court found that the referred contract was an adhesion contract, which did not determine in a clear way the medical services included or excluded of the plan. The contract made reference to the different particular agreements to be reached with the various medical centers, for which there was not a complete, sufficient and truthful information to the associate.</p> <p>So the Court decided that in doubtful cases, the decision must be in favor of consumers. Consequently, because of the lack of clarity of the limits of the services included in the Plan hired by the plaintiff, the Court ordered the defendant to reimburse the payments made because of the dental surgery of the plaintiff's daughter, plus an extra payment as indemnification for emotional harm.</p> |
| <b>Comment:</b>        | <p>We have here another decision in favour of consumers. Not only advertising made is binding for the offeror, but the incomplete or insufficient information provided to consumers is interpreted in their favour, for which everyone who produce, distribute, import or commercialize any good or service should be very careful on the advertising made and the information given to consumers on their products or services.</p>  |

## AUSTRALIA



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| <b>1. Case Report:</b> | Grosse v Purvis [2003] QDC 151  |
| <b>Topic:</b>          | Recognition of the tort of privacy for individuals  |
| <b>Where:</b>          | Queensland District Court   |
| <b>When:</b>           | Decided in 2003   |
| <b>What happened:</b>  | <p>A recent decision of the Queensland District court in <i>Grosse v Purvis</i> [2003] QDC 151 has found for the first time in Australia that an individual can bring an action based on the tort of invasion of privacy. The Queensland District court is a court with jurisdiction in the state of Queensland, which is one of the States of Australia.</p> <p>Legislation at State and Federal level provides regulation for the public and private sectors on the obligations of organisations in relation to the collection, handling and disclosure of personal information of individuals. However, the legislative regime is restricted to information privacy. Now that a common law action has been upheld for the tort of invasion of privacy for such things as intruding and "stalking", the privacy rights of individuals have been extended beyond information privacy.</p> <p>Although the principle that there was no general common law right to privacy had been established in Australia for many years, comments by the High Court of Australia in the case of <i>Australian Broadcasting Corporation v Lenah Game Meats</i> in 2001 left the door ajar to an action for invasion of privacy. The Queensland District Court opened the door further so that the tort of invasion of privacy is now established legal principle in Queensland. Whilst the case is not binding in other Australian States and Territories, it will have a persuasive effect in States and Territories outside Queensland.</p> <p>An appeal against the decision of the District Court has been lodged, so the Queensland Court of Appeal may have the opportunity to rule on this issue if the appeal proceeds.</p> <p><b>The tort of invasion of privacy</b></p> <p>Senior Judge Tony Skoien of the Queensland District Court in <i>Grosse v Purvis</i> set out his view of the essential elements to establish the cause of action for invasion of privacy of an individual as follows:</p> <ul style="list-style-type: none"><li>• a willed act by the defendant;</li><li>• which intrudes upon the privacy or seclusion of the plaintiff;</li><li>• in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;</li><li>• and which causes the plaintiff detriment in the form of mental, psychological harm or distress or which prevents or hinders the plaintiff</li></ul> |

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|                 | from doing an act which she is lawfully entitled to do.   |
| <b>Comment:</b> | <p>Apart from actions against individuals for invasions of privacy, this decision could impact on any business where the business could be vicariously liable for the actions of its employees.</p> <p>Media reporters, journalists, photographers, marketers, private investigators and businesses engaging them may need to review their practices and activities to ensure that their conduct does not result in the invasion of an individual's privacy. Prudent practices should be adopted to ensure that behaviour towards and contact with individuals does not intrude into that individual's privacy or seclusion and result in physical, psychological and emotional harm or hinder the legitimate acts of the individual.</p> |

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| <b>2. Case Report:</b> | Kabushiki Kaisha Sony Computer Entertainment v Stevens ("The Sony Playstation mod-chipping case")  |
| <b>Topic:</b>          | 'Mod-Chipping", circumvention devices  |
| <b>Legislation:</b>    | Copyright Act 1968 (Cth)   |
| <b>Where:</b>          | Full Court of the Federal Court of Australia   |
| <b>When:</b>           | 30 July 2003   |
| <b>What happened:</b>  | <p>This case is one of the first to interpret the anti-circumvention provisions of the Digital Agenda Act 2000 modifying Australia's Copyright Act, and which was intended to satisfy Australia's obligations under the WIPO Copyright Treaty (akin to the Digital Millennium Copyright Act 1998 of the USA).</p> <p>Sony Playstation used a chip on each console and an access code trace on each CD game to prevent the use of unauthorised copies of games. This security system also technologically enforced Sony's regional coding of consoles and games software.</p> <p>A local Australian Playstation/games retailer (Stevens) sold and installed "mod-chips" for consoles, which then allowed customers to play games coded for other regions and to play unauthorised copies of games on their consoles.</p> <p>Sony sued Stevens for trade mark infringement, misleading or deceptive conduct and for liability under section 116A of the Copyright Act, claiming that the supply and installation of a mod-chip constituted a circumvention device capable of circumventing "technological protection measures" in the consoles.</p> <p>The judge at first instance held that the protection measures did not constitute a "technological protection measure" and thus Stevens' mod-chips were not infringing circumvention devices.</p> <p>The Full Federal Court held, conversely, that Sony's console/games CD's protection was a "technological protection measure" and thus the retailing and installation of mod-chips did constitute a circumvention device capable of circumventing a technological protection measure and thus breached s.116A of the Copyright Act.</p> |

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| <b>Comment:</b> | <p>Implications:</p> <ul style="list-style-type: none"> <li>• may now extend to DVDs – resellers who have modified DVD players to play DVDs manufactured in any of the 8 international regions may now find themselves infringing s116A too.</li> <li>• The ACCC has disapproved of this decision, remarking that consumers will now suffer a loss of choice and pay more for their games.</li> </ul> |
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| <b>3. Case Report:</b> | Telstra Corporation Limited v Royal & Sun Alliance Insurance Australia Limited [2003] FCA 786<br>"The Goggomobile Case"   |
| <b>Topic:</b>          | Advertising, passing-off, secondary or suggestive brand advertising   |
| <b>Legislation:</b>    | Trade Practices Act 1974 (Cth) ss.52, 53(c) and 53(d)<br>Copyright Act 1968 (Cth) ss.10, 14 and 31(1)   |
| <b>Where:</b>          | Full Federal Court of Australia   |
| <b>When:</b>           | 1 August 2003   |
| <b>What happened:</b>  | <p>The owner of rights to the Australian Yellow Pages ran a series of very well-known and successful TVCs in the 1990's for Yellow Pages, which featured a male character who came to be known as "Mr Goggomobile". He spoke in a thick Scottish brogue and was a restorer of the quaint and rare Goggomobile car. The TVCs showed him trying to locate parts for his Goggomobile and becoming frustrated when car parts dealers hadn't heard of it or confused the model. The TVCs featured him spelling the name in his distinctive voice. "Goggomobile...that's G-O...G-G-O..."</p> <p>Finally, through his diligent use of the Yellow Pages, he finds a car parts dealer that has heard of the car and can help him with the spare part he needs much to the relief and joy of Mr Goggomobile.</p> <p>A few years after that campaign, the advertising agency for Shannons, an automotive insurer specialising in insuring rare, vintage or otherwise expensive vehicles, decided to embark on a campaign featuring Mr Goggomobile seeking to insure his beloved Goggomobile and not having much luck with other insurers, until he happens across Shannons, who are "on his wavelength". The TVCs feature the same actor playing Mr Goggomobile with the same heavy Scottish brogue and featured other identifiable elements from the Telstra Mr Goggomobile TVCs such as Mr Goggomobile having to spell the name of the car.</p> <p>Shannons' agency had approached Telstra seeking their consent to the use of the Mr Goggomobile character. Telstra refused, as they claimed to have had an unfavourable outcome to granting consent previously to another advertiser.</p> <p>Shannons went ahead with the TVCs, claiming they tried to make them as unlike the Yellow Pages TVCs as possible.</p> <p>Telstra sued for copyright infringement in their script and also for misrepresentations and misleading and deceptive conduct in trade or commerce in breach of the Trade Practices Act, as well as the tort of passing-off.</p> |

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|                 | <p>The Full Court held that there was no copyright infringement in the script, but that the Shannons TVC did pass off on the reputation built up in the earlier Yellow Pages TVCs and also that the Shannons TVCs suggested a false association, endorsement by, or other connection with, Yellow Pages. The Court considered that consumers would quite likely think that Yellow Pages (Telstra) had given permission to one of their customers (Shannons) to use their Mr Goggomobile concept in the customer's own advertisement. Shannons was permanently enjoined from further broadcasting the TVCs or any TVC "substantially similar or a colourable imitation" and was ordered to pay damages (quantum to be determined at mediation, or otherwise to be subsequently determined by the Court).</p> |
| <b>Comment:</b> | <p>The defendant (Shannons) raised several defences, one of which was parody. The issue of parody was unfortunately not considered in any detail in the Court's judgment; which is a shame as it is an area in which some judicial comment and guidance would be useful, given that parody has become a popular marketing technique.</p>  |

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| <b>4. Topic:</b>      | Transfers (Change of Registrar of Record) Policy   |
| <b>Who:</b>           | auDA - .au Domain Administration   |
| <b>When:</b>          | 16 June 2003   |
| <b>What happened:</b> | <p>The new transfer policy is intended to promote competition within Australia as:</p> <ul style="list-style-type: none"> <li>• registrants will be able to make an informed choice when choosing a domain name registrar; and</li> <li>• domain names can be easily and quickly transferred.</li> </ul> <p>All requests for domain name transfers are to be made in writing by either email, facsimile or letter, and should include the domain name password. Validly requested domain name transfers will be effected within 2 days of notification.</p> <p>In order to ensure that it meets its stated objectives, auDA will hold a public review of the new policy 6 months after implementation.</p> |
| <b>Comment:</b>       | <p>The new policy will allow registrants to transfer their domain names at any time during the domain name license period without any loss of the remaining license period.</p> <p>The new policy also prohibits registrars from which the domain name is being transferred to delay or prevent the transfer. Further, it prohibits a fee in respect of the transfer being levied by either the outgoing or incoming registrar.</p>  |

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| <b>5. Case Report:</b> | National Office for the Information Economy v Verisign Australia Limited LEADR Case No. 02/2003 |
| <b>Topic:</b>          | Panelist recommends an alternative remedy in a dispute under the auDRP                          |
| <b>Who:</b>            | LEADR, Sole Panelist, Philip N Argy   |
| <b>When:</b>           | 26 June 2003  |

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| <p><b>What happened:</b></p> | <p>In 1998, the National Office for the Information Economy (NOIE) launched the government's Gatekeeper strategy. Gatekeeper is an accreditation scheme for providers of Internet infrastructure technology. It is intended to secure online transactions between government agencies through a digital certificate system.</p> <p>NOIE applied for the trade mark GATEKEEPER as a certification mark in June 2000, following which NOIE began to accredit both governmental and commercial internet service providers. NOIE registered the domain name "gatekeeper.gov.au" in February 2000.</p> <p>In order to achieve full accreditation, it is necessary to pass NOIE's strict authentication framework. Verisign was granted entry level accreditation on 5 April 2000 and full accreditation in April 2001.</p> <p>From 9 April 2000, Verisign (then eSign Australia Limited) began advertising its Gatekeeper accredited services through its website <a href="http://gatekeeper.esign.com.au">http://gatekeeper.esign.com.au</a>. Verisign subsequently registered the domain name "gatekeeper.com.au" on 20 September 2002.</p> <p>NOIE brought a complaint against Verisign under the .au Dispute Resolution Policy (<b>auDRP</b>).</p> <p>It was found that the disputed domain name was identical to NOIE's trade mark and that Verisign had no rights or legitimate interest in "gatekeeper.com.au". Further, by registering this domain name it was likely that Internet users would be redirected to Verisign's website, which could cause Internet users to think that Verisign was the sole supplier of digital certificates under NOIE's Gatekeeper programme.</p> <p>Philip Argy concluded that:</p> <ul style="list-style-type: none"> <li>• Verisign had intentionally attempted to attract Internet users for commercial gain;</li> <li>• the domain name had been registered and used in bad faith; and</li> <li>• the domain name should be transferred to NOIE.</li> </ul> <p>However, it was possible that due to NOIE's status as a government entity, such a transfer would not be possible (as NOIE could be considered to be ineligible to hold a ".com.au" domain name).</p> <p>Therefore, an alternative solution was recommended by Philip Argy that the disputed domain name be cancelled and the term "Gatekeeper" added to auDA's reserved list of words.</p> <p>This alternative remedy would prevent any other party from applying for a domain name containing the word "gatekeeper" without NOIE's prior consent.</p> |
| <p><b>Comment:</b></p>       | <p>It is arguable that a panellist can order the cancellation of a domain name where no such request has been made by the complainant, and whether this alternative remedy can be proposed at all.</p> <p>If the term "Gatekeeper" is placed on auDA's reserved list, it would</p>  |

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|  | effectively create a quasi-monopoly in the word "Gatekeeper" within the .au domain space. Should auDA confirm this suggested remedy, it would prevent bona fide registrants from using the word "Gatekeeper" in a domain name even if they would otherwise be entitled to such registration. |
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| <b>6. Case Report:</b> | Universal Music & Ors v Hendy Petroleum & Ors [2003] FMCA 373 (5 September 2003)   |
| <b>Topic:</b>          | Copyright in CDs   |
| <b>Where:</b>          | Federal Magistrates Court of Australia   |
| <b>When:</b>           | Decided in 2003  |
| <b>What happened:</b>  | <p>The case concerned the alleged sale of illegal music CDs containing song compilations. In this case the second respondent purchased 10 CDs for \$200.00 cash in a bar in Darlinghurst, Sydney and subsequently sold them in his service station and convenience store (the first respondent) which regularly stocked CD's for \$25.00 each.</p> <p>The second respondent's evidence suggested that CDs were purchased for his son. However, it was later suggested in his evidence that the CDs were also for his step sons and his son's friends. It was claimed that the respondents were innocent infringers. In particular the second respondent stated that "as the fellow was openly offering the CD's for sale in a public place I assumed there was nothing illegitimate about the CDs"</p> <p>There was no question as to whether copyright existed in the CDs and the case primarily concerned the infringement of the copyright by the respondents.</p> <p>It was found that the purchase of the CDs was not an innocent one based on a number of factors such as:</p> <ul style="list-style-type: none"> <li>• providing the court with different evidence as to how and where the CDs were purchased,</li> <li>• that the second respondent purchased ten CDs but only of three types;</li> <li>• the second respondent's evidence to the fact that he had enough experience of people selling him 'suspicious' items to know the difference between a legitimate item and not; and</li> <li>• that the second respondent would know that people do not sell legitimate CDs in bars out of duffle bags and that legitimate sellers give receipts and attend upon one's premises to effect a sale.</li> </ul> <p>In considering the damages to be awarded to the applicants, the court noted the inclusion of subsections 115(4)(b)(i)(ia) and (ib) of the <i>Copyright Act 1968</i> (Cth) effective from May 2003, which states that the court can have regard to:</p> <p><i>"(ia) the need to deter similar infringement; and</i><br/> <i>(ib) the conduct of the defendant after the act constituting the infringement or; if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright;..."</i></p> |

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|                 | <p>While it was found that the consideration of (ib) did not hold much weight, it was found that the deterrent factor was one that should be given considerable weight. However, although it was found that the respondents knew that the CDs they were selling were not legitimate, it was <u>not</u> found that there were many copies of the CDs, or that the respondents were burning themselves new copies, or that the CDs were just the "tip of iceberg".</p> <p>As such, the respondents' conduct was found to fall towards the lower end of the range of flagrancy and damages were awarded to applicants in the amount of \$17,500.00.</p> |
| <b>Comment:</b> | <p>This is another case of the worldwide clamp-down on illegal copying of CDs and an indication of the extent to which the larger record companies are prepared to go to deter entities from engaging in illegal copying or selling illegal copies.</p>  |

## AUSTRIA



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| <b>1. Case Report:</b> |   |
| <b>Topic:</b>          | Misleading Advertising  |
| <b>Where:</b>          | Austrian Supreme Court  |
| <b>When:</b>           | March 13, 2002  |
| <b>What happened:</b>  | <p>The defendant was the publisher of an internet register. In this register the data of companies and enterprises was registered and published on the internet. The companies and enterprises who ordered an entry in the register had to pay an annual fee.</p> <p>The defendant sent offers to a large number of companies and enterprises for this registration. These offers consisted of a proposal for an entry in the "online company register". The addressee was asked to examine the data, which the defendant had obtained from the public commercial register, and to correct any errors. The addressee was further asked to confirm the (corrected) proposal and send it back to the defendant.</p> <p>The information that by returning the offer a contract for registration was concluded and a fee was payable was only contained in the small print.</p> <p>The Association for the Protection of Fair Competition started court action against the defendant for illegal and misleading advertising.</p> <p>The Austrian Supreme Court admitted the plaintiff's claim. The Court ruled that any advertising must be clearly identifiable. It is an offence against the rules of fair competition if a letter sent to a customer is misleading and does not make sufficiently clear that the letter is an offer for a registration, for which fees have to be paid. When reading the letter one could have the impression that the letter's only purpose is for the correction of an existing entry.</p> |
| <b>Comment:</b>        | It is the general attitude of the Austrian Supreme Court that offers for a registration and similar services must be clearly identifiable as such. In particular it must be made clear that accepting the offer will result in fees.  |

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| <b>2. Case report:</b> |  |
| <b>Topic:</b>          | Austrian National Tennis Association   |
| <b>Where:</b>          | Austrian Supreme Court   |
| <b>When:</b>           | October 15, 2002   |
| <b>What happened:</b>  | <p>The plaintiff is the general distributor for "Tretorn" tennis balls in Austria.</p> <p>The defendant is the Austrian National Tennis Association. The National Tennis Association is the roof organization for the local tennis associations.</p> |

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|                 | <p>The local tennis associations in Austria organize tournaments. Furthermore there are several leagues and championships between the local tennis associations and their members.</p> <p>The results of all official tournaments and championships will only be approved by the Austrian National Tennis Association, if the official tennis balls, approved by the Austrian National Association, were used. Using other tennis balls leads to the annulment of the results of a tournament or of a match in a championship and could also lead to the expulsion of the respective member from the Austrian National Tennis Association.</p> <p>The general distributor for Tretorn tennis balls sued the Austrian National Tennis Association on the grounds that by approving only tennis balls of a certain trademark and by forcing the local tennis associations to use only these approved tennis balls, they would be excluded from a major segment of the Austrian market.</p> <p>The Austrian Supreme Court admitted the plaintiff's claim. The Court ruled that the Austrian National Tennis Association, by allowing the local members only to use the approved tennis balls, is violating European antitrust law. The Austrian National Tennis Association is excluding all the other competitors in the tennis market from a major segment of the Austrian market. Such violation of European antitrust law is at the same time a violation of the Austrian Act Against Unfair Competition.</p> |
| <b>Comment:</b> | Violation of European antitrust law is also a violation of the Austrian Act Against Unfair Competition.  |

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| <b>3. Case report:</b> |   |
| <b>Topic:</b>          | Illegal Photographing on Private Property   |
| <b>Where:</b>          | Austrian Supreme Court  |
| <b>When:</b>           | January 29, 2002  |
| <b>What happened:</b>  | <p>The plaintiff is the owner of a swimming pool. The defendant, a construction company, took photos of the swimming pool in order to have them published in their catalogue. To take the pictures the defendant had to enter the private property of the owner of the swimming pool.</p> <p>The owner of the swimming pool as plaintiff started court action against the defendant. The court action was based on the argumentation that, although the swimming pool was not protected under the Intellectual Property Act, the picture was illegally taken as the defendant entered the plaintiff's private property without permission. Therefore the defendant was using an illegal picture in his advertising.</p> <p>The Austrian Supreme Court admitted the plaintiff's claim. The Court found that it is illegal to enter private property without the permission of the owner in order to take a photograph. Furthermore it is illegal advertising to use such pictures in a catalogue. The defendant therefore had to refrain from any further use of this picture.</p> |
| <b>Comment:</b>        | Although the swimming pool as an object did not have protection under the Intellectual Property Act, the Austrian Supreme Court found that it is  |

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|  | illegal to use the image of the object if the photograph was illegally obtained. |
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## BRAZIL



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| <b>1.Self - Regulation</b> |   |
| <b>Rules</b>               |   |
| <b>Topic:</b>              | TV: New Rules for Alcoholic Beverage Advertisements   |
| <b>When:</b>               | September 2003  |
| <b>Where:</b>              | Brazil  |
| <b>What happened:</b>      | <p>The Brazilian Self- Regulation Advertising Council, has decided to review the ethic rules that regulate advertisement of Alcoholic Beverages.</p> <p>Exhibits A and P of the Brazilian Self-Regulating Code, which deal with publicity of alcoholic beverages have been modified, in order to restrict the use of sexual and teenager appeals in the advertisements.</p> <p>The new wording of Exhibit A determines that these advertisements shall not encourage consumption of alcoholic beverages, but should rather be focused on the trademark diffusion.</p> <p>The new rules are the following:</p> <ul style="list-style-type: none"><li>- Any person who appears in the advertisement shall look and be over 25 years old.</li><li>- The advertisements shall not have erotic appeals.</li><li>- The advertisements shall not use graphic and audiovisual resources connected with the children's world, such as animated animals, dolls or animations that may raise the curiosity of the children.</li><li>- The advertisement shall not contain pictures or sounds that imitate the consumption of the product.</li><li>- The advertisement shall be broadcasted only in TV programs destined to adults.</li><li>- The advertisement shall not induce to the consumption of alcoholic beverages, being restricted to the exhibition of the product and the diffusion of the trademark.</li><li>- The advertisement shall not induce to abusive and irresponsible consumption.</li><li>- The advertisement shall not make use of Olympic sports clothing for promotion/marketing of its trademarks.</li><li>- The advertisement shall not associate the image of the products with sexuality.</li></ul> |
| <b>Comment:</b>            | These new rules on advertisement for alcoholic beverages have been very criticized by the public opinion. Beer consumption in Brazil is very  |

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|  | <p>high, and there are several brands in the market. Consequently, beer publicity is a market that involves millions of dollars, and the advertisements are always very creative. Beer publicity is always intensified in the summer, when the image of beautiful women wearing bathing suits is very common and also the use of computer animated animals, to have a funny connotation.</p> <p>Therefore, these new rules on alcoholic beverages advertisement have restricted the imaginative creation of the advertisement agencies, that will have to adapt this kind of publicity to these new rules.</p> |
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| <b>2. Self - Regulation</b> |  |
| <b>Case Report:</b>         |  |
| <b>Topic:</b>               | Beer advertisement   |
| <b>When:</b>                | May, 2003  |
| <b>Where:</b>               | Brazilian Self-Regulating Advertising Council  |
| <b>What happened:</b>       | <p>A famous beer advertisement in a magazine showed the moderation advice, "Avoid Excessive Consumption of Alcohol" , recommending responsible consumption in very small letters, almost not visible to the naked eye.</p> <p>The Council recommended the alteration of the advertisement in order to make this recommendation advice visible in the magazine advertisement.</p> |
| <b>Comment:</b>             | This decision confirms the position mentioned in the first box, that the courts and the Self-Regulating Advertising Council are taking in order to restrict the publicity of alcoholic beverages.  |

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| <b>3. Case Report:</b> | Comparative Advertisement  |
| <b>Who:</b>            | Procter & Gamble   |
| <b>When:</b>           | May 2003   |
| <b>Where:</b>          | Brazilian Self-Regulating Council  |
| <b>What happened:</b>  | <p>Procter &amp; Gamble, which makes the product "Hipoglos" filed a complaint against Bristol-Myers Squibb, on the grounds that its product has been subject of comparative advertisement to Bristol's product "Dermodex Prevent".</p> <p>Procter &amp; Gamble argued that Bristol-Myers is using the expressions "the mothers are unsatisfied with the leading brand" , and "better results than the main competitor".</p> <p>The flyers where this advertisement appears say that the data is based on research done by specialized agencies. Procter &amp; Gamble counter argued by saying that "Hipoglos" has been in the market for 55 years, and that it is the leading brand in the market, with more than 80% of the market share.</p> <p>The company also argued that the research presented in the</p> |

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|  | <p>advertisement does not represent the public opinion and therefore is not valid.</p> <p>The Council understood that, in fact, the information given in the flyer is not conclusive. The research does not make proof that the "mothers are unsatisfied with the leading brand", and that Bristol's product present "better results than the main competitor".</p> <p>The Council decided that Bristol-Myers needed to immediately stop the distribution of the flyers.</p> |
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| <b>4. Case Report:</b> | Respectfulness  |
| <b>Who:</b>            | Flora & Lew   |
| <b>When:</b>           | May 2003  |
| <b>Where:</b>          | Brazilian Self-Regulating Advertising Council   |
| <b>What happened:</b>  | <p>The TV commercial of bathing soaps showed two soaps, one supposed to be male and the other one female, in positions that resembled sexual relationship. A consumer filed a complaint arguing that this advertisement did not respect the public due to its sexual and erotic connotation.</p> <p>The Council decided that this advertisement is not disrespectful, and that it is creative and healthy, and dismissed the complaint.</p> |

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| <b>5. Case Report:</b> |  |
| <b>Who:</b>            | Unibanco AIG   |
| <b>When:</b>           | March 2003   |
| <b>Where:</b>          | Brazilian Self-Regulating Advertising Council  |
| <b>What happened:</b>  | <p>A consumer filed a complaint against a TV commercial broadcasted by an insurance company, Unibanco AIG, arguing that it referred to feelings such as fear and panic to sell insurance policies.</p> <p>The consumer believes that this advertisement diffuses the fear of doing simple things, such as going out at night, driving your car, and even eating, by showing scenes in which people get hurt and even die by doing these simple things.</p> <p>The Council reached the decision that this TV advertisement was not disrespectful to consumers and that no one's personal life will be badly influenced by it.</p> |

## CANADA



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| <b>1. Self Regulation</b> |   |
| <b>Topic:</b>             | New Canadian Code of Advertising Standards  |
| <b>Who:</b>               | Advertising Standards Canada  |
| <b>When:</b>              | May 2003  |
| <b>Where:</b>             | Canada  |
| <b>What happened:</b>     | <p>In May, Advertising Standards Canada ("ASC") released a revised Canadian Code of Advertising Standards ("Code"). The Code applies to all forms of media including broadcast, out-of-home, print and Internet. It does not apply to product packaging and labeling, or to media originating from outside Canada unless the advertiser is a Canadian entity.</p> <p>The revised Code is effective as of September 1, 2003. Key amendments to the Code include the following:</p> <ul style="list-style-type: none"><li>• The requirement that ads not discredit, disparage or attack competitors is now qualified by the word "unfairly" (Clause 6)</li><li>• While the prior Code prohibited advertisements that showed a disregard for safety or depict situations that might encourage unsafe or dangerous practices, the new Code prohibits only situations that "might <i>reasonably</i> be interpreted" encouraging such acts. (Clause 10)</li><li>• Scenes that exploit, condone or incite violence, or that exhibit indifference to unlawful or reprehensible behaviour, are now prohibited when the depiction of violence is "realistic", or the indifference towards the behaviour is "obvious" (Clause 14(b))</li><li>• The new Code qualifies that the ad must show "obvious" indifference to, or encourage "gratuitously and without merit" conduct or attitudes that offend standards of public decency to be a violation (Clause 14(d))</li></ul> <p>In addition to these changes, the ASC has announced that Interpretation Guidelines will be developed on an as-needed basis to promote consistency and reasonableness in interpreting the Code. The first Guideline released states: "In assessing impression(s) likely to be conveyed by an advertisement, Council shall take into consideration the use and application in the advertisement(s) of such elements as humour and fantasy."</p> <p>Finally, procedural changes mean that if a complaint is received concerning an issue of Safety (Clause 10) or Unacceptable Depictions and Portrayals (Clause 14), the advertiser will now be asked to respond to the complainant, either directly or through the ASC. If the complainant is</p> |

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|                 | not satisfied with the advertiser's response, then the matter will continue through the traditional ASC complaint process. If the complainant is satisfied, the matter will not proceed further.  |
| <b>Comment:</b> | The revisions to the Code, as well as the development of Interpretation Guidelines, are important in allowing advertisers both more flexibility and greater certainty with respect to how the ASC will apply the Code. The new procedure for complaints about Safety and Unacceptable Depictions and Portrayals has the potential to lead consumers to a better understanding of the advertiser's position, and may encourage advertisers to be more directly accountable to consumers. |

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| <b>2. Industry Guidelines</b> |  |
| <b>Topic:</b>                 | Canadian Guidelines With Respect to the Sale and Marketing of Diamonds, Colour Gemstones and Pearls  |
| <b>Who:</b>                   | Jewellers Vigilance Canada Inc.  |
| <b>When:</b>                  | August 2003  |
| <b>Where:</b>                 | Canada   |
| <b>What happened:</b>         | <p>The Canadian Guidelines With to the Sales and Marketing of Diamonds, Coloured Gemstones and Pearls have been revised. These Guidelines, endorsed by the Competition Bureau, address definitions and terminology for use in advertising and sale of diamonds, coloured gemstones and pearls. These Guidelines are to be followed with respect to any representation, in any media, regarding these items.</p> <p>It is contrary to the purposes of the Guideline: (a) to make a representation that does not conform in all respects to these Guidelines in the selling, advertising, or distribution of any substance defined in these Guidelines; or (b) to make any misleading or deceptive statement, representation or illustration relating to origin, formation, production, condition or quality of any substance defined in these Guidelines. Some examples of the guidance provided by this document are as follows:</p> <ul style="list-style-type: none"> <li>• It is contrary to the purpose of the Guidelines to refer to any diamond or coloured gemstone to identify any substance that has been partly or wholly created through human intervention. Such items must be identified as synthetic, composite, assembled, artificial, imitation, or simulated, as appropriate. This qualification must immediately precede the word diamond or coloured gemstone. Neither phrase may be given greater prominence or emphasis, or may be separated from each other.</li> <li>• The term "carat", in reference to diamonds, may not be used where it could be presumed to refer either to karat weight or precious metal quantity.</li> <li>• It is unacceptable to use the word "perfect" to refer to any attribute of a pearl, cultured pearl, coloured gemstone or diamond.</li> <li>• With respect to coloured gemstones, the term semi-precious should not be used in any context.</li> </ul> |
| <b>Comment:</b>               | These Guidelines complement those established in the Canadian  |

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|  | Diamond Code of Conduct, as well as other general restrictions respecting advertising, sales and warranties under the Competition Act. They are applicable to all those engaged in the sale and advertising of coloured gemstones, diamonds and pearls in Canada. |
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| <b>3. Industry Regulation</b> |  |
| <b>Topic:</b>                 | Internet Advertising Guidelines  |
| <b>Who:</b>                   | Competition Bureau   |
| <b>When:</b>                  | February 2003  |
| <b>Where:</b>                 | Canada   |
| <b>What happened:</b>         | <p>The Canadian Competition Bureau has released guidelines concerning the application of the <i>Competition Act</i> to advertising on the Internet (the "Guidelines"). The Guidelines provide some practical insights on the Bureau's approach to misleading representations and deceptive marketing practices on the Internet. Under the Guidelines, the Internet is treated no differently than any other media with respect to the application of the <i>Competition Act</i>. Therefore, the same prohibitions against false or misleading advertising will apply. The Guidelines, however, provide further details with respect to how the Act will be applied to this medium. For example:</p> <ul style="list-style-type: none"> <li>• Disclaimers and text hyperlinks leading to information relevant to an offer or claim should be very explicit, and accessible to all users, regardless of the software or hardware used to access the webpage;</li> <li>• Attention-grabbing tools, such as flashing text, cannot be used to draw the consumer's attention away from a disclaimer;</li> <li>• Illustrations, photography, and/or artwork should fairly and accurately illustrate the product or service being offered;</li> <li>• Websites should not create a false or misleading impression as to the company's location, identify or affiliation.</li> </ul> <p>The application of the Guidelines will be based on the test of general impression, and will be interpreted on a case by case basis.</p> <p>The Competition Bureau also states that it will: "Assert Canadian jurisdiction over foreign entities to the fullest extent authorized by law whenever necessary to protect the Canadian market from misleading representations and deceptive marketing practices".</p> |
| <b>Comment:</b>               | The Guidelines go into great detail with respect to examples of permitted and restricted practices. With respect to international compliance, no doubt the Competition Bureau will be reliant upon cross border co-operation in order to enforce its Guidelines on extra-territorial advertisers.  |

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| <b>4. Regulations:</b> | Natural Health Products Regulations, Food and Drugs Act ("FDA")            |
| <b>Topic:</b>          | New regulation of natural health products (includes "dietary supplements") |
| <b>Where:</b>          | The Canadian Federal Government (Natural Health Products Directorate)      |

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| <b>When:</b>          | June 18, 2003   |
| <b>What happened:</b> | <p>The final <i>Natural Health Product Regulations</i> ("NHPR") of FDA were published on June 18, 2003 but will not come into force until January 1, 2004 (except for the 60 day monograph approval process which starts July 1, 2004). The NHP Directorate ("NHPD") is developing key information for NHPR compliance but little information is currently available. Other FDA regulations are the food, drugs, cosmetics and medical devices regulations.</p> <p>The NHPR will apply to NHPs as of 01/01/04, <i>except</i> where specific transitional periods for compliance apply with respect to product licensing, site licensing, good manufacturing practices ("GMPs") and labeling requirements of NHPs, notably:</p> <ul style="list-style-type: none"> <li>• A product that has a drug identification number issued under the FDA drug regulations <i>and</i> falls within the NHP definition, has 6 years to comply with the NHPR (ending December 31/09);</li> <li>• Those who manufactured, packaged, labeled, imported NHPs before 01/01/04, have 2 years ending December 31, 2005 to meet the NHP site license/GMP requirements.</li> </ul> <p>During the transition periods, the FDA drug regulations apply.</p> <p>NHPs will be regulated as a subset of drugs and must be pre-cleared, either by the 60 day monograph approval process or by providing other evidence to support the claim.</p> <p>Foreign and domestic site license applicants may submit a GMP compliance report from their own qualified Quality Assurance ("QA") person in place of government inspectors. The NHPD will develop agreements with foreign regulators to establish GMP equivalence between countries.</p> <p>NHPs <i>must</i> make permitted health claims: structure-function claims risk-reduction claims or therapeutic claims (cure/treatment of a disease). (<i>Notably, US dietary supplements must not make treatment claims which may pose a challenge for North American packaging as the NHPR will permit treatment claims</i>). Currently there are no proposed NHP advertising guidelines.</p> |
| <b>Comment:</b>       | The NHPR will have a significant impact on the NHP industry in Canada with some smaller entities struggling to comply, while larger, international entities focus on meeting the challenge of integrating the NHPR into their NHP international labeling and marketing plans.   |

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| <b>5. Discussion Paper:</b> | Options for Amending the Competition Act   |
| <b>Topic:</b>               | Strengthening the Civil Provisions of the Competition Act for Misleading Advertising |
| <b>Where:</b>               | The Canadian Government---Competition Bureau   |
| <b>When:</b>                | June, 2003   |

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| <b>What happened:</b> | <p>The Competition Bureau issued a Discussion Paper for comment---Options for Amending the Competition Act. Key proposals in the advertising area include:</p> <ul style="list-style-type: none"> <li>• Increasing the current “administrative penalties” for misleading advertising/deceptive marketing practices from a limit of \$100, 000 for a corporation and \$50, 000 for an individual (or twice these amounts for subsequent violations) to an amount in the discretion of the Competition Tribunal based on the facts of each case.</li> <li>• Restitution: The courts would be empowered to order business and individuals who violate the misleading advertising provisions of the Competition Act and cause consumers loss, to provide restitution to consumers either by providing restitution directly to consumers from a restitution fund or by appointing a fund administrator to do so. The courts would have discretion in determining how any balance in the fund could be distributed including for example, giving it to non profit organizations that work to benefit consumers rather than returning it to the violator.</li> <li>• Civil Cause of Action: Those who suffer loss by misleading advertising/deceptive marketing practices would be entitled to seek damages in civil court. The Competition Act provisions currently limited to civil actions for criminal conduct (such as conspiracy/pyramid schemes) or breaches of Competition Bureau orders would be amended to facilitate such civil actions.</li> </ul> |
| <b>Comment:</b>       | <p>The above represents a number of sweeping proposals that the Bureau had not previously signaled were coming. If these proposals are enacted, they will surely “up the ante” for misleading advertising in Canada.</p>  |

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| <b>6. For Review and Comment</b> | Proposed Competition Act Guidelines:   |
| <b>Topic:</b>                    | Guidelines on the Deceptive Notice of Winning a Prize Provisions, Competition Act  |
| <b>Where:</b>                    | The Canadian Federal Government ---Competition Bureau  |
| <b>When:</b>                     | August 26, 2003.   |
| <b>What happened:</b>            | <p>The proposed guidelines to the Deceptive Notice of Winning a Prize provisions (“Prize Provisions”) of the Competition Act provide the following clarifications to key wording in the Prize Provisions:</p> <ul style="list-style-type: none"> <li>• Sending prize notifications by “electronic or regular mail or by any other means” includes mail, electronic mail, fax and door to door communications;</li> <li>• The reference to the recipient “doing a particular act” (to win a prize/benefit) refers to doing something positive rather than something passive (such as meeting residency/age requirements to enter a contest);</li> <li>• The reference to the recipient having to “incur a cost” to win a prize does not refer to an initial, incidental cost such as a stamp or to an amount that is nominal compared to the prize (i.e. the cost of getting</li> </ul> |

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|                 | car insurance for a car prize). It would apply to having to call a 900# and incur costs to win a prize.  |
| <b>Comment:</b> | The Guidelines to the Competition Act provisions on Deceptive Notice of Winning a Prize ("Prize Provisions") clarify certain points in the provisions and generally track the Competition Act requirements for required disclosures in promotional contests and overall should be helpful. |


