CHILE

Rodrigo Albagli & Guillermo Rivas Sureda
Albagli Zaliasnik & Cia.
ralbagli@az.cl
grivas@az.cl
www.az.cl

1. Case Report	
Topic:	Deceit or confusion for consumers
Who:	The Council for Advertisement Self-Regulation and Ethics (CONAR)
Where:	Santiago, Chile
When:	September, 2004
What Happened:	Goliath versus Goliath. Unilever filed a claim against Procter & Gamble for a cleaning products advertising campaign. The ad shows two housewives doing laundry. One housewife is carrying an ALO product (clearly resembling Unilever's OMO) and is confronted by another housewife using Procter's ACE detergent. The latter makes a comparison between the results of the two products and tells the audience that ACE gives any garment an amazing "whiteness," the "whitest of all whites" because active ingredients remove dirt to the very end, "trapping" them in the water and then getting your clothes whiter. OMO and ACE are both best-sellers in the niche market for the segment called "Whiteness". It was argued that consumers were being deceived by the use of misleading publicity, for it gave the sense that with this detergent it is possible to get clothes even whiter. The Ethic's Code establishes that advertising may not be false, nor mislead consumers to wrong conclusions. In order to grasp a complete sense of the consumer's reaction, the Council requested chemical tests from *TCAl-Tex Limita*¸ an organization duly certified by *The American Association of Textile Chemist and Colorist*s (AATCC) and from *The American Society for Testing Materials* (ASTM) and *The British Textile Technology Group* (BTTG) to find out whether the statements made in this add were accurate or not. The outcome of the chemical test revealed that OMO produced better results pertaining to "whiteness" when compared to ACE. Clothes washed with OMO showed superior "whiteness" than those using ACE. The Council ruled that although Procter's statements were not based on scientific grounds and chemical tests, they were well within the scope of regular advertising campaigns, and consumers are clearly able to understand a certain sense of "exaggeration" without recourse to scientific testing. Such statements are to be interpreted by consumers in a subjective way and such are not required to be proved as in a court of law where the standard is different.
Comments:	The Council made a strong point by ruling out the claim saying that certain statements made within the regular course of advertising campaigns do not have to be proven with scientific evidence. Rather, the Council preferred to rely on people's common sense where an exaggeration is made in an advertising

	campaign.

2. Case Report	
Topic:	Unfair competition using a competitors product's reputation.
Who:	Antitrust Court
Where:	Santiago, Chile
What Happened:	Laboratorios Recalcine S.A., one of the largest pharmaceutical companies in Chile filed a claim against Novartis, a Switzerland based pharmaceutical company, on the grounds that Novartis had distributed a certain catalogue among doctors all over the country which showed certain statements considered to be false and slanderous to Recalcine's Oxicodal. Oxicodal is a medicine used in the treatment of epilepsy. The catalogue showed a big finger pointing to Novartis's competitors catalogues, especially Recalcine's and the following statement: "Do you think the U.S. Food and Drug Administration would approve just any medicine?" And then "Don't risk the results, use the original". The recently created Antitrust Court ruled in favor of Recalcine based on the fact that the catalogue contained not only false statements but also slanderous publicity which was labelled by the Court as unfair competitive behavior. The Court cleared Recalcine's Oxicodal and stated that there is no doubt regarding the quality of the products made in Chile by Recalcine. Novartis was not able to produce convincing evidence – clinical studies, scientific probes – showing the superiority of Novartis's products solely because they are manufactured abroad. More importantly, the ruling, aside from the huge fine (for local standards) it imposed, made clear that "to try to discredit a competitor's product and then underhandedly provoke public alert by questioning the quality of a product previously approved y national health authorities is typical unfair competitive behavior."
Comments:	This is a seminal case for the newly created Antitrust Court. The decision established that where public health is concerned, false statements contained in catalogues, brochures or advertising campaigns discrediting a competitor's product which has previously been approved by local pharmaceutical watchdogs, constitutes not only slander but also unfair competitive behavior.