## CHILE



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| <b>1. Case Report:</b> |   |
| <b>Topic:</b>          | Giving Away Promotions and the Consumer's Right to be Duly Informed   |
| <b>Who</b>             | The Council for Advertisement Self-Regulation and Ethics (CONAR)  |
| <b>When:</b>           | March 27, 2003  |
| <b>Where:</b>          | Santiago, Chile   |
| <b>What happened:</b>  | <p>Due to the large impact of Bank Santander's promotional campaign "giving away a DVD set" connected with money loans, the Council on its own initiative analyzed the compliance of such promotion with the Ethic Code's provisions.</p> <p>The Council grounded its ruling over the doctrine of promotions and offers by which advertisers must inform the audience providing enough elements so consumers are able to take educated and informed decisions considering all relevant factors. Moreover, advertising must not be either false or misleading consumers to wrong choices.</p> <p>In this case the Council ruled that the promotional campaign "Get a free DVD with your loan" was not in compliance with the Code's requirements. TV commercials and advertising campaigns must inform consumers about the essential features of the gifts and their conditions to be eligible to win those prizes together with the terms in which the offer remains available to the public, participant's restrictions, limitations et al.</p> <p>TV commercials and ads put under scrutiny were deemed outside the self-regulatory framework set by the Ethic's Code and the Bank was asked to withdraw all advertising actions.</p> |
| <b>Comment:</b>        | The Council made a very interesting point setting the standard widely applied in future rulings by which advertising campaigns must not mistake the public with strict promotional guidelines - unknown to the audience and kept in secret in - with the content finally exhibited to them, which may differ with the guidelines.   |

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| <b>2. Topic:</b> | Likelihood of Confusion and Promotion of In-house Brands |
| <b>Who:</b>      | Chilean Trademark Office                                 |
| <b>When:</b>     | June 2003  |
| <b>Where:</b>    | Santiago, Chile  |

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| <p><b>Advertisement:</b></p> |  <p>(1)</p> <p>(2)</p>  |
| <p><b>What happened:</b></p> | <p>D &amp; S filed for an application for registration for the following device (label)</p> <p>Unilever N.V. filed opposition against the application based on the similarity of its own label (shown above) already registered at the Chilean Trademark Office. Moreover, both labels cover same type of product (Class 03 of the Int'l Classifier).</p> <p>The Chilean Trademark Office clearly ruled in favor of Unilever N.V. due to the similarity of the label submitted by D &amp; S.</p> <p>The Trademark Office based its decision on a comparative analysis between the labels in dispute. The analysis showed that both layouts are evidently similar in features drawings and color combination.</p> <p>These common features may result in a likelihood of confusion because respondent's label was not able to differentiate itself from claimant's.</p> <p>From an advertising point of view, respondent's labels are banned to be published, aired or exhibited.</p> |
| <p><b>Comment:</b></p>       | <p>This ruling set a threshold regarding in-house brands developed by big retail chains aimed at resembling those traditional brands with a long standing in the local market. As a consequence, the labels are forbidden to be used in future commercial ads.</p>   |

**3. Case Report:**

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| <b>Topic:</b>         | Unfair Comparative Advertising   |
| <b>Who:</b>           | The Council for Advertisement Self-Regulation and Ethics (CONAR)   |
| <b>When:</b>          | October 2002   |
| <b>Where:</b>         | Santiago, Chile  |
| <b>What happened:</b> | <p>Ford Motor Company aired a TV commercial showing a Subaru car.</p> <p>Petitioner claims the ad as unfair and misleading on the basis that the Subaru car is depicted as obsolete due to the strong remarks made by the characters. In fact, the key part of the ad shows a teenager emotionally frustrated when getting the Subaru car as a graduation gift from his parents.</p> <p>The teenager thought he was getting a new Ford Fiesta.</p> <p>The Council for Advertisement Self-Regulation and Ethics (CONAR) concluded that there is no prejudice in showing on TV a competitor's car under certain circumstances. Respondent acknowledges the fact that the ad conveys "deception and surprise" when the son realizes he is getting the Subaru's car instead of a Ford's.</p> <p>According to the respondent although the "deception and surprise" element the ad did not involved or implied any "obsolescence" message disparaging Subaru because the teenager had assumed his parents are bringing a new model as a graduation gift.</p> <p>The Council nevertheless determined the ad showed the Subaru's car as not desired and thus violating the Ethic Code.</p> |
| <b>Comment:</b>       | <p>CONAR's ruling set the standard for advertising campaigns using comparative tools based on registered trademarks.</p> <p>The Council's decision stated that ethical use of a registered trademark implies obtaining prior consent from the owner of the trademark.</p> <p>The owner is the only person or entity in a position to assess the impact on its own trademark when used in advertising campaigns created by third parties or competitors.</p>  |

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| <b>4. Topic:</b>      | Advertising, Violence and Young People  |
| <b>Who:</b>           | The Council for Advertisement Self-Regulation and Ethics (CONAR)  |
| <b>When:</b>          | April 2002  |
| <b>Where:</b>         | Santiago, Chile   |
| <b>What happened:</b> | <p>Petitioner's claims filed before the Council for Advertisement Self-Regulation and Ethics (CONAR) are based on a TV ad aired between 1 - 9PM aimed at promoting BK's sneakers.</p> <p>The ad shows a young person skating through the crowds while suddenly stops before a gym where older fellows are practicing yoga. The youngster riding the skate enters into the room imitating yoga movements. While making turns he grabs and breaks an old person's neck resulting in the person falling dead into the floor.</p> |

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|                 | <p>The ad's closing remark shows the slogan "Put adrenaline in your life".</p> <p>Respondent defended on the grounds that petitioner is confused about the meaning, purpose and content of the ad. BK claims to have used a humorous situation in order to reach a primary objective audience.</p> <p>CONAR's ruling stated that the message infringed Ethic's Code and requested BK to withdraw the ad from TV on the grounds that even humorous situations while used in advertising are neither exempt nor excluded from Ethic's Code provisions.</p> <p>Likewise, the message cannot convey or in some ways provide any support to any kind of violent acts.</p> <p>Even tough humorous TV commercials and ads are always abided by certain morality rules and messages are not allowed to convey statements or to represent situations clearly conflicting with the predominant concept of decency held by society at a given time</p> |
| <b>Comment:</b> | <p>In this case the Council draws the line between the use of humorous and ironic situation used in advertising in connection with the provisions set by the Ethic Code. It is worthwhile to note that the Council stress the point that the media must be morally responsibly before society for certain values implied in the messages conveyed to the public.</p>  |

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| <b>5. Case Report:</b> |  |
| <b>Topic:</b>          | Advertising and Banking Services   |
| <b>Who:</b>            | Chilean Regulatory Agency for Banks and Financial Entities   |
| <b>Where:</b>          | Santiago de Chile  |
| <b>When:</b>           | June 2003  |
| <b>What happened:</b>  | <p>Following certain measures enacted by the Chilean Government, on June 30, 2003, all Chilean and foreign banks executing banking transaction in connection with the local market are now bound by updated controls and restrictions when advertising banking and financial services.</p> <p>The main aspects of Directive No. 3.226 are as follows:<br/> <i>a) <u>New Legend Attached to the Governmental Insurance Protection Provided by the Government of Chile</u></i><br/> The current mandatory legend attached to any advertising action in connection with banking and financial services by which private deposits are backed up with governmental insurance ("Inform yourself regarding the insurance limit provided by the Government") was changed as follows: "Inform yourself regarding governmental insurance provided at your bank or at <a href="http://www.sbinf.cl">www.sbinf.cl</a>".</p> <p>The Directive mandates a gradual process by which all banks and financial entities must start using the new legend while set in motion advertising campaigns. Likewise, the legend must be added to the formats currently used by customers in regular banking transactions, to the branches, affiliates and website.</p> <p><i>b) <u>Advertising Measures Aimed at Chilean Banks and Financial Entities with</u></i></p> |

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|                 | <p><u>Branches or Subsidiaries at Overseas Locations</u><br/>Advertising campaigns and commercial ads published or advertised in local media by Chilean banks and financial entities while mentioning branches, subsidiaries at overseas locations are subject to certain restrictions.</p> <p>Commercial ads must include the following legend: i. Exact location of the branch or subsidiary together with the name of the bank or the financial entity, ii. State the fact that the branch or subsidiary is bound to the laws of the government where it was established and, iii. Private deposits are not subject to the governmental insurance provided by the Government of Chile.</p> <p><u>c) Advertising Measures Aimed at Foreign Banks and Financial Entities with Branches or Subsidiaries in Chile</u><br/>Advertising campaigns and commercial ads published or advertised in local media by foreign banks and financial entities promoting services related or executed in its headquarters, branches, subsidiaries located overseas are subject to certain restrictions as well.</p> <p>Commercial ads must include the following legend: "Banking transactions executed by the headquarter of this bank or other branches at overseas locations are neither subject to compliance requirements set by the Chilean Government nor to the governmental insurance provided by the Government of Chile."</p> <p><u>d) Advertising Measures Aimed at Local Agents of Unlicensed Foreign banks in Chile</u><br/>Advertising campaigns and commercial ads published or advertised in local media related with transactions executed in headquarters, branches or subsidiaries located overseas of unlicensed foreign banks having an agent in Chile are subject to more stringent restrictions.</p> <p>Commercial ads must include the following legend: "This bank's headquarter is located overseas (country, city) and all transactions held in connection with the headquarter are subject to the laws and court decisions of said country. This bank is neither subject to Chilean Authorities nor to the governmental insurance provided the Government of Chile."</p> <p><u>e) Advertising Format for the Governmental Insurance Legend Provided by the Government of Chile</u><br/>The Directive also set the format, dimensions and other features for all the legends and ads above mentioned in this report.</p> |
| <b>Comment:</b> | New measures enacted by the Chilean regulatory watchdog are aimed at keeping abreast with banking services' globalization and the risks involved in this process.  |

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| <b>6. Topic:</b> | Advertising and Dangerous and Reckless Conduct in Violation of Traffic Laws |
| <b>Who:</b>      | The Council for Advertisement Self-Regulation and Ethics (CONAR)            |
| <b>When:</b>     | January 2000  |

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| <b>Where:</b>         | Santiago, Chile  |
| <b>What Happened:</b> | <p>Petitioner brought an action against a local tobacco maker for diffusing a TV commercial where groups of youngsters drive an SUV with unfastened seat belts. In addition, one of them is observed exposing half of his body outside the vehicle seated in the window while in movement.</p> <p>Petitioner argued the commercial ad was fostering illegal and reckless conduct against current traffic laws.</p> <p>The Council agreed with petitioner considering the ad as infringing traffic laws and article 16° of the Ethic Code. Such proviso states that <i>“commercial ads may not exhibit dangerous or reckless conducts especially those aimed at young people or children”</i>.</p> <p>The Council asked respondent to withdraw the TV commercial and to refrain from future campaigns showing these types of conduct.</p> |
| <b>Comment:</b>       | The Council's ruling though somewhat obvious is interesting as it set a clear restriction to the use of reckless behavior in violation of traffic laws in advertising.   |

## COLOMBIA



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| <b>1. Legislation</b> | Law 813  |
| <b>Topic:</b>         | Trademark Forgery  |
| <b>Who:</b>           | Congress   |
| <b>When:</b>          | July 2, 2003   |
| <b>What happened:</b> | This law modified and added some articles to the Criminal Code in force. In particular, it added an article about Trademark Forgery. This regulation states that anyone who forges trademarks, signs or signatures used officially to certify weight, measure, quality, quantity, value or content, or apply them to different object or good from the one that was destined, will incur in prison of one (1) to five (5) years and a fine of one (1) to twenty (20) monthly legal most minimum salaries in force. |
| <b>Comment:</b>       | Criminal law in Colombia has assumed greater significance in the protection of intellectual property. The criminal law complements and supplements the existing civil remedies for trademark infringement. It complements these remedies by providing criminal penalties for certain egregious acts of trademark infringement. It supplements private civil remedies by prohibiting conducts that in the past were not contemplated as felonies.   |

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| <b>2. Legislation</b> | Sentence File 2000627801  |
| <b>Topic:</b>         | Notorious trademarks  |
| <b>Who:</b>           | <i>Consejo de Estado</i> - Court that hears appeals against administrative decisions  |
| <b>When:</b>          | July 4, 2003  |
| <b>What happened:</b> | <p>The Superintendency of Industry and Commerce granted the trademark FINESS for the class 16 of the Nice Classification despite that a Colombian company raised oppositions or objections to the registration based on its notorious trademark FINESSE, considering that the products that identify both trademarks are completely different and belong with different classes of the International Nice Classification.</p> <p>The <i>Consejo de Estado</i> ordered the annulment of the registration of the trademark FINESS considering that the notoriety alleged by the owner of the trademark FINESSE was proved in a proper way, and therefore, although the classes and products are different the only exception for the application of the similarity (considered in the review of confusion between trademarks) is the notoriety and that is the criterion which is the most important.</p> |
| <b>Comment:</b>       | This decision is important because the Superintendency of Industry and Commerce usually refuses oppositions based on notorious trademarks   |

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|  | since proves are never enough. The sentence states that when someone wants to prove notoriety can use one or many of the proofs mentioned in the Decision 486, but don't have to prove all of them. |
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| <b>3. Legislation</b> | Resolution 19110  |
| <b>Topic:</b>         | Previous notice of integration  |
| <b>Who:</b>           | Superintendency of Industry and Commerce  |
| <b>When:</b>          | July 7, 2003  |
| <b>What happened:</b> | When companies that are dedicated to distribute, supply or produce the same kind of goods (products, raw materials or merchandise) will merge, consolidate, integrate or do other figure for such purpose must report the operations in the National Government. Companies will not be able to materialize the processes of integration that intend to carry out, without the assent of the competent authority, in this case, the Superintendency of Industry and Commerce.                          |
| <b>Comment:</b>       | Normally the most affected with processes of integration of companies that are engaged to the same activities are the consumers because this fact could attempt against free competition. Consequently consumers would buy the same goods or services for higher prices and producers won't be interested in improving the goods because they are not competing with anyone. Therefore the Government must inspect these integrations and determine which cases could carry monopoly and which don't. |

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| <b>4. Legislation</b> | Resolution 19629  |
| <b>Topic:</b>         | Information supplied to the consumers on the refrigerators and domestic freezers of use   |
| <b>Who:</b>           | Superintendency of Industry and Commerce  |
| <b>When:</b>          | July 15, 2003   |
| <b>What happened:</b> | <p>Refrigerators with or without shelves of low temperatures, shelves to store frozen food and freezer of food have to comply the following requirements if they will be commercialised in the national territory, from October 1, 2003.</p> <ol style="list-style-type: none"> <li>1. Each product, imported or produced in the country, should have adhered or printed in its label or packing information related to the gross nominal volume, nominal total volume of storage, type and quantity of refrigerant liquid according to the international system of units, class of climate for which it was manufactured and system without frost (when it applies) or lacking of this system.</li> <li>2. This information must be in a permanent way and on an easily visible place for the consumer and in Spanish.</li> <li>3. The refrigerant agents that do part of the cooling system or the agents used to produce them should not be found in the list of substances controlled in the Protocol of Montreal. The SIC in exercise of the faculties of surveillance and control will be able in any moment, to verify the conformity of the information contained in the labels.</li> </ol> |

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| <b>Comment:</b> | No special comments. |
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| <b>5. Legislation</b> | Resolution 19353  |
| <b>Topic:</b>         | Unfair competition actions related to distinctive signs   |
| <b>Who:</b>           | Superintendency of Industry and Commerce  |
| <b>When:</b>          | July 9, 2003  |
| <b>What happened:</b> | <p>The Superintendency of Industry and Commerce used to refuse unfair competition actions related to intellectual property rights saying that it wasn't competent to decide on them since these cases should be debated through judicial actions. Recently it has revoked providences that rejected and ordered to shelve actions which were debated if a supposed imitation of an identification element or association of a merchant (as distinctive signs), can be demanded through actions of unfair competition.</p> <p>The law 446 of 1998 confers to the Superintendency of Industry and Commerce the same faculties to proceed with unfair competition actions that the judicial officials or judges have.</p> <p>Before the enactment of the law, unfair competition actions had to be debated through judicial actions because the protection of these rights related to the industrial property was within the judge's jurisdiction, and not an administrative body.</p> |
| <b>Comment:</b>       | When someone is affected by acts of unfair competition what he wants when filing an action of unfair competition is to achieve an immediate measure from the Government that avoid detriments or damages. That is why it is quite important that an administrative body as the Superintendency of Industry and Commerce decides on these actions instead of judges, because Superintendency studies these actions and makes decisions faster since it has more resources to determine the real effect of the unfair competition acts.   |

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| <b>6. Legislation</b> | <i>Circular externa 04</i>   |
| <b>Topic:</b>         | Quality requirements and guarantee of electrical appliances  |
| <b>Who:</b>           | Superintendency of Industry and Commerce   |
| <b>When:</b>          | April 28, 2003   |
| <b>What happened:</b> | <p>Superintendency of Industry and Commerce has to watch for the enforcement of the quality conditions of goods and services. According to the type of good or service the warranty has to provide the necessary technical aid for its utilization and has to repair the good which includes supplying the necessary pieces that have to be replaced for this last effect.</p> <p>It's a function of the Superintendency of Industry and Commerce to watch for the observance of the regulation about consumer's protection and to instruct producers or traders the way to comply with those norms and procedures for their correct application.</p> <p>Quality warranty, suitability and after-sales service: People who</p> |

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|                 | <p>commercialise these kind of products have to offer a warranty to consumers that satisfies the specifications announced and includes quality warranty, suitability and after-sales services.</p> <p>The consumer will be able to make use of the quality warranty, suitability and after-sales service directly before the trader or any of the people who distribute, import, commercialise or produce the goods.</p> <p>A Certificate of Warranty has to be given to all consumers who buy these goods. This certificate must be a written document in Spanish, in which the warranty terms have to include the quality, suitability and after-sales service and:</p> <ul style="list-style-type: none"> <li>- The identification of the producer.</li> <li>- The specifications for its correct use.</li> <li>- The conditions of warranty validity and its time limit of enforcement;</li> <li>- The description of the pieces excluded of the warranty;</li> <li>- The conditions of attention of the warranty and of after-sales services.</li> </ul> <p>In order to comply what the law says the producers should arrange directly, or through service centers an inventory of the same goods sold to replace them and pieces to fix them.</p> |
| <b>Comment:</b> | <p>There are all kind of electrical appliances in the market with different prices and quality. With the enforcement of this regulation the Government tries to guarantee to the consumer a minimum standard of quality and the possibility to order to the manufacturer of the defective good to deliver other good or to fix the one that did not work.</p>   |

## COSTA RICA



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| <b>1. Case report:</b> | Ministerio Público v. Tiendas La Gloria  |
| <b>Topic:</b>          | Counterfeiting / Parallel imports  |
| <b>Where:</b>          | Fiscalía de San José   |
| <b>When:</b>           | August 2003  |
| <b>What happened:</b>  | <p>The police seized Adidas® and Tommy Hilfiger® branded merchandise in five stores and three warehouses of one the main Department Stores in the Country. The merchandise was seized on the basis of complaints made by the owner of these trademarks, alleging that the products are forged, and sold without a license or consent from the trademark owner.</p> <p>Representatives from the store affirm that the product is not counterfeit, and that it was legally purchased directly from the facilities that produce the products in the Far East. They further allege that the products were purchased and imported legally, and they constitute legally permitted parallel imports, against which the owner of the trademark has no legal action.</p>  |
| <b>Comment:</b>        | <p>Even though it is still early to predict the outcome of this process, the legal discussion has correctly been directed towards whether or not the product is authentic, and not towards the ownership of the trademark. If the discussion remains on this issue, it seems that all the parties involved agree that if the products were not forged, the parallel import would be legally permitted.</p> <p>This focal point of the discussion is the result of recent reforms on Costa Rican trademark Laws, that expressly allows parallel imports. In similar cases in the past (before the current law), part of the discussion was on whether or not a third party may legally sell a branded product without a license from its owner, even if the product was legally acquired in the market.</p> |

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| <b>2. Regulation:</b> | List of requisites for complaints  |
| <b>Topic:</b>         | Complaints against offensive advertising   |
| <b>Where:</b>         | Oficina de Control de Propaganda (Office for the control of advertisement)   |
| <b>When:</b>          | March 2003   |
| <b>What happened:</b> | <p>The "Oficina de Control de Propaganda" (Office for the Control of Advertisement) issued a series of requirements that must be followed by anyone wishing to file a complaint against any advertisement.</p> <p>Among others, the main change is that all complaints must be made in</p> |

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|                 | <p>writing, with sufficient information to identify the allegedly offensive ad, and the legal basis for the claim.</p> <p>This office is the governmental authority in charge of the application of Law 5811, which prohibits advertisement that may offend women, children or family values.</p>  |
| <b>Comment:</b> | <p>For many years, this office admitted claims without any formal basis. In some cases, verbal complaints made through the telephone were upheld without even identifying the complainant. Some ads were pulled out based on the sole of the point of view of the petitioner.</p> <p>This rule is a positive first step towards the reduction of subjectivity in this sensitive area of the law.</p> |

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| <b>3. Case report:</b> | Fenasco v. Mall San Pedro   |
| <b>Topic:</b>          | Promotions  |
| <b>Where:</b>          | Comisión Nacional del Consumidor  |
| <b>When:</b>           | September 2003  |
| <b>What happened:</b>  | <p>FENASCO, a non-for-profit association of consumers filed a claim against Mall San Pedro (a Shopping Center), for modifying the rules of a promotion.</p> <p>The promotion consisted of a car that would be raffled between shoppers of the Mall. The raffle was initially scheduled for August, and then suspended and re-programmed for the month of December.</p> <p>The Commission found that the organizer of the promotion infringed its terms and the Law, and ordered the payment of a penalty.</p>                 |
| <b>Comment:</b>        | <p>The legal principle involved in this case is very clear: Every promise made to the general public has the binding force of an agreement.</p> <p>This case reinforces the need for advertisers to carefully review the rules of a promotion and to stick to them when it is carried out.</p> <p>This need is increased due to the fact that promotions are not cleared by any authority beforehand, but the advertiser is responsible for any infringement of consumer rights occurring during any promotional program.</p> |

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| <b>4. Case report:</b> | Fonseca v. Comidas Centroamericanas S. A.  |
| <b>Topic:</b>          | Special offers   |
| <b>Where:</b>          | Comisión Nacional del Consumidor   |
| <b>When:</b>           | May 2003   |
| <b>What happened:</b>  | <p>Defendant (local franchisee of Pizza Hut® restaurants) made an offer to the general public in which certain products could be bought at special prizes.</p> <p>The claim originated when a Consumer tried to benefit from this special offer, but the special price was denied because that particular restaurant was not participating in the offer. However, the advertisement of the offer</p> |

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|                 | <p>did not inform that it was applicable only in certain restaurants.</p> <p>The Commission agreed with the applicant, considering that the advertisement was deceitful and misleading. The advertiser was ordered to correct the ads, and to pay a penalty.</p>   |
| <b>Comment:</b> | <p>This decision ratifies the obligation of every advertiser to sufficiently inform consumers of all elements necessary to make its decisions. Failure to inform consumers may lead to the existence of legal obligations in excess of the desire of the advertiser, along with the exposure to legal penalties.</p> |

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| <b>5. Case report:</b> | Almacenes Santa Marta et. al. v. ASODELGO  |
| <b>Topic:</b>          | Comparative advertising / substantiation of claims   |
| <b>Where:</b>          | Comisión Nacional del Consumidor   |
| <b>When:</b>           | March 2003   |
| <b>What happened:</b>  | <p>A group of retailers of electric appliances filed a complaint against an ad of the concessionaires of a duty free Commercial Zone in Golfito. This ad affirmed that this Commercial Zone was "Costa Rica's biggest Shopping Center", in which the prices were 50% less than in the rest of the Country.</p> <p>The advertisement was considered misleading, since it failed to inform that due to governmental regulations, all purchasers of the Commercial Zone were required to stay at least one night in a local hotel, which increased the costs of shopping.</p> <p>Additionally, it considered that the claim of having the prices 50% below the rest of the Country required substantiation, and in this case it was not provided.</p> |
| <b>Comment:</b>        | <p>This case involved two interesting developments in the criteria of the Commission. Firstly, it allowed a claim made by a group of competitors, rather than consumers (the commission had been reluctant to do that).</p> <p>Secondly, the Commission established that the burden of the proof of the accuracy of the advertising relies on the advertiser, who must substantiate all claims when a complaint is filed. Hence, advertiser must proof that the claim is accurate, instead of the petitioner having to proof that is a false claim.</p>  |

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| <b>6. Case report:</b> | HWWP v. Ministerio de Salud   |
| <b>Topic:</b>          | Substantiation of claims on health related products   |
| <b>Where:</b>          | Ministry of Health  |
| <b>When:</b>           | July 2003   |
| <b>What happened:</b>  | <p>Ministry of Health rejected an ad for a hair growth product. The ad was considered misleading in claiming that it was an appropriate cure for hair loss.</p> <p>The authorities questioned the phrase "More hair guaranteed", since the product was useful only against some of the causes for hair loss, while it did not treat other causes.</p> |

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|                 | Hence, the claim of "more hair guaranteed" could not be substantiated, and the ad was rejected.   |
| <b>Comment:</b> | <p>As the Constitutional Hall of the Supreme Court has established, the advertisement of any product that may affect the health is to be analyzed with stricter standards.</p> <p>Even if all advertisement must be truthful, substantiation is particularly relevant in this type of products.</p> |

## CZECH REPUBLIC




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| <b>1. Case report:</b> |  |
| <b>Topic:</b>          | Immoral claim can be used in hyperbolic sense  |
| <b>Who:</b>            | Self-regulation body, Prague trade commission  |
| <b>When:</b>           | Autumn 2003  |
| <b>Where:</b>          | Czech Republic   |
| <b>What happened:</b>  | <p>The local condom producer Pepino advertised his products with claim "ANYTIME, ANYWHERE, WITH ANYBODY". Self regulation body considered this ad to be so much hyperbolic, that it has no immoral impact in reality. Nevertheless, the body added, that their task is to find unethical ads, not just stupid ads ☺.</p>  |

## DENMARK



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| <b>1. Case Report:</b> | Different Cases   |
| <b>Topic:</b>          | Violation of the Marketing Practices Act (MPA)  |
| <b>Where:</b>          | The Maritime and Commercial Court   |
| <b>When:</b>           | February – October 2003   |
| <b>What happened:</b>  | <p><u>19 February 2003:</u><br/>Newsbooster offered a web news service, which would non-stop collect information from more than 4000 news media on the internet. Against payment of a fee, users would access a search facility. Entering a search word would result in a personal news summary listing headlines containing the search word. This service of listing headlines from and creating deep links to other news media was held to be a violation of MPA § 1.</p> <p><b>This decision is a landmark decision on the use of deep links. The Newsbooster case is in fact the first real case in Denmark interpreting the legal use of deep links to material made legally available to the public.</b></p> <p><u>11 March 2003:</u><br/>Was the defendant's sale of skirts and women's trousers a violation of the plaintiff's rights pursuant to the MPA. The Court found that the plaintiff's designs were sufficiently distinctive to enjoy protection under the MPA. As the defendant's articles only differed insignificantly from the plaintiff's designs, the Court held that the sale constituted a breach of the MPA. The defendant was prohibited from selling, manufacturing, marketing, importing and exporting the articles in question. Destruction of the articles and DKK 500,000 in damages.</p> <p><b>A rather large sum for a Danish court on the subject of violation of the MPA.</b></p> <p><u>1 May 2003:</u><br/>On approximately 150 occasions, the defendant contacted consumers, businesses and others by telefax with a view to selling goods and services. None of the contacted people had consented in advance to being contacted. The Court considered this a breach of the MPA § 6. Damages of DKK 15,000, taking into consideration of the defendant's financial situation.</p> <p><b>This is the first decision relating to breach of § 6 a (which prohibits spamming), but the size of damages were considerably below the expected. Legislation has been changed after this decision.</b></p> |

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| <b>2. Case Report:</b> | The Consumer Ombudsman vs. Jensen Finans K/S   |
| <b>Topic:</b>          | Was an agreement to lease covered by the Consumer Credit Act (CCA)   |
| <b>Where:</b>          | Østre Landsret (The Eastern High Court)  |
| <b>When:</b>           | 3 September 2003   |
| <b>What happened:</b>  | Jensen Kredit K/S rented out music systems for a period of 3 years, upon which the customer could repurchase the system for DKK 1.- The Eastern High Court held that - given that the objective of the agreement was for the hirer to become owner of the product after 3 years - this was a credit agreement rather than a lease, and should therefore be subject to the strict duty of disclosure. One of the consequences being that Jensen Kredit K/S was not allowed to claim higher interest than the pre-judgment interest. |
| <b>Comments:</b>       | This decision harmonizes with the practice developed in this field and the practice and attitude of the Consumer Ombudsmand.   |

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| <b>3. Topic:</b>      | Use of consumer guarantees in advertising and contract terms  |
| <b>Who:</b>           | The Danish Ombudsmand   |
| <b>When:</b>          | June 2003   |
| <b>What happened:</b> | The Guidelines replaces and develops the previous guidelines of 1987 on the same subject. The objective of the Guidelines is to ensure that the MPA § 4 is observed. § 4 states that a guarantee is only legal if it improves considerably the consumer's legal position in comparison with the position granted by the legislation, in other words if the guarantee is real. A violation of this must be considered to be a breach of the general clause in § 1 and § 2 on misleading advertising. |
| <b>Comments:</b>      | The Guidelines only codifies current practice and does not change recent practice and attitude of the Consumer Ombudsman.   |

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| <b>4. Legislation:</b> | Changes to the MPA § 6a – Implementation of set of directives "99-review"   |
| <b>Who:</b>            | The Consumer Ombudsmand   |
| <b>When:</b>           | July 2003   |
| <b>What happened:</b>  | As a consequence of a EU directive, Denmark has been forced to alter the MPA. Thus it will in future be legal in certain cases to distribute advertising material to the consumers by means of electronic mail. The distribution of electronic mail will only be legal under certain circumstances, e.g. mail shall only be forwarded to addresses furnished voluntarily by the consumer, and furthermore, it must be easy and free of charge for the consumer to unsubscribe. Previously, the consumer was actively to accept receiving advertising material – the change means that the consumer is now to actively reject receiving such material. Violation of this directive will be punished with a fine. |
| <b>Comment:</b>        | This is an obvious change in relation to previous practice of the Consumer Ombudsman as well as of the legislation relating to electronic mail to consumers. The Consumer Ombudsman, who has been forced to change his practice on this field, finds that the legislation prejudices the consumer's rights.   |

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| <b>5. Diverse:</b> |                                     |
| <b>Topic:</b>      | Different cases relating to the MPA |

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| <b>Who:</b>           | The Consumer Ombudsmand  |
| <b>When:</b>          | 2003   |
| <b>What happened:</b> | <p>The Consumer Ombudsman has been at the tele companies, who have forwarded overcharged SMS services without giving the recipient a possibility to decline the reception of further SMS'.</p> <p>Furthermore, the Consumer Ombudsman has been at the oil companies because they have marketed porno magazines and other material at eye-level, which is contrary to the given guidelines directions.</p> <p>The Consumer Ombudsman has contacted youth traveling agencies as a result of their sale of vacations consisting only of drinking orgies. The Ombudsman requested the traveling agencies to observe their social responsibility.</p> |
| <b>Comments:</b>      | The Consumer Ombudsman strictly observes that current marketing legislation is obeyed. He usually takes the matters up for consideration after they have been brought forward by the media, however hemay also enter matters on his own initiative.  |

## FRANCE



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| <b>1. Legislation:</b> |  |
| <b>Topic:</b>          | TV advertising for specific economic sectors (continued)   |
| <b>Who:</b>            | French Government  |
| <b>When:</b>           | October 2003   |
| <b>Where:</b>          | E.U., France   |
| <b>What happened:</b>  | <p>After much debate on the opening of certain economic sectors to advertising on television, a draft decree has been published. Today, the draft decree sets forth the following amendments to French regulations :</p> <ul style="list-style-type: none"><li>- TV advertising should be allowed for the press sector from January 1, 2004, on all TV channels;</li><li>- TV advertising should be allowed for the book publishing sector and the distribution sector from January 1, 2004, on cable and satellite channels only;</li><li>- TV advertising should be allowed for the distribution sector from January 1, 2007 on all TV channels.</li></ul> |
| <b>Comment:</b>        | The draft decree should be presented to the European Commission on October 8, 2003 in order for France not to face proceedings for non-compliance with E.U. requirements. This draft decree is criticized by the French association of advertising agencies (AACC) in particular due to the fact that the consultations which took place during the process have not been taken into account   |

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| <b>2. Legislation:</b> |  |
| <b>Topic:</b>          | Sanctions for unsolicited commercial communications by fax and telephone   |
| <b>Who:</b>            | French government  |
| <b>When:</b>           | Decree n° 2003-752 dated August 1, 2003  |
| <b>Where:</b>          | France   |
| <b>What happened:</b>  | <p>As indicated in our previous reports, it is now prohibited in France to send unsolicited commercial faxes to individuals or companies who have not signed in a special register, indicating their acceptance.</p> <p>The decree of August 1, 2003 provides that a fine of 750 Euros per unsolicited fax is applicable in case of non-compliance. This fine applies when the unsolicited communication is sent to individuals. The decree does not deal with companies which are subject to such unsolicited</p> |

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|                 | communications. However, principles of tort liability remain applicable in such instance.   |
| <b>Comment:</b> | The CNIL ( <i>Commission Nationale de l'Informatique et des Libertés</i> ) has declared that it is satisfied with the adopted decree.<br><br>This sanction also applies to illicit commercial telephone calls made by automated machines. |

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| <b>3. Legislation:</b> |  |
| <b>Topic:</b>          | Corporate patronage by producers of alcoholic beverage   |
| <b>Who:</b>            | French parliament  |
| <b>When:</b>           | Law 2003-709 dated August 1, 2003  |
| <b>Where:</b>          | France   |
| <b>What happened:</b>  | <p>The "Loi Evin" of 1991 on the advertising for alcoholic beverages provides that a decree is to be enacted to deal with corporate patronage by producers of alcoholic beverage.</p> <p>The decree that was subsequently enacted was cancelled by the <i>Conseil d'Etat</i>, and therefore the matter was not dealt with under French regulations. As a consequence, there was no more corporate patronage by producers of alcoholic beverages.</p> <p>The law of August 1, 2003 replaces the decree and aims at developing corporate patronage by producers of alcoholic beverages. The law provides that corporate patronage by producers of alcoholic beverage is allowed and that such companies may advertise their participation through a written mention only.</p> <p>The issue is to determine the scope of the notion of "<i>written mention</i>" : does it include the company's logo ? does it include a catch phrase ? On what documents may the company name appear ?</p> |
| <b>Comment:</b>        | <p>There is a part of uncertainty in the interpretation of the new law. However, it is likely that the courts will take a restrictive approach, since French courts constantly seek to fight indirect and illicit advertising for alcoholic beverages.</p> <p>The courts are therefore likely to try and ensure that this new law does not provide a means of avoiding the restrictive regulations on the advertising for alcoholic beverages.</p>   |

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| <b>4. Legislation:</b> |   |
| <b>Topic:</b>          | Towards the end of self-regulation in the field of advertising ?  |
| <b>Who:</b>            | French members of Parliament  |
| <b>When:</b>           | February 2003   |
| <b>Where:</b>          | France  |
| <b>What happened:</b>  | A number of members of the Parliament in France recently decided to react against the abusive use of indecent advertising and issued a draft law. |

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|                 | <p>They consider that, too often, ads showing women are shocking (especially for children who are likely to see the poster ads) and that there is often no link between the picture of a woman and the product advertised for. They also consider that this trend gives a negative image of France abroad.</p> <p>The draft law provides for a very general prohibition, to which criminal sanctions are attached :</p> <p><i>"Any offense against the dignity of the human being through degrading or humiliating advertising campaigns may be subject to a one-year imprisonment and a fine of EUR 45,000."</i></p> |
| <b>Comment:</b> | <p>The problem is to determine the scope of the offense, especially since criminal sanctions are applicable.</p> <p>The professionals, who prefer to remain under self-regulation principles, are opposing this draft law, which although reflecting a current trend is unlikely to be adopted.</p>   |

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| <b>5. Case Report:</b> |  |
| <b>Topic:</b>          | Premium sales  |
| <b>Who:</b>            | <i>Sté Marie Brizard Berger diffusion c/ Sté Teisseire France</i>  |
| <b>When:</b>           | <i>Cour de cassation, Chambre commerciale, March 11, 2003</i>  |
| <b>Where:</b>          | France   |
| <b>What happened:</b>  | <p>French law limits the value of premiums offered along with a sale. As a general principle, the value of premiums may not be higher than 7% of the value of the main product. This court decision provides interesting but very restrictive indications on the method of calculation of the premium value.</p> <p>A company selling fruit syrup had added famous cartoon figures on top of its bottles. The <i>Cour de cassation</i> considered that the value of the premium included every cost necessary for the setting up of such premium, including special packaging and license fees for the use of the trademark.</p> |
| <b>Comment:</b>        | <p>The main consequence of this decision is that the item eventually received by the consumers as a premium is of a very low value. The interest of the promotion is therefore very low as well.</p> <p>Non-compliance with regulations on premium sales is subject to criminal sanctions (a fine of up to 1,500 Euros per infraction). This matter was dealt with by the commercial section of the court rather than the criminal section, since this case was based on an action undertaken by a competitor on the ground of unfair competition.</p>   |

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| <b>6. Case Report:</b> |  |
| <b>Topic:</b>          | Sales outside official sales period  |
| <b>Who:</b>            | <i>Sté Weill Boutique</i>  |
| <b>When:</b>           | <i>Cour de cassation, Chambre commerciale, February 19, 2003</i>   |
| <b>Where:</b>          | France   |
| <b>What happened:</b>  | In our country report of September 2002, we discussed a decision handed down by the Paris Court of appeal, which interpreted strictly the criminal |

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|  | <p>law on official sales, by considering that a promotional operation could only be deemed a sales operation if it was <u>advertised</u> as aiming at the accelerated sale of stocks.</p> <p>We then underlined that the French administration takes a stricter approach, since it considers that there may be an illicit sale if the promotion <u>aims at</u> the accelerated sale of the stocks, even if this purpose is not advertised for.</p> <p>In the decision of February 19, 2003, the court took the same approach as the administration, considering that the promotional operation was an illicit sales operation even though the advertising of the accelerated sale of the stocks was not explicit.</p> <p>In this instance, the company had chosen to send invitations for private sales to a selected number of customers, for a period immediately preceding that of the official sales. The sending out of private invitations was deemed to constitute an implicit advertising of the promotion and the promotion was deemed illicit sales.</p> |
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| <b>7. Case Report:</b> |   |
| <b>Topic:</b>          | Indirect advertising for tobacco  |
| <b>Who:</b>            | <i>Comité national contre le tabagisme</i>  |
| <b>When:</b>           | <i>Cour de cassation, Chambre criminelle, March 18, 2003</i>  |
| <b>Where:</b>          | France  |
| <b>What happened:</b>  | <p>A sports car magazine published photos of vehicles on which a sponsor's cigarette trademark could be seen.</p> <p>While the Court of appeal considered that the purpose of the magazine was to inform the readers rather than to promote tobacco trademarks and that there was no prohibited indirect advertising for tobacco, the <i>Cour de cassation</i> overruled this decision by considering that this was indirect advertising for tobacco products, irrespective of the purpose of the reference to tobacco.</p> |
| <b>Comment:</b>        | This is a very broad definition of indirect advertising for tobacco products, which should lead publishers to great care.   |

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| <b>8. Case Report:</b> |   |
| <b>Topic:</b>          | Political spamming  |
| <b>Who:</b>            | La Droite Libre   |
| <b>When:</b>           | <i>Tribunal de Grande Instance of Paris, May 26, 2003</i>   |
| <b>Where:</b>          | France  |
| <b>What happened:</b>  | <p>In the context of the large strikes and demonstrations which took place in France last spring against the reform of the pension system, a political group suggested that anyone wishing to express his/her opinion against the strikes send e-mails to the main trade unions and to their leaders in order to overflow their e-mail systems.</p> <p>In a decision rendered in summary proceedings, the tribunal considered</p> |

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|                 | that the intent was malicious and went against the normal exercise of the freedom of speech. The party which organized the operation had to pay 400 to 1,000 Euro in damages to each of the trade unions concerned. The judge also requested that the party stop inviting its members to send e-mails massively. |
| <b>Comment:</b> | This case was judged in summary proceedings in order to stop immediate trouble. To our knowledge, there will not be any decision on the merits which would allow to have more details on the grounds of action other than that of emergency and immediate trouble.   |

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| <b>9. Case Report:</b> |   |
| <b>Topic:</b>          | Trademarks and sub-levels of domain names   |
| <b>Who:</b>            | Studyrama c/Mairie de Paris   |
| <b>When:</b>           | <i>Tribunal de Grande Instance</i> of Paris February 28, 2003   |
| <b>Where:</b>          | France  |
| <b>What happened:</b>  | The city of Paris owns the website <a href="http://www.paris.fr">www.paris.fr</a> , to which they added a section for the young citizens of Paris, accessible at <a href="http://www.jeunes.paris.fr">www.jeunes.paris.fr</a> . The tribunal considered that this sub-level domain name constituted a trademark infringement against the trademark of a magazine named "Jeunes à Paris".  |
| <b>Comment:</b>        | <p>The tribunal prohibited the city of Paris from using the sub-level domain name. However, the tribunal did not order the transfer of the name to Studyrama, the owner of the magazine Jeunes à Paris.</p> <p>This decision is justified by practical reasons, since ordering the transfer of the domain name <a href="http://www.jeunes.paris.fr">www.jeunes.paris.fr</a> to the magazine owner would have deprived the city of Paris from the domain name <a href="http://www.paris.fr">www.paris.fr</a>.</p> <p>This is the first decision handed down in France on a question involving a sub-level domain name.</p> |

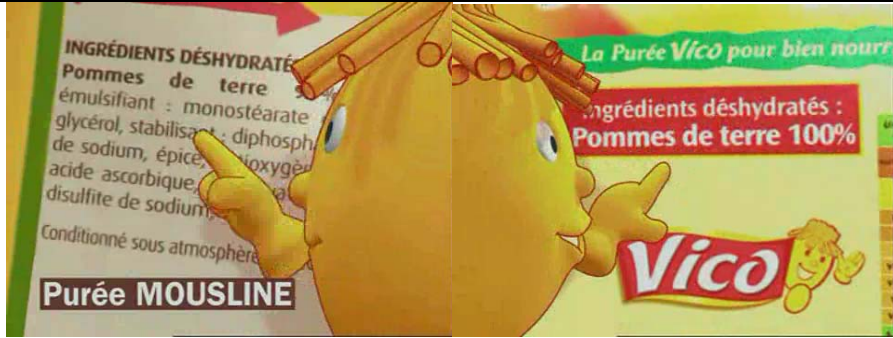
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| <b>10. Case Report:</b> |   |
| <b>Topic:</b>           | The legality of systems of protection against the copying of music CDs  |
| <b>Who:</b>             | EMI Music France vs. consumer associations  |
| <b>When:</b>            | <i>Tribunal de Grande Instance de Nanterre</i> June 24, 2003 and September 2, 2003  |
| <b>Where:</b>           | France  |
| <b>What happened:</b>   | <p>EMI Music France placed a system of protection against the copying of music on its CDs.</p> <p>Consumers realized that the protected CDs could not be played on a number of CD-players, in particular on car systems.</p> <p>In the first instance, the tribunal considered that the selling of such CDs, without warning the consumers that they might be impossible to use on certain players, constituted a deceit of the consumers. The tribunal thus ordered that EMI Music France place a specific warning on its CDs.</p> <p>In the second instance, the tribunal considered that the fact that the CDs</p> |

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|  | could not be played on one type of car system constituted a hidden defect. The tribunal ordered that EMI reimburse the purchaser of the CD of the price of the CD. |
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| <b>11. Self-regulation</b> |   |
| <b>Topic:</b>              | Sexist advertising campaign   |
| <b>Who:</b>                | La Meute (an international feminist network acting against sexist advertisements, <a href="http://lameute.org.free.fr/index/">http://lameute.org.free.fr/index/</a> )<br>Renault Clio   |
| <b>When:</b>               | Spring 2003   |
| <b>Where:</b>              | France  |
| <b>What happened:</b>      | <p>A television advertising campaign conducted by Renault for its Clio faced criticisms by La Meute. The ad presented a man winning the lottery and comparing the key elements of his life "before and after" winning the lottery, the catch being that he kept his Clio in both cases. The ad showed a fat ugly wife "before" and a sexy woman "after" winning the lottery. The ad was therefore deemed sexist.</p> <p>Renault reacted humorously against this criticism by showing a second campaign reversing the original idea : this time, a woman wins the lottery, keeps her Clio, and takes a handsome husband instead of her ugly one.</p> |

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| <b>12. Self-regulation</b> |  |
| <b>Topic:</b>              | Sponsorship of sports events   |
| <b>Who:</b>                | Sporsora   |
| <b>When:</b>               | June 2003  |
| <b>Where:</b>              | France   |
| <b>What happened:</b>      | <p>Sporsora, an association of the main actors of sports sponsors, has sent to the minister of sports a draft charter for sponsors' ethics.</p> <p>Through this document, the sponsors who will sign the charter undertake to comply with principles regarding violence, cheating and doping. Non-compliance with this charter could lead to the breach of the sponsorship agreement with an athlete, an organization, a federation or a company in charge with the organization of the event.</p> |
| <b>Comment:</b>            | Sponsorship of sports events in France represent an estimated yearly budget of 1.5 billion Euro.   |

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| <b>13. Self-regulation</b> |  |
| <b>Topic:</b>              | Development of comparative advertising in France   |
| <b>Who:</b>                | - Vico<br>- Les Inrockuptibles   |
| <b>When:</b>               | May 2003 and September 2003  |
| <b>Where:</b>              | France   |
| <b>What happened:</b>      | Comparative advertising is still not used very frequently in France. It has been used in fields where the accuracy of the comparison is easy to evidence, such as for instance the audience of radio stations or the rates charged by telecommunication companies. |

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|                        | <p>A more daring campaign, however, was recently conducted on TV and on the Internet by the second largest manufacturer of dried mashed potatoes (Vico), against the largest manufacturer (Mousseline).</p> <p>Furthermore, another campaign was recently launched in magazines by "Les Inrockuptibles", a cultural magazine, against another cultural magazine (Telerama).</p>   |
| <p><b>Comment:</b></p> | <p>The Vico ad seems to be compliant with the applicable regulations (which are the implementation of the EU requirements on comparative advertising), and thus the ad did not lead to any legal action.</p> <p>In particular, the ad quotes the trademark "Mousseline" using a very neutral typography, so as to avoid claims according to which Vico would try to benefit from Mousseline's notoriety. The ad also compares objective elements of the products : the new Vico dried mashed potatoes are 100% potatoes, whereas Mousseline's have additional ingredients. (See an extract of the ad below).</p> <p>More recently, the weekly cultural magazine "Les Inrockuptibles" launched an ad against another weekly cultural magazine, "Telerama". The ad did not really constitute comparative advertising, since it did not compare objective elements of the products. However, the name "Telerama" appeared dozens of times in the ad and Telerama requested that this ad be stopped because Telerama believed the ad was parasitical. "Les Inrockuptibles" chose to remove the ad in order to avoid further legal action. (See the ad below).</p> |
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## GERMANY



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| <b>1.</b>         | Jurisdiction   |
| <b>Topic:</b>     | Transparency in „terms& conditions“ („Allgemeine Geschäftsbedingungen „) have to be clear, easily understandable, and easily readable, particularly on the internet. Otherwise the terms & conditions are not applicable.<br><br>Author's Remark:<br>Because of the comment made about transparency particularly related to the rules for sweepstakes, games for advertising purposes, etc. on the internet, German participants should follow this guideline. |
| <b>Who:</b>       | LG Köln  |
| <b>When:</b>      | vom 29.1.2003  |
| <b>Where:</b>     | Az. 26 0 33/02   |
| <b>Published:</b> | Source: Computer und Recht 2003 S. 697.  |

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| <b>2.</b>         | Bundesgerichtshof (BGH)  |
| <b>Topic:</b>     | <b>“Formats” of TV Programs are not protected by copyright law</b><br><br>The “frame” of a TV program is not protected by copyright law.<br><br>A French broadcaster sued a German broadcaster because there had been a French program aired since 1977 in which kids between 6 – 10, presented themselves singing a song, accompanied by a host, their parents, grandparents etc. and a “star” guest. The German broadcaster started a program with the same system under the name “Kinderquatsch mit Michael”.<br><br>The German Supreme Court held that the German broadcaster did not infringe the French broadcaster's copyright since a frame like this is not protected by copyright. |
| <b>When:</b>      | vom 26. Juni 2003 ;  |
| <b>Where:</b>     | Az. I ZR 176/01  |
| <b>Published:</b> | (Wettbewerb in Recht und Praxis) WRP 2003, S. 1135   |

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| <b>3.</b>     | Legislation  |
| <b>Topic:</b> | Copyright law: The EU Directive 2001/21/EG was implemented into German law. The law deals with a new right of use ( „öffentliche Zugänglichmachung“); private digital copies, & technical protection against misuse of copyrights. |

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| <b>When:</b>      | 13.09.2003    |
| <b>Published:</b> | NJW VIII/2003 |

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| <b>4</b>          | German unfair competition law and EU Directive  |
| <b>Topic:</b>     | The German government presented in the Spring a draft of a new unfair competition law („Gesetz gegen den unlauteren Wettbewerb“). It will review the draft and involve the draft of the EU Commission's directive against unfair practices. |
| <b>Who:</b>       | German Government   |
| <b>When:</b>      | Autumn 2003   |
| <b>Where:</b>     | Berlin  |
| <b>Published:</b> | KOM (2003) 356 endgültig ; 2003/0134 (COD)  |

## GREECE



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| <b>1. Self - Regulation Rules</b> |   |
| <b>Topic:</b>                     | New Self-Regulation Code of Conduct for Advertising (finally implemented after 3 years of negotiations)   |
| <b>Who:</b>                       | Broadcasting – Advertising Companies  |
| <b>When:</b>                      | January 2003  |
| <b>Where:</b>                     | Greece  |
| <b>What happened:</b>             | <p>Following the entry into force of Law No. 2863/2000 in the year 2000, both the Hellenic Association of Advertising Companies (HAAC) and the Hellenic Advertiser Union (HAU) undertook to establish a civil law corporation, which will be responsible for the upholding of a uniform and unified Code of Conduct in the advertising field. Both unions have proceeded to the adoption of the New Code of Advertising Conduct. The aforementioned Code of Conduct has been officially endorsed by 12 TV broadcasting stations and 34 radio stations so far, and is expected to be endorsed by the vast majority of media nationwide, the latest until the end of 2003.</p> <p>The newly enforced system provides for a swift, flexible, economic and effective solution in the hands of the consumers for the successful ethical control of advertising. This system is of course modeled after its successful "counterparts" in other EU-States, thereby ensuring transparency, effectiveness and adequate consumer protection. The system operates via two different-level Committees:</p> <p><i>a. First Instance Committee</i><br/>It accepts petitions and complaints by consumers, organizations, institutions and advertising companies. It comprises of 2 members of the HAAC and 2 members of the HAU. Its powers allow it to demand amendment of a certain advertisement or even its withdrawal.</p> <p><i>b. Second Instance Committee</i><br/>It is chaired by a Ministry of Commerce representative, whereas it is comprised of both HAAC and HAU members, as well as media and consumers' organizations' representatives. Appeals to decisions of the First Instance Committee are the main work frame. Decisions by the Second Instance Committee are legally binding and obligatory; all Greek media have vowed to contribute to that extent.</p> |

## 2. Athens 2004 Advertising-Related Legislation

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| <b>Topic:</b>         | Removal of outdoor advertising signs within the "historical" centre of Athens  |
| <b>Who:</b>           | Ministry of Culture, Organizing Committee of Athens 2004 Olympic Games   |
| <b>When:</b>          | August 2003  |
| <b>Where:</b>         | Athens, Greece   |
| <b>What happened:</b> | <p>Following a somehow "unclear" and "shadowy" previous status quo regulated by fragmented laws and ministerial decisions, the Ministry of Culture, along with the Organizing Committee of Athens 2004 Olympic Games and the "Public Company for Unification of Athens Archaeological Sites" decided to amend all previous legal provisions concerning the regulation of outdoor advertising within a certain perimeter of Athens' commercial city centre and other parts of the city, mainly those labeled as "Olympic Games Sites". By virtue of Laws 2946/2001, 2947/2001 and 3053/2003 outdoor advertising in the forms of neon ads, banners and signs was literally banned from the facades and terraces of all buildings, both public and private ones. Main justification behind the laws reasoning was that in previous years, excessive outdoor advertising had caused alterations in the architectural and traditional appearance of the city's commercial centre. The traditional architectural style of the buildings needed to be protected. In view of that, outdoor advertising was allowed only at certain parts, such as bus stops, specially designed advertising spaces and behind shops' windows.</p> <p>The laws provided for high fines for perpetrators, removal at the expense of the violator, and in cases of repeated violations the advertising license of the specific company can also be revoked (temporarily or permanently). After the implementation of the law, there have been massive actions at the administrative courts regarding the provisions of the specific law, with main legal arguments that the specific prohibiting provisions directly contradicted basic individual rights such as economic freedom, as expressed in Art. 17 of the Greek Constitution, or that they constituted "de facto expropriations" of private property. Nearly each and everyone lawsuit was rejected by the administrative courts, in view of public interest (Olympic Games) and protection of the cultural and social environment.</p> <p>As a result, within the designated areas of the Athens city centre, there is no single outdoor advertising left on building facades or terraces, something which has dubbed as a "city transformation to the better" by public opinion and Greek media.</p> |

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| <b>3. Legislation</b> |  |
| <b>Topic:</b>         | E-commerce Directive close to be implemented (spamming)  |
| <b>Who:</b>           | Greek Parliament   |
| <b>When:</b>          | September 2003   |
| <b>Where:</b>         | Athens, Greece   |
| <b>What happened:</b> | <p>The Greek Parliament has come close to agreeing to a final text of what would be a Presidential Decree, by virtue of which EU Directive Nr. 2000/31 will be transcribed in the Greek legal system.</p> <p>Main points of the new system, do not defer much of those of other EU-States:</p> |

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|  | <p><i>a. Commercial on-line communication (B2B, B2C):</i></p> <ul style="list-style-type: none"><li>- all commercial communication must be clearly presented as such and the sender's identity should be immediately recognizable.</li><li>- provisions concerning data protection apply to every kind of commercial communications and distance contracts (not only unsolicited ones).</li></ul> <p>Consumers will be preliminary informed as to the purposes and the modalities of their personal data processing and their prior consent to such treatment is required. All communications must render the consumer the right to opt-out (removed from mailing list) from receiving future communication of such kind.</p> <p><i>b. Information to be provided:</i></p> <ul style="list-style-type: none"><li>- general information concerning the identity of the person on behalf of whom commercial communication is being conducted.</li><li>- contractual information (prior to the order sending) such as: procedural steps for conclusion of contract, technical means for identifying and correcting input error prior to placing of order and legal disclaimer and dispute settlement provisions.</li></ul> <p><i>c. Providers' liability:</i></p> <p>Generally they are not required to monitor all transmitted or stored information. Only if providers are aware of illegal activities must they inform competent public authorities, providing them with all necessary data. However, there are –up to the present- no clear intentions of what direction the fine and penalty system of the Decree should move.</p> |
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## HUNGARY



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| <b>1. Legislation</b> |   |
| <b>Topic:</b>         | Modification of Personal Data Protection Act  |
| <b>Who:</b>           | Hungarian Parliament  |
| <b>When:</b>          | 7 <sup>th</sup> July 2003   |
| <b>Where:</b>         | Budapest  |
| <b>What happened:</b> | <p>In the interest of fully implementing EU directive 95/46/EC the Hungarian Parliament has introduced several modifications to Act LXIII of 1992 on Personal Data Protection.</p> <p>The new regulations specify the personal and territorial scope of application of the Hungarian Act (which was not previously determined). The Act applies to every data controlling and data processing performed in the territory of Hungary, without consideration of the citizenship, address or registered seat of the performer. Complying with EU directives, the data processing by a natural person for exclusively personal goals has been excluded from the scope of application.</p> <p>Terminology has been adapted according to the definitions used by the EU directive. The meaning of "identified or identifiable natural person", "data subject's consent", "third country", "data subject's objection" and "filing system" have been introduced according to the wording of the directive.</p> <p>The new act grants to every data subject the right to object the processing of personal data relating to him if the data processing is exclusively necessary for the enforcement of the rights or legitimate interests of the data controller. A data subject may also object to the use or transfer of personal data for marketing purposes, and for public opinion or scientific research.</p> <p>Regarding Criminal Personal Data, the Act prescribes a stronger protection than the one provided by the directive: criminal personal data may only be processed by the State and local Authorities.</p> <p>New legitimate data processing cases are introduced:</p> <ul style="list-style-type: none"><li>- whenever processing is necessary for the performance of a private contract in which the data subject is a party,</li><li>- for the purposes of public interest, the exercise of a public authority and of a legitimate interest.</li></ul> <p>According to Article 17 of the directive, processing contracts shall be in writing.</p> |

In the case the data controller is not established in the territory of the EU and makes use of persons or equipment situated in Hungary for the purposes of personal data processing, he must nominate a representative in Hungary (unless the equipment is exclusively used for purposes of data transfer within the EU).

From 1<sup>st</sup> May 2004, all differences between the flow of personal data within Hungary and flows to EU countries are abolished.

Regarding data transfer abroad to third countries, from the date of accession to the EU (1<sup>st</sup> May 2004) it will only be allowed to countries which provide adequate protection according to the opinion of the competent EU authority.

The Hungarian Data Protection Act was originally passed in 1992. Since then new technologies have been developed, so it was necessary to take into account such developments.

A new element is the regulation of automated individual decisions. In this case, the express consent of the data subject is required and, at his request, information regarding the mathematical system used should be provided.

The Act introduces the obligation for data controllers to implement appropriate security measures.

The powers of the Data Protection Parliamentary Commissioner (also known as Data Protection Ombudsman) are widely extended in order to comply with the directive, giving him an authority which is unknown to Hungarian parliamentary commissioner institutions and to ombudsman institutions. The Data Protection Commissioner may:

- order the blocking, erasure or destruction of data illegally processed,
- ban the illegal data controlling or processing,
- suspend data transfer abroad,

The Commissioner may make accessible to the public opinion cases of illegal data controlling or illegal data processing.

The Commissioner ensures the implementation of data protection regulations and contributes to its application (this means that the commissioner may, for example, determine the security measures that should be adopted by data processors).

Another new element introduced by the Act is the prior checking by the Commissioner of data processing activities. Such prior checking may be carried out before the registration of a data processing activity or in the case big data processors (public authorities, banks, insurance companies, private pension managing companies, public utility companies, telecommunication companies, etc.) plan to introduce new data protection technology or to process new databases.

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| <b>2. Self - Regulation</b> |   |
| <b>Case Report:</b>         |   |
| <b>Topic:</b>               | Negative models of conduct  |
| <b>Who:</b>                 | Ethical Committee of the Hungarian Advertising Association  |
| <b>When:</b>                | 2003  |
| <b>Where:</b>               | Budapest  |
| <b>Advertisement:</b>       | Chips advertising   |
| <b>What happened:</b>       | <p>Several complaints were filed before the Committee regarding a TV advertisement for chips</p> <p>The TV ad showed an elderly couple fighting each other (grandma trips up grandpa, etc.) in order to get a package of chips.</p> <p>The Committee decided that the advertisement infringes advertising ethical prescriptions, with special reference to Article 4 of the Hungarian Code of Advertising Ethics, according to which "an advertisement may not include such elements and may not create a general impact that would injure the generally accepted moral and ethical norms of society" and that an advertisement may not include elements and may not create a general effect that encourages, supports or justifies aggressive, violent or unlawful behavior.</p> <p>The humor present in the advertising can not be accepted as an excuse for a chain of violent and aggressive actions, morally unacceptable.</p> <p>The target audience was mixed, but since it was also targeted to children (who may watch the advertisement) it also infringes Article 11 of the Code of Ethic Advertising (an advertising aimed at children may not show poor role models and negative moral values) since it is a poor role model and may encourage the imitation of a bad example.</p> <p>Therefore the Commission suggested the discontinuation of the advertising.</p> |

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| <b>3. Self-Regulation:</b> |   |
| <b>Topic:</b>              | Sexism  |
| <b>Who:</b>                | Ethical Committee of the Hungarian Advertising Association  |
| <b>When:</b>               | 2003  |
| <b>Where:</b>              | Budapest  |
| <b>Advertisement:</b>      | Citroën "Do you want to belong to the elite"  |
| <b>What happened:</b>      | <p>On 31<sup>st</sup> March 2003 Citroen's Xsara advertising was published in a newspaper.</p> <p>The picture showed in a humiliating situation the gentle sex, featuring a beautiful young girl dragging herself along the leg of the higher rank male, under the following text: "Do you want to belong to the elite?".</p> |

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|  | <p>The Committee considered that the picture suggests that the elite is represented by the man, and not by the possession of the car. The advertising would have been balanced if another ad, where the role of the man and the woman were the opposite/inverted, so that the car would be the common line/feature.</p> <p>The advertising, in the way in which it was published, infringes Article 4 of the Code of Advertising Ethics: an advertisement may not include such elements and may not create a general impact that would injure the generally accepted moral and ethical norms of society and more specifically that "an advertisement may not distinguish sexes disadvantageously and may not support such views"</p> <p>The Committee suggested the remaking/adaptation of the advertising taking into account the above mentioned considerations.</p> |
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| <b>4. Self-Regulation:</b> |   |
| <b>Topic:</b>              | Religious symbols   |
| <b>Who:</b>                | Ethical Committee of the Hungarian Advertising Association  |
| <b>When:</b>               | 2003  |
| <b>Where:</b>              | Budapest  |
| <b>Advertisement:</b>      | "Jesus in 2000 an after"  |
| <b>What happened:</b>      | <p>A complaint was filed against a free card and an outdoor advertisement of an art gallery. The advertising featured one of the photographs of an exhibition of two art photographers.</p> <p>In the picture a young girl was seen wearing a nun cap, one of the breasts uncovered, from which blood poured. Over the picture appeared the inscription "I.N.R.I."</p> <p>As advertising material, the breast-bleeding nun with the I.N.R.I. inscription infringes Article 4 the Code of Advertising Ethics: an advertising may not insult any views on the world and, within that, any religious belief. Religious symbols and motifs may only be used in advertising within the limits of good taste and in such a way that their use matches the subject</p> |

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| <b>5. Case Report:</b> |   |
| <b>Topic:</b>          | Deception to consumers  |
| <b>Who:</b>            | Competition Commission  |
| <b>When:</b>           | 22 May 2003   |
| <b>Where:</b>          | Budapest  |
| <b>Advertisement:</b>  | Procter & Gamble - Head & Shoulders   |
| <b>What happened:</b>  | <p>In a TV advertisement and in Procter &amp; Gamble's web site the following statements were made regarding Head &amp; Shoulders dandruff shampoo: "It not only eliminates 100 % of the visible dandruff, but in the case of continuous use, it creates a protective layer, helping prevent the reappearance of dandruff. That's why there is no other dandruff shampoo more effective than Head &amp; Shoulders! Ultra thin ZPT, the most</p> |

popular formula against dandruff".

The product contains as much ZPT as other dandruff shampoos, but "it is not the quantity of ZPT the relevant factor, but the quantity of ZPT that reaches its target"

On the Internet web site it was possible to read that 1% cink pirition (ZPT) and 2% ketokonazol are the most popular formulas, underlining that clinic research proved that the formula has the same effects as pharmaceuticals with 2% of ketokonazol.

In the opinion of some Clinics, Universities and Research Institutes consulted, there is no scientific evidence of the effectiveness of the formula and that several other dandruff shampoos cause the same effects, which also depend on each person.

According to the Competition Council, Procter & Gamble was not able to show scientific evidence of the statements. Therefore, the Council concluded that the statements made were able to mislead consumers, imposing a fine of 5.000.000 HUF on Procter & Gamble.

## IRELAND



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| <b>1. Legislation:</b> | Public Health (Amendment) Bill 2003   |
| <b>Topic:</b>          | Tobacco advertising, marketing and sponsorship  |
| <b>Who:</b>            | Department of Health, Cigarette Companies   |
| <b>When:</b>           | September 2003  |
| <b>What happened:</b>  | In our report in April 2003 we told how the Public Health (Tobacco) Act 2002 had to be withdrawn after a High Court challenge by the cigarette companies. The legislation had not been implemented in accordance with EU directions so the Irish Government was forced to withdraw it. A new bill has now been prepared which includes the provisions of the 2002 Act and also gives effect to EU Directive 2003/33/EC on the advertising and sponsorship of tobacco products. There will now be a comprehensive ban on tobacco advertising and all forms of tobacco sponsorship. |
| <b>Comment:</b>        | The Department of Health in Ireland has taken a strong anti-smoking stance as shown by the speed with which it drafted new legislation to replace the 2002 Act. In addition from January 1 <sup>st</sup> 2004 smoking in all workplaces will be banned. This will include pubs and restaurants  |

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| <b>2. Topic:</b>      | Poster Advertisement  |
| <b>Who:</b>           | Advertising Standards Authority of Ireland  |
| <b>When:</b>          | July 2003   |
| <b>Where:</b>         | Ireland   |
| <b>What happened:</b> | An advertising poster for a Playstation 2 game "Primal" was the subject of complaints from members of the public. The poster displayed a picture of a young woman who was the lead character in the game under the heading "for heroine addicts". Complaints were directed at the words "heroine addicts" which some members of the public felt was a play on the words "heroin addicts" and trivialised heroin addiction while at the same time making it somewhat glamorous through the image of the young woman. The posters were also displayed in areas of Dublin where heroin addiction was a known problem and complainants found this particularly offensive. The advertisers claimed that heroines are a common character in computer games and the people who play them are often "addicted" to the activity of playing those games. They said they had no intention of trivialising drug abuse and their own pre-testing did not raise any issues. |
| <b>Comment:</b>       | The <b>complaint</b> was <b>upheld</b> . The Code on Advertising Standards requires that ads contain nothing likely to cause grave or widespread offence. This advertisement could clearly offend large sections of the public particularly those working in the area of drug addiction and   |

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| <b>3. Topic:</b>      | Poster Advertising - Alcohol   |
| <b>Who:</b>           | Advertising Standards Authority of Ireland   |
| <b>When:</b>          | April 2003   |
| <b>Where:</b>         | Ireland  |
| <b>What happened:</b> | A poster advertisement for the drink "Coors Light" was the subject of objections. It featured a man's hand on a woman's bottom underneath which was written " <i>Smooth and well rounded with a 4.3% strength – goes down easy</i> " the complainants claimed the ad was degrading to women and that it belittled them in general by reducing their bodies to sexual objects. The advertisers claimed that the picture merely showed a man with his arms around a woman's waist and that there was no depiction of sexual activity. The people in the ad were fully clothed and the only activity depicted was recreational. |
| <b>Comment:</b>       | The <b>complaint</b> was <b>upheld</b> . The ASAI Code on Advertising requires that an advertisement should not imply that drinking can contribute to social or sexual success. The Complaints Committee found that the advertisement did not respect the dignity of women and were concerned about the implication that drinking Coors Light contributed to sexual success.   |

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| <b>4. Topic:</b>      | Press - Free Gift Promotion   |
| <b>Who:</b>           | Advertising Standards Authority of Ireland  |
| <b>When:</b>          | July 2003   |
| <b>Where:</b>         | Ireland   |
| <b>What happened:</b> | The News of the World newspaper carried a banner headline stating " <i>Free today – Carry On full length DVD for every reader</i> ". On purchasing the paper complainants found there was no DVD inside and they had in fact to send a stamped address padded A5 envelope to a PO Box and would receive the DVD one month later. They claimed it was misleading as it was not "free". The advertisers acknowledged the headline was incorrect and had been carried over from the UK edition. It had been intended to change the headline for Ireland. |
| <b>Comment:</b>       | The <b>complaint</b> was <b>upheld</b> . The ASAI Code on sales Promotion Practice has specific rules for free gift promotions. Any requirements which might influence a consumer's decision to participate should be prominently displayed. In this case they found the advertising misleading. Advertisers running free gift promotions should therefore be sure to take legal advice before running the promotion to ensure compliance.  |

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| <b>5. Topic:</b>      | Television Advertisement   |
| <b>Who:</b>           | Advertising Standards Authority of Ireland   |
| <b>When:</b>          | August 2003  |
| <b>Where:</b>         | Ireland  |
| <b>What happened:</b> | A television ad for HB Ice cream which showed three men jumping from a bridge into a river was the subject of a complaint. The complainant voiced concerns that youths could imitate the ad leading to injury or |

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|                 | death. He felt the dangers of jumping into unknown waters should be clear and were well known to those who work in water safety. The advertisers responded that they had researched the ad with focus groups including teenagers and mothers before it was aired. The ad had received clearance from numerous broadcasting authorities across Europe. They had been careful to ensure that the people jumping off the bridge were all adults and it was not portrayed as taking a risk.                                     |
| <b>Comment:</b> | The <b>complaint</b> was <b>not upheld</b> . While the Code requires that an advertisement should not depict dangerous or unsafe practices except in the context of promoting safety the Complaints Committee felt that when the ad was taken as a whole it did not encourage dangerous behaviour. It was clear that the advertisers had taken precautions to ensure that it was not the case. The decision displays to potential advertisers the benefits of proper research and advice in advance of airing a commercial. |

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| <b>6. Who:</b>        | Director of Consumer Affairs   |
| <b>When:</b>          | September 2003   |
| <b>Where:</b>         | Ireland  |
| <b>What happened:</b> | As indicated in our April report the European Communities (Requirement to Indicate Product Prices) Regulations 2002 has now been enacted in Ireland. The Director of Consumer Affairs has sought to strictly regulate retailers since that date and has continuously surveyed them to check on compliance. By June 2003 compliance with the pricing regulations was up to 65%. In July a survey of products advertised by Irish companies on the Internet showed that of over 300 products surveyed all were in compliance with the new regulations. It is not clear what action is to be taken against companies not in compliance but District Court proceedings are a possibility. A number of retailers have recently been successfully prosecuted by the Director of Consumer Affairs for non compliance with the EC (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002 leading to convictions and fines of up to €1,000. |
| <b>Comment:</b>       | After criticism in recent years of the low number of prosecutions taken by the Director of Consumer Affairs there has been an increase in the past twelve months which is matched by an increase in complaints to her office. However retailers and advertisers alike need to be aware of changing pricing and advertising legislation and the possibility of prosecution if found to be in breach of the new legislation.   |

## ITALY



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| <b>1. Legislation and Self-Regulation</b> |  |
| <b>Topic:</b>                             | Data Protection  |
| <b>Who:</b>                               | Italian Government   |
| <b>When:</b>                              | June 2003  |
| <b>Where:</b>                             | Italy  |
| <b>What happened?</b>                     |  |
| <b>(i) Legislation:</b>                   | On June 30 <sup>th</sup> , 2003 a Consolidated Act on protection of personal data was approved (by Legislative Decree no. 196).  |
| <b>The new "Data Protection Code"</b>     | <p>Clearly pursuing a harmonizing intent, the Consolidated Act concentrates in a unified text all the domestic rules previously issued on topics involving protection of personal data. It also adds several new provisions intended to enforce general principles and criteria established by the local Data Protection Commissioner ("<i>Garante della Privacy</i>", an independent Authority in charge of controlling the enactment of all the rules on protection of personal data), set by EU Directives as well as by domestic Statute Law.</p> <p>The Code consists of 186 articles, divided into three sections, containing:</p> <ol style="list-style-type: none"><li>1) general provisions on collection and processing of personal data performed by private subjects or public entities (in detail, the section deals with required conditions, data bases' and systems' security, data transfer abroad),</li><li>2) regulations for specific sectors, as judicial proceedings, police force, public administration, health services, education, statistical, historical and scientific researches, employment and social security, banking, financial and insurance systems, electronic communications, journalism, direct marketing,</li><li>3) special provisions on: administrative and jurisdictional measures for infringement of the Code, sanctions, functions of the Privacy Commissioner.</li></ol> <p>Key topics dealt with by the new "Data Protection Code":</p> <p>- <i>Notification</i>: Previously required as a binding condition for the collection and the processing of any kind of personal data, is now necessary only if the treatment: (a) concerns sensitive data, (b) is performed through</p> |

electronics means and is aimed at "profiling" of consumers' habits and purchasing approach, at employees' monitoring or at market surveys. Notification procedure has been greatly simplified (i.e. may now be filed also on-line, by following guidelines and using forms published on the Privacy Commissioner's website).

- *Consent*: The data subject's prior consent is still required as a condition for legal data processing, but a broad range of exemptions have now been set, e.g. data treatment performed: within the context of banking services, by non-profit associations (in the interest of their members), by use of lists or registers publicly available,

- *Information*: While requirement of preliminary information of the data subject on purposes and modalities still stands as a requirement, the Privacy Commissioner may establish a simplified procedure (e.g. when performed by call-centers),

- *Health*: Procedure has been greatly simplified. Now the patients may deliver their formal consent once to the family's doctor or to the sanitary office; from that moment on the consent will be considered as given for any future sanitary service. Additional measures have to be observed for granting patient's privacy when undergoing sanitary treatment (courtesy's distance, prohibition of patient's roll call in the waiting room, caution as to information given by phone or referring to patients in a hospital).

Genetic data treatment requires a special authorization from the Commissioner's office (which will coordinate with the Ministry for Health).

- *Work*: A deontological code will be issued and govern information and consent procedure for employees' monitoring and curricula treatment. As to the workers' distance control, the Code, in compliance with the regulation already in force (Law, no. 300, dated 20.05.1970 "Workers' Statute", article 4), bans the use of audio-visual means and other tools aimed directly at workers' activity distance control. Audio-visual systems required for productive or organizing needs or for security and organizations purposes, but likely to consent the workers' activity distance control, can be settled only with the prior union agreement. Servants must keep privacy with respect to home life.

- *Electronic Communication*: Following the general principles set by the EC Directive no. 2002/58/EC, the Code provides a new - and reduced - maximum term for the maintenance of traffic data stored for control and crimes' repression purposes (previously 5 years, now 30 months). With respect to processing of location data of mobile phone holders, the Code requires data subject's consent.