3. Case Report	
Topic:	Unfair use of trademarks in an advertising campaign
Who:	The Council for Advertisement Self-Regulation and Ethics (CONAR)
Where:	Santiago, Chile
When:	July, 2004
What Happened:	Falabella versus Ripley. The retail war goes to a new battle site. Falabella S.A.C.I., Chile's biggest retail company files a claim against Ripley S.A., which is Chile's second biggest retail company behind, Falabella. The claim was grounded as follows: Ripley´s advertising campaign for linen and bed clothes was aired using the phrase "5 white days". Falabella in turn claimed to have had the same expression duly registered as a trademark. Falabella claimed that such conduct aside from being illegal, constituted an infringement on certain provisions of the Advertising Ethic's Code.

	The Ethic's Code provides *inter alia* that advertising campaigns must not contain any statement or visual devices that may lead consumers to the wrong conclusions, with special attention to: copyrights, intellectual property rights such as patents, trademarks, designs, models and trade names. Ripley counterattacked raising as it's defense that this campaign was set in motion for the first time in 1995 and that no one has the right to claim intellectual rights over the word "white," being a generic term used in Chile to describe bed sheets or bathroom fabrics and the like. Moreover, Ripley claimed to have had no idea that the expression "5 white days" was already a registered trademark owned by a third party, which unfortunately happened to be its most fierce competitor. Ripley also asserted its good behavior in response to Falabella's charges, noting that once the mistake was discovered they commanded the advertising agency in charge to modify all the ads, brochures, catalogues related to the "5 white days" campaign. The Council ruled that the advertising campaign was a 'mistake' and although it was duly corrected by Ripley the infringement was nonetheless committed.
Comments:	The Council made no exemptions for unaware infringement where an advertising campaign depicted a registered trademark of a competitor. In other words, the Council just did the right thing upholding intellectual rights, which cannot be used by another party even if the other party claims "innocent use" and promptly repairs the damage.

4. Case Report	
Topic:	Deceit or confusion for consumers
Who:	The Council for Advertisement Self-Regulation and Ethics (CONAR)
Where:	Santiago, Chile
When:	August, 2004
What Happened:	Inacap, a non profit Chilean Technical Institute, created in accordance with the provisions of Legal Decree No 3631 (that sets legal requirements for educational and technical institutions), presented an objection to the campaign brought up by their competitor Culinary (not created according to Legal Decree No 3631), in the El Mercurio Newspaper, on Saturday, January 24, 2004. The claim was filed on the grounds that consumers were being deceived by the use of misleading publicity, giving the sense that Culinary was legally established within the boundaries of Legal Decree No 3631, which grants the President of the Republic of Chile with the power to legally recognize Universities and Professional Institutes, but only under non profit status. The ad posted in El Mercurio on page 20, section A, allegedly promoted Culinary's services as those of a University, using the following statement: *"CULINARY: The University of Culinary Arts"* and on the bottom of the same page, another statement that highlighted Culinary's university environment. Inacap argued that the Ethic's Code establishes that advertising may not be false nor mislead consumers to wrong conclusions and must not abuse the confidence of the public nor exploit their lack of culture, knowledge or experience. In addition, ads must not use scientific terms incorrectly nor apply scientific language in order to give an appearance which is not accurate, such as, being a University and not a Professional School. Culinary argued that they used the word University in a broad sense (as a concept that evokes something universal not a University) and never intended to

	breach any provision of Legal Decree No 3631 and asserted that the contracts they sign with their students, clearly recognize that they do not comply with said Decree and thereby, do not hold a University legal statues. The Council grounded its decision on two articles of the Ethic Code, ruling that the newspaper ad was not in compliance with the Code's requirements and could definitely cause confusion among consumers regarding the academic accurateness of the degrees that Culinary offers in the educational market.
Comments:	The Council made a point in establishing that, when it comes to higher education, an ad must be accurate in pointing out clearly the different educational levels or academic degrees offered by the organization and that only the nomenclature established in Legal Decree 3631 may be used.