- *Processing of Personal Data for judicial purposes*: The Code strengthens measures aimed at protecting the privacy of parties in the context of judicial proceedings (e.g. data subject may ask that the verdict leaves out his personal data if the decision will be published on juridical magazines or diffused through electronic means). Special protection is

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| <p><b>(ii) Spamming: Guidelines from the Privacy Commissioner</b></p> | <p>granted to minors involved in any kind of proceedings (criminal as well as civil or administrative ones).</p> <p>- <i>Public Administration</i>: All judicial or administrative documents are to be inserted into sealed envelope if they are served to a person different from the addressee. Public entities are required to adopt additional internal regulations as to processing of sensitive data.</p> <p>- <i>Electoral Registers</i>: They cannot be used for commercial or advertising purposes, but only for electoral procedures or for statistical, scientific, historical or social-welfare purposes.</p> <p>- <i>Internet, Video monitoring, Direct Marketing</i>: It was felt that a specific Ethical Code should deal with those sectors, where the nature of the technical means used is likely to give rise to peculiar problems of privacy's rights violations.</p> <p>A huge number of claims filed during the last two years by Internet users induced the Data Protection Commissioner to issue (in May 2003) specific instructions meant to limit the excessive amount of unsolicited advertising and promotional materials distributed on-line without consent from the targeted public. According to those instructions, which apply to all operators active on Internet, sending unsolicited advertising e-mails without the addressee's consent is totally banned. Such unsolicited distribution - especially if performed methodically for commercial (profit making) purposes – may be considered as a criminal offense.</p> <p>Therefore, the use of e-mail for commercial and promotional purposes, can be legally performed only if it fulfils the following requirements:</p> <ul style="list-style-type: none"> <li>- the users'/subscribers' e-mail address can be used only with their prior consent,</li> <li>- such consent must be obtained before any message is sent and after the users have been clearly informed as to the purposes for which their personal data will be used (the so called opt-in rule ),</li> <li>- anonymous messages are forbidden: operators must specify their address and the nature of their message,</li> <li>- the data operator must grant to data subjects the application of privacy protection rules.</li> </ul> <p>Any infringement of these provisions is punished with a fine up to 90.000,00 Euro and with imprisonment from 6 months to 3 years.</p> <p>As to spamming from abroad, usually Italian law for privacy protection does not apply. But the data subject can ask the Foreign Authority competent on privacy protection in the sender's country to check the compliance of the received mail with domestic privacy regulation.</p> <p>But when spamming results in criminal offense, Italian criminal law states that, even if the illegal action/behavior originates from abroad, the crime will be considered as committed in Italy when the injuring and damaging effects have occurred in Italy.</p> |
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|                 | In such case national law becomes applicable.   |
| <b>Comment:</b> | <p>The new Code will come into force on January 1<sup>st</sup>, 2004.</p> <p>The spamming regulation is already in force.</p> <p>Through the above-mentioned provisions the regulation's privacy protection has been greatly renewed and harmonized in compliance with the guidelines and principles set by the respective European Directives.</p> |

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| <b>2. Self- Regulation Rules</b> |  |
| <b>Topic:</b>                    | Minors and Internet  |
| <b>Who:</b>                      | Non-profit Associations for minors protection and Internet Providers   |
| <b>When:</b>                     | 2003   |
| <b>Where:</b>                    | Italy  |
| <b>What happened:</b>            | <p>The protection of minors, already greatly increased through a recent Self-Regulation Code concerning television and broadcasting, is going to receive additional strength with respect to Internet use by minors.</p> <p>The Minister for Communication has announced that a Self Regulation Code for the protection and the defense of minors from the risks of uncontrolled Internet access will be soon enacted.</p> <p>A special Committee, formed by members representing associations for minors' protection as well as Internet providers, was established by the Minister and started its work.</p> <p>The final draft version of the Code was presented recently to the Internet providers for their approval.</p> <p>The Code is aimed at providing protective measures, deontological rules and special duties imposed on providers, in order to reduce the risks linked to Internet access by minors.</p> <p>Police has significantly increased control on Internet use, especially as to pornography and pedophilia.</p> |
| <b>Comment:</b>                  | The upcoming Code should improve the protection of minors during Internet access. In addition, the Secretary of Communication declared that – in his view - the problem ought to be approached on a transnational level and that for that reason he would sustain any European initiative for financing programs and projects aimed at developing proper software or technical means able to offer better control on Internet use by minors.   |

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| <b>3. Legislation</b> |                                    |
| <b>Topic:</b>         | EU Directives implemented in Italy |
| <b>Who:</b>           | Italian Parliament                 |
| <b>When:</b>          | 2003                               |

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| <b>Where:</b>         | Italy   |
| <b>What happened:</b> | <p data-bbox="467 237 586 260"><u>Foodstuff</u></p> <p data-bbox="467 264 1390 359">The European Directive no. 2000/13 concerning "<i>Labeling, presentation and advertising of foodstuff</i>" has been implemented in Italy through the Law by Decree, no. 181, dated June 23<sup>rd</sup>, 2003.</p> <p data-bbox="467 394 1369 489">The new provisions, amending the legislation already in force (Law by Decree no. 109, dated 27.01.1992), follows the guidelines issued by the Directive as to the compulsory indications on the labeling of foodstuff.</p> <p data-bbox="467 525 1114 548">In particular, the most relevant provisions concern:</p> <ul data-bbox="513 554 1406 814" style="list-style-type: none"> <li>- the date of minimum durability (including the day, the month and the year), or in case of highly perishable foodstuff, the "use by" date;</li> <li>- the name or business name and the address of the producer or packager, as well as of the place of origin where failure to give such information might mislead consumers;</li> <li>- as to alcoholic beverages containing more than 1,2% by volume of alcohol, the effective alcoholic strength by volume.</li> </ul> <p data-bbox="467 850 1341 945">The implementing Italian law states that any infringement of the said provisions is punished with a fine ranging from Euro 3.500,00 to Euro 18.000,00.</p> <p data-bbox="467 980 1304 1041">Those provisions apply also to the presentation and advertising of foodstuff.</p> <p data-bbox="467 1077 1411 1171">As to advertising consumers benefit from additional protection through Law by Decree, no. 74, dated 25.01.1992 on misleading and comparative advertising.</p> <p data-bbox="467 1207 1401 1367">In a recent case, the Market and Competition Commissioner held an advertising message on a chocolate package as misleading consumers with respect to the applied price. According to the Authority, the cursive character used for indicating the applied price (Euro 2,30) resulted in an unclear presentation, as the number 2 was likely to be confused with a 1.</p> <p data-bbox="467 1402 591 1425"><u>Tobacco:</u></p> <p data-bbox="467 1432 1382 1526">The European Directive no. 2001/33, concerning "<i>Manufacture, presentation and sale of tobacco products</i>", has been implemented in Italy through the Law by Decree, no. 184, dated June 24<sup>th</sup>, 2003.</p> <p data-bbox="467 1562 1336 1623">The Directive has been entirely implemented without any significant additional provision.</p> <p data-bbox="467 1659 1250 1682">As to transitional provisions, the implementing law states that:</p> <ul data-bbox="513 1688 1406 1822" style="list-style-type: none"> <li>- cigarettes not in compliance with the provided requirements may be sold till the September 30<sup>th</sup>, 2003 while;</li> <li>- tobacco products, different from cigarettes, not in compliance with said provisions may be sold till the September 30<sup>th</sup>, 2004.</li> </ul> <p data-bbox="467 1858 1411 1881">Any infringement of the said provisions, as long as it does not amount to a</p> |

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|                 | <p>crime, is punished with a fine ranging up from Euro 10.000,00 up to Euro 50.000,00. If the case is particularly serious the fixed amounts may be doubled.</p> <p><u>E-commerce:</u><br/>The European Directive no. 2000/31, concerning "<i>Electronic Commerce</i>", has been implemented in Italy through the Law by Decree, no. 70, dated April 9<sup>th</sup> 2003.</p> <p>The Directive has been entirely implemented without any significant additional provision.</p> <p>On providers' liability the implementing Italian provisions state that - save cases of "<i>mere conduit</i>", <i>hosting</i> and "<i>catching</i>", the providers are required:</p> <ul style="list-style-type: none"> <li>- to promptly notify the authorities about illegal activities ascertained with respect to the recipients of their service,</li> <li>- to provide the competent authorities, on their request, with information enabling the identification of recipients of their service, whom providers have storage agreements with as to caching.</li> </ul> <p>As to out-of-court-dispute-settlement, the implementing law states that providers and recipients of the service may bring an action before a special Body. The procedure may be started also on-line</p> <p><u>Copyright</u><br/>The European Directive no. 2001/29, concerning "<i>Copyright and related rights in the information society</i>" has been implemented in Italy through the Law by Decree, no. 68, dated April 9<sup>th</sup>, 2003.</p> <p>The implementing law is partially amending the previous copyright regulation (Law no. 633, dated April 22, 1941) in compliance with the guidelines given by the Directive.</p> |
| <b>Comment:</b> | Through such implementation Italy has greatly improved the local regulation with respect to the main topics actually involved by the European process of harmonization of national laws: the personal data protection and the consumers protection.  |

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| <b>4. Self regulation:</b> |  |
| <b>Topic:</b>              | Cosmetics  |
| <b>Who:</b>                | Review Board of the Institute for Self-Regulation in Advertising   |
| <b>When:</b>               | June 2003  |
| <b>Where:</b>              | Italy, Milan   |
| <b>What happened:</b>      | <p>The Review Board stopped an ad of a famous cosmetic producer promoting a gel for weight loss as infringing Articles 2 (misleading advertising) and 23 (cosmetics for personal health) of the Self-Regulation Code.</p> <p>In its injunction the Review Board stated that the advertising messages about the promised slimming effects of the product were greatly</p> |

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|                 | <p>deceiving for consumers with respect to the real results achievable by using the gel.</p> <p>The claimed ad pretended to affirm that the simple use of the product - without any additional other effort, except a massage - could achieve results identical to those deriving from a low-calories diet and from practice of physical activity. Consumers would therefore be induced to believe that the promised results could be promptly achieved without efforts; such claim was likely to deceive consumers and to induce them to purchasing the promoted product.</p> <p>The Review Board also found that the claim on how the gel was supposed to perform its effects resulted lacking of substantiation. The message pretended to claim that the product was based on aromatherapy, i.e. caffeine contained in the gel would decompose fat; in addition, a special aroma, reaching the brain, would stimulate the metabolism and burn the fat.</p> <p>In the Board's view, a cosmetic product can have only a superficial effects at epidermic level - aimed at hydrating and toning up the skin - but is not likely to perform slimming effects.</p> <p>Therefore the term "thinning" appeared improperly used in the message, since it indirectly referred to a therapeutic effect of high complexity, which is reserved to medical treatment.</p> |
| <b>Comment:</b> | <p>According to Industry Self-Regulation advertising messages must take into due account consumer perceptiveness, i.e. their tendency of being more sensitive towards claims which promise the achievement of extraordinary results.</p>  |

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| <b>5. Industry News</b> |   |
| <b>Topic:</b>           | Wireless Advergame: the advertising challenge.  |
| <b>Who:</b>             | German car producer   |
| <b>What happened:</b>   | <p>A well known German motor producer promoted its last car model, by using, behind the traditional means (the TV and the press), a new communication technique: an advertising videogame, so called "wireless advergame".</p> <p>In an interview the company's general manager illustrated the huge advantages deriving from such new advertising format.</p> <p>In Italy almost 50 million are currently in use: therefore mobile phones clearly offer an appealing potential as a marketing vehicle.</p> <p>Moreover, the last generation of mobile phones has larger and colored display, able to receive a broad range of communication.</p> <p>Wireless advergames far result more effective than SMS. The latter tend to be promptly cancelled by receivers, while a videogame can be targeted to an audience ranging from 25 to 45 years and will be perceived as a form of entertainment, where the presence of the company's brand is</p> |

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|                 | <p>not felt as an intrusion. The new technique contributes therefore to increasing brand awareness, as exposure to the targeted audience is superior to the one (usually not more than 30 seconds) offered by TV.</p> <p>In addition, advergames clearly favor an interactive relationship between companies and consumers.</p> <p>Finally such form of advertising is not so expensive. Production costs of wireless advergames range approximately between 10.000 and 20.000 Euro.</p> |
| <b>Comment:</b> | The challenge has been launched. We'll now have to see how consumers and their associations will react, especially with regard to personal data processing and to fair advertising practices.  |

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| <b>6. Case Report:</b> |  |
| <b>Topic:</b>          | Nasty guests   |
| <b>Who:</b>            | Market and Competition Commissioner  |
| <b>When:</b>           | April 2003   |
| <b>Where:</b>          | Italy  |
| <b>What happened:</b>  | <p>A consumer required action from the Market and Competition Commissioner (competent on misleading ads) against an promotional message, which a tour operator had put on his catalogue promoting with respect to a hotel on Mauritius Island.</p> <p>The message presented the hotel as "totally sheltered from the winds". The claimant stated that the message was misleading since the presentation did not correspond to the reality; he complained that during his stay in the hotel, he had supported a very heavy wind.</p> <p>The Commissioner's office investigated on whether in normal meteorological conditions the hotel was effectively totally protected from the winds. Experts were asked to verify the winds' periodicity nearby the hotel, taking into account the usual weather conditions on Mauritius Island.</p> <p>After such inquiry the Commissioner found that the message promised that guest could relay on a an holiday stay in a hotel well sheltered from the wind's. The claimant was right in affirming that during his stay heavy winds hit the hotel, but this occurred as a result of weather conditions, to be considered – according to the local meteorological station as unusually unfavorable and unforeseeable.</p> <p>Such – exceptional - weather conditions during a specific period, together with the fact that the hotel was actually situated in a well sheltered place (surrounded by hills creating a natural barrier), convinced the Commissioner that the message could not be considered as misleading.</p> <p>Therefore the claim was dismissed.</p> |
| <b>Comment:</b>        | The case illustrates that the evaluation of the misleading character of a promotional message may have to take into account not only the   |

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|  | consumer's perception and confidence, but also factual circumstances and their characteristics |
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| <b>7. Self- Regulation</b> |   |
| <b>Rules</b>               |   |
| <b>Topic:</b>              | Code of Advertising Self-Regulation   |
| <b>Who:</b>                | The Institute for Advertising Self Regulation (IAP)   |
| <b>When:</b>               | July 2003   |
| <b>Where:</b>              | Italy   |
| <b>What happened:</b>      | <p>On July 28, 2003, the IAP approved the 35<sup>th</sup> edition of the Code of Advertising Self- Regulation.</p> <p>The text of the new Code is substantially confirming the precedent edition with an amendment to article 40, referring to the publication of the Jury's decisions. The article provides that the extracts of all decisions shall be published only on the IAP website and no more in the newsletter.</p> <p>In addition, new provisions on the applicability of the Code have been introduced.</p> <p>The IAP has enacted six regulations alleged to the Code, providing the guidelines aimed at applying and enforcing the rules set by the Code:</p> <ul style="list-style-type: none"> <li>- <i>Regulation for the required deadline for the self-regulation decisions' enforcement:</i></li> </ul> <p>An ads held as illegal must cease within seven working days from the moment of delivery of the desist order as to ads been diffused by the following media: TV, Radio, newspapers and posters.</p> <p>For ads diffused through media different from the mentioned ones, the cease order shall be enforced within the time strictly necessary with respect to the peculiar characteristics of the used media.</p> <ul style="list-style-type: none"> <li>- <i>Regulation for filing advertising projects:</i></li> </ul> <p>Agencies wishing to protect their creative projects/proposals realized for a tender must deposit at the IAP Office a copy of such project and the alleged required documents in compliance with the given prescriptions. The regulation contains guidelines and forms.</p> <ul style="list-style-type: none"> <li>- <i>Regulations for protection of planned/announced ads:</i></li> </ul> <p>Who intends to protect a specific idea/concept for a future advertising campaign, must deposit a description of the idea/concept and publish an abstract of the key characteristics in compliance with given guidelines.</p> <ul style="list-style-type: none"> <li>- <i>Regulation for advertising campaigns run abroad:</i></li> </ul> <p>Whoever seeks protection against imitation in Italy of ads already run abroad, may deposit a copy of said ad with the IAP in compliance with the specific guidelines. The procedure grants a priority right valid for 5 years from the moment of said filing.</p> |

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|                 | <p>- <i>Regulation for the advertising of foodstuff supplements</i><br/>Some main provisions:</p> <ul style="list-style-type: none"> <li>- the product may not be presented as a slimming drug,</li> <li>- the proper function of foodstuff supplements is that of an "aid to weight reducing diets",</li> <li>- advertising messages have to specify that the supplements must be used in conjunction with – and not as substitute of - an appropriate slimming diet and a physical activity,</li> <li>- advertising messages may not use terms as: "ideal weight, "ideal figure" or similar.</li> </ul> <p>- <i>Regulation for veterinary drugs.</i><br/>For advertising of veterinary drugs the prescriptions set for pharmaceuticals apply.</p> <p>It must result clear that the product has to be considered as a pharmaceutical for medical treatment. Advertising may not suggest that prior veterinary counsel is useless and that the use of the product does not imply any risk for the animal.</p> |
| <b>Comment:</b> | <p>Industry Self-Regulation is sensitive changing habits and needs; it's eager to adapt its code to new developments.</p> <p>Recently the IAP's Jury has stated - as a general principle - that the Code's provisions clearly apply also to advertising brochures (the defendant had argued that the Code was not applicable to the brochure since the diffusing company had not accepted the self-regulation system).</p> <p>In the Jury's view the code was applicable as the adviser had signed the special acceptance clause inserted into standard the contracts used by agencies and their associations. The advertiser cannot pretend to go around the Code's prescription through a particular mean of communication or distribution mechanism.</p>   |

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| <b>8. Self Regulation</b> |  |
| <b>Topic:</b>             | Using women in advertising: not necessarily offensive or sexist  |
| <b>Who:</b>               | Jury of the Institute for Self-Regulation in Advertising   |
| <b>When:</b>              | July 2003  |
| <b>Where:</b>             | Italy, Milan   |
| <b>What happened:</b>     | <p>The Review Board of the IAP objected against a TV campaign – aired in June 2003 - for lemon, orange and grapefruit juices and filed a case with the Jury considering the ad as infringing articles 1 ( Fairness in advertising), 9 (Violence, Vulgarity, Indecency) and 10 (Human dignity).</p> <p>The commercial showed a close-up of a prosperous breast, wearing a small bikini that was jumping rhythmically. Then the framing gradually enlarged, showing a girl sitting down on a rubber boat speeding on the sea.</p> <p>The boat's driver is looking stunned the breast's movement; sometimes he withdraws his eyes and drinks the juice. Meanwhile a voice comments:</p> |

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|                 | <p>“Drink K juices and discover on labels how to win a rubber boat”.</p> <p>The Review Board claimed that the message was likely to exploiting the woman's image, offending the human dignity. Moreover the vulgarity deriving from the sexual hint to the body's and breast's movement exceeded the limits set up by the Code.</p> <p>The advertiser argued that the ad was based on an ironic tone where the woman is presented as part of the joke and the feminine beauty is not associated to any offensive side-meaning. It could be considered as ambiguous, but it's also quite clearly intended to be ironic without any vulgar association.</p> <p>According to the Jury the commercial, even seeking to cause impact on the public trough the initial scene, did not exceed the limits of decency imposed by the Code, as the presentation describes a joking situation, within the context of a the holiday atmosphere, which prevails over sexual association and vulgar outcome.</p> <p>Moreover the Jury stressed that checks performed on advertising with respect to its compliance with the Code's provisions have to be conducted on the ad as a whole an not just on single parts.</p> <p>Simple reference of anatomical parts of the female body (especially those traditionally considered as representative of woman's beauty) cannot be deemed as apt to automatically transform a scenario in an indecent or vulgar presentation.</p> <p>The Review Board's claim was dismissed.</p> |
| <b>Comment:</b> | Sex has always been a very common tool in advertising. What actually counts is not if , but how sex is associated to a marketing campaign   |

## MALAYSIA



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| <b>Topic :</b>         | MALAYSIA BANS TOBACCO ADS   |
| <b>Where :</b>         | Malaysia  |
| <b>When :</b>          | 22 <sup>nd</sup> August 2003  |
| <b>What happened :</b> | <p>The Malaysian Health Ministry recently announced that it will ban all forms of tobacco advertising as well as promotions in Malaysia. This ban will be effective from 1<sup>st</sup> January 2004.</p> <p>However, this ban will not apply to sports such as Formula One motor racing which relies heavily on sponsorship from tobacco companies. This sport has been granted a temporary exemption.</p> <p>Currently, tobacco companies are allowed to advertise indirectly and sponsor sporting activities under the present regulations and guidelines governing advertising in Malaysia. Once the ban is effected, all forms of advertising be it direct or indirect will cease.</p> <p>The Malaysian health minister was also quoted as saying that further discussions were necessary to discuss implications on some sports which receive tobacco advertising such as soccer and Formula One motor racing to which Malaysia is involved in as hosts to one of its series.</p> <p>Three tobacco companies, British American Tobacco, Japan Tobacco Industry and Phillip Morris have agreed to withdraw all forms of cigarette-related advertisements from the end of this year.</p> <p>In a general survey by the Health Ministry, it was reported that nearly 25% of Malaysians were smokers in 1996 as compared with 21.5% in 1986. What is more surprising is that 20% of the Malaysian youth are smokers. The Malaysian Health Ministry attributes the rising number of smokers in Malaysia to increased expenditure on advertising, estimated around \$12.4 million between January and May of this year alone.</p> |
| <b>Comments:</b>       | <p>A step in the right direction to promote health awareness and the dangers of smoking. However the forthcoming ban may have economical implications on the Malaysian economy especially sports activities which receive huge amounts of sponsorships from tobacco companies. Although most sports activities held in Malaysia have ceased to receive sponsorship backing from tobacco companies, there are some tobacco companies that are still involved albeit indirectly.</p>  |



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| <b>Topic :</b> | FOOD LABELS NOW REQUIRED TO CARRY SPECIAL NUTRITIONAL INFORMATION |
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| <b>Where :</b>         | Malaysia  |
| <b>When :</b>          | 7 <sup>th</sup> September 2003  |
| <b>What happened :</b> | <p>The Health Ministry reported that all food products especially health products will now have to carry their specific nutritional information in order to protect consumers from misleading information.</p> <p>In their statement, the Health Ministry also said that manufacturers will now no longer be allowed to carry information that make such claims that are considered misleading or baseless, such as a product being able to cure or protect consumers from diseases and ailments.</p> <p>These changes, part of the Malaysian Food Regulations of 1995 which came into effect on the 1<sup>st</sup> September 2003 covers product labeling, wording of the nutrient content, its comparison and functions, and advertisements.</p> <p>Under the amendments, manufacturers will have to use certain wordings or those carrying similar meanings, to explain the nutritional information of their products.</p> <p>The spokesperson from the Ministry was also quoted as saying that these new amendments have been implemented to protect consumers from misleading product information and to assist the food industry to give priority to the nutrient content found in products.</p> <p>It is now evident that all advertisements through labeling will come under the purview of the said regulations.</p> |
| <b>Comments :</b>      | <p>The new amendments aim to protect the consumer from frivolous and baseless information supplied by manufacturers. With this, consumers can now be assured that product that they purchase of the shelves correspond with the information on the labels of such products, especially pharmaceutical products.</p>   |

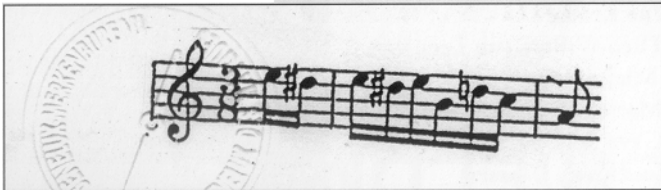
## NETHERLANDS



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| <b>1. Civil Proceedings:</b> |   |
| <b>Topic:</b>                | Trademark infringement  |
| <b>Who:</b>                  | Verstappen / Albion   |
| <b>When:</b>                 | October 16, 2002  |
| <b>Where:</b>                | Civil Court Amsterdam, The Netherlands  |
| <b>Advertisement:</b>        | <br>   |
| <b>What happened:</b>        | <p>Jos Verstappen is the only Dutch Formula 1 racecar driver, and he is very well known. Verstappen has registered his name, Jos Verstappen, as a written trademark, and his portrait as a pictorial trademark with the Benelux Patent Office.</p> <p>Albion is the publisher of the monthly magazine Formula 1, which is dedicated entirely to the Formula 1 and everything that has to do with it. In addition to that magazine, Albion also issues a special guidebook at the beginning of each new racing season: Formula 1 Preview Special. In this magazine Formula 1 teams are regularly discussed, including that of Verstappen. Verstappen has no objection to this.</p> |

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|  | <p>This also occurs in the Formula Preview Special, and Verstappen does not object to this either. In this guidebook all Formula 1 circuits are also discussed, and there is also a column under the heading 'The view of Jos Verstappen', in which a commentary on the specific problems of the relevant circuit are discussed in first-person form. This creates the impression that Jos Verstappen collaborated on the publication and gave his permission for it. This is not the case. Jos Verstappen is claiming damages on the basis of trademark infringement. The publisher is appealing to freedom of expression. The court decided that a specification of the name of Verstappen with his portrait in the magazine Formula 1 goes no further than what is journalistically permitted. But it ruled otherwise with respect to the guidebook Formula 1 Preview Special. This is a series. For each circuit there is the same heading, and a text that suggests that Verstappen collaborated in the interviews and publications. Thus the publisher is obtaining a commercial advantage from the use of the portrait, the name, and the alleged interviews with Verstappen. This is an interest against which Verstappen can appeal on the basis of his brand and portrait rights, says the court. Therefore his claim will be granted and he will be granted damages of € 4,500.--.</p> |
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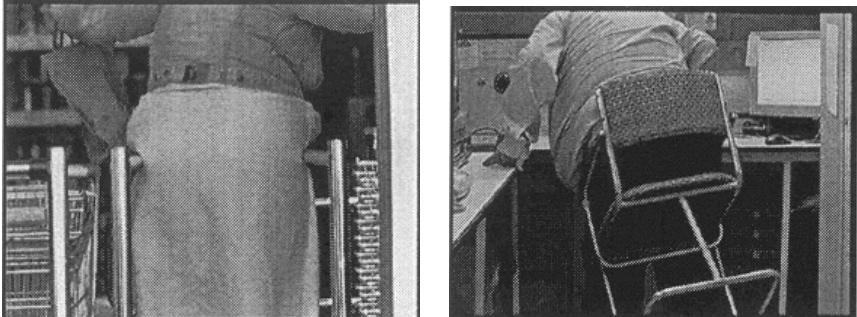
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| <b>2. Civil Proceedings:</b> |   |
| <b>Topic:</b>                | Trademark on sounds   |
| <b>Who:</b>                  | Advice Solicitor General Colomère   |
| <b>When:</b>                 | April 3, 2003   |
| <b>Where:</b>                | European Court of Justice   |
| <b>Advertisement:</b>        |   |
| <b>What happened:</b>        | <p>On June 5, 1992 the patent office Shieldmark, an inventive new agency that was beginning at that time, registered a logotype consisting of the first 9 notes of 'Für Elise' in the Benelux. Thus it had registered a sound patent. A competing patent office used the same notes, this time in the form of a crowing chicken. Parties instituted a test case in the matter, at which time the Court at The Hague ruled in 1999 that this brand registration was not valid, in particular because Benelux Patent Law does not include a specification of a technically adequate manner in which to register sound patents. There was an appeal against the ruling, and the Supreme Court presented a number of questions to the European Court of Justice.</p> <p>The Solicitor General stated that he felt that through the registration of staff notation, patent rights were indeed obtained by Shieldmark for the first notes of 'Für Elise'.</p> |

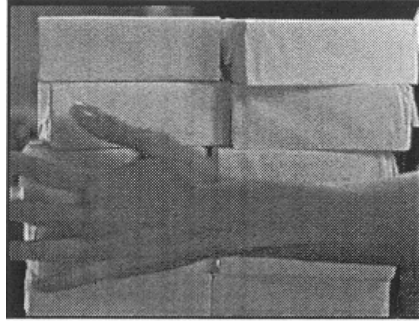
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|                 | One must wait to see whether the European Court of Justice will go along with the advice of Solicitor General Colomère.   |
| <b>Comment:</b> | If the Court goes along with the Solicitor General, this will open up the option for all of Europe to register sounds or a melody as a brand by using staff notation. |

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| <b>3. Civil Proceedings:</b> |   |
| <b>Topic:</b>                | Cutting offices   |
| <b>Who:</b>                  | Court of Law Amsterdam and Court of Justice Leeuwarden  |
| <b>When:</b>                 | September 4, 2002 and November 7, 2002  |
| <b>Where:</b>                | The Netherlands   |
| <b>What happened:</b>        | <p>In 1996 the Supreme Court ruled in the so-called Newspaper Cuttings case that a non-commercial collection of newspaper cuttings made of paper that was obtained locally must be viewed as a work to which the press exception referred to in article 15 of copyright law applies. So collections of cuttings were permitted. Such a situation does not represent an infringement upon the copyrights of the publication from which the cuttings are taken.</p> <p>In 2002 there were two new proceedings on this topic, this time concerning electronic collections of cuttings. The Court in Amsterdam feels that there is a significant difference between a non-commercially printed collection of cuttings and a commercial electronic one. This is remarkable, since with respect to granting or not granting a copyright the Court proceeds on the basis of the answer to the question of whether an action is or is not commercial in nature. The manner in which the work is exploited should not be relevant when it comes to the decision of whether copyrights are being infringed upon. In any case, the Court decided on a ban. In addition, in these proceedings an appeal was made to protection on the basis of the Databank Act. The Court rejected this appeal on the basis of the goal and purport of the EU Databank directive, referring to the explanation. In order to be eligible for databank protection, this collection must contain elements of a work of reference. A newspaper or magazine does not fulfil this criterion, says the Court.</p> <p>When asked the same question, the Leeuwarden Court of Justice ruled differently than the Court of Law at Amsterdam, indeed upholding the press exception as per the earlier ruling by the Supreme Court of 1996, but subsequently stating that the requested ban must nonetheless be granted on the basis of the Databank Act. The court believes that parts of a databank can also be viewed as an independent separate databank. This involves special columns of employment advertisements in the Saturday edition, equipped with an electronic access mechanism.</p> |
| <b>Comment:</b>              | There are two conflicting rulings. The Supreme Court will have to make the final decision. It would be nice if a link were to be sought from the ruling of the German court concerning collections of cuttings (BGH 11 July 2002, Elektronischer Presspiegel).  |

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| <b>4. Civil</b> |
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| <b>Proceedings:</b>   |  |
| <b>Topic:</b>         | Online casino games  |
| <b>Who:</b>           | Court of Law Utrecht   |
| <b>When:</b>          | February 27, 2003  |
| <b>Where:</b>         | The Netherlands  |
| <b>What happened:</b> | <p>In a previous newsletter I noted a ruling by the Court of Law Arnhem in which, pursuant to a claim by the National Lotto, the betting giant Ladbrokes had to close its virtual betting offices.</p> <p>Now, at the request of Holland Casino and with a similar argument, the Court of Law Utrecht has ruled that Universal Amusements and Paramount must refuse to admit Dutch players to Internet casinos that they run.</p> <p>The Lotto, and now Holland Casino as well, have commenced civil proceedings to obtain such a ban, because the Public Prosecutor is not enforcing any legal measures against these games of chance, but is allowing them pending a political decision concerning changes in the Act on Games of Chance.</p> <p>The Court feels that although, due to the absence of legal regulations in the Netherlands, Holland Casino is not yet able to offer its games via the Internet, other companies such as Paramount and Universal can indeed do this from outside the Netherlands without fulfilling very stringent permit conditions, the latter companies have an unfair advantage over Holland Casinos, which must be viewed as being unlawful.</p> |
| <b>Comment:</b>       | It is remarkable that in these proceedings, the EU aspects were hardly addressed at all. In the Italian Gambelli case, Public Prosecutor Albert concluded that the raising of funds as such is not enough reason to establish a (state) monopoly against offering games of chance. So the question is whether seemingly protectionist regulations on games of chance such as the Crown apparently intends to establish will indeed be able to meet the requirements of the European Crown Court.   |

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| <b>5. Self-Regulation:</b> |  |
| <b>Topic:</b>              | Fat people   |
| <b>Who:</b>                | Advertising Code Commission  |
| <b>When:</b>               | July 7, 2003   |
| <b>Where:</b>              | Court of Appeals, Advertising Code Foundation, file 1259/03.0199                     |
| <b>Advertisement:</b>      |  |



**What happened:**

Remia is a manufacturer of mayonnaise, sauces and oil that is well known in the Netherlands. The company sells such products as liquid deep-frying oil on a vegetable basis. It has been scientifically proven that using liquid vegetable oils for deep-frying is considerably healthier than using solid fats, whether vegetable or not. Remia wanted to use this fact for its TV commercial without wishing to explicitly state the health aspect. In the commercial we see a fat woman who becomes stuck in a shop door, and a fat man who becomes stuck in a chair and tries, at the end, to get on a motorbike chair and all. Use Remia deep-frying oil instead of 'solid fat'.

More than 20 complaints have come in about this commercial. To begin with the complaint was accepted, and it was re-addressed in appeal. In the opinion of the Court of Appeals, the manner in which the fat people were shown in the commercial is not of such a nature that it exceeds the limits of what is acceptable in the context of the Netherlands Advertising Code. Assessing the commercial as a whole, including the scene in which a man stuck in a chair attempts to get on a motorbike, depicts such an extreme exaggeration of the inconveniences with which fat people are confronted in daily life through no fault of their own that a reasonable connection with reality for the average member of the public is lacking. In these circumstances one cannot say that the commercial, which is unmistakably intended to be humorous – though not everyone will appreciate this humour – makes such fun of overweight people that it is unnecessarily hurtful to fat people.

**Comment:**

Although it finally turned out well for the advertiser, this situation showed once again that great reticence is called for when it comes to utilising certain groups of the population in commercials. Whether you're talking

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|  | about Belgians, Chinese, Arabs, Catholics, business people, stewardesses, or fat people, obviously groups feel quickly that they are being pinpointed and are usually good for a large number of complaints with respect to advertisements in which those groups feature. |
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| <b>6. Self-Regulation:</b> |   |
| <b>Rules</b>               |   |
| <b>Topic:</b>              | Evaluation advertising code for children  |
| <b>Who:</b>                | Commission for the media  |
| <b>When:</b>               | April 19, 2003  |
| <b>Where:</b>              | The Netherlands   |
| <b>What happened:</b>      | <p>In the Netherlands Advertising Code, based on self-regulation, a stipulation has existed for many years that regulates television advertising aimed at children. In view of the contemporary nature of this topic, including in a European context, the commission has had a study carried out for the media of the practical execution of this article. This concerns article 13.2, which reads as follows:</p> <p><i>Advertising on television shall cause no mental or physical harm to minors and for their protection, shall therefore satisfy the following criteria:</i></p> <p><i>(a) it shall not encourage minors to buy a particular product by taking advantage of their inexperience or credulity;</i><br/> <i>(b) it shall not directly encourage minors to persuade their parents or others to buy (sic) advertised products;</i><br/> <i>(c) it shall not take advantage of the special confidence which minors have in parents, teachers or others;</i><br/> <i>(d) it shall not, without reason, depict minors in dangerous situations.</i></p> <p>Among other things it had an analysis carried out of the advertising messages that are broadcast during the children's programming of the stations Zeppelin, Foxkids, Yorkiddin and Kindernet / Nickelodeon. No advertising messages were found that infringed upon article 13.2.</p> <p>Studies have shown that children only become reasonably able to recognise advertising starting at age 8, and that they have a critical attitude with regard to it. The percentage of advertising messages that focuses on the relatively vulnerable group of children under 8 years of age proved to be 16% on all four channels mentioned above. The largest number was found on Kindernet.</p> <p>In addition very few commercials were broadcast on the four stations for sweets and snacks. Finally, it was noted that fewer commercials were broadcast during school hours. The advertiser bears in mind the times at which children most watch children's programmes. But the commercials were not specifically attuned to the programmes at the times at which they are broadcast.</p> <p>But there was one channel that did broadcast tele-shopping commercials aimed at children.</p> |
| <b>Comment:</b>            | Source: co. media, no. 97, April 2003   |

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| <b>7. New Self-Regulation:</b> |  |
| <b>Topic:</b>                  | SMS code of behaviour  |
| <b>Who:</b>                    | Mobile operators   |
| <b>When:</b>                   | August 1, 2003   |
| <b>Where:</b>                  | The Netherlands  |
| <b>What happened:</b>          | <p>Mobile operators have established an SMS code of behaviour together with fourteen providers of SMS services. The Opta has published this code and it can be found on <a href="http://www.opta.nl">www.opta.nl</a>.</p> <p>The purport of the code is to erase any lack of clarity with respect to the costs of SMS services.</p> <p>When SMS services are offered for sale, the costs of receiving messages and the frequency of the messages must be specified. In addition there must be a reference to a web or teletext page on which background information can be obtained about the service. This basic information must always be available to subscribers by sending the word 'help' to the shortcode of the service. With respect to more expensive SMS services (from € 0.70 per message received) the user must specifically send a message 'ok' when he confirms his subscription.</p> |

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| <b>8. Legislation:</b> |  |
| <b>Topic:</b>          | Electronic signatures  |
| <b>Who:</b>            | Act on Electronic Signatures (WEH) goes into effect  |
| <b>When:</b>           | May 21, 2003   |
| <b>Where:</b>          | The Netherlands  |
| <b>What happened:</b>  | <p>The Act on Electronic Signatures (WEH) went into effect on 21 May 2003. The objective of the bill is to execute the directive concerning a mutual context for electronic signatures.</p> <p>The first objective is to simplify the use of the electronic signature (EHT) and contribute to the legal recognition of the EHT in addition to the handwritten signature.</p> <p>Secondly a contribution will be made to decreasing nationally determined differences concerning the EHT and EHT service providers and removing impediments to the free traffic of services via the electronic highway.</p> <p>The Resolution on Electronic Signatures went into effect simultaneously with the WEH Act. This resolution includes a specification of the standards that must be met by certificate providers.</p> |
| <b>Comment:</b>        | Source: Wereldwet.nl   |

## NEW ZEALAND



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| <b>1. Legislation</b> |   |
| <b>Topic:</b>         | Fair Trading Act Enforcement Powers   |
| <b>Who:</b>           | New Zealand Parliament  |
| <b>When:</b>          | July 2003   |
| <b>Where:</b>         | Wellington  |
| <b>What happened:</b> | <p>The New Zealand Parliament has extended the Commerce Commission's enforcement powers to deal with misleading and unfair trading practices by businesses.</p> <p>The amendments to the Fair Trading Act double the maximum penalties for offences from \$30,000 to \$60,000 for individuals and \$100,000 to \$200,000 for companies. In the case of pyramid selling schemes the maximum penalty is the higher of \$200,000 for both individuals and companies or the value of any commercial gain derived from the scheme.</p> <p>The existing search powers of the Commission have been widened. The Commission has obtained new information gathering powers.</p> <p>The Commission no longer has to provide undertakings as to damages in cases where it seeks interim injunctions.</p> <p>The Commission now has a more effective power to require corrective advertising.</p> |
| <b>Comments:</b>      | <p>The changes are intended to strengthen the Commission's investigation powers so that it will have more complete evidence when it prosecutes.</p> <p>It is hoped this will lead to higher penalties in cases of conviction.</p> <p>Consumer protection agencies say the changes are necessary for "unscrupulous traders" and businesses that have not been deterred from misleading or unfair trading practices.</p>  |

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| <b>2. Legislation</b> |                                 |
| <b>Topic:</b>         | Consumer Guarantees Act widened |
| <b>Who:</b>           | New Zealand Parliament          |
| <b>When:</b>          | July 2003                       |

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| <b>Where:</b>         | Wellington   |
| <b>What happened:</b> | <p>The Consumer Guarantees Act is the foundation of New Zealand's consumer laws providing rules to protect the rights and remedies for buyers of products and services that turn out to be defective. The law requires that goods must be of acceptable quality. Services must be performed with reasonable care and skill.</p> <p>When things go wrong the supplier or manufacturer has an opportunity to put things right except in serious cases when the consumer can chose to reject the goods or cancel the contract and get a refund. The legislation makes the supplier in the supply chain, who is best placed to manage the risk of product failure, liable to the end consumer for defects.</p> <p>The amendment to the Consumer Guarantees Act removes previous uncertainty and provides that the Act applies to electricity, gas, water and computer software. It also covers network supply functions for electricity, gas, telecommunications, water and waste water removal.</p> |

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| <b>3. Regulation</b>  |  |
| <b>Topic:</b>         | Unbundling of local loop to Commerce Commission  |
| <b>When:</b>          | September 2003   |
| <b>Where:</b>         | Wellington   |
| <b>What happened:</b> | <p>The Commerce Commission has issued a draft decision concluding there would be substantial benefits if Telecom New Zealand (New Zealand's ubiquitous telecommunications provider) unbundles its local loop and fixed public data networks. The Commission sees unbundling as a means of allowing competitors to use parts of the network on a wholesale basis in order to build up a competitive offering of retail services.</p> <p>The local loop network is the copper wire network that links homes and businesses to the national telephone network. By obtaining access to Telecom's copper wire network, other carriers will be able to compete more vigorously with Telecom in delivering broadband and voice services to both residential and business users.</p> <p>The Commission's draft decision concludes that unbundling the public data network will encourage further competition in the supply of data transmission and other data services to businesses.</p> <p>The Commission is seeking submissions and will hold a public conference in October in preparation for its final recommendation to the Minister of Communications on this topic in December 2003.</p> |

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| <b>4. Case Report</b> |   |
| <b>Topic:</b>         | News media - invasion of privacy  |
| <b>Who:</b>           | Court of Appeal   |
| <b>When:</b>          | September 2003  |
| <b>Where:</b>         | Wellington  |
| <b>What happened:</b> | The appellant is a well known media personality who is attempting to prevent publication of his children's' photograph by a wide circulation magazine. The photograph was taken in a shopping mall. |

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|                  | The High Court decision which is being appealed questions whether there is a common law protection of an individual's privacy in New Zealand.   |
| <b>Comments:</b> | It is expected that the Court of Appeal's decision will clarify whether there is common law right to individual privacy. News media organisations are particularly interested because generally the statutory protection of privacy given by the Privacy Act, does not apply to the news media. |

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| <b>5. Case Report</b> |  |
| <b>Topic:</b>         | Antibiotics in chickens  |
| <b>Who:</b>           | District Court   |
| <b>When:</b>          | July 2003  |
| <b>Where:</b>         | Palmerston North   |
| <b>What happened:</b> | <p>The Commerce Commission laid charges against a company Medallion Trading Limited alleging the company's advertising breached the Fair Trading Act 1986.</p> <p>The company advertised claims that its chickens were fed "no antibiotics".</p> <p>The Commerce Commission's investigations revealed that the chickens had in fact been fed coccidiostats, a type of antibiotic and some had also been fed a mix of other antibiotics.</p> <p>The Commission considered the offending to be serious because it was very difficult for consumers to verify the claims being made. Also consumers were prepared to pay a premium for such chickens and so were utterly reliant on the antibiotic free claims being accurate.</p> <p>The company raised issues about the classification of coccidiostats as antibiotics and whether or not there had been a systems failure in the feed formula used. Nevertheless the company pleaded guilty and was fined \$10,000 plus costs.</p> |
| <b>Comments:</b>      | The Court accepted the Commission's view that while there may be issues regarding the classification of the coccidiostats and the feed formula systems the company had failed to accurately represent to consumers the characteristics of the chickens. This was inconsistent with the aims of the Fair Trading Act which requires an informed market place.   |

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| <b>6. Case Report</b> |  |
| <b>Topic:</b>         | Telecommunications Sector advertising  |
| <b>Who:</b>           | District Court   |
| <b>When:</b>          | September 2003   |
| <b>Where:</b>         | Auckland   |
| <b>What happened:</b> | <p>A major telecommunications provider, Telstra Clear promoted a "Chat 'N Surf" offering 30 hours "free" internet access per month if a minimum of \$30 was spent on toll calls.</p> <p>The promotion was advertised on television and aired a total of 86 times nationally.</p> |

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|                  | <p>In fact the offer was not available to approximately 53,000 of the defendant's customers with existing bundled telephoned and internet plans.</p> <p>The terms and conditions of the offer appeared in small print for 4 seconds towards the end of the television advertising.</p> <p>In the Commission's view the disclosure of the terms and conditions was inadequate and would not have been seen by viewers.</p> <p>The company was fined \$3,000 plus costs after pleading guilty to breaching the Fair Trading Act.</p> |
| <b>Comments:</b> | <p>The relatively low fine suggests the Court gave credit to Telstra Clear for having thoroughly reviewed and overhauled its compliance procedures earlier this year. This decision reminds advertisers of the dangers in attempting to qualify advertising messages with small print conditions.</p>  |

## POLAND



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| <b>1. The Issue:</b>                    | Dishonest advertising, advertising in breach of good practice   |
| <b>The Parties:</b>                     | Federation of Consumers v. "Clou" Spółka z o.o.   |
| <b>Place:</b>                           | The Court of Appeal in Gdańsk, case file no: I ACr 839/96   |
| <b>Date:</b>                            | November 11, 1996   |
| <b>Facts and judgment of the court:</b> | <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</p> |

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|                  | in the appealed verdict of the issues related to good practice meant that the mentioned verdict infringed the law, in particular Article 16 of the Act on suppression of unfair competition.  |
| <b>Comments:</b> | 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. |

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| <b>2. The Issue:</b>                    | Admissibility of the cigarettes promotion lottery   |
| <b>The Parties:</b>                     | P.M. Polska S.A. and the Minister of Finance  |
| <b>Place:</b>                           | The Supreme Administrative Court in Warsaw, case file no: II SA 1016/00   |
| <b>Date:</b>                            | April 4, 2001   |
| <b>Facts and judgment of the court:</b> | <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</p> |

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|                  | obliged to undertake actions aimed at protection of health from the 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. |
| <b>Comments:</b> | The general prohibition on cigarettes and nicotine product advertisement covers the prohibition of cigarette promotion lotteries as well.   |

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| <b>3. The Issue:</b>                    | Prohibition of advertising and promotion of the products taking advantage of similarity to alcohol beverages   |
| <b>The Parties:</b>                     | The Polish Confederation of Private Employers  |
| <b>Place:</b>                           | The Constitutional Tribunal, case file no: K 2/02  |
| <b>Date:</b>                            | January 23, 2003   |
| <b>Facts and judgment of the court:</b> | <p>The Polish Confederation of Private Employers filed a motion with the Constitutional Tribunal for a declaration that the provisions of Article 13<sup>1</sup> Section 3 and 4 of the Act of October 26, 1982 on education in sobriety and suppression of alcoholism and Article 45<sup>2</sup> of this Act that includes the penal provisions that are incompatible with the Constitution. Article 13<sup>1</sup> 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 13<sup>1</sup> Section 3 and 4 and Article 45<sup>2</sup> 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 13<sup>1</sup> Section 3 and the prohibition of advertisement and promotion of the business entities specified in the Article 13<sup>1</sup> 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 13<sup>1</sup> 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 13<sup>1</sup> 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 -</p> |

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|                  | <p>does not infringe Article 20, 21, 22, 31 Section 3, Article 32 and Article 64 of the Constitution and Article 10 of the Convention for the protection of human rights and fundamental freedoms. Moreover, Article 45<sup>2</sup> of this Act in conjunction with Article 13<sup>1</sup> 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 13<sup>1</sup> 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>  |
| <b>Comments:</b> | <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> |

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| <b>4. The Issue:</b>                    | Advertising misleading the consumers  |
| <b>The Parties:</b>                     | U.(...)D.(...) Inc – Sp. z o.o. v. D.(...)E.(...)P.(...) Sp. z o.o.   |
| <b>Place:</b>                           | The Supreme Court of the Republic of Poland, case file no: I CKN 52/96  |
| <b>Date:</b>                            | January 14, 1997  |
| <b>Facts and judgment of the court:</b> | <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</p> |

the effect that the defendant is the exclusive distributor of this equipment 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

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|                  | <p>defined by the Act. However, it shall be noted that the doctrine briefly 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> |
| <b>Comments:</b> | <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>  |

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| <b>5. The Issue:</b>                    | The advertising of beer, indirect advertising, advertising in breach of good practice.   |
| <b>The Matter:</b>                      | Okocim Brewery   |
| <b>Place:</b>                           | The Supreme Court of Republic of Poland, case file no: III CKN 213/01  |
| <b>Date:</b>                            | September 26, 2002   |
| <b>Facts and judgment of the court:</b> | <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> |

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|                  | <p>The Supreme Court decided that such advertisement constituted indirect 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.</p>  |
| <b>Comments:</b> | <p>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.</p> |

## PORTUGAL



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| <b>1. Legislation</b> |   |
| <b>Rules</b>          |   |
| <b>Topic:</b>         | Tobacco Products: Implementation of Directive No. 2001/37/CE  |
| <b>Who:</b>           | Portuguese Government   |
| <b>When:</b>          | February 2003   |
| <b>Where:</b>         | Portugal  |
| <b>What happened:</b> | <p>The Portuguese Government implemented Directive nr. 2001/37/CE regarding the production, advertising and selling of tobacco products.</p> <p>Besides setting the levels of tar and nicotine allowed in tobacco products, it also imposes the use of warnings such as: "Smoking kills" and "Smoking severely harms your health and the health of those around you". The sellers must also choose a warning from a list, which indicates health related dangers in smoking and advising the protection of children. Moreover, it has clear rules on the position, size and type of the letter in which such warnings must be imprinted. It forbids the sale of tobaccos destined for oral use as well as the selling of tobacco in health, education, public-administration and sporting facilities and in museums or libraries. Finally, it also imposes some obligations on the producers and importers of tobacco of informing the ingredients contained in the tobacco sold.</p> |
| <b>Comment:</b>       | The new advertising rules concerning tobacco products strengthens the fight against the consumption of tobacco products and restricts even further the freedom in their advertising, imposing precise rules on the packaging of tobacco products.   |

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| <b>2. Self-Regulation:</b> |   |
| <b>Case Report:</b>        |   |
| <b>Topic:</b>              | Implicit Comparative Advertising  |
| <b>Who:</b>                | The Jury of the Civil Institute of Self Regulation in Advertising (ICAP)            |
| <b>When:</b>               | July 2003   |
| <b>Where:</b>              | Portugal  |
| <b>What happened:</b>      |  |


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|                        | <p>A well-known dishwashing detergent company used comparative advertising to promote its product, implicitly identifying the competitors and using what their competitor considered as a depreciative remark. The TV commercial showed two tea-stained cups, stating that it is one of the hardest stains to remove and that their brand cleaned better than other ordinary brands. In a second commercial, the advertisement showed two dirty inox pans, stating that it was very difficult to maintain the shine in inox and that their brand was the more effective in maintaining the brightness in inox. Although admitted by the infracting company, it was considered as implicit advertising since the market share of the two most sold dishwashing detergents indicated that the comparing product could only be from one company. As for the tea stain removal efficiency, the company was capable of proving the facts that distinguished its dishwashing detergent from other dishwashing detergents sold by other companies by means of tests performed under equal conditions. Nonetheless, it was not capable of proving the better efficiency in maintaining brightness in inox. In fact, not only did it not prove that ability but it was also proven that the results were manipulated, i.e. the inox pan shown as washed with the "ordinary" detergent was clearly not as bright as it should be, in order to evidence the contrast between brands and therefore was considered as misleading. Finally, regarding the use of the word "ordinary", taking into account the normal/average meaning of the word in Portuguese language, the Jury didn't consider it as depreciative. It ordered the campaign to cease but declared not to have the powers to oblige a company to make corrective advertising.</p> |
| <p><b>Comment:</b></p> | <p>The Jury's verdict appears interesting as it fixes some restrictions to comparative advertising, impending on the advertising that is comparing the products the burden of proof of the features it claims its products to have. According to the Jury's opinion there is liability for misleading and comparative advertising, although it does not have the powers to enforce corrective advertising.</p>   |

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| <p><b>3. Self-Regulation:</b></p> |   |
| <p><b>Case Report:</b></p>        |   |
| <p><b>Topic:</b></p>              | <p>Misleading Advertising</p>   |
| <p><b>Who:</b></p>                | <p>The Jury of the Civil Institute of Self Regulation in Advertising (ICAP)</p>   |
| <p><b>When:</b></p>               | <p>April 2003</p>   |
| <p><b>Where:</b></p>              | <p>Portugal</p>   |
| <p><b>What happened:</b></p>      | <div data-bbox="483 1549 1003 1812" data-label="Image"> </div> <p>A telecommunications company used a journalist to advertise their</p> |

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|                 | <p>promotion on lower price calls on a TV commercial by simulating an outdoor news report where the journalist asked people if they new mathematics and to execute a calculus operation. Not waiting for the persons answer, the journalist said: "if more people knew how to do mathematics, more people would change to our operator". This was considered as an illegitimate use of a well-known newsperson in a commercial by a competitor, which presented the case to the Jury of the ICAP. The Jury agreed to the charges presented and ordered the advertising to be removed from television. Although Portugal is not part of the European Convention of Television Without Frontiers which expressly advises the non-use of journalists or newspersons in television advertisements, this type of advertising was considered to violate the principles of advertising due to the fact that it was misleading to the general audience that may be incapable of distinguishing the commercial from a news report.</p> |
| <b>Comment:</b> | <p>The use of a well-known newsperson is bound to mislead the general audience and therefore should be done with clear identification of the advertising nature of the commercial. Newspersons have a trust from the consumer audience that should not be used for commercial advantages, as both ethics in advertising and journalism advise.</p>  |

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| <b>4. Self-Regulation:</b> |  |
| <b>Case Report:</b>        |  |
| <b>Topic:</b>              | Misleading Advertising to a limited offer  |
| <b>Who:</b>                | The Jury of the Civil Institute of Self Regulation in Advertising (ICAP)   |
| <b>When:</b>               | April 2002   |
| <b>Where:</b>              | Portugal   |
| <b>What happened:</b>      | <div style="text-align: center;">  </div> <p>In an advertisement to diapers, a company claims to have the best and driest diapers and to offer a discount, although limited to the existing stock. A competitor presented charges on the basis of misleading comparative advertising and depreciative advertising. In the analysis of the comparative and allegedly misleading advertising, the Jury finds it to be perfectly legitimate, since the claiming to have the driest diapers in the market is affirming a prominent position in the market and excluding all other competitors from that position, without mentioning any of them. Although it is common for the advertising company to use superlative language and overstate its qualities. To state: "It's the best product in the market" does not constitute a violation of the law. However, a statement that clearly refers that the company has the driest diapers must be provable by the advertiser. Nevertheless it cannot be considered as depreciative to any competitor since it does not indicate any them.</p> |

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|                 | As to the indication of the limited stock, the Jury also considers that all legal obligations were met. Since indicating that the discount is limited to the existing stock is a legal obligation under Decree-Law nr 253/86, the competitor alleged that there should be an indication as to the number of existing units in the stock. However, the Jury considered as sufficient the warning of "promotion limited to the existing stock", since it would be excessive to impose such burden on any campaign with a limited offer. |
| <b>Comment:</b> | This case enlightens the interpretation of two important issues; comparative/superlative advertising and indication of limited stock offer. It reinforces the principles of truthfulness and misleading advertising by restating that all invoked features of a product must be provable by the advertiser and that legal requirements should not be interpreted without limitations.   |

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| <b>5. Self-Regulation:</b> |   |
| <b>Case Report:</b>        |   |
| <b>Topic:</b>              | Truthfulness and Legality Principles and restrictions in advertising to minors  |
| <b>Who:</b>                | The Jury of the Civil Institute of Self Regulation in Advertising (ICAP)  |
| <b>When:</b>               | September 2002  |
| <b>Where:</b>              | Portugal  |
| <b>What happened:</b>      |  <p>The review board ordered the ceasing of a TV commercial in which a child is viewed rejecting all food that is presented to him because of "defects", such as spines in fish, bone in chicken, rind in an apple, cream in milk, and then accepts a sandwich with no crust, since he finds it to have no defects. The Consumer Defense Association (DECO) filed a complaint stating that the advertising should be prohibited because it was misleading, since it suggested the sandwich could substitute a complete meal and stimulates people not to consume other products, which should be part of a regular diet. Moreover it considered that it offended the principles of advertising regarding minors, namely their constitutional right for a well-balanced and healthy nourishment and explores their psychological vulnerability and credulity. The Jury firstly decided that DECO was right in all charges, namely by suggesting that the bread with no crust could act as a substitute for all the other food presented, stimulating children not to consume it. However, the review board decided, on a second analysis, that there was no misleading advertising, since there was no suggestion that bread without crust could be a replacement for the other products presented. It considered the advertisement a simple parody to children's "attitude" towards food and consequently considered the advertisement not to violate any principles of advertising regarding minors, except for the exploration of their</p> |

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|                 | credulity and psychological vulnerability, since children would identify themselves with the child presented in the commercial and therefore be stimulated to reject everything they did not want and "get away with it".  |
| <b>Comment:</b> | The Advertising Self-Regulation system sets the limits in campaigns regarding minors. Although it may be considered has a somewhat exaggerated decision, the review board clarifies that all advertising regarding minors should be particularly well thought and careful in the message it tries to send out. |

## SINGAPORE





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| <b>1. Topic:</b>      | Liver transplant TV actress wins lawsuit against over-the-counter Slim 10 pill importer and distributor   |
| <b>Where:</b>         | Singapore   |
| <b>When:</b>          | 4 October 2003  |
| <b>What happened:</b> | <p>Television actress Andrea De Cruz has been awarded by the Singapore High Court an estimated US\$575,000 from parties involved in the Slim 10 slimming pill saga.</p> <p>The 29-year-old television actress had sued importer Health Biz and its director, Mr. Semon Liu, 33 and the distributor TV Media for the liver injury that almost killed her after she had taken the China-made diet pills.</p> <p>De Cruz was saved by a liver transplant when her fiancée donated part of his liver.</p> <p>A 43-year old Singaporean, Ms. Rani Raja, who is believed to have taken the same product died from acute liver failure. About a dozen other people who took Slim 10 were hospitalised.</p> <p>Mr. Liu and Health Biz, Justice Tay Y. K. said, placed 'blind faith' in the Chinese manufacturer and did not do tests to make sure the product was free of banned substances, such as fenfluramine.</p> <p>TV Media, in turn, placed 'blind faith' in everything Mr. Liu said when it agreed to distribute and promote his product - even though he had no track record as an importer of Chinese medicines.</p> <p>It appears that traditional Chinese medicine was not to blame, but a certain unsafe drug fenfluramine which had been added. The serious health risk of this drug, which can cause hepatitis, heart valve problems and thyroid problems were not drawn to the attention of the consumers. In March of this year, a settlement was reached in a class-action suit in Canada also involving fenfluramine.</p> <p>Health Biz imported the pills from China and packaged them with a sleek, stylish modern look. It was advertised and distributed by TV Media known for advertising home exercise equipment and other household goods.</p> <p>Health Biz and TV Media owed a 'duty of care' to consumers like Ms. De Cruz, said the judge.</p> <p>Justice Tay awarded what Ms. De Cruz had sought in medical expenses,</p> |

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|  | <p>amounting to an estimated US\$122,500, and the estimated US\$145,000 she had asked for as compensation for what she had suffered and may continue to suffer.</p> <p>Besides the effects of liver failure, he took into account the 'nagging and gnawing' thought of whether the transplanted liver would fail or her weakened body would succumb to some disease or other. 'Visits to hospitals have become a way of life for this once vivacious young lady who is now uninsurable', he said.</p> <p>The Court also awarded her estimated US\$155,000 - based on the next 34 years for future drug expenses.</p> <p>Her award for loss of earnings was estimated US\$55,500 perhaps taking into consideration that she could still return to television or that few television actors have a lengthy careers.</p> <p>The total award was about estimated US\$520,000.</p> <p>The Consumer Association is reported to have described the judgment as a clarion call to manufacturers, importers and sellers of products to exercise responsibility and duty of care to consumers.</p> <p>With the huge publicity of the case rather than because of any new legal precedent, the case has been described as a landmark victory for consumer rights. The well-publicised case may influence aggrieved consumers in Singapore to be more prepared to seek legal redress.</p> <p>Manufacturers and other businesses who market goods to the Singapore market and advertise through the Singapore media are advised to discuss with Singapore importers and distributors and consult with Singapore legal counsel steps that can be taken to reduce the likelihood of product liability lawsuits.</p> |
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| <b>2. Case Report :</b> | Civil Appeal No. 43 of 2002A  |
| <b>Topic :</b>          | Trademark Infringement  |
| <b>Where :</b>          | Singapore   |
| <b>When</b>             | 2002  |
| <b>What Happened:</b>   | 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. |

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| <p><b>Comment:</b></p> | <p>Trade Mark/Copyright Infringement</p> <p>Bee Cheng Hiang Hup<br/>Chong Foodstuff Pte Ltd v.<br/>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>Fragrance commenced an action in the High Court for copyright and trade mark infringement and concurrently applied for an <i>ex partes</i> injunction. The application was eventually heard <i>inter partes</i>.</p> <p>Further to BCH entering its appearance to the action, Fragrance applied for summary judgment in respect of the alleged copyright infringement.</p> <p>The High Court judge heard the <i>inter partes</i> 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.</p> <p><u>The Appeal</u></p> <p>It was not in dispute that:-</p> <ol style="list-style-type: none"> <li>a. Fragrance owned the copyright in the "Xiang Fragrance" logo;</li> <li>b. BCH had published the "Xiang Fragrance" logo without Fragrance's consent; and</li> <li>c. BCH had <i>prima facie</i> infringed Fragrance's copyright in the "Xiang Fragrance" logo.</li> </ol> <p>BCH appealed to the Court of Appeal on the basis that while there was <i>prima facie</i> infringement, BCH was entitled to defences under S. 27(6) of the Trademarks Act and S. 37 of the Copyright Act.</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> |
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## SOUTH AFRICA



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| <b>1. Self-Regulation:</b> |  |
| <b>Rules</b>               |  |
| <b>Topics:</b>             | Section 2 , Clauses 8 and 9 of the Advertising Standards Authority (ASA)'s Code of Advertising Practice ("exploitation of advertising goodwill" and "imitation")   |
| <b>Who:</b>                | Appeal Committee of ASA of South Africa  |
| <b>When:</b>               | July 2003  |
| <b>Where:</b>              | Johannesburg, South Africa   |
| <b>What happened:</b>      | <p>The Appellant is a manufacturer and distributor of an extensive range of both sweet and savoury biscuits (cookies) in South Africa. It had lodged a complaint with the ASA against the Respondent on the basis of Clause 8 ("exploitation of advertising goodwill") and Clause 9 ("imitation") of the ASA Code of Advertising Practice, as the Respondents had launched, over several years, five products with labelling and packaging imitating the get-up of the Appellant's products.</p> <p>The ASA Tribunal had ruled that two of the Respondents products sold as LEMON CREAMS and MARIE, did infringe the Code, while the biscuits sold as CHOC-KRUST and MUNCH-A-LOT did not. The Tribunal did not rule on the fifth product sold under the name TEA LOVERS. The Appellant appealed the decision in respect of CHOC-KRUST, MUNCH-A-LOT and TEA LOVERS, while the Respondent cross-appealed in respect of the LEMON CREAMS and MARIE products.</p> <p>On appeal, the Respondent argued that:</p> <ol style="list-style-type: none"><li>i) the ASA did not have jurisdiction to hear the complaint as the Respondent was not a member of the ASA;</li><li>ii) the self-regulatory nature of the ASA offended against Section 4 of the Competitions Act (dealing with restrictive horizontal practices).</li></ol> <p>The Appeal Committee dismissed both arguments. It held that the Respondent had, by its conduct, consented to the ASA's jurisdiction, even though it was not a member of the ASA, and it held that the self-regulatory nature of the ASA does not contravene Section 4 of the Competitions Act.</p> <p>In deciding whether Clauses 8 and 9 of the ASA's Code had been contravened, the Appeal Committee analysed the allegedly offending packaging of the Respondent's products and compared them with the Appellant's original packaging. The Appeal Committee found that the Appellant had failed to establish that the Respondent had intended to copy or take advantage of its goodwill in relation to the brands sold</p> |

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|                  | under CHOC-KRUST and TEA LOVERS. However, it found that the similarities between the Respondent's MUNCH-A-LOT, LEMON CREAMS and MARIE products and the Appellant's equivalent products were such that it was clear that the Respondent had an intention to copy and take advantage the Appellant's advertising goodwill. The Respondent was directed to withdraw the packaging of those products within 3 months of the date of the order. |
| <b>Comments:</b> | The ASA Appeal Committee pointed out that it is, in fact, in the interests of fair competition that self-regulation of the advertising industry is overseen by a body that is not a competitor in the marketplace. It also highlighted the negative effect that misleading advertising has on lawful competition. The regulation of advertising is practised on a self-regulatory basis worldwide.   |

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| <b>2. Self-Regulation:</b> |  |
| <b>Rules</b>               |  |
| <b>Topics:</b>             | Section 2 , Clauses 8 and 9 of the Advertising Standards Authority (ASA)'s Code of Advertising Practice ("exploitation of advertising goodwill" and "imitation")   |
| <b>Who:</b>                | Advertising Industry Tribunal of the Advertising Standards Authority (ASA)   |
| <b>When:</b>               | May 2003   |
| <b>Where:</b>              | Johannesburg, South Africa   |
| <b>What happened:</b>      | <p>The Complainant had registered the trade mark SPRING FRESH in South Africa in relation to sanitary preparations (class 5) and had applied to register the trade mark SPRING FRESH in South Africa for bleaching and other preparations (class 3). It had also used the mark SPRING FRESH in relation to its products sold as JIK and HARPIC for many years and contended that it had acquired an extensive goodwill and reputation in relation to the mark SPRING FRESH.</p> <p>The Complainant lodged three complaints, based on "exploitation of advertising goodwill" (Clause 8 of the ASA Code) and "imitation" (Clause 9), with the ASA against the three Respondents, which were using the mark SPRING FRESH as a variant for their respective products, (all of which fell into class 3 and/or 5). The First Respondent was using the mark SPRING FRESH as a variant for its HANDY ANDY and DOMESTOS products. The Second Respondent was using it as a descriptor for its fabric softener product sold under the name STA-SOFT, and the Third Respondent was using it in relation to its brand of fabric softeners.</p> <p>The Second Respondent submitted extensive evidence that it had used the mark SPRING FRESH to describe a product variant of STA-SOFT for over thirty years. It also argued that the term SPRING FRESH is used on at least seven different products in South Africa. All three Respondents alleged that the term SPRING FRESH was purely descriptive and was nothing more than a generic term which was widely used in the trade.</p> <p>The Advertising Tribunal of the ASA ruled that SPRING FRESH was a generic term extensively used by various manufacturers in the trade. It held that the descriptor SPRING FRESH had not become a brand name (or a sub-brand) and that any consumer looking for a product in the relevant</p> |

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|                  | categories would look for the JIK, DOMESTOS or STA-SOFT trade marks. The complaints were accordingly dismissed.  |
| <b>Comments:</b> | A word that is in such common use in the market place so as to become generic can never be monopolised by one trader. This would jeopardise fair competition in the market place in respect of the products which, for example, use this word to describe one of its variants. |

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| <b>3. Self-Regulation:</b> |   |
| <b>Rules</b>               |   |
| <b>Topics:</b>             | Advertising Standards Authority (ASA) Code of Advertising Practice:<br>Section 2 , Clause 4.2.1 “misleading claims”<br>Section 11, Clause 4.1 “ substantiation”<br>Appendix C, Clause 8 “ advertising of cosmetics”- use of the word ‘natural’<br>Appendix C, Clause 9 “ advertising of cosmetics”- use of the word ‘pure’<br>Appendix C, Clause 19.2 “advertising of cosmetics SPF claims”- preparations containing sunscreens- SPF claims.  |
| <b>Who:</b>                | ASA Directorate   |
| <b>When:</b>               | July 2003   |
| <b>Where:</b>              | South Africa  |
| <b>What happened:</b>      | <p>The Complainant, who is a consumer, lodged a complaint with the ASA against an advert published in a health magazine and a television commercial for the Respondent’s SKIN NATURALS FRESH and SKIN NATURALS PURE products. The adverts feature the packaging of the product and the claim “.. A sunscreen to help provide protection” appears on the packaging.</p> <p>The Complainant argued that the claim on the packaging of the products, relating to the sunscreen that helps provide protection, is in contravention of South African legal requirements, as the precise sun protection factor (SPF) is not stated. The Complainant further argued that the word FRESH as used on the packaging of the product shown in the magazine advert is replaced with the word PURE in the television commercial. The Complainant contended that this, together with the fact that the range is called SKIN NATURALS, clearly misleads the consumer into thinking the product is natural.</p> <p>The Respondent argued that its SKIN NATURALS range is an international brand name for which worldwide trade mark registrations have been obtained. Active natural ingredients are used wherever possible. The SKIN NATURALS range consists of three sub-ranges: a) ESSENTIALS -for normal to dry skin, b) FRESH- for normal to combination skin and c) PURE- for combination to oily skin. The Respondent argued that it chose not to make a SPF claim, as it was not aware of any legal obligation to do so and also did not wish to confuse and mislead the consumer into believing that he is fully protected from the sun with such a product.</p> <p>The ASA Directorate considered the relevant documentation submitted to it by the respective parties, as well as the expert opinion requested by the ASA Directorate from the Cosmetics, Toiletries and Fragrance Association of South Africa (CTFA). This expert opinion related to the reference to SPF without stating the specific sun protection factor and the</p> |

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|                  | <p>use of the words FRESH and PURE on the products in dispute.</p> <p>The ASA Directorate held, with regard to the packaging of the SKIN NATURALS products, that the CTFA's view regarding the claim "a sunscreen to help provide protection" is that no cosmetic product can claim that it contains sunscreen unless a valid SPF number appears on the product, otherwise it is misleading, as it is impossible to determine the amount of protection being offered. The ASA held that the adverts and packaging are therefore in contravention of Clause 19.2 of Appendix C.</p> <p>In addition, it was held that the Respondent failed to submit substantiation to support the claim "a sunscreen to help provide protection", therefore it did not prove that the product contains sunscreen and the SPF number of the sunscreen contained in the product. Therefore the product is in contravention of Clause 4.1 of Section 2 . Furthermore, it was held that the packaging and adverts are in contravention of Clause 4.2.1 of Section 2, as the claim "a sunscreen to help provide protection" is misleading in that it is not clear as to the SPF number of the product. As such, the Respondent is required to withdraw all advertising bearing this claim, with immediate effect.</p> <p>The ASA Directorate also noted the CTFA's opinion that the word PURE is used in a non-descriptive sense and is merely the name of a specific product. As the product does not make any claims that it contains pure products, it is not in contravention of Clause 8 of Appendix C. Furthermore, as the CTFA submitted that the television commercial does not attempt to mislead consumers into believing that the product is made from an all natural source, the television commercial is not in contravention of Clauses 8 and 9 of Appendix C of the Code.</p> <p>The complaint was partially upheld.</p> |
| <b>Comments:</b> | <p>The CTFA advised that consumers are generally well-informed in terms of SPF numbers and the protection afforded by them. Thus a claim "a sunscreen to help provide protection" is misleading, as the amount of protection offered is not measurable. Clause 19.5.2 of Appendix C states that specific protection claims may only be made with reference to SPF numbers clearly stated on the label.</p>   |

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| <b>4. Self-Regulation:</b> |  |
| <b>Rules</b>               |  |
| <b>Topics:</b>             | <p>Advertising Standards Authority (ASA) Code of Advertising Practice:<br/> Section 1, Clause 1.2 "responsibility"<br/> Section 2, Clause 4.1 "substantiation"<br/> Section 2, Clause 4.2.1 "misleading claims"</p>  |
| <b>Who:</b>                | ASA Directorate  |
| <b>When:</b>               | July 2003  |
| <b>Where:</b>              | South Africa   |
| <b>What happened:</b>      | <p>The Complainant lodged a complaint with the ASA against the Respondent's print advertisement for its unregistered RECHARGE product, which was distributed directly to pharmacies. One of the claims made in the advertisement was that the product "aims to get you off your normal</p> |

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|                  | <p>diabetic tablets or insulin and is suitable for type one and type two diabetics".</p> <p>The Complainant argued that the advertisement is misleading and dangerous, in that it suggests that RECHARGE can "get you off your normal diabetic's tablets or insulin".</p> <p>The Respondent argued that the document referred to by the Complainant is not an advertisement, but is the first information letter sent by it to pharmacies requiring information on the product. It further argued that this letter had never been published in any magazine or newspaper. The Respondent argued that its product RECHARGE is a "complimentary" product and does not profess to be a cure or replacement for any medication. It argued that it provides information in all of its documentation that ensures that the public receives as much information about dealing with diabetes as possible. It argued that it advises consumers to use prescribed diabetic medicine and to consult their doctor and pharmacy. In addition, the Respondent argued that the document in question was used only once in 2001 and was sent directly to pharmacies. It stated that it has not been used since 2001 and will not be used again in the future</p> <p>The ASA Directorate noted the Respondent's submission that the document in question was not an advertisement and was only sent out to pharmacies to provide information on the product. It also noted that the Respondent used the advertising material only once in 2001, had not used it since and would not use it again in the future. As such, the ASA Directorate accepted the Respondent's undertaking not to use the advertising material again in future.</p> |
| <b>Comments:</b> | <p>The ASA Directorate accepted that any material promoting any product or service which is distributed directly to the trade does constitute advertising.</p>   |

## SPAIN



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| <b>1. Legislation:</b> | GENERAL ADVERTISING ACT  |
| <b>Topic:</b>          | Unlawful advertising   |
| <b>When:</b>           | MAY 2003   |
| <b>Who:</b>            | ADVERTISING SELF-REGULATION ASSOCIATION  |
| <b>Where:</b>          | SPAIN  |
| <b>Highlight:</b>      | <p>The company Allied Domecq España, S.A. is responsible for an advertising campaign called "Go Snow" consisting of 3 posters, all of which carry the Ballantine's logo. In the first poster there is a drawing of 3 toy figures sliding down a mountain side. The second poster has a drawing of a toy figure doing a pirouette on a snowboard. And in the third poster we can see the drawing of a toy figure sliding on a snowboard. All the posters include the slogan "Go Snow" and, written on the lower part of the poster: "9th Ballantine's Snowboard Circuit. Break with routine and come snowboarding with Ballantine's".</p> <p>The Spanish Scientific Society for Studies on Alcohol, Alcoholism and other Drug Addictions (Socidrogalcohol) filed a complaint before the AAP against that campaign alleging that it associated alcohol with sports, thereby infringing the General Advertising Act and the Advertising Self-regulation Code of the Spanish Alcoholic Beverage Federation (FEBE - Federación Española de Bebidas Espirituosas).</p> <p>In their written allegations, Allied Domecq España S.A. said that the campaign in question advertised a sponsored sporting event, and denied that in the campaign alcoholic beverages were associated with sports, beyond the lawful sponsoring of sports events, because the texts and images used in the advertisements in no way associated consuming the products of the sponsor trade mark with snowboarding.</p> <p>As a preliminary point the AAP Jury said that there are currently no provisions that generally ban sponsoring of sports events by alcoholic beverage trade marks. Consequently, such sponsoring must be considered lawful.</p> <p>After reviewing the advertising campaign in question the AAP Jury rejected the allegation that merely because an alcoholic beverage trade mark sponsors a sporting event, the drinking of alcohol is associated with improved physical performance. Therefore, to be able to frame the advertisements as unlawful advertising, these would have to include messages leading the targeted consumers to associate drinking the alcoholic beverage whose trade mark sponsors the event with improved physical performance. From that point of view the Jury considered the "Go Snow" campaign to be lawful.</p> |

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| <b>Comment:</b> | In Spain it is still lawful for alcoholic beverage trade marks to sponsor sporting events. |
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| <b>2. Legislation:</b> | General Advertising Act  |
| <b>Topic:</b>          | Unlawful advertising   |
| <b>When:</b>           | May 2003   |
| <b>Who:</b>            | ADVERTISING SELF-REGULATION ASSOCIATION  |
| <b>Where:</b>          | SPAIN  |
| <b>Highlight:</b>      | <p>The company Iparlat, S.A. published two advertisements, one in print and another in television. The first advertisement showed, against the background of a park, three "Benecol of Kaiku" products, and on the right-hand-side an image of athlete Martin Fiz. Over both images was written: "Against cholesterol? Exercise and Benecol of Kaiku". Besides, on the packages of the products one can clearly read: "Reduces cholesterol".</p> <p>The advertisement aired on television showed cook Juan María Arzak in a restaurant kitchen saying: "Some food maintains cholesterol levels and other food regulates them. However, I have discovered a marvellous dairy drink that is natural, tastes good and, besides, reduces cholesterol". The advertisement ended with a voice off screen saying: "Benecol of Kaiku with ethanol reduces cholesterol".</p> <p>According to the complainant, the Communication Users Association (AUC - Asociación de Usuarios de la Comunicación), using expressions such as "Benecol reduces cholesterol" may be framed as a case of unlawful advertising, on the grounds of Section 3 of the General Advertising Act which provides that advertising is unlawful if it breaches the provisions governing the advertising of certain products, goods, activities or services.</p> <p>In that respect the AUC referred to the provisions of Section 4.7 of Royal Decree No. 1907/1996, on advertising and commercial promotion of alleged health care products or services, which bans direct or indirect advertising, whether massive or individualised, of alleged health care products which, among other things, "purports to provide evidence from health care professionals, famous or known persons, or actual or supposed patients, as a way of enticing consumers to use them."</p> <p>The AAP Jury took the view that the advertisement in question breached the provisions of Section 4.7, 4.9 and 4.13 of the above-mentioned Royal Decree. Section 4.9 bans advertisements that claim given forms, presentations or trade marks of common food products to have concrete and specific prevention, therapeutic or curative properties, and Section 4.13 bans advertisements that use the term "natural" as a feature linked to alleged prevention or therapeutic effects.</p> <p>The Jury concluded that the advertisement in question attributed cholesterol prevention and therapeutic properties to a common food product, describing it as "natural", and showing the images of famous persons enticing consumers to use the product on the grounds of its prevention and therapeutic properties. Consequently, the Jury declared</p> |

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|                 | the advertisements to be unlawful and called on the advertiser to withdraw them.  |
| <b>Comment:</b> | The advertisements violate the principle of truthfulness by claiming that a product has cholesterol prevention and therapeutic properties, of which there is no scientific proof. |

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| <b>3. Legislation:</b> | Spain amends General Telecommunications Act   |
| <b>Topic:</b>          | E-Commerce  |
| <b>When:</b>           | May 2003  |
| <b>Who:</b>            | SPANISH PARLIAMENT  |
| <b>Where:</b>          | SPAIN   |
| <b>Highlight:</b>      | <p>When the Information Society Services and E-Commerce Act (LSSI - Ley de servicios de la sociedad de la información y de comercio electrónico) became effective, an interesting debate took place in Spain over future amendments to be introduced in the Act in respect of advertising sent by businesses to their clients by e-mail in order to bring its provisions in line with Directive 2002/58/EC, concerning the processing of personal data and the protection of privacy in the electronic telecommunications sector. While such advertising was permitted by the Directive, it was banned under the LSSI.</p> <p>The solution finally adopted by the Spanish Ministry of Science and Technology has not been the most appropriate in our view. Instead of amending the LSSI, the Government has chosen to reform the General Telecommunications Act (LGT - Ley General de Telecomunicaciones).</p> <p>Thus, Section 38 of the LGT Bill approved last May by the Spanish Parliament provides that consumers and end users have a right <i>not to receive automated calls without human intervention, fax messages, e-mail or data messages sent to fixed or mobile terminals, for direct sales purposes, without their prior and informed consent</i>. So far we have no objections.</p> <p>However, there is an exception to the rule, which results from transposing the relevant provisions of Directive 2002/58/EC almost literally in the LGT Bill, as follows: <i>when an individual or juristic person obtains the e-mail address of customers in the context of a sale of a product or service in accordance with Section 6.2 of the Spanish Data Protection Act No. 15/99, of December 13 1999, the same individual or juristic person is allowed to use the e-mail address for direct marketing of its own products or services having similar characteristics, provided that the customer is offered in an absolutely clear manner, the opportunity of refusing such usage, free of charge and in a simple manner, at the time of collecting the personal data and, in case the customer has not initially refused such usage, each time the customer receives a further message</i>.</p> <p>Given the obvious contradiction there is between the LSSI and the LGT, it will be necessary to resort to the Repealing Provision of the latter Act, which repeals all other provisions of the same or a lower rank which are contrary to the provisions of the LGT.</p> |
| <b>Comment:</b>        | In conclusion, the absolute ban on SPAM found in Section 21 of the LSSI is  |

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|  | repealed. |
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| <b>4. Legislation:</b> | Advertising Code of Conduct  |
| <b>Topic:</b>          | Advertising that offends the dignity of women  |
| <b>When:</b>           | January 2003   |
| <b>Who:</b>            | ADVERTISING SELF-REGULATION ASSOCIATION  |
| <b>Where:</b>          | SPAIN  |
| <b>Highlight:</b>      | <p>The company Internacional de Relojería, S.A. recently published an advertisement featuring a picture of a wrist watch and the following text, in large letters: "Women smoke our Cohibas. Drive our Harleys. Drink our Lagavulin. Let them at least leave our IWCs to us! Along with that message there was another, in smaller letters, which read as follows: "Its size only admits powerful wrists: the Portuguese Chrono-Automatic. An analog self-winding stopwatch with a small seconds hand". Lastly, there was the trade mark logo, along with the slogan: "Since 1868. For as long as there are men".</p> <p>A private individual filed a complaint against that advertisement before the Advertising Self-regulation Association (AAP - Asociación de Autocontrol de la Publicidad), on the grounds that the advertisement offended the dignity of women and of persons in general. In the complainant's view, the advertisement directed to male customers used negative connotations, i.e. showed the watch as a symbol beyond the reach of women.</p> <p>The AAP Jury took the view that the advertisement in question breached rule 10 of the Advertising Code of Conduct, which provides that "advertising shall not suggest circumstances involving discrimination, whether by reason of race, nationality, religion, sex or sexual preference, and shall not offend the dignity of persons."</p> <p>In the opinion of the AAP Jury, the advertisement in question is clearly discriminatory and clearly shows bad taste in the way it treats the female public by continuously referring to our Cohibas, our Harleys, etc. The advertisement does not merely indicate who the wrist watch is designed for: it presents the product as being solely for the male sex and absolutely forbidden to women.</p> <p>In conclusion, the text of the advertisement suggests that using or consuming the watch in question must be solely reserved to men by reason of their maleness, thereby promoting a differential social positioning of men and women based solely on their sex. This message is manifestly at odds with the principle of non-discrimination in advertising reflected in the above-mentioned rule 10.</p> <p>Therefore the AAP Jury resolved to call on the advertiser to withdraw the advertisement.</p> |
| <b>Comment:</b>        | The message of this advertisement is contrary to the constitutional principle of equality and non-discrimination between genders, given that advertising the watch as being solely for the male sex is not expressly required by the very nature of the product.   |

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| <b>5. Legislation:</b> | Advertising Code of Conduct   |
| <b>Topic:</b>          | Exploitation of another's good name and imitation   |
| <b>When:</b>           | January 2003  |
| <b>Who:</b>            | ADVERTISING SELF-REGULATION ASSOCIATION   |
| <b>Where:</b>          | SPAIN   |
| <b>Highlight:</b>      | <p>The company Danone, S.A. is responsible for an advertising campaign conducted over TV and by means of billboards. In the spot the first image on the screen shows the phrase "The round pleasure has arrived" and the Danone logo, while a voice speaking off screen repeats the same phrase. Next, a cup of "Danissimo" yoghurt can be seen, while the off-screen voice says: "New Danissimo" and then "With a delicious touch of cream. Danissimo. The only yoghurt that is so creamy. So round". The following sequences show a young woman dipping her finger in the yoghurt and sucking it, while the off-screen voice says: "The round pleasure of Danone. ¡Mmm!" The advertisement ends with a close-up shot of the young woman's face, while the voice repeats the message superimposed on the screen: "The round pleasure has arrived".</p> <p>The billboard, for its part, shows a close-up image of a hand holding a cup of "Danissimo" yoghurt, while the other introduces one of the fingers in the cup. On top of this image is written the slogan: "The round pleasure".</p> <p>The company Panrico, S.A. filed a complaint against that advertising campaign before the Self-regulation Jury of the AAP (Spanish acronym for Advertising Self-regulation Association) claiming that the campaign breached rule 20 of the AAP Advertising Code of Conduct (exploiting the good name of others and imitation), because it takes advantage of the idea and advertising impact of the successful campaign created by Panrico-Donuts based on the slogan: "Would you like to have a round day?" Panrico argued that the adoption by Danone of the "The round Pleasure" slogan and the repeated use of the same advertising idea that matches roundness with what is positive or pleasant could hardly be accepted as accidental. On the contrary, Panrico said that Danone's slogan lacked originality, and clearly took advantage of the idea and of the significant advertising impact of Panrico's campaign. The complainant also alleged that its campaign was consequently diluted and lost value, because the idea became commonplace and the singularity of Panrico's campaign was spoiled.</p> <p>Danone defended itself by alleging that the idea of "roundness" had not been created by the complainant, had been used previously in many other advertising campaigns by various companies and there were many other trade marks containing the adjective "round". Danone also denied that the idea of associating "roundness" with something positive or pleasant was created by Panrico, because in Danone's view such idea and association had long formed part of the Spanish cultural heritage. Lastly, Danone alleged that the expression "A round day" is not liable to be appropriated on an exclusive basis because it is of common, colloquial and general use.</p> |

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|                 | <p>Consequently, Danone argued that their campaign did not infringe rule 20 of the Code of Conduct, because it did not involve taking advantage of the work of others and because the "round" and "round day" slogan that Panrico claimed to own did not have a distinctive force of its own, and concluded that the two campaigns were not similar and therefore not liable to give rise to confusion.</p> <p>The AAP Jury reviewed the campaign in question in the light of rule 20 of the Advertising Code of Conduct, which reads as follows:</p> <p><i>"Advertisements shall neither explicitly or implicitly contain references to the distinctive signs of another advertiser, other than in the cases admitted by law or by custom or of acceptable comparative advertising. Nor may advertisements imitate the general pattern, text, slogan, distinctive signs, visual presentation, music, or sound effects of other advertisements, whether domestic or foreign, even if they belong to campaigns that have already finished, in a way that leads the public to confusion or involves unduly taking advantage of others' efforts. All risk of confusion must be averted in advertising."</i></p> <p>The Jury concluded that, actually, there was a coincidence in using the idea of associating "roundness" with something positive, which resulted in a similarity between both advertising campaigns.</p> <p>However, the coincidence resulted from using a very common expression, involving the use of the adjective "round" in the sense of "perfect, complete or successful".</p> <p>As the AAP Jury has acknowledged in previous cases, common expressions must be considered to be freely available for use in advertising, and an advertiser may not claim the right to use them on an exclusive basis. Therefore, using the adjective "round" as associated to something positive or pleasant may not be considered to be a new or original idea attributable Panrico. In fact, associating the term "round" to something positive in advertising is not a new or exclusive idea.</p> <p>Besides, the Jury did not find that any confusion was caused in the target public, as the products were different and there were no other coincidences in the rest of the component elements of the advertising campaigns in question. Therefore, the Jury dismissed Panrico's complaint.</p> |
| <b>Comment:</b> | <p>Once again it is clear that ideas in themselves are not eligible for protection; only the specific way of expressing the ideas may be protected.</p>  |

## SWEDEN



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| <b>1. Case Report:</b> |  |
| <b>Topic:</b>          | Discrediting marketing   |
| <b>Who:</b>            | Swedish state owned railway company SJ against car seller  |
| <b>When:</b>           | September 2003   |
| <b>Where:</b>          | Market Court   |
| <b>What happened:</b>  | <p>A Swedish car seller launched an advertising campaign in order to promote its sale of cars. In the adverts the car seller claimed "We have the solution to your commuting misery – buy a car!". The text in the ad was illustrated by a sign from a railway station stating that the journey between "Hope and despair" is cancelled. The car seller even offered to give a discount to commuters who traded their monthly railway ticket.</p> <p>This campaign was brought to the market court by SJ who claimed that the adverts were discreditable in violation of the marketing practices act and an unfair comparison between traveling by train compared to traveling by car as well.</p> <p>The car seller claimed that the adverts were ironic and that it should not be interpreted literally.</p> <p>The market court held that the adverts were disparaging and disrespectful against train companies in general and against SJ in particular. The car seller was prohibited against using the contested advertising campaign.</p> |
| <b>Comment:</b>        | Humour and irony is not always a good defence.   |

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| <b>2. Case Report:</b> |   |
| <b>Topic:</b>          | Marketing of a device for decoding of television signals  |
| <b>Who:</b>            | Swedish cable TV operators against media company running a website  |
| <b>When:</b>           | September 2003  |
| <b>Where:</b>          | Market Court  |
| <b>What happened:</b>  | <p>On the webpage of the media company adverts promoting devices that enables decoding of TV signals where published. The persons that bought the devices where able to view various cable and satellite transmissions without subscribing to the channels. Sale and use of such devices are prohibited according to Swedish law.</p> <p>The issue in the case before the market court was if the media company could be held responsible for the marketing of the decoding devices. The court found that, since the sale of the devices was illegal, marketing of said devices was in violation of the marketing act. The court used a rule in the</p> |

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|                 | marketing practices act that states that anyone that contributes to a marketing activity that is in violation of the marketing practice act can be held responsible and be subject to a prohibition. Consequently, the media company was prohibited from publishing ads promotion illegal decoding devices on its website. |
| <b>Comment:</b> | This case illustrates that more than the advertiser can be held responsible for violations of the marketing practices act.   |

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| <b>3. Self regulation:</b> |  |
| <b>Topic:</b>              | Revised agreement on opt-out to direct marketing by use of telephone   |
| <b>Who:</b>                | "NIX-telefon" (NIX-phone) and the Consumer Ombudsman, SWEDMA   |
| <b>When:</b>               | August 2003  |
| <b>What happened:</b>      | A new agreement that gives consumers a possibility to be spared from direct marketing by use of telephone. According to the agreement consumers that don't want to receive unsolicited marketing calls at home can submit their number to a list "NIX-telefon". The existence of the list means that undertakings must check phone numbers prior to calling for marketing purposes. It is considered to be a violation of the marketing practices act to call a listed phone number for direct marketing purposes. Currently approximately 200 000 telephone numbers are listed in Sweden. |
| <b>Comment:</b>            | Advertisers that use telephone advertising must check phone numbers before calling consumers.  |

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| <b>4. Topic:</b> | Data protection and children  |
| <b>Who:</b>      | The Nordic Consumer Ombudsmen have conducted a survey of WebPages directed to children and found that on almost all pages the children are tempted to give away personal data. The survey shows that the children are often promised various premiums such as access to games, chat rooms and competitions in return of submitting personal data. According to the Consumer Ombudsman special caution shall be observed when personal data is collected from children and premiums such as participation in games, surveys shall in general be avoided. |
| <b>Comment:</b>  | Advertisers must be careful when personal data is collected from children and ensure that the methods used to collect such data is in accordance with legislation and guidelines such as the guidelines on advertising on the Internet issued by the Nordic Consumer Ombudsmen.   |

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| <b>5. Case Report:</b> |   |
| <b>Topic:</b>          | Misleading advertising  |
| <b>Who:</b>            | Ge-Kås i Ullared ./. Ullared2.se  |
| <b>When:</b>           | August 2003   |
| <b>Where:</b>          | Market Court  |
| <b>What happened:</b>  | Ge-Kås i Ullared is a very well known low-price department store situated in the small place called Ullared. The store has up to 20 000 customers per day and it stocks over 200 000 individual items. Ge-Kås claimed that the words Ge-Kås and Ullared has become synonyms with low-price shopping among consumers not only in Sweden but in the rest of the Nordic countries, the Baltic states and in the north of Germany and Poland. |

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|                 | <p>Ge-Kås was initially founded by a Mr. Karlsson who later sold the company and started a new store, using the same low-price concept, called ullared2.se. The new store was not established in Ullared.</p> <p>Ge-Kås filed a case in the Market Court claiming that the name ullared2.se was misleading advertising, and that the use of the name Ullared was misleading as of the commercial origin.</p> <p>The court found that in spite of the fact that Ullared is a name of a place, it had by extensive use acquired distinctiveness and become established as a trade name for Ge-Kås. Thereby the court found that Mr. Karlssons use of the name ullared2.se was misleading of the commercial origin and an unfair use of the reputation that is associated with Ge-Kås.</p> <p>Mr. Karlsson was prohibited from using</p> |
| <b>Comment:</b> | <p>Extensive use of a geographic name can establish enough distinctiveness to use the marketing practises act to prevent other undertakings from using the name. However, the conclusions of this judgment shall not be overstated mostly due to the fact that the place Ullared would not be known to the general consumers if it weren't for Ge-Kås and that Ge-Kås is extremely well known to the consumers in Sweden.</p>   |

## SWITZERLAND



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| <b>1.</b>             | Jurisdiction  |
| <b>Topic:</b>         | Comparative Advertising   |
| <b>Who:</b>           | Two big Swiss Optician Chains   |
| <b>When:</b>          | May 2003  |
| <b>Where:</b>         | Swiss Federal Court Lausanne  |
| <b>Published:</b>     | BGE 129 II 426  |
| <b>What happened:</b> | <p>A Swiss consumer magazine studied the prices of two big chains of opticians stores and held that X Ltd, despite pretending to be the cheapest, was not always cheaper than Y Ltd. In 4 Y-stores the magazine had found cheaper prices. 4 weeks later the magazine had to correct it since the 4 Y –stores had special offers. After this Y Ltd. published a number of ads with the results from the first article in Z Magazine. X Ltd started legal action claiming unfair comparative advertising.</p> <p>The federal court held that the ads of Y Ltd had to be considered an unfair comparison, since the test only showed details. On the other hand Y Ltd. had published the slogan "Y Ltd, Swiss optical market leader detected to be the cheapest". This was not regarded to be a superlative advertising but a comparative one, since it was combined with the printing of the results. To defend itself, Y Ltd. claimed that X Ltd. had "unclean hands" because it had been found guilty of unfair competition itself in the past. The Federal Court held that this argument is unknown in Switzerland and does not help to protect from somebody claiming his rights.</p> |
| <b>Comment:</b>       | How stupid can even big firms be? If they had asked a specialist they could have saved all this mess and the cost involved. Interesting the argument of the "unclean hands" but clearly rejected.   |

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| <b>2.</b>             | Jurisdiction   |
| <b>Topic:</b>         | Spamming   |
| <b>Who:</b>           | District Court of Zurich   |
| <b>When:</b>          | December 6, 2002,  |
| <b>Published:</b>     | SIC 7,8/2003, page 619ff.  |
| <b>What happened:</b> | A company was advertising its technical products via E-mails. In addition it offered mailing services for other companies. A consumer who received these mailings started both civil as well as penal action claiming the breach of various articles of the Swiss Penal Code as well as of the Swiss Law Against Unfair Competition and the Swiss Law For Data Protection. |

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|                 | <p>In a very detailed judgement, the single judge of the District Court of Zurich found that "spamming" was not illegal, neither in the penal nor in the civil law sense. It considered the mails not to be unfair competition because it would not put a psychological pressure on the consumer to buy goods or services. Spamming would only be considered a duress, if the sender continues to send further mails, after the receiver has rejected to receive further mails. The use of the e-mail address is considered as "data processing" and therefore protected by the DSG. The DSG requires either a registration of such a data base or the explicit approval of the person involved. In casu there was no prove that the mailing company intended to pass the data on to third parties. Spam-mails would be considered as unfair competition if the sender uses a false address himself. In general, such mails are legal if there is no deception on the sender, if they are marked as "advertising" including an indication of the content in the reference (title), if the mail does not have a big content, if the receiver can opt-out and if the mail is directed to selected addresses and not wide spread.</p> |
| <b>Comment:</b> | <p>The claimant, a well known lawyer specialized in IT-law presented a very long list of infringed articles and arguments, but finally did not push through, because the example he took to court (trying to obtain a landmark judgement), was not the right one. He will try it again. Interesting: Use of an e-mail address is already considered a data processing in the sense of the data protection law.</p>   |


## TAIWAN



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| <b>1. Topic:</b>      | Mainland China Product Ads in Taiwan   |
| <b>Who:</b>           | A Beer Company   |
| <b>When:</b>          | April 2003   |
| <b>Where:</b>         | Taiwan   |
| <b>What happened:</b> | <p>Taiwan's liquor market used to follow the Japanese government monopoly system under which liquor and wine were only produced and sold by the Tobacco and Wine Monopoly Bureau. The market wasn't open to foreign products until 1994.</p> <p>The sales volume of beer in Taiwan is around 550,000 tons per year, and foreign beer (mostly from Europe, the United States and Japan) previously made up 15% of the market. However, a beer company named "T", one of the biggest beer companies in Mainland China, changed this situation within a short time. T Beer was allowed to be imported by a Taiwan company ("the Company") into Taiwan starting in April 2002, and the Company began to engage in all kinds of promotions. Within a year, T Beer had spent huge amounts on advertisements, taking 8% of the market within that time.</p> <p>In April 2003, however, the Government Information Office (GIO) of Taiwan prohibited T Beer's ads since the company hadn't obtained permission from the GIO. According to the "Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area", unless permitted by the competent authorities, no individual, juristic person, institution, or other organization of the Taiwan Area may entrust to others, be entrusted, or act on its own to import, produce, distribute, serve as an agent for, broadcast, publish any advertisement, for or engage in any other promotional activity in the Taiwan Area for the benefit of any product, service, or other item of the Mainland China Area (Article 34). The Company obeyed the suspension order, and thus the ads for T Beer cannot be seen currently.</p> |
| <b>Comment:</b>       | <p>Trading between Taiwan and China is limited in many ways because of political reasons. Although the importation of many products from Mainland China into Taiwan is allowed at present, ads for such products still cannot be published or shown without the Taiwanese government's permission. In recognition of traders' needs for promotion, Taiwan's Mainland Affairs Council has proposed an amendment to the present regulations. However, while waiting for the amendment to be approved, enterprises importing products or services from Mainland China still have to obtain permission before engaging in advertising.</p>   |

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| <b>2. Topic:</b> | Trademarks Included in Sign Might Be Misleading |
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| <b>Who:</b>           | A Fitness Center   |
| <b>When:</b>          | February 2003  |
| <b>Where:</b>         | Taiwan   |
| <b>Advertisement</b>  |   |
| <b>What happened:</b> | <p>A fitness center named "C" in Taipei ("the Company") is the Taiwan branch of C Fitness Centers belonging to "24 HOUR FITNESS INC.", an American company.</p> <p>The dispute arose from the fact that on its sign and membership card, the Company has "24 HOUR" written in white on a red back ground (please see the attached pictures), which is part of an American-registered trademark belonging to its parent company, "24 HOUR FITNESS INC.". Many consumers thought that "24 HOUR" stands for the Company's hours of operations, but in fact it doesn't, and this has resulted in a consumer's complaint to the Fair Trade Commission. The Company explained that "24 HOUR" shows that it's associated with the American group "24 HOUR FITNESS INC.", and it has never claimed to be a 24-hour gym in its brochures and advertisements.</p> <p>However, the Fair Trade Commission still decided to penalize the Company, because 1) consumers cannot tell whether "24 HOUR" represents the Company's association with "24 HOUR FITNESS INC." or its hours of operation, and 2) though the Company has stated its opening hours, this information is only available after consumers get in touch with the Company. Therefore, the "24 HOUR" mark on signs is misleading to consumers and violates the Fair Trade Law, which prohibits an enterprise making or using false or misleading representations or symbols as to price, quantity, quality, content, production process, production date, valid period, method of use, purpose of use, place of origin, manufacturer, place of manufacturing, processor, or place of processing on goods or services or in advertisements, or in any other way of making itself known to the public.</p> |
| <b>Comment:</b>       | Enterprises should consider whether any mark or expression, such as a trademark of its associated company, on its advertisement has the effect of misleading consumers. If it does, the enterprise will be in violation of the Fair Trade Law, even it's an authorized user of the trademark and it doesn't violate the Trademark Law.   |

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| <b>3. Topic:</b>      | False Ads in a Mail-order Catalog  |
| <b>Who:</b>           | A Credit Card-issuing Bank   |
| <b>When:</b>          | June 2003  |
| <b>Where:</b>         | Taiwan   |
| <b>What happened:</b> | Banks that issue credit cards usually cooperate with other businesses in order to increase profits margin for all companies involved. One of the most common ways is to send mail-order catalogs to cardholders whereby the cardholders can make purchases using a credit card issued by the bank, with the alternative of paying in installments. |

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|                 | <p>One such bank ("the Bank") cooperated with a mail-order company ("the Mail-order Company") to send catalogs to its cardholders. This case occurred because of several exaggerated ads for "slimming pants", "beautiful leg" machines and "breast enlargement" devices in the catalogs. The Fair Trade Commission regarded these ads as false or misleading because they lacked sufficient proof of the curative effects claimed in the ads, and decided to punish the Bank and the Mail-order company.</p> <p>The dispute in this case was not whether the content of the ads was false and misleading, but whether the bank was responsible for it. The Bank defended itself by saying that it was the Mail-order Company and not the Bank that printed the catalogs, and therefore it was not aware of the content. In addition, the Bank explained that it only provided the credit card and installment service, and didn't engage in selling these products. However, the Fair Trade Commission decided the Bank was liable because 1) according to the contract between the Bank and the Mail-order Company, the Bank earned 6% for each transaction under this cooperative relationship, substantially higher than regular commissions, and thus the Bank was making a profit from selling these mail-order products; and 2) according to the above-mentioned contract, the catalogs were publication of the Bank. The Bank had reviewed the catalogs and provided the Mail-order Company with the name list and addresses of its cardholders. Therefore, the products were sold by both the Bank and the Mail-order Company and thus both were liable for the misleading ads.</p> |
| <b>Comment:</b> | <p>Although mail-order is not the main business of a credit card-issuing bank and a bank usually doesn't get involved in the production of ads for its mail-order products, as the sender of catalogs and the seller of products, a bank is responsible for the content of the ads. In addition to an administrative fine under the Fair Trade Law, if the contents of the ads are false or misleading, thus resulting in damage to consumers, the bank may even be liable for compensation under the Consumer Protection Law. Therefore, banks should carefully review mail-order catalogs or other promotional materials they send out.</p>  |

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| <b>4.Topic:</b>       | Ads with Negative Effect on Young People  |
| <b>Who:</b>           | A Cash Card Issuer  |
| <b>When:</b>          | January 2003  |
| <b>Where:</b>         | Taiwan  |
| <b>What happened:</b> | <p>The "cash card", which allows the holder to borrow a small sum of money and does not require a guaranty or income certificate, is a popular financial product because of its convenience, though it does come with a high interest rate (a yearly rate of approximately 18%). At present, most banks offer this new product.</p> <p>A Bank named "D" issued a cash card called the "Much Card", which was advertised in a TV commercial (the "Commercial") featuring a famous TV entertainer known for his success in paying back a gigantic debt of 160 million NT dollars (equivalent to US\$4,700,000).</p> |

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|                 | <p>The dispute arose from the slogan used in the Commercial, "borrowing money is decent." The commercial caught the attention of the public as well as the competent authority, the Government Information Office (GIO), soon after its release. Since young people are the primary customers of the cash card, many parents worried that the commercial would have a negative effect on their children. Therefore, the GIO asked D to reschedule the airing time of the commercial to midnight.</p> <p>D explained that its slogan, "borrowing money is decent." means that it's not shameful to borrow money when one is really in need, the point is the borrower has to be responsible. Regardless of its explanation, however, under the high pressure of public opinion, D finally withdrew the commercial, replacing it with a new one featuring the same actor and a modified slogan, "borrowing is decent only when you can pay it back."</p> |
| <b>Comment:</b> | <p>Although Taiwan is a liberal country with a rich and diverse culture, traditional values still exist in many ways. For example, thrift is a virtue, while borrowing is viewed negatively. Thus, it goes against tradition when banks release ads encouraging people to borrow money. Furthermore, government and society hold stricter standards when it comes to teenagers and young adults. Therefore, a business has to be cautious so as to avoid having its ads violate traditional values, and even more careful if the ads target teenagers and young adults.</p>  |

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| <b>5. Topic:</b>      | Inappropriate Quote in a Milk Powder Ad   |
| <b>Who:</b>           | Milk Powder Companies   |
| <b>When:</b>          | August 2003   |
| <b>Where:</b>         | Taipei  |
| <b>What happened:</b> | <p>A milk powder company named "A" produced an ad claiming "according to the latest international medical journals, infant formula with a large amount of palm oil will reduce absorption of calcium" and "our milk powder for toddlers doesn't contain palm oil", resulting in concern for many consumers. The Department of Health then issued a press release to clarify that palm oil is not harmful to the human body and consumers don't have to worry about infant milk powder which is approved by the Department of Health. Later, in August 2003, the press release was quoted in an anonymous ad jointly produced by three other big milk powder companies entitled "Statement of Department of Health". The Department of Health finally decided to penalize A because it had quoted inappropriately and to ask the company to cease broadcasting its ad. As to the other three companies, the Department of Health also asked them to withdraw their ad since it might mislead consumers into thinking that the ad was produced by the Department of Health.</p> |
| <b>Comment:</b>       | <p>When citing or using opinions from academic journals or statements of government authorities in their advertising, enterprises should excerpt the contents correctly and cite the origin. In addition, producing an ad anonymously and pretending it's a statement from a government authority may also bring a penalty.</p>   |

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| <b>6. Topic:</b> | False Satisfaction Guarantee   |
| <b>Who:</b>      | A Multi-Level Sales Enterprise |

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| <b>When:</b>          | July 2003   |
| <b>Where:</b>         | Taiwan  |
| <b>What happened:</b> | <p>Multi-level sales is common and popular in Taiwan, and the Fair Trade Law has specific regulations regarding multi-level sales, such as Article 23-1 and Article 23-2 providing that, under certain conditions, participants are entitled to rescind or terminate the participation agreement and to return the goods to the enterprise and ask for a refund of their payment.</p> <p>A multi-level enterprise named "A" represented on its Website that if you are not satisfied with the profit this participation brings, we will offer you a refunding guarantee plan. Consumer "B" joined A's multi-level sales program and was told that there would be a 14-day satisfaction guarantee. After trying A's product, B was not satisfied with it and applied for a refund within 14 days of his purchase, however, the application was rejected by A. A explained that it refunds payment only when the product hasn't been unpacked. Furthermore, A claimed that the representation on its Website regarding refunding the payment referred to termination and refunding according to Article 23-1 and Article 23-2 of the Fair Trade Law.</p> <p>The Fair Trade Commission regarded A's ad as false and misleading and thus penalized it because 1) the representation on its Website would lead a consumer to believe that if he/she were not satisfied with the product, A would refund the money he/she had paid, and 2) A admitted that it had not proposed or executed a "satisfaction guarantee plan".</p> |
| <b>Comment:</b>       | A representation in an ad regarding a refunding guarantee must be made carefully. If there is any condition to the refund, it must be disclosed in the ad.  |

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| <b>7. Topic:</b>      | Illegal Medical Ads   |
| <b>Who:</b>           | Clinics   |
| <b>When:</b>          | August 2003   |
| <b>Where:</b>         | Taipei, Taiwan  |
| <b>What happened:</b> | <p>Recently there are many clinics producing ads such as "laser whitening of teeth in 8 minutes", "discount with student ID card", and "three people for the price of two", or exaggerated ads featuring some celebrity to attract patients. The competent authority, the Department of Health of the Taipei City Government (DHTCG), issued a notice that these ads are illegal.</p> <p>Medical ads are not wholly prohibited in Taiwan, and medical organizations such as hospitals or clinics can engage in advertising. However, according to the Medical Care Act, the content of medical ads is limited to general information, such as the address, telephone number, and registration number of the organization and the name and experience of doctors, while the curative effect of therapy or equipment and any representation as to promotional discount are not allowed. The DHTCG claimed the aforementioned dental clinic's ad claiming "laser whitening of teeth in 8 minutes" was illegal because it featured the curative effect of medical equipment and furthermore, whether a laser is effective in whitening teeth and whether 8 minutes is enough still remain doubtful.</p> |

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| <b>Comment:</b> | Medical ads are restricted in many ways and can only be used by medical organizations to convey certain information. In addition, according to the Medical Care Act, medical organizations can not attract patients by illegal methods, and medical ads cannot be produced under another party's name or quote medical journals or be presented as an informational interview. |
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## TURKEY



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| <b>1. Case Report:</b> |   |
| <b>Topic:</b>          | Misleading Advertisements   |
| <b>Authority:</b>      | The Advertisement Board   |
| <b>Where:</b>          | Turkey  |
| <b>What happened:</b>  | <p>The Advertisement Board determined the misleading character of an advertisement and decided that the subject matter advertisement was deceptive.</p> <p>It was an advertisement of a famous sanitary napkin product which was broadcasted on national TV channels. In the advertisement, the product was announced to be the only sanitary napkin product which was approved by the Turkish Gynecology Association. Indeed, this product was the only sanitary napkin product that was approved by the Turkish Gynecology Association, however, it was also the only sanitary napkin product, which applied to Turkish Gynecology Association for an approval. Although the statement given through the advertisement was accurate, the Advertisement Board reached a decision that the outcome of the advertisement was likely of the meaning that the Turkish Gynecology Association examined, tested and made a comparison between all of the sanitary napkin products and as a result approved only the subject matter product. Therefore, the advertisement was banned.</p> |
| <b>Comment:</b>        | In case the claim of an advertisement is accurate but the general sense of the advertisement is misleading the advertisement can be accepted as deceptive.  |

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| <b>2. Case Report:</b> |  |
| <b>Topic:</b>          | Misleading Advertisements  |
| <b>Authority:</b>      | The Advertisement Board  |
| <b>Where:</b>          | Turkey   |
| <b>What happened:</b>  | <p>The Advertisement Board banned an advertisement published by a company with a famous trademark, manufacturing electrical goods with respect to the provision set by Article 16 of the Advertising Code.</p> <p>The advertisement was headed as "... The Most Intelligent American". The statement on the advertisement followed that "No down payment is required. We do not ask for interest cost. Payment through up to 15 installments is available." At first sight it was seemed that the statement was applicable to all products appearing in the advertisement. However, at the bottom of the chart in small print it was written that "There is no interest cost on 3 installments option". The former statement of "we do not</p> |

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|                 | ask for interest cost" was considered by the Advertisement Board contrary to the latter statement. It was decided by the Board that it was impossible to recognize this issue at first sight and the statement, which had to be disclosed to the consumers, was not clear on the advertisement. Therefore, the advertisement was banned. |
| <b>Comment:</b> | The presentation of the important points and limitations in a character preventing the consumers to recognize them at first sight constitutes deviousness.   |

## UNITED KINGDOM



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| <b>1. Self-Regulation</b> |  |
| <b>Topic:</b>             | Alcohol Advertising  |
| <b>Who:</b>               | The Portman Group, the UK alcohol industry self-regulating body  |
| <b>When:</b>              | June and July 2003   |
| <b>What happened:</b>     | <p>Having won the ban on tobacco advertising, the nation is now turning its attention to booze. Bizarrely, as drug laws are liberalised, focus is shifting to the even greater social and economic costs of alcohol abuse.</p> <p>It is no surprise, therefore, to see The Portman Group, the alcohol industry self-regulatory body, launch a sobering attempt to preserve self-regulation and stave off a ban.</p> <p>The Group started by tightening the rules on sponsorship of sports with a significant 'youth' audience. Some football clubs have now changed their replica strips for children, removing the alcohol branding of their sponsors. The Group recently banned <i>FCUK Spirit</i>, a vodka-based alcopop, following research that showed its name appealed primarily to under 18's.</p> <p>The French have already banned alcohol advertising on television. The Swedes, Germans and Irish have proposals under discussion, while the UK Government is in consultation over a national alcohol strategy, with talk of health warnings on the labels of alcoholic beverages.</p> <p>Meanwhile, our media is filled with images of gorgeous young things in glamorous settings enjoying a drop of the hard stuff, playing neatly into the hands of all those who doubt the efficacy of self-regulation, and bringing legislation even closer.</p> |
| <b>Comment:</b>           | The dilemma for advertisers is whether to exploit current advertising freedoms while they can, but at the risk of hastening stricter restrictions. Or exercise greater discretion, only to face the same ultimate outcome.   |

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| <b>2. Case Law</b>    |   |
| <b>Topic:</b>         | Copyright   |
| <b>Who:</b>           | <i>Football Association Premier League Ltd and others v Panini UK Ltd</i><br>[2003] EWCA Civ 995  |
| <b>When:</b>          | 11 July 2003  |
| <b>What happened:</b> | Nothing adds authenticity to an advert like a well-chosen prop, but if the prop is protected by copyright, the advert might attract a claim for copyright infringement. |

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|                 | <p>In July, the Court of Appeal delivered a helpful steer on the 'incidental inclusion' defence under section 31 of the Copyright, Designs and Patents Act 1988. The defence says that the copyright in a work is not infringed by its incidental inclusion in another work, such as a photograph or a film. But deciding whether inclusion is incidental is not always easy.</p> <p>The case involved rival firms' collections of stickers and albums featuring Premier League football players. It turned on whether the inclusion of the Premier League emblem and club badge on the players' shirts was incidental to their photographs. The key question was why such iconography, copyright works in themselves, were included in the shots.</p> <p>The FA Premier League, and Topps, makers of their official stickers and albums, convinced the judges that the inclusion of club and league badges was integral to the authenticity of the players' photographs, and therefore to their appeal to collectors. Result: rivals Panini were ordered to withdraw their version from sale.</p> |
| <b>Comment:</b> | <p>Following Panini's defeat, advertisers will have a hard time convincing a judge that the inclusion of an artistic work in which copyright subsists is incidental if that work is essential to the purpose for which a photograph was created.</p>   |

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| <b>3. European Initiative</b> |   |
| <b>Topic:</b>                 | Food advertising  |
| <b>Who:</b>                   | European Commission   |
| <b>When:</b>                  | 16 July 2003  |
| <b>Regulation</b>             | Draft proposal for a Regulation on Nutrition and Health Claims  |
| <b>What happened:</b>         | <p>As we digest the news that 20% of the UK population is high in fat, Brussels has sprouted a draft Regulation to promote healthy eating and informed choices by banishing misleading and meaningless claims from food labels. Phrases such as 'low-calorie', 'fat-free' and 'high in fibre' will be rationed by stricter definitions. <i>Reduced</i> or <i>light</i> products must contain at least 30% less of the dreaded fat than the regular variety.</p> <p>But advertisers need not start dieting just yet. The proposals are unlikely to be implemented by Member States until 2007 at the earliest. That leaves plenty of time for the UK government to flesh out its lean, mean proposals for stricter controls of food advertising to children, due to be served up this autumn.</p> <p>There have also been calls to include health warnings on unhealthy foods and to ban supermarket promotions of high fat foods and the advertising of food during children's television programmes. It is claimed that nearly half of all children's advertising is for sweets and cakes, and that 90% of food advertising during children's TV is for food with high fat, salt or sugar content.</p> |
| <b>Comment:</b>               | <p>Although Member States will not be affected by the Commission's proposals for some years to come, the growing public resentment of advertisements for foods high in sugar, salt and fat, particularly when targeted to children, may persuade the UK Government to implement</p>   |

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|  | changes sooner rather than later. |
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| <b>4. Litigation</b>  |   |
| <b>Topic:</b>         | Public Relations  |
| <b>Who:</b>           | US Supreme Court  |
| <b>When:</b>          | June 2003   |
| <b>Where:</b>         | USA   |
| <b>What happened:</b> | <p>In June, the US Supreme Court decided to postpone consideration of whether Nike's Public Relations (PR) campaign in defence of its foreign labour practices is commercial speech, subject to Californian laws against misleading advertising laws, or non-commercial speech protected under the First Amendment. The current Californian litigation started by activist Marc Kasky must run its course first.</p> <p>The California Court decided that Nike's PR is 'commercial speech' by a business to consumers, concerning statements of fact about the business, and intended to promote sales of its products, and thus subject to the laws.</p> <p>The UK's Control of Misleading Advertising Regulations arguably could even catch PR materials. The Regulations place the Office of Fair Trading (OFT) under a duty to consider complaints about misleading advertisements, which are widely defined, once other avenues of redress are exhausted. As PR is outside the remit of the Advertising Standards Authority, it is conceivable that British activists could get immediate satisfaction from the OFT.</p> <p>The European Convention on Human Rights only offers qualified protection for commercial speech, like Nike's, which is really about defending its own interests, rather than debating the wider issues of third world child labour. All of which could be bad for balanced debate, and counter productive to the process of promoting corporate social responsibility. And history suggests that activists do not have a monopoly on the truth. So should they have a built in advantage over commerce?</p> |
| <b>Comment:</b>       | It has yet to decide whether the Californian laws against misleading advertising have been infringed by Nike's campaign, but British businesses are already reviewing materials on their websites that might be subject to scrutiny in California.  |

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| <b>5. Self-Regulation</b> |   |
| <b>Topic:</b>             | Religion  |
| <b>Who:</b>               | Committee of Advertising Practice   |
| <b>When:</b>              | 17 April 2003   |
| <b>What happened:</b>     | The ASA moves in mysterious ways, first defending religion, then investigating it. Fortunately, however, the spring equinox was accompanied by a guiding star and some welcome clarification in the form of the Committee of Advertising Practice "Help note on religious offence". |

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|                 | <p>The guidance suggests that humorous religious references can be uncontroversial, such as those featuring caricatures of devils or angels. But other use of religious symbols, sacred texts or holy rituals in advertising can cause serious or widespread offence. This offence can apparently be 'rational' or 'emotional', although atheists may question the role of rationality in this debate.</p> <p>CAP say that the degree of offence caused will often depend on whether the advertisement appears to mock religion or makes an inappropriate association. Given that the family planning adverts featuring John Paul II still hold the record for the number of ASA complaints promulgated, it does not require a leap of faith to accept that proposition.</p> <p>But then the ASA came over all skeptical, upholding complaints by one church to have salvaged 250,000 people from drugs, and by another to have used the miracle working power of Jesus to heal people, because the claims could not be substantiated.</p> |
| <b>Comment:</b> | <p>Logically, the ASA may ultimately ban advertising by all the major religions of the world, unless they can substantiate their claims. After all, where will the Church of England lay its hands on satisfactory substantiation for the claim about the loaves, the fish and the feeding of the 5,000?</p>   |

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| <b>6. Case Report:</b> |   |
| <b>Topic:</b>          | Unsolicited Marketing Communications  |
| <b>Who:</b>            | Department of Trade and Industry  |
| <b>When:</b>           | June 2003   |
| <b>Regulation:</b>     | Draft Privacy and Electronic Communications (EC Directive) Regulations 2003   |
| <b>What happened:</b>  | <p>The Advertising Standard Authority's (ASA) most recent Annual Report says complaints about unsolicited emails (also known as "spam") have increased ten-fold in the past year. So you might have expected a universal welcome for the DTI's draft Privacy and Electronic Communications Regulations, designed to curb spam and unsolicited mobile text messages (SMS). If so, you're destined for disappointment. Critics argue that the Regulations are much softer than the EC Directive that they implement. They point to the Directive's requirement that recipients must "opt-in" to receiving unsolicited emails and SMS, unless they are "existing customers". But the Regulations give this group the broadest possible definition, encompassing online shoppers who just make an enquiry. And now businesses are frantically emailing existing contacts so that they can take advantage of the 'soft opt-in' regime after the Regulations become law.</p> <p>So if the critics are unhappy, presumably the direct marketing industry is relieved? No. The Direct Marketing Association argues that the Regulations will prevent small businesses from entering new markets. And the Mobile Marketing Association says the Regulations fail to differentiate between SMS and email marketing and don't take into account customer-initiated mobile marketing.</p> |

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|                 | But the direct marketing industry in the UK should count its blessings. In Denmark, the regulators are seeking a prison sentence for a director of a software company guilty of spamming. Sending spammers to the slammer really would put a spanner in the works.                             |
| <b>Comment:</b> | The softly-softly approach of the Privacy and Electronic Communications Regulations has diluted the effect of the "opt-in" requirement of its EC parent as UK businesses may continue to spam existing customers, even those who have simply expressed an interest in their goods or services. |

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| <b>7. European Initiative</b> |  |
| <b>Topic:</b>                 | Consumer Protection  |
| <b>Who:</b>                   | European Commission  |
| <b>Regulation:</b>            | Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive) COM (2003) 356 Final  |
| <b>When:</b>                  | 18 June 2003   |
| <b>What happened:</b>         | <p>On 18 June, the European Commission published its draft Unfair Commercial Practices Directive, intended to improve consumer protection and facilitate trade between member states by introducing a general duty to trade fairly.</p> <p>The Directive will be a 'Framework' Directive supplemented by sector rules, such as those that currently exist in relation to doorstep selling and consumer credit.</p> <p>The general prohibition on unfair commercial practices lays down two cumulative tests to determine what is 'unfair'. First, is the practice contrary to 'professional diligence'? The OFT describes this as analogous with the concept of 'good faith' in English law, but now applied to a broader spectrum of traders.</p> <p>Second, will the practice materially distort the economic behaviour of the average consumer? This mythical creature is characterised as reasonably well informed and circumspect.</p> <p>The Directive also identifies various misleading actions and omissions, focusing on issues such as after-sales care, and prohibits aggressive commercial practices, and the use of harassment, coercion and undue influence.</p> <p>But the UK will be unable to introduce or retain any enhanced consumer protection measures. This effectively applies the "country of origin" principle, making it easier for British business to sell to consumers in EU member states, but will necessitate amendments to many existing laws, although the existing gaps that it plugs are relatively few.</p> |
| <b>Comment:</b>               | The introduction of the Directive provides an opportunity to simplify the current consumer protection regime whilst avoiding the addition of another layer of regulation.  |

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| <b>8. Self-Regulation</b> |  |
| <b>Topic:</b>             | Self-regulation  |
| <b>Who:</b>               | The Advertising Standards Authority and the Independent Television Commission  |
| <b>When:</b>              | 2003   |
| <b>What happened:</b>     | <p>UK advertising regulation comes in all shapes and sizes, with sanctions ranging from a slapped wrist to a criminal prosecution or a six figure fine. However, a number of recent actions illustrate that some regulators have more bite than others.</p> <p>In January, the Advertising Standards Authority (ASA) was embarrassed by its inability to compel the UK Life League to comply with its ruling that a direct mailing featuring images of aborted babies would cause "serious or widespread offence". Advertisers also exploit the ASA's impotency in relation to their own websites. BMW and Mazda recently created Internet only ads that would ordinarily breach the off-line rules against making speed or acceleration their predominant message.</p> <p>And flyposting continues to flout the law and the member guidelines of the Institute of Practitioners in Advertising, although local councils are cracking down with more frequent prosecutions. The Mates brand of condoms courted controversy recently after it pasted its own "ishaggedhere.com" posters over those belonging to other advertisers.</p> <p>At the other end of the spectrum, surreptitious marketing of a weight loss product in a show on lifestyle channel "You TV" resulted in a fine of £20,000 from the Independent Television Commission for breaking the rules on undue prominence. Npower faces prosecution by trading standards and a hefty fine for allegedly misleading statements in leaflets promoting its "freeze your energy prices" promotion. But worst of all, the Financial Services Authority fined DBS Financial Management £100,000 for misleadingly suggesting that a complex ISA product was 100% safe. The FSA added that the fine would have been much higher had DBS not promised to overhaul its advertising procedures.</p> |
| <b>Comment:</b>           | Recent defiance against the ASA confirms suspicions that its bark is worse than its bite. However, the above fines illustrate that advertising regulation is far from toothless and non-compliance can be a costly affair.   |

## UNITED KINGDOM



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| <b>1. Case Report</b> |  |
| <b>Topic:</b>         | Food   |
| <b>Who:</b>           | Kellogg's and the ITC  |
| <b>Where:</b>         | London   |
| <b>When:</b>          | May 2003   |
| <b>What happened:</b> | <p>The ITC considered a complaint by one viewer in respect of an advertisement for Kellogg's Nutri-Grain Eleveses Bar. The ad described the product as a "healthy snack with wholegrain oats, wheat and fruit" and ended by describing the product as "all good stuff". The BACC, when pre-vetting the commercial, had apparently taken advice from an independent nutritional consultant, who had expressed concern about describing a product containing high levels of sugar (38%) as "healthy".</p> <p>On balance, however, the BACC took the view that "healthy" was justified. This was apparently because the bar was fortified with nutrigains and iron, and appeared to be low in fat and contain more vitamins than some other snacks.</p> <p>As for the "all good stuff" phrase, the BACC and its nutritional consultant both considered that the basic ingredients of the bar, consisting of whole grain oats, wheat and fruit was sufficient to justify it.</p> <p>In its defence, Kellogg's also stated that the bar had no more sugar than a portion of some fruit, for example an orange.</p> <p>The ITC acknowledged that there was no intention on the part of Kellogg's to mislead, but it did have concerns about the unqualified use of the term "healthy".</p> <p>The ITC considered that the public generally understood foods such as fruit, vegetables, salad, fish etc. to be "healthy" but not processed snacks such as this.</p> <p>In the light of other evidence put forward by Kellogg's which showed Eleveses in a better light than a number of other competing snack products, the ITC indicated that it might be prepared to live with "healthier", but "healthy" did not pass muster, in essence because this was a processed snack.</p> <p>As for "all good stuff", the ITC was not quite so clear as to its reasoning. It found against the use of the phrase, but stated that "whilst it might in</p> |

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|                          | <p>some circumstances be a legitimate reference to the substantially natural basic ingredients", it was not acceptable in conjunction with the absolute claim "healthy", "as it appeared to offer the claim unqualified support."</p> <p>With respect, this reasoning is obscure in the extreme. If the phrase "all good stuff" is a legitimate reference to what the ITC accepts are potentially natural basic ingredient it is unclear as to why the use of the term "healthy" in another part of the voiceover renders the phrase misleading.</p> |
| <b>Why this matters:</b> | <p>The ITC's point about the use of the term "healthy" in connection with processed products is reasonably well made, but we do not completely follow the reasoning behind the position taken against "all good stuff", and we encourage the ITC to be slightly clearer in explaining its reasoning on findings like this during the last few months of its existence.</p>   |

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| <b>2. Case Report</b> |  |
| <b>Topic:</b>         | Food   |
| <b>Who:</b>           | ASDA Stores Limited and Consorzio Del Prosciutto Di Parma  |
| <b>Where:</b>         | The European Court of Justice  |
| <b>When:</b>          | May 2003   |
| <b>What happened:</b> | <p>The long-running saga of ASDA's fight to be able to slice and package Parma Ham in the UK came to an end in the European Court of Justice. The proceedings had originally started in November 1997. The Parma Ham producers' beef was that the ham should be sliced and packaged in the Parma area. This, they said, was part of the specification lodged with the relevant EU authorities when "Prosciutto Di Parma" achieved "Protected Designation of Origin" status.</p> <p>However, the "slicing and packaging in Parma" requirement was not apparent from the central register of PDOs kept by the European Union. Accordingly, Tesco defended on the basis that they could not be bound by a particular part of the specification which was not on general view. They also argued that it was in-appropriate and disproportionately restrictive for any PDO status to require that a food that was otherwise produced in accordance with the PDO specification, was also sliced and packaged in a particular way.</p> <p>Previously in the saga, the Parma Ham producers had also sued for passing off and invited trading standards officers in the UK to bring proceedings under the Trade Descriptions Act. By the time the case got to the ECJ, however, only the PDO issues were at stake, and the outcome was a mixed one for both parties.</p> <p>On the one hand, the ECJ found in favour of the ham producers by pronouncing that if they wanted to describe their products as Parma Ham, Asda did have to ensure that it was sliced and packaged in the Parma area. They saw no reason why slicing and packaging should not be part of a PDO specification. Parma Ham, the ECJ judges said, is consumed mainly in slices and the operations leading to that are all designed to achieve a specific flavour, colour and texture which will be appreciated by consumers.</p> |

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|                                 | <p>The slicing and packaging of the product thus constituted important operations which might harm the quality and hence the reputation of the PDO if they were carried out in conditions that resulted in a product not possessing the "organoleptic" qualities expected. The operations might also compromise the guarantee of the product's authenticity, because they necessarily involved removal of the mark of origin from the whole hams used. In consequence, the condition of slicing and packaging in the region of production was justified as a measure protecting the PDO.</p> <p>So far so good for the prosciutto producers. However, then came ASDA's big moment.</p> <p>The ECJ noted that under the PDO regulation number 2081/92, to enjoy protection in every member state, designations of origin must be registered at community level, with the entry in the register also providing information to those involved in trade and consumers. The relevant EU regulations in this case were the blanket Council regulation 2081/92, laying down the framework for protection and requiring that relevant foods comply with their "specification," and regulation 1107/96 which made "Prosciutto Di Parma" a PDO. This was done by way of a simplified procedure. This allowed names previously protected by national laws to acquire EU protection without the need for publication of the specification.</p> <p>In his provisional opinion on the case, the Advocate General had felt that the absence of the full specification from the register was no excuse for ASDA. He said they could quite easily have made further enquiries and discovered the slicing and packaging requirements. The ECJ, however, took a different view. It felt that particularly because slicing and packaging was not normally part of a PDO specification, it was not fair to impose it on "economic operators" if insufficient steps had been taken to give the specification adequate publicity. The requirement of legal certainty, the ECJ judgment continued, meant that Community rules must enable those concerned to know precisely the extent of the obligations which were imposed on them and this could have been done by mentioning the slicing and packaging requirement in the relevant part of regulation number 1107/96. This was not done, and so the requirement was not historically binding on ASDA.</p> |
| <p><b>Why this matters:</b></p> | <p>Stefano Fanti, managing director of the Parma Ham Consortium, said that he was delighted at the ECJ's ruling, and claimed it was "an important day for the producers of Parma Ham and all the owners of PDO products in Europe". On the other hand, the failure to include the full specification in the relevant EU regulation seems to have been a crass error which allowed Asda to come out of this case ahead on points. One imagines that the mistake will long since have been rectified so that in future the world can be saved from Parma Ham which has not been sliced or packaged in the correct geographical location.</p>  |

**3. Self - Regulation**

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| <b>Topic:</b>   | TV   |
| <b>Who:</b>   | Lord Currie, Chair of Ofcom  |
| <b>Where:</b>   | Advertising Association Lunch  |
| <b>When:</b>  | 19 May 2003  |
| <b>What happened:</b>   | <p>Lord Currie, Chairman of the new communications super regulator, Ofcom, appeared to give the green light to a radical overhaul of the regulation of broadcast advertising in the UK. For some months advertising industry bodies have been working on proposals to move to a system of "co-regulation" in the sector. In essence, the model would entail the handling of complaints in respect of broadcast advertising by an industry-funded entity, rather than by a statutory body such as the Independent Television Commission, which currently does the job.</p> <p>More work needs to be done to develop the proposals to a point at which they are ready to go after Ofcom comes into existence at the end of 2003. In the meantime, there follows below a piece written by marketinglaw.co.uk editor Stephen Groom recently published on his regular Media Week column.</p>  |
| <p><b>OUT OF THE BOX</b></p> <p><b>Stephen Groom</b></p> <p><b>Media Week</b></p> <p><b>30/5/03</b></p> <p><b>New victory for ad self-regulation?</b></p> | <p>So it's official. According to OFCOM Chair Lord Currie, the new communications super regulator is "quietly hopeful" that a scheme to revolutionise our broadcast advertising control systems can be got off the ground.</p> <p>And we're not talking slow lane here. The current plan is to have the new system up and running by the time OFCOM takes over from the ITC, the Radio Authority, the Broadcast Standards Commission, the Director General of Telecommunications and Uncle Tom Cobley in December.</p> <p>So what's so revolutionary about the plan? In essence, it takes day to day processing of complaints about broadcast ads out of the hands of a statutory authority (currently the ITC) and into the remit of a new, ad industry-funded arm of the Advertising Standards Authority.</p> <p>Funnily enough, in terms of the front end of the process, this will bring the actuality into line with general perception. Surveys, and the long-suffering switchboard of the ASA will testify, that so far as the great complaining British public is concerned, the ASA is the body that handles ad complaints, period.</p> <p>And therein lies the beauty of the plan. Mirroring OFCOM, a one stop shop for pretty much all complaints about UK advertising and marketing, based on a tried and trusted model and a well respected and for most, instantly recognisable brand.</p> <p>So that's the easy bit, but how will it work?</p> <p>For instance, what about the current vetting of all broadcast ads before going on air, and who's going to pay for all this?</p> <p>Currently, vetting is bankrolled by the commercial TV and radio networks and done on their behalf by specialised clearance centres. And make no mistake, it's a massive task. In 2002, the Broadcast Advertising</p> |

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|  | <p>Clearance Centre (TV ads) cleared over 30,000 ads.</p> <p>By and large, despite the inevitable stresses and strains, the system works pretty well. And there's not a snowball's chance of the networks getting out of having to stump up the cash. So most will say "If it ain't broke..."</p> <p>But on the other hand, pre vetting is something the self-regulatory system for non broadcast ads already does. The Committee of Advertising Practice ("CAP"), (which together with the ASA and the Advertising Standards Board of Finance ("ASBOF") makes up the triumvirate at the heart of the process) currently operates a free Copy Advice service for all non broadcast advertising. Admittedly, as CAP vetting is not compulsory, the operation is in a different dimension to that of, say, the BACC. Last year, for example, the CAP advised pre publication on roughly 4,500 ads, less than a sixth of the volume handled by the BACC.</p> <p>But if, as currently seems to be the plan, the ASA is going to operate, behind the front desk, discrete systems for processing non broadcast and broadcast ad complaints, what could be more logical than similar systems for pre-vetting, under the auspices of an expanded CAP Copy Advice system, all running inside the same big "ASA" tent?</p> <p>There is the question of funding.</p> <p>But would it be a major problem? Advertisers currently fund the ASA/CAP system via ASBOF and a tiny levy on most non broadcast advertising spend. If, as seems to be the plan, the new "BASA" broadcast ad complaint handling system is to be a separate cost centre and funded out of an ASBOF type levy on broadcast advertising spend, it may not be a huge problem to have another separate, BASA pre-vetting cost centre, still funded by the networks.</p> <p>Perhaps a change too far when so much else is in the melting pot, including the broadcast ad Codes, and time of course is short. But it surely makes sense to review the whole process from front to back in one go, and whatever happens, there are undoubtedly exciting times ahead for the ASA, and its sterling team headed by Chair Lord Borrie and Director General Chris Graham. It couldn't happen to two nicer guys!</p> |
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| <b>4. Self - Regulation</b> |   |
| <b>Topic:</b>               | Direct marketing  |
| <b>Who:</b>                 | Direct Marketing Association  |
| <b>Where:</b>               | UK  |
| <b>When:</b>                | September 2003  |
| <b>What happened:</b>       | Following the example of the Committee of Advertising Practice, which launched the new edition of its CAP code in March 2003, the UK's premier marketing industry body, the Direct Marketing Association, has published a new edition of its own code. This new, third edition will be in force from September 2003. It will replace the second edition which was published back in 1996, and it has taken a year to produce. |

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|                                 | <p>Running to over 100 pages, the code takes into account new legislation, and technologies, practices and standards that have appeared and developed over the intervening seven years. It has a new structure and format, new sections and incorporates an extensive section on on-line marketing, including useful practices on marketing on-line to children, which were previously in a separate document.</p> <p>A new layout makes it more accessible and easier to use as reference. Whilst the second edition had twelve sections, only one of which dealt with a specific type of communication (telephone) the new edition has 21 sections, 12 of which deal with particular channels including e-mail marketing, SMS, inserts, fax, direct response TV and radio, catalogue and home shopping as well as on-line and SMS.</p> <p>Members are encouraged to refer to the particular section that deals with the channel of communication relevant to them and read that in conjunction with the general provisions. These deal with general issues such as data handling compliance and content.</p>   |
| <p><b>Why this matters:</b></p> | <p>Compliance with the DMA code is compulsory for all DMA members, who face castigation and in serious cases expulsion if they fail to comply.</p> <p>It has to be said, however, that to date only one member has been expelled for failing to comply with the code, and the case load has not been heavy. The complaints referred to the Direct Marketing Authority in 2001 for example, numbered only 152, with only 9 needing adjudication.</p> <p>So the DMA has to work harder at raising the profile of its code and of its sister, enforcement body the Direct Marketing Authority. They must also be more public in their handling of complaints and the publication of adjudications. In this way they can square the circle of needing to process sufficient numbers of complaints to be credible, but not too many to suggest mass non-compliance.</p> <p>There are additional pressures on the DMA to raise their compliance game. The Office of Fair Trading is on the warpath against particular industry sectors, and direct marketing is one of them. To reduce the risk of further, more intrusive legislation in the area, the OFT is looking for the industry to up its act, introduce a robust and enforceable code and walk the talk.</p> <p>To help this process, the OFT has established a benchmark for industry codes, and the DMA will be seeking OFT approval against that benchmark for the new edition of the code.</p> <p>To have a chance of achieving this, it must also show established systems for compliance and enforcement.</p> <p>This is going to involve all of its members having to pay more than just lip service to code compliance: DMA members are now required to lodge certification with the DMA, each year, that they have appointed a compliance officer to take responsibility for the member's compliance</p> |

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|  | <p>who will make it their job to have a thorough knowledge of the provisions of the code and all relevant legislation. They will also be required to complete the annual compliance questionnaire, which all members must now submit to the DMA as part of the new certification process.</p> <p>At the present time, the DMA is holding a series of "roadshows" in which, over half a day, members are told about the new code, the new compliance and certification regime, the role of the Direct Marketing Authority and the various preference services which the DM Authority operates. These sessions are invaluable for both members and non-members, and attendance is in fact compulsory for all DMA members, as their appointed compliance officer must certify in the required questionnaire that the course has been attended.</p> <p>As DMA members, Osborne Clarke is taking part in this process and it wishes the DMA well in promoting the best interests of the UK direct marketing industry in the UK as well as protecting the interests of consumers.</p> |
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| <b>5. Case Report</b> |   |
| <b>Topic:</b>         | Misleading advertising  |
| <b>Who:</b>           | ICSTIS, BT Directories and "The Number"   |
| <b>Where:</b>         | UK  |
| <b>When:</b>          | June 2003   |
| <b>What happened:</b> | <p>In May 2003 we reported on a spat between BT Directories and "The Number", one of BT's new competitors following the liberalisation of the directory enquiry service sector. Both companies had issued, on consecutive days in the national press, advertisements headed "Public Notice". The headline of the BT ad was "Public Notice. BT directory enquiries is being updated. The old 192 number will be replaced by: 118500".</p> <p>The headline of "The Number" equivalent and was "Public Notice, BT directory enquiries is being updated. The old 192 number is being replaced by a radical new directory enquiries concept. Being helpful. The new number is 118118".</p> <p>BT's beef over the 118118 ad was that it infringed BT's copyright and it successfully applied to the Court for an injunction preventing further publication of the 118118 ad.</p> <p>At the same time, both of the advertisements caught the eye of Oftel. The telecoms regulator was concerned about the BT "Public Notice" ad. It felt it might mislead consumers into thinking that BT continued to control directory enquiries, whereas with effect from August the entire market will be deregulated and the 192 number will be phased out.</p> <p>Oftel referred the matter to the Advertising Standards Authority and the premium rate telephone line regulator ICSTIS ("the Independent Committee for the Supervision of Telephone Information Services").</p> |

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|                          | <p>Having deliberated, ICSTIS took the view that both advertisements broke its code by being misleading as to premium rate telephone information services.</p> <p>The BT ad was capable of misleading consumers into thinking its service was the exclusive replacement for 192. 'The Number' ad was misleading because it made its pricing information insufficiently prominent.</p> <p>BT Directories and The Number were each fined £10,000.</p> <p>The ASA also upheld the complaint in respect of the BT ad, but it has no power to levy fines.</p> |
| <b>Why this matters:</b> | <p>Of all the UK's current advertising regulators, ICSTIS has the sharpest teeth in terms of its ability to levy substantial fines at the end of a process which it is clearly capable of completing very quickly. Where premium rate lines are concerned, therefore, advertisers should be especially vigilant to ensure accuracy and clarity in their advertising.</p>   |

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| <b>6. Case Report</b> |  |
| <b>Topic:</b>         | TV   |
| <b>Who:</b>           | The Independent Television Commission  |
| <b>Where:</b>         | London   |
| <b>When:</b>          | August 2003  |
| <b>What happened:</b> | <p>In one of its last 'Television Advertising Complaints Reports' before it is gobbled up by OFCOM in December 2003, the Independent Television Commission, in a rare development, has included a 'Comment' on a particular issue that arises out of one of the cases reported.</p> <p>The issue in question is indirect promotion of prohibited categories of advertising.</p> <p>Because of its easy accessibility by children or other vulnerable audiences, or its potential influence or intrusiveness in the home, advertising for certain product and service categories is banned from UK TV. Rule 3.2 of the ITC's Advertising Standards Code is also designed to prevent advertising getting round this prohibition by leading viewers to promotional material for prohibited products in other media. An accompanying note states 'No advertisement is acceptable if a significant effect of it would be to publicise an unacceptable product or service by, for example, referring viewers to a website, publication etc where the product or service is promoted to a significant extent'</p> <p>The ITC comment goes on to say that current policy on indirect promotion has required those who pre-vet advertising on behalf of the television companies (namely the Broadcast Advertising Clearance Centre ('BACC') which pre-vets all advertising before it goes on UK television) to make its own 'pragmatic' judgments about how 'significant' a particular piece of indirect promotion might be.</p> <p>But there are still occasional problems with this, as the 'Deal4free.com' example reported August 2003 underlines.</p> |

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|                                 | <p>In that case, it was advertising on the specialised financial TV channel Bloomberg which led to the problem. Advertising on that channel for Deal4free.com (a financial services company which operates only via its website) led viewers to its website. Amongst other things this offered visitors the chance to make a 'spread bet' as one of three options for services provided on other website pages. Spread betting cannot be advertised on UK TV.</p> <p>Bloomberg defended on the basis that the website in question was not predominantly dedicated to spread betting and this service was not the most prominently promoted service on the page.</p> <p>The ITC did not agree that this was the effect of the rule. The key was the 'significant effect test'. Reasonable judgments had to be made as to the point of at which any promotion for banned categories of advertising was no longer 'significant'. In this case, the ITC concluded, spread betting was strongly promoted on the web page to which viewers were first led, and rule 3.2 had therefore been breached.</p> <p>Going back to its comment on the issue, the ITC accepts that particular difficulties can arise with websites since they can be easily changed during the run of a TV campaign. Sites can also be very large and have links to various other sections and to other websites entirely, but nevertheless the ITC expects television companies/ the BACC to make all reasonable checks and enquiries when applying this rule.</p> <p>In other words, when applying the 'significant effect' test, the ITC will expect pre-vetting of advertising to include the investigation of the major categories of content on the advertised website itself and any link or route to that content or other sites which it seems reasonably likely that viewers would follow.</p> <p>It is not necessary to pursue every conceivable path if it is unlikely that viewers would follow them. There will also be no criticism likely if circumstances change in ways which could not have reasonably been anticipated.</p> <p>Nevertheless, 'reasonable judgments' must be made as to when the 'significant effect' test comes into play and advertising should be removed promptly when licensees are alerted by any means to the possibility that 3.2 is being breached.</p> |
| <p><b>Why this matters:</b></p> | <p>One comment on the form, the other on substance. As to form, it is interesting that towards the end of its long life, the ITC is on a rare occasion including its helpful comments and guidance in its Advertising Complaints Reports. It is to be hoped that the trend will continue under the new OFCOM regime, depending of course on whether, long term, OFCOM will take over this role from the ITC or become less 'hands on'.</p> <p>As to substance, it is clearly a bit of a tall order for the Broadcast Advertising Clearance Centre or the networks to continuously monitor websites which TV advertising might refer to so as to ensure that the</p>   |

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|  | website does not, to any significant degree, promote unacceptable products or services. Having said this, the comment appears to indicate that it would be sufficient for a reasonably extensive enquiry to be conducted at the time of initial vetting and to act promptly to either a change on the website or the relevant advertising if circumstances change. |
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| <b>7. Case Report</b> |   |
| <b>Topic:</b>         | Digital Marketing   |
| <b>Who:</b>           | The Training Guild  |
| <b>Where:</b>         | The Advertising Standards Authority   |
| <b>When:</b>          | September 2003  |
| <b>What happened:</b> | <p>The Advertising Standards Authority published its adjudication on a complaint over unsolicited marketing e-mail. The e-mail was promoting training seminars organised by 'The Training Guild' of Southampton. In the subject field it stated 'Business Seminars – Telesales and Selling Skills Made Easy'. When opened, the e-mail was headlined 'The Training Guild Business Training Seminar' and stated 'Telesales and Selling Skills...MADE EASY...At Last a Selling Skills Course for Non-Aggressive Sales People. The most successful sales course in the UK...more than six hundred and fifty companies have attended...'</p> <p>There were two objections to the e-mail from the recipient who complained. First of all, that the subject field information did not make it sufficiently clear that it was a marketing communication. The second complaint was that the advertisers did not get explicit consent before sending the e-mail to the recipient.</p> <p>The first complaint was not upheld. The ASA agreed with the Training Guild that the words 'Business Seminars – Telesales and Selling Skills Made Easy' made it clear enough that this was a marketing communication.</p> <p>On the second complaint, the Training Guild encountered heavier weather.</p> <p>It defended its position on the basis that the e-mail address of the recipient who had complained was in a list of e-mail addresses which they had bought and they honestly thought was clear for use. This was because they had been informed by the supplier of the list that the addresses were for businesses, not individuals, which they believe had opted to receive information about training and business development topics by e-mail.</p> <p>The ASA acknowledged that the list in question had been received in good faith, but in this case of course the address was not of a business but of an individual. The Training Guild was also unable to produce any evidence that this particular individual had ever opted into receiving information of this kind by e-mail.</p> <p>The ASA concluded that under the CAP Code it was up to the Training Guild to ensure that all recipients on the list that they used had given their</p> |

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|                          | 'explicit consent' to receive communications of this kind, and since this could not be proved the complaint was upheld.   |
| <b>Why this matters:</b> | <p>This is the very first reported ASA decision on email opt-in since the Committee of Advertising Practice unilaterally changed the rules for e-mail marketing in the UK. They did this by way of the new CAP Code of British Advertising, Direct Marketing and Sales Promotion, which was launched in March 2003.</p> <p>Before this, in the UK the legal position on email marketing was the same as the position under the CAP Code. It was quite acceptable to send unsolicited commercial e-mails unless and until the recipient opted out of receiving future such communications.</p> <p>The new CAP Code in March 2003 changed all this. It introduced a requirement, that except where the e-mail was being sent to 'existing customers' of the sender, no unsolicited commercial e-mail could be sent without the 'explicit consent' of the recipient having been obtained beforehand.</p> <p>Compliance with the CAP Code is compulsory for all UK marketers, and this decision now underlines the importance of the change in the Code.</p> <p>The report also highlights that it is very much 'caveat emptor' (let the buyer beware) for those acquiring or renting e-mail marketing lists. Due diligence is now essential as to exactly how the addresses on the list were obtained in the first place, what disclosures were given at the time of data capture and the 'opt-in/opt-out' position. The contract governing the renting or buying of the list should also be in writing and contain suitable warranties and indemnities from the supplier.</p> <p>On the other complaint, dealing with identification of the e-mail as a marketing communication. This is not just a CAP Code requirement but also a legal obligation. Under the 2002 E-Commerce regulations, all unsolicited commercial e-mail sent by UK marketers must be identifiable as a marketing communication immediately on receipt.</p> |

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| <b>8. Legislation</b> |  |
| <b>Topic:</b>         | Digital marketing  |
| <b>Who:</b>           | The DTI  |
| <b>Where:</b>         | London   |
| <b>When:</b>          | 18 September 2003  |
| <b>What happened:</b> | <p>For half a year the DTI has been consulting stakeholders on proposed regulations to give the EU Privacy and Electronic Communications Directive the force of law in the UK.</p> <p>As previously reported on <a href="http://marketinglaw.co.uk">marketinglaw.co.uk</a>, this Directive is the biggest stride yet towards harmonising EU rules affecting digital and non-digital marketing. It contains measures impacting on an unprecedented array of marketing activities and techniques. These include the use for marketing purposes of cookies, data showing where a mobile phone is located, reverse search telephone directories, directories of mobile phone and fax</p> |

numbers, e-mail, SMS/text, fax, automated calling systems and telephone calls to businesses.

The Directive required EU member states to transpose the Directive into their local laws by 31 October 2003. The UK has been consulting on draft regulations since March 2003, and the original plan was to publish the final version of these in August 2003 and have them in force by Halloween.

Since March, however, there have been delays and it was only on 18 September that the final UK rules, The Privacy and Electronic Communications (EC Directive) Regulations 2003, were laid before Parliament and published, with an "in force" date of Thursday 11 December 2003. The regulations can be accessed at:

[http://www.dti.gov.uk/industries/ecomunications/directive\\_on\\_privacy\\_electronic\\_communications\\_200258ec.html#regs](http://www.dti.gov.uk/industries/ecomunications/directive_on_privacy_electronic_communications_200258ec.html#regs)

So UK marketers now have just short of three months to get their houses in order and ensure that they are operating within the new rules. The Government is by all accounts likely to issue detailed Guidelines on the Regulations in November 2003, but responsible marketers will be wanting some clarity on the position before then. So what are the new rules, and how does the final version differ from the draft?

In this piece we will focus on the provisions of the Regulations dealing with commercial email and SMS. In the next three monthly updates on [www.marketinglaw.co.uk](http://www.marketinglaw.co.uk) we will focus on other provisions of the Regulations, analyse their effect and assess their impact.

#### **E-mail and SMS/text marketing**

In its response to the March consultation, the DTI reports widespread support from those it consulted for the introduction of general opt-in for email and SMS/text marketing. Many saw a move to permission-based marketing in these channels as inevitable given the growing global problem of spam.

#### **Soft opt-in**

On the "existing customer" exemption from opt-in (so-called "soft opt-in" although it's actually qualified opt-out!) most supported the DTI's broad interpretation of the exemption in the draft Regulations.

The Directive applied this exemption to messages to individuals whose email addresses had been obtained "in the context of the sale of a product or service." In the draft Regulations published in March 2003, the DTI broadened this out to email addresses collected "in the course of the sale or negotiations for the sale of a product or service."

The DTI also softened the Directive when it came to the type of messages that could be sent to these "existing customers".

The Directive refers to the "direct marketing of its own similar products or services" [i.e. "similar" to the products or services being bought at the time

of the email address first being captured]. The DTI's draft Regulations referred to direct marketing of products or services which the sender has taken reasonable steps to ensure the recipient is aware of.

**Soft opt-in data capture circumstances kept broad, but watch out for the CAP Code!**

All seemed set fair then for a marketing-friendly UK spin on the Directive, but UK marketers' hopes have now been half-dashed. Final Regulation 22 (3) certainly retains the wider definition of the circumstances in which e-mail addresses can be captured for soft opt-in to apply. These are described as "in the course of the sale or negotiations for the sale of a product or service". The DTI says in its March 2003 consultation document that it regards this as extending to a situation where "someone has registered an interest in a product and allowed their email address to be recorded for future marketing use".

This augured well, although it should be remembered that as indicated below under "The CAP Code factor", the DTI's business-friendly approach here is currently rendered completely academic by the CAP Code. This is because, in the same context, the CAP Code says that, unless they have previously opted in, digital messages can only be sent to "existing customers" not "actual or prospective customers". See below for more on this.

**What can be promoted is narrower than in draft Regs**

When it comes to the subject matter of future emails, however, the final Regulations now revert to the wording of the Directive. In other words for soft opt-in to apply, the future email/SMS messages must relate to the products or services of the company which originally captured the email address, and these must be "similar" to what the recipient was buying or negotiating to buy when he or she first provided their email address.

**Opting out "without charge"**

Another change between the draft and final Regulations relates to the opt-out opportunity that must be provided, both when the email address is first supplied and also whenever future emails/SMS are sent.

Previously this had to be a "simple means, without charge, of refusing" the use of the email address or mobile phone number for future direct marketing. Now more clarification is given on the "without charge" aspect.

The relevant wording in the final Regulations now reads "a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use ...."

So an opt out by email or text will be regarded as "without charge" even though actually sending the opt-out message will involve a telecoms cost. Does this extend to a premium rate message by SMS/text? As there is no insertion of wording such as "at standard rates", we must assume for the moment that it does, but we must stress that it is early days and as with all our comments here on the new rules, this is not intended to be

legal advice on specific cases, where separate advice should be taken each time.

### **Unsubscribe and sender identity rules apply more widely**

Another change between the draft and final Regulations is in parts imposing general rules for direct marketing email/SMS.

The general rules are requirements that the identity of the person on whose behalf the communication has been sent must not be disguised or concealed, and senders must always provide a valid address to which the recipient can send an unsubscribe request.

In the draft, these applied only to unsolicited email /SMS sent for direct marketing purposes to individual subscribers (defined as living individuals or unincorporated bodies of individuals (e.g. partnerships) which are parties to contracts with providers of public, electronic telecommunications services for the supply of such services) .

In the final version these general rules apply to all direct marketing email/SMS, whether or not it is unsolicited, and whether or not it is sent to individual subscribers. In other words, from 11 December 2003, a valid unsubscribe address and absolute clarity about on whose behalf the message is sent will be essential for all direct marketing by email or SMS in the UK, whether it is B2C or B2B.

### **Corporate subscriber carve-out**

In the draft Regulations, the opt-in and soft opt-in rule does not apply to emails sent to corporate subscribers.

In its response to the consultation, the DTI reports unease that the distinction between corporate and individual subscribers might not always be clear-cut. However, "given the limited scope for maneuver allowed by the Directive" and strong concerns that universal opt-in would be harmful for B2B selling, the Government decided to stick with the relevant provisions.

So applying the definitions in the final Regulations, come 11 December 2003, unsolicited direct marketing email/SMS can continue to be legally sent on an opt-out basis to "corporate subscribers."

### **Four corporate carve-out caveats**

But that's not the end of the story here, and we can't leave this section without focusing on four key aspects.

### **B2B digital marketing on probation**

First, the Government says ominously that it is prepared to review the decision it has taken here "in the light of working experience of the new rules." So the message is that digital unsolicited B2B marketing is on probation and the exception in its current form could disappear if it is abused.

[info@bloggs ltd.com?](mailto:info@bloggs ltd.com)

Secondly, does this corporate subscriber exemption from opt-in apply only to emails addressed to e.g. [info@bloggsLtd.com](mailto:info@bloggsLtd.com) or does it extend to [john.smith@bloggsLtd.com](mailto:john.smith@bloggsLtd.com)?

On our reading of the definitions, it is who pays the relevant telecoms service bill (i.e. the subscriber who pays the bill for the telecoms service at the receiving end) that is key, not whether the email address is that of an individual. Otherwise the opt-in rule would have been stated to apply to messages sent to "individuals" as opposed to "individual subscribers."

So marketinglaw's view is that whether the address is info@ or john.smith @ does not matter. If it is @bloggsLtd.com at the end of the address, then the legal exception to opt in applies.

### **Companies and partnerships**

Our third key parting shot here relates to the definitions of individual and corporate subscribers. The effect of this is that the "B2B" direct marketing exception to opt-in will not apply to unsolicited email or SMS sent to screens where a partnership or sole trader is the subscriber. So as, for example, Osborne Clarke is a partnership, not a limited company, to be legal, unsolicited direct marketing emails to [Stephen.groom@osborneclarke.com](mailto:Stephen.groom@osborneclarke.com) can only be sent on an opt-in or soft opt-in basis.

### **The CAP Code factor**

Lastly, eagle-eyed readers may have spotted that above we have stressed that under the new Regulations, unsolicited direct marketing email can be sent *legally* to "corporate subscribers" on an opt-out basis.

Why have we emphasised that this is the *legal* position?

This is because the situation is different under the CAP Code of Advertising, Sales Promotion and Direct Marketing, the self regulatory Code that all UK marketers must comply with or face the wrath of the Advertising Standards Authority.

It's been this way since the new edition of the Code was published in March 2003. The crucial new provision is at para 43.4. This states that "the explicit consent of consumers is required before..... marketing by email 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."

Readers might think that this leaves the corporate subscriber exception alive by referring to "consumers". Sorry, nothing doing. The Code defines "consumer" as "anyone who is likely to see a given marketing communication, *whether in the course of a business or not.*" [our italics]

So what this means is that unsolicited direct marketing by email or SMS may be legal if it is sent to individuals at their corporate email address, but

it will still not be permitted in the UK, thanks to the CAP Code.

Satisfactory state of affairs? Hardly, and marketinglaw believes that now the Regulations are in final form and we have nearly three months before they have the force of law, the Committee of Advertising Practice should take this opportunity to make suitable changes to the Code.

### **Direct marketing**

Throughout the above analysis we have made it clear that the new Regulations apply to "direct marketing" email or SMS.

So if a message sent by email is not for direct marketing purposes at all, then all this aggravation can be avoided? Quite so, and since this is so crucial, is there a helpful definition of "direct marketing" in the Regulations? Er...no.

Is there any other legally recognised definition of "direct marketing" that might help?

Well there is the Data Protection Act 1998. This defines direct marketing for the purposes of conferring the right on individuals to require businesses not to use their data for direct marketing. The definition is "any advertising or marketing material which is directed to individuals." Hmm. This is not terribly enlightening, although the UK data privacy watchdog, the Information Commission, has commented

"The Commission regards the term "direct marketing" as covering a wide range of activities which will apply not just to the offer for sale of goods or services, but also the promotion of an organisation's aims and ideals. This would include a charity or political party making an appeal for funds or support and, for example, an organisation whose campaign is designed to encourage individuals to write to their MP on a particular matter or to attend a public meeting or rally."

There is also the CAP Code, which contains helpful lists of what it does and does not regard as a marketing communication. But will this be regarded as definitive by the Information Commission or by a court applying the new Regulations? Only time will tell, and in the meantime senders of commercial emails or SMS looking at this exception will need to take advice in each case.

### **Solicited/Unsolicited**

Another crucial aspect of the new Regulations is that if the communication is solicited, neither opt in nor soft opt in apply, and legally, marketers can carry on sending marketing emails/SMS until the recipient opts out.

So do we have a helpful definition of "unsolicited" or "solicited" in the Regulations? Funnily enough, in the draft, some help was offered.

Proposed Regulation 21 (6) stated:-

"For the purposes of this Regulation, a communication shall not be treated as an unsolicited communication if the recipient has notified the

sender that he does not object to communications being sent, or at the instigation of, the sender for direct marketing purposes."

This looked encouraging. It certainly seemed much more industry-friendly than the only other relevant UK statutory definition marketing law has been able to find. This is in regulations introduced under the Financial Services and Markets Act 2000 defining a "solicited" communication. These narrowly define such communications as either "initiated by the recipient" or "made in response to an express request from the recipient."

#### **Legacy database angle**

Other industry pundits also saw 21 (6) as a get-out for legacy databases. This was in the absence of anything else in the draft Regulations that suggested existing databases could carry on being used for digital marketing after the new law came into force.

Unfortunately, all this optimism was blown away by the final Regulations. Regulation 21 (6) had gone and there was nothing remotely similar in its place.

And pouring salt on the wound for legacy list users, the Response to the Consultation confirmed that the draft Regulations contained no transitional saving for existing lists. It also stated, in terms, that the idea of having any special saving for legacy databases had been considered and rejected. This was partly because of fears that such a transitional exemption could be abused by marketers.

So far as the meaning of "unsolicited" is concerned, we are back to square one, and marketers looking to ensure their messages are "solicited" and escape opt-in will need to take advice.

#### **The "instigation" angle**

The opt in and soft opt in rules apply to transmitting or sending (confusingly both expressions are used) emails or SMS in the relevant circumstances or "instigating" that transmitting or sending.

This seems to cater for situations where list owners arrange for any third party to send the communications on their behalf. But at what point does the transmitting cease to be "instigated" by the list owner and become sent by the third party entirely as a venture of its own, so that the list owner can have no liability? Unfortunately the final Regulations contain no definition of "instigation," so again marketers will have to take advice if they believe this issue could be crucial to contemplated activity. This may also have an impact on contractual provisions dealing with processing of data for marketing purposes.

#### **Enforcement**

How are the new rules to be enforced?

The draft Regulations continued to give the Information Commission the right to take action against transgressors either in response to a complaint or on its own initiative.

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|                                 | <p>The Response to the Consultation reports many expressing concern (with considerable justification) that current enforcement sanctions and processes were slow and laborious and were therefore being exploited by repeat offenders. Others suggested a power to force service providers such as ISPs and telephone operators to disclose the source of emails or calls suspected of breaking the rules on unsolicited direct marketing. On the other hand there was a concern as to how this could be done in a way that did not expose the discloser to liability under the Data Protection Act 1998.</p> <p>At the end of the day, the Government's response to all this has been to make no decision on any possible changes without further consultations with stakeholders. In the meantime the enforcement provisions of the final Regulations stay the same as they were at the time of the draft. In other words, the Information Commission will be the enforcement body of first resort, using the powers and mechanisms under the 1998 Data Protection Act.</p> <p><b>Right to sue for damages</b></p> <p>In addition, individuals who suffer damage by reason of any contravention of the rules will be able to bring proceedings for compensation, and defendants to such proceedings will be able to avoid liability on the basis that they had taken such care as in all the circumstances was reasonably required to comply with the relevant requirement.</p> <p><b>Ofcom</b></p> <p>Also there are the powers Ofcom already has under the Communications Act 2003. Under these, Ofcom (and after December 2003 Ofcom in its place) can take action and levy fines of up to £5000 for persistent misuse of telecommunications networks.</p> <p><b>ASA</b></p> <p>Finally, as already mentioned, given the stricter regime for commercial email and SMS under the CAP Code, the Advertising Standards Authority may find that its digital marketing caseload increases substantially as public awareness of the tighter regulatory landscape grows.</p> |
| <p><b>Why this matters:</b></p> | <p>Inevitably, as the source of so much spam is outside the EU, these new rules are not going to make the problem go away overnight. In addition, given the Government's refusal to contemplate any immediate step change in the enforcement landscape, even those who transgress the new rules that are within its jurisdiction are unlikely to face instant and punitive policing action.</p> <p>On the other hand, responsible digital marketers will want to take this chance to stave off even more draconian legislation and/or the imposition of "sledgehammer" technological solutions that don't discriminate.</p> <p>They will want to ensure that their activities are compliant come 11 December and the next few weeks give them an excellent opportunity to</p>  |

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|  | <p>get their houses in order. At the same time, a thorough compliance audit to ensure conformity with other legislation impacting on email and SMS marketers, such as E commerce and Distance Selling Regulations and data protection legislation generally, would be a sure-fire way, going forward, of maximising the value of contact and customer databases, and of the businesses that use them.</p> |
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## UNITED STATES



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| <b>1. Case Report:</b> | Kasky v. Nike Inc.   |
| <b>Topic:</b>          | Commercial Free Speech   |
| <b>Where:</b>          | California Supreme Court   |
| <b>When:</b>           | September 12, 2003   |
| <b>What happened:</b>  | Shoe and clothing manufacturer, Nike, settled a commercial free speech lawsuit by agreeing to pay \$1.5 million to a workers' rights group to improve factory conditions and monitoring. A San Francisco labor activist filed a lawsuit against Nike claiming that Nike's 1997 statements in a public relations campaign that responded to attacks that Nike engaged in unfair labor practices in its overseas factories constituted false and misleading advertising under California's consumer protection laws. Nike defended on the grounds that the public relations campaign was not commercial speech because it did not offer to sell anything but was protected First Amendment speech. The California Supreme Court ruled that Nike's speech was less protected under the First Amendment than that of its critics and, therefore, Nike could be sued on false advertising grounds. Questions concerning what constituted free versus commercial speech made their way to the U.S. Supreme Court, which dismissed the case in June 2003 and sent the case back to the California state courts. |
| <b>Comment:</b>        | The issues of whether Nike's public relations activities qualified as protected speech under the First Amendment and, more broadly, whether a company's politically oriented statements are entitled to full First Amendment protection were never resolved. The California Supreme Court's decision holds that labor unions have protected free speech rights but that an employer's right to reply is afforded less protection. So while Nike's settlement may be best for them and make business sense to its shareholders, the failure of the U.S. Supreme Court to rein in the radical attack on free speech by the California court leaves standing a most unsettling precedent.   |

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| <b>2. Case Report:</b> | U-Haul v. WhenU  |
| <b>Topic:</b>          | Online Pop-Up Advertisements   |
| <b>Where:</b>          | U.S. District Court for the Eastern District of Virginia   |
| <b>When:</b>           | September 5, 2003  |
| <b>What happened:</b>  | U-Haul filed a lawsuit against adware firm WhenU claiming that by delivering competitors' pop-up advertisements to users' computers when they visited the U-Haul website, WhenU engaged in trademark and copyright infringement, unfair competition, trademark dilution, and |

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|                 | contributory infringement. The WhenU software, which displays advertisements based on a user's browsing activity, is bundled with free software which consumers can download from the web. In July, the court granted WhenU's motion to dismiss the trademark, copyright and unfair competition claims, thus, upholding the legality of pop-up advertisements. In its opinion, the court held that users consented to receive When-U's advertisements by downloading the free software. The court further held that the pop-up advertisements do not violate a Web site publisher's trademark or copyright, because they appear in a separate window and are labeled as WhenU advertisements. |
| <b>Comment:</b> | Many advertisers and media companies see organizations like WhenU as hijacking their advertising traffic and interfering with visitors' experiences. One court, at least, has now found that the this business model does not result in injury of rights protected by trademark and copyright law.  |

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| <b>3. Case Report:</b> | Pelman v. McDonald's Corporation  |
| <b>Topic:</b>          | Fast Food Advertising   |
| <b>Where:</b>          | U.S. District Court for the Southern District of New York   |
| <b>When:</b>           | September 4, 2003   |
| <b>What happened:</b>  | <p>The court dismissed a second lawsuit filed against McDonald's fast food restaurants which alleged that its advertising and marketing practices contributed to obesity in children and misled consumers to believe that its food products were nutritious. The court had dismissed an earlier version of the suit which made similar allegations in January 2003, but had allowed the plaintiffs to refile the case with new information.</p> <p>The court held that the plaintiffs failed to show an adequate connection between their consumption of McDonald's food and their alleged injuries, and that the plaintiffs had not provided McDonald's with enough information to determine whether its products are the cause of the alleged injuries.</p> |
| <b>Comment:</b>        | Hopefully this dismissal will put an end to the ludicrous idea that advertisers are responsible for obesity rather than the children and families in which they are raised and peer pressures totally unrelated to marketing.   |

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| <b>4. Topic:</b>      | Health Claims for Food and Dietary Supplements   |
| <b>Where:</b>         | The Food and Drug Administration ("FDA")   |
| <b>When:</b>          | July 10, 2003  |
| <b>What happened:</b> | <p>The FDA announced its new health claims review process for conventional foods and dietary supplements. The agency will begin using the new process, which is intended to reduce the regulatory uncertainty that currently surrounds the use of qualified health claims, in September of 2003.</p> <p>The new health claims approval process is part of the agency's "Consumer Health Information for Better Nutrition" initiative, which has two stated goals: (1) to encourage marketers of conventional foods and dietary supplements to make accurate claims about the health benefits</p> |

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|                 | <p>of their products; and (2) to create strong disincentives for dietary supplement marketers to make false or misleading health claims.</p> <p>In particular, FDA officials will use a grade-based ranking system to categorize the quality and strength of scientific evidence supporting each proposed health claim. The scientific evidence in support of each proposed claim will be given a grade such as A, B, C or D. The "A" grade will be used if there is significant scientific agreement about the claim. The "B" grade will be assigned if there is good scientific evidence supporting the claim, but the evidence is not entirely conclusive. The "C" grade will apply to claims where the evidence is limited and inconclusive. The "D" grade will apply if there is little scientific evidence to support the claim. Proposed health claims that have the agency's "A" grade will be classified as unqualified health claims and will require no disclaimers. In contrast, proposed health claims that are graded "B," "C," or "D" by the agency will require disclaimers or other qualifying language to avoid misleading consumers.</p> |
| <b>Comment:</b> | <p>Industry members have historically struggled to convince the FDA that truthful and accurate health claims provide substantial benefits to consumers and promote marketplace efficiency. The structure of the FDA's new health claims approval process suggests that the agency is beginning to understand this message. Whether the implementation of the new process will fairly evaluate desired claims remains to be seen.</p>  |

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| <b>5. Topic:</b>      | Telephone Consumer Protection Act ("TCPA")   |
| <b>Where</b>          | Federal Communications Commission ("FCC")  |
| <b>When:</b>          | June 26, 2003  |
| <b>What happened:</b> | <p>The FCC approved a revision to the TCPA that establishes, with the coordination of the Federal Trade Commission ("FTC"), a national Do-Not-Call registry for residential telephone subscribers. The FCC has broader jurisdiction than the FTC and the FCC's Do-Not-Call registry also applies to all intrastate commercial calls, as well as calls from commercial telecom carriers, banks and the airline industry. (The FTC's Do-Not-Call registry is limited to interstate calls.) The FTC will administer the national registry but enforcement will be coordinated between the FCC and the FTC. The FCC's and FTC's Do-Not-Call registry becomes effective on October 1, 2003.</p> <p>The FCC's new rules do not cover calls by non-profit tax-exempt organizations and callers who have an established business relationship with a consumer are exempt, as well, albeit with certain limitations. The revisions also prohibit telemarketers from abandoning more than 3% of their calls or blocking information from caller ID systems.</p> <p>Although initially overlooked, the revised TCPA also changes the rules for sending unsolicited commercial faxes. The revised rule prohibits the sending of unsolicited advertisements via fax without the recipients' express written consent, and removes the prior exemption that permitted businesses to send unsolicited advertising faxes to individuals and businesses with whom they have an established business relationship. The written consent requirement for sending unsolicited commercial faxes becomes effective on January 1, 2005.</p> |

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| <b>Comment:</b> | <p>The FCC waited until the FTC was almost ready to launch its popular National Do-Not-Call list before endorsing the registry. The FCC's new fax rules, which close existing loopholes in the TCPA, went largely unnoticed in the FCC's June order, because that order primarily concerned the new federal Do-Not-Call registry. The challengers believe that the new rules, intended to prevent nuisance faxes, wrongly interfere with valid communications between associations and their members, as well as businesses and their existing customers. Companies are encouraged to seek written consent from as many individuals and businesses as possible prior to the effective date in an effort to maintain uninterrupted communications with customers via fax. It remains to be seen whether these stricter rules will significantly harm telemarketers as many industry groups predict.</p> |
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## URUGUAY



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| <b>1. Case Report:</b> | Sony Corporation vs. P.C.S.A. and others<br>Uruguayan Court confirms SONY's IP rights  |
| <b>Topic:</b>          | Parallel-imported products, modified without Sony's permission.  |
| <b>Where:</b>          | Civil Court of first instance of the 5 <sup>th</sup> Circuit   |
| <b>When:</b>           | February 12, 2003  |
| <b>What happened:</b>  | The court confirmed the company's rights and ruled that the modifications were illegal. The ruling became final and binding on March 10 <sup>th</sup> . The judge in the case said that the alterations were "significant" because they could affect consumer's conceptions of the product and consequently undermines the Sony trademark's reputation in the market. Accordingly, the court ruled that parallel importers are precluded from changing the video-norm and voltage without clearly indicating on the altered product what the changes are.  |
| <b>Comment:</b>        | <p>The case concerned parallel imported goods, which had been modified without Sony's permission. Parallel importers obtain goods from sources other than the manufacturer and do not maintain any commercial nor legal relationship with the manufacturer. This is usually legal, except when the marked product is altered or modified. Three companies were involved in this case, though their names were not disclosed. The companies had acquired genuine Sony TV and audio equipment abroad and imported it into Uruguay legally. Then they changed the products' video standard and electricity voltage from NTSC into PAL N (standard in Uruguay) and from 110 volts into 220 volts (which is the local voltage).</p> <p>The importers also removed the original identification labels placed by the manufacturer (Sony) indicating the goods serial numbers. Altered products were sold in the local market without any special warning or clarification.</p> <p>The case entailed legal implications vis-à-vis several bodies of law (trademark protection, consumer protection, unfair competition, product liability and labelling regulations).</p> <p>The defendants argued, unsuccessfully, that the plaintiff's trademark actions were part of a broader strategy to gain a 'dominant position'. Considering that the first comprehensive antitrust legislation was passed in Uruguay in June 2000, this has been the first case in which the interface between antitrust and intellectual property rights has ever been discussed before the courts.</p> <p>This is the first court decision given in Uruguay on the scope of intellectual property protection and the limits of parallel imports, since the enactment of the Trademark Act in 1998.</p> |

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| <b>2. Topic:</b>      | Image Rights  |
| <b>Where:</b>         | Civil Court of first instance of the 6 <sup>th</sup> Circuit  |
| <b>When:</b>          | July 1989   |
| <b>What happened:</b> | The reproduction on the cover of an exercise book, among other city sights, of a picture showing the plaintiff in the role of "Mama Vieja" in the "Llamadas" carnaval parade.   |
| <b>Comment:</b>       | <p>The reproduction of the image does not constitute an illicit conduct pursuant to subsection 3 of Article 21 of Law No.9.739, which establishes exceptions to the rule of express consent.</p> <p>Our case law held that the provisions of article 21 of the referenced law apply to the individual, but not to the character being interpreted. In application of this criterion, the person whose image in the interpretation of the character of "Mama Vieja" was used on the cover of an edition of exercise books was excluded from this norm.</p> <p>This is confirmed in subsection 8 of Article 45 of Law No. 9.739*. In the first place, because the event shown in the picture took place in public within the context of an activity traditionally open and expansive, such as the celebration of carnaval and the participation in this type of event implies a waiver of privacy, knowing full well that the image will be widely publicized. In the second place, because the image whose reproduction figures on the cover of the exercise books, is not the picture of the plaintiff, but of the character being interpreted by an individual, there being no interest in the person playing the part of "Mama Vieja".</p> <p>*The ruling of this landmark case was based on the provisions Art. 21 of Law No.9.739. The new Copyright Law No. 17.616 of 10 January 2003 has modified several articles of this law, but the provisions of Art. 21 remain unchanged.</p> |

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| <b>3. Case Report:</b> | Magela Buysan vs. El País S.A.   |
| <b>Topic:</b>          | Infringement of Image Rights   |
| <b>Where:</b>          | Civil Court of first instance of the 5 <sup>th</sup> Circuit   |
| <b>When:</b>           | December 1997  |
| <b>What happened:</b>  | <p>The picture of Magela Buysan, a publicity model, was used in the sales promotion of a magazine, without consent. Ms. Buysan sued for damages for civil liability not covered by contract and unjust enrichment.</p> <p>Although the plaintiff was photographed in a public place -the weekly Feria in the Villa Biarritz Park- and the picture published with her consent in the society pages of the magazine "Paula" published by El País S.A., later on and <u>without her consent</u>, the image was used to promote the sale of said magazine in publicity spots in TV and advertisements in the press.</p> <p>The court held that the image rights have been infringed upon due to the circulation of a photograph for advertising purposes without consent.</p> <p>The conduct, which violates image rights, constitutes an illicit act that can</p> |

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|                 | <p>be indemnified in conformity with Article 1319 of the Civil Code and specifically Article 21 subsection 1 of Law No. 9.737 (article, which has not been modified by the new Copyright Law No. 17.616 of January 2003).</p> <p>The court accepted the propriety of pecuniary damages as the photograph is marketable, i.e. it can be put into circulation for payment. There is a value derived from the picture, which is taken advantage of by the person using the picture.</p> <p>The court held that there was a case of lost profits, as the plaintiff was a model, who normally gets paid a fee for promotional "spots" or publicity. The damages were calculated on the basis of the model's regular fees for publicity "spots".</p> <p>The defendant filed an appeal against the decision of the Judge in first instance, but the ruling of first instance was confirmed, awarding pecuniary damages calculated on a publicity model's fee schedule. As the plaintiff failed to prove moral prejudice, the court did not award compensation.</p> |
| <b>Comment:</b> | <p>Consequently, it has to be pointed out that the mere fact of having authorized the photograph does not imply a waiver of ones rights. Therefore, we agree with the Judge in that the image rights of the plaintiff have been infringed upon by virtue of the circulation of her photograph for publicity purposes without her consent, a conduct that constitutes an illicit conduct and entitles the plaintiff to damages.</p>  |

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| <b>4. Case Report:</b> | Marcelo Porras vs/Banco de Seguros del Estado and M.R.M. Publicidad  |
| <b>Topic:</b>          | Infringement on Image Rights   |
| <b>Where:</b>          | Civil Court of first instance of the Second Circuit  |
| <b>When:</b>           | October 7, 1998  |
| <b>What happened:</b>  | <p>The defendants used a photograph of the plaintiff (taken in the Boxing Club Palermo, in classic apparel and boxing posture) in a TV spot called "Photographs" relating to disability insurance.</p> <p>In first instance the co-defendants argued that the airing of the picture on TV was related to "scientific, didactic and, in general, cultural purposes or circumstances and activities of public interest or which took place in public".</p> <p>The defendants tried a thesis based on the presumption that the only purpose of the publicity was to prevent accidents in the workplace, and that no profitability was involved. The judge confirmed this position in first instance.</p> <p>In the second instance the court held that, although the final purpose of the ad was the prevention of accidents in the workplace, there is no doubt that the advertising agency did have profit in mind. The plaintiff never authorized the use of his image in publicity.</p> <p>The judge in second instance granted damages in the amount usually paid to an actor for a "photoslide", in conformity with the Fee Schedule of the Uruguayan Actors Society.</p> |
| <b>Comment:</b>        | It cannot be argued that the advertising agencies acted without profit in  |

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|  | mind and that their conduct was based on values of cultural, scientific or didactic nature only. The advertising agencies have been engaged with a commercial purpose. They were paid for their work according to the creativity, structuring and circulation of the publicity spot. |
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| <b>5. Case Report:</b> | Associazione dei Siciliani en Uruguay vs/AUDAP  |
| <b>Topic:</b>          | Discriminatory or offensive publicity   |
| <b>Where:</b>          | Out-of-court complaint  |
| <b>When:</b>           | July 29, 1994   |
| <b>What happened:</b>  | <p>The "Associazione dei Siciliani in Uruguay filed a complaint with AUDAP (Uruguay Association of Advertising Agencies), denouncing a publicity which in their view was offensive to the Italian community.</p> <p>The publicity showed a scene where a grandfather and an apparent counselor treated the grandson as a traitor for "working" within the law; even more, they reproached him for "not going to the nightclubs anymore" and for having forgotten what grandmother had taught them: "lie to the teacher", "never do the scores" and now "working". By all appearances, the publicity was inspired by a scene from "The Godfather", showing the grandfather smoking in the background and the counselor, hardly hiding a gun under his waistcoat, saying: "el cento per cento, cuanto si gana?" suggesting that the grandfather find a new source of income.</p> <p>In the view of the Associazione dei Siciliani in Uruguay, this publicity constitutes an offence the Italian community. The offence was considered even more serious, due to the fact that the publicity in question was in promotion of the State Lottery, the Lottery and Pools Office being an Agency of the State.</p> <p>In their complaint the Association made a strong point of the provisions of the Universal Declaration of Human Rights, which stipulates in its Art. 13.5: <i>"The law prohibits all propaganda in favour of war and all justification of national racial or religious hate, which constitute an incitement to violence or any other similar illegal action against any individual or group of individuals for whatever reason, including race, colour, religion, language or national origin."</i></p> |
| <b>Comment:</b>        | The publicity was taken off the air without recourse to the courts.   |

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| <b>6. Legislation:</b> | Law No. 17.250 – Consumer Protection Law   |
| <b>Topic:</b>          | <u>Advertising</u>   |
| <b>Comment:</b>        | <p>The legislation regarding this subject matter is still very recent. The Law stipulates that all advertising must be transmitted and published in a manner, which enables the consumer to recognize it as such ("Principle of identification of advertising").</p> <p>Misleading advertising is prohibited by means of a flexible definition. Information is considered "misleading" if it induces somebody into error in respect to the nature, quantity, origin or price of an advertised object. Quality is not included, wherefore it is not taken into account in assessing the deceit.</p> |

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|  | <p>In the event of evidence of misleading or unlawful advertising, the competent authorities may judicially file for suspension of the advertisement or require clarification or counter advertising, independently from the other penalties stipulated in the law.</p> <p>The essential aspects in relation to advertising, particularly "comparative" advertising have been contemplated in the Consumer Protection Law No. 17.250, enacted in August 2000. In its Art. 25 de Law admits comparative advertising, subject to the objectivity of the comparison and the possibility of proving the assertions made in the advertisement.</p> |
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| <b>7. Legislation:</b> | Law No. 17.011 – Trademark Law   |
| <b>Topic:</b>          | Registration of "slogans" or "publicity phrases" as trademarks   |
| <b>Comment:</b>        | <p>In Art. 3, this law, as most modern legislations in this matter, expressly stipulates the possibility to register "Slogans" or "publicity phrases" as trademarks.</p> <p>The new legal text confirms the registration of "publicity phrases", whenever they show a distinctive character.</p> <p>Although registration was possible under the former law, Law No. 17.011 provides for the standardization of a contradictory and erratic administrative jurisprudence.</p> <p>By the way of illustration we shall indicate some examples of the "slogans" or "publicity phrases", which have been registered under the new law:<br/> <i>"Nothing powers your life like energizer"</i> (Eveready Battery Company, Inc.),<br/> <i>"From Farm to Fork"</i> (S.C. Johnson Commercial Markets, Inc.),<br/> <i>"Más blanco no se puede"</i> (The Procter &amp; Gamble Co.),<br/> <i>"Se tiene o no se tiene"</i> (Chivas Brothers Limited).</p> |

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| <b>8. Legislation:</b> | Law No. 17.616 – Copyright Law (Jan/10/2003)   |
| <b>Topic:</b>          | Scope of the law in relation to advertising and publicity  |
| <b>Comment:</b>        | <p>Chapter I Art. 5 refer to the scope of the intellectual, scientific and artistic production.</p> <p>Chapter VII Arts. 36 to 39 refer to the rights of the interpreting artists, sound producers and broadcasting entities.</p> <p>Chapter IX Art. 44 deal with illegal reproduction and Art. 45 with the legal reproduction.</p> <p>Chapter X provides for the penalties to be imposed in case of infringement of the law.</p> <p>Bado, Kuster, Zerbino &amp; Rachetti shall be glad to assist GALA members and their clients in Uruguay with cases related to copyright and advertising law.</p> |

## VENEZUELA



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| <b>1. Case Report:</b> |   |
| <b>Topic:</b>          | Unfair Competition  |
| <b>Who:</b>            | Aventis Pharma, S.A. vs. Representaciones Nolver, S.A and Casa de Representaciones Farmacéuticas Sinergium, S.A.  |
| <b>When:</b>           | August 2003   |
| <b>Where:</b>          | Venezuela   |
| <b>What happened:</b>  | <p>The Venezuelan company Aventis Pharma, S.A, who produced the pharmaceutical product "TAXOTERE" (a medicine for cancer patients), denounced "Representaciones Nolver, S.A" and "Casa de Representaciones Farmacéuticas Sinergium, S.A." based on article 17 of the "Ley para Promover y Proteger la Libre Competencia" (the Venezuelan antitrust legislation). The mentioned article establishes the prohibition of: <i>The development of commercial policies which tend to eliminate competitors through unfair methods of competition are prohibited; especially in the following cases: (...)3° Bribery in commerce, the violation of industrial secrets and products simulation".</i></p> <p>The denounced companies registered before sanitary authorities the products ONCODOCEL and DOXETAL (which have the same composition of TAXOTERE) to be distributed in Venezuela, and AVENTIS PHARMA, C.A. alleged that there is unfair competition by infringement of industrial secrets and taking advantage of other competitor effort. According to the "Ley del Ejercicio de la Farmacia" (Pharmacy practice Law) and the "Instructivo de Registro Nacional de Productos Farmacéuticos del Instituto Nacional de Higiene Rafael Rangel" (National registration instructive for pharmaceutical products of the National Institute Rafael Rangel), the pharmaceutical products are divided in: 1) known products; 2) new products. Each product has its special procedure to obtain the commercialization permission. In the case of the known products exist the brief procedure</p> <p>Aventis Pharma, S.A alleged that the SINERGIUM did not file the pre-clinics test to the "Instituto Nacional de Higiene Rafael Rangel" in order to obtain the sanitary permission of its products because they invoked the data and evidence submitted by Aventis.</p> <p>The Antitrust office indicated in its decision that in order to determine the existence of unfair competition practices, it is necessary to evaluate the legality of having access to files of the "Instituto Nacional de Higiene Rafael Rangel" to obtain an authorization for the commercialization of certain</p> |

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|  | <p>products, based in the use of the "brief procedure" established in the norms of the above mentioned Institute for the products already registered.</p> <p>In this sense, and according to the indications of "Instituto Nacional de Higiene Rafael Rangel", the normative frame is basically the Medicines Law (Ley de Medicamentos), the reform of the regulation of the Pharmacy Practice Law (Ley del Ejercicio de la Farmacia) and the intern norms dictated by the mentioned Institute, such as the Norms of the Reviewer Group of Pharmaceutical Products.</p> <p>The antitrust office quoted a resolution from July 23, 2003 which arranged that when the national laboratories make use of the "brief procedure", do not acquire confidential information not disclosed by third parties, because the new registrant merely indicate in the application form that it is a product already known, its active principle, name and number of the approved product.</p> <p>The denounced was dismissed, since the requirements of article 17 of the antitrust law were not fulfilled. In this sense the antitrust office concluded that there is not unfair competition, specifically and advantage of other people's effort.</p> |
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| <b>2. Case Report:</b> |   |
| <b>Topic:</b>          | Anti-piracy pertaining to Trademarks and Copyrights   |
| <b>Who:</b>            | Mattel Inc. Vs. Distribuidora Toy Center  |
| <b>When:</b>           | May 16, 2003  |
| <b>Where:</b>          | Caracas   |
| <b>What happened:</b>  | <p>Mattel Inc. claimed the infraction of pertaining to trademarks rights and copyrights on some of their BARBIE designs, and denounced the existence of counterfeited products before the National Prosecutor with competence on copyright law, who ordered the preventive seizure of merchandise identified with BARBIE trademarks and designs.</p> <p>The normative base was Decisions number 351 and 486 of the Andean Community, the Copyrights Law and the criminal code. The infraction specifically consists on the non-authorized application of the "Barbie" doll to school supplies that identify with the family of trademarks and designs "Barbie" that entered the country in significant amounts. The police investigations agency kept preventively more than 21000 pieces</p> |

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| <b>3. Case Report.</b> |   |
| <b>Topic</b>           | Anti-piracy pertaining to Trademarks and Copyrights   |
| <b>Who:</b>            | Mattel Inc. vs. Zapatería Seven's   |
| <b>When:</b>           | September 8, 2003   |
| <b>Where:</b>          | Caracas   |
| <b>What happened:</b>  | Mattel Inc. claimed the infraction of trademarks rights and copyrights on some of their "Barbie" designs and denounced before the Office of the public prosecutor 18 with national competence in copyrights and fundamentals rights which ordered the preventive seizure of merchandise |

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|  | with the BARBIE doll. The normative base was Decisions numbers 351 and 486 of the Andean Community, the Copyright Law and the criminal code. The infraction specifically consists on the non authorized application of the "Barbie" doll to school supplies that identify with the family of trademarks "Barbie" that enter the country in significant amounts. The police investigations agency kept preventively more than 5000 back packs |
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| <b>4. Case Report:</b> |   |
| <b>Topic:</b>          | Unfair Competition  |
| <b>Who:</b>            | Cebra, S.A and Industrias de Productos para Pintar INPROPIN vs. Union KCA, MATCOFER, S.A y FERKA, S.A.  |
| <b>What happened:</b>  | <p>The companies Cebra, S.A and Industrias de Productos para Pintar INPROPIN denounced the companies Union KCA, MATCOFER, S.A y FERKA, S.A. for the presumed commitment of the practices established in article 17, number 3 of the "Ley para Promover y Proteger el Ejercicio de la Libre Competencia" (antitrust Law), which prohibits <i>"The development of commercial policies which tend to eliminate competitors through unfair methods of competition are prohibited; especially in the following cases:</i></p> <p><i>1° Misleading or false advertising directed to impede or limit free competition.</i></p> <p><i>2° The promoting of products and services based on false declarations with regards to the disadvantages or risks of any other competitors' product or service; and</i></p> <p><i>3° Bribery in commerce, the violation of industrial secrets and the pirating of products".</i></p> <p>The CEBRA company alleged that they are one of the most traditional and prestigious companies in the country for the sales of brushes and other related products, having as a principal product a brush with blue handle of the standard series 1200. They alleged that the blue color in the handle is the key distinctive element in the market having no importance the trademark of the product. In addition they alleged that there is an ethic code between the manufacturers companies and each one has a different color for not confusing the consumers.</p> <p>For these reasons they denounced companies MATCOFER, UNION K and FERKA for incurring in unfair competition practices for the following reasons:</p> <ul style="list-style-type: none"> <li>- They assimilated the color and form of the handle of the brush produced by CEBRA (product simulation).</li> <li>- Violations of an advertising contract for the non promotion of the brushes from CEBRA, specifically by the substitution of the CEBRA brushes for those distributed by UNION K.</li> <li>- Violation of industrial secrets, since MATCOFER hired two ex-workers from CEBRA.</li> </ul> <p>The antitrust office established in the decision that publicity is every form of communication carried out within the framework of a commercial, industrial, artisan or liberal activity, which objective is the promotion of the</p> |

provision of goods or services, including real estates, rights and obligations; it is part of the commercial activity of a certain economical agent, that its products or services be know by the consumer, and for this reason, in matter of free competition takes shelter of the correct use of this form of communication, and when it is generated in disloyal form and with the spirit to create confusion it is named "deceptive publicity".

In addition, the decision established that the "deceptive publicity" is an action where the intention of violator is to disturb the transparency of the information that the consumers receive with the objective of confuse them and to notch the position of a competitor, being unnecessary that the final objective is to exclude a competitor from the market.

Concerning the violation of the contract advertising, the antitrust office decided that there is not such violation because it does not have the characteristics of a private law contract. It is merely an invitation to participate in a catalogue of the store. If the brushes are not in the catalogue, and has been substituted by others, it cannot be consider as a disloyal practice.

In addition and related to the argument that in the catalogue the brushes are promoting without case, it is important to indicate that in others catalogues are displayed in the same manner, since the cases diminish the quality of the image. It is not a practice tending to cause confusion in the consumers and was verified in retail stores that brushes are sold with its identified cases. Moreover, in many catalogues there is a legend with the information of every kind of brush.

Additionally, it was not possible to prove that the consumer identified the brushes by color and not for the trademark, and it was not proved that the color is the key factor identifier of a manufacturer or distributor.

Concerning the practice established in article 17, n° 3 about the bribery in commerce, the violation of industrial secrets and product simulation, the decision indicates that the confusion acts must be verified from the point of view of the consumers, specifically if from a disloyal act results a displacement of certain clients, to the company acting disloyalty.

The Superintended recognized that product simulation is formed by an act of confusion, which must be prohibited because it is a source of inefficiencies for the economical agents generating distortions in the market and affecting the competence for disloyal acts.

About the marks of the companies' producers of brushes and the color of the handle, the decision indicates that it was totally demonstrated that the mark in each brush could be in the handle or the bristles protector because there are many companies in the market with brushes with the same color in its handles. It is not possible to allow the monopolization of a color in general because it would cause a barrier to the rest of the competitors. For the mentioned reasons it was not verified that consumers identified the blue color with a specific company.

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|  | <p>Concerning the molds base of the handles, the denounced established that were used the same molds that those that were used for them and about it, the antitrust office establishes that there was not proved the existence of specific molds to the companies INSOPLAST and BICIPLASTIC for being of exclusive use of CEBRA and INPROPIN.</p> <p>Finally, concerning the violation of industrial secrets, the denounced companies indicated that two ex-workers of CEBRA were contracted by UNION K, who took advantage of the knowledge of the workers. In this sense, the antitrust office indicated that CEBRA failed to prove that all necessary measures to protect such secret were taken.</p> <p>For all the above mentioned reasons, the antitrust office rejected the filed denounce of CEBRA, C.A. and Industrias de Productos para Pintar INPROPIN and establishes that there is not unfair competition.</p> |
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| <b>5. Case Report:</b> |   |
| <b>Topic:</b>          | Anti-piracy pertaining to Trademarks and Copyrights   |
| <b>Who:</b>            | Tommy Hilfiger Inc. vs. Distribuidora Lady Modas before the Office of the public prosecutor 18 with national competence in copyrights claiming the infraction of trademarks and copyrights on some of their designs applied to footwear. The Office of the public prosecutor 18 with national competence in copyrights ordered several preventive seizures of shoes that reproduced and simulates "Tommy Hilfiger" marks and works. More than 60.000 pairs of shoes were. |
| <b>When:</b>           | July 2003.  |
| <b>Where:</b>          | City of Valencia, Carabobo state.   |
| <b>What happened:</b>  | The Tommy Hilfiger company denounced to Distribuidora Lady Modas  |

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