

PERU



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Jurisprudence	
Topic:	Comparative Advertisement
Who:	Tribunal of Defense of Competition and Intellectual Property
When:	10 December 2003
Where:	Lima, Peru
What Happened:	<p>A worldwide soft drink manufacturer sued a domestic soft drink company for alleged infringement of Advertisement Norms in Defense of Consumers.</p> <p>The basis of this claim is a television ad by the local manufacturer consisting of the following chain of events:</p> <p>The ad showed a person approaching a couple of tourists walking along the frontis of a church, and offering them a drink of black color, while asking "Guess which flavor is this?". The man tastes the beverage and answers, "Um, this is A" (1) while the screen shows this man's name, passport number, and nationality. Subsequently, a group of tourists is shown in a restaurant in which Andean music is being played, one of whom raises a glass containing a beverage of black color and asserting, "A is the best" while, as in the former case, the name, passport number and nationality is included. The next image shows a couple of tourists in some Andean ruins, one of them tastes a beverage of black color and says, "Yea baby, it's A". As in the previous cases the name, passport number and nationality of the person is presented. Followingly, a group of tourists in the jungle, one of whom holds a glass containing a beverage of black color, while saying, "Always A", the name, passport number and nationality of this person is included. Next, images showing these persons in the same places, all smiling and holding a glass with a beverage of black color, while an off voice says, "All of them thought that the flavor of A was incomparable until they knew Peru ...", after which appears an image of three bottles of the beverage "B" (2), while the off voice indicates "The new B". Then, again, the four persons aforementioned are shown while saying, "Wasn't it A?", to which the voice in off responds, "It is B, the best we have", while showing the image of five bottles of this product and a woman drinking a glass of this beverage, along with the phrase "Ask for it ... it costs less".</p> <p>The first instance - Commission for Repression of Unfair Competition - dismissed the claim (3). Claimant appealed this Resolution, which appeal was</p> <p>(1) Where A is the brand of the worldwide softdrink manufacturer. (2) Where B is the brand of the local softdrink manufacturer. (3) Resolution N° 29-2003/CCD-INDECOPI dated 18 March 2003. File N° 051-2002/CCD granted: Among other procedural / formal issues, the second instance, Tribunal for Defense of Competition and Intellectual Property, resolved on the lawfulness of the TV ad based on Legislative Degree N° 691, Norms of Advertisement in Defense of Consumers (Articles 8° and 4°) which provide that it is lawful to make express comparisons of products in so far as these do not deceit consumers nor denigrate competitors (Article N° 8), and that advertisements must not contain information nor images which directly or indirectly, or by omission, ambiguity or exaggeration may induce consumers</p>

to error, specially with regards to the characteristics of the product, price and conditions for sale (Article 4^o), and on the Law of Repression of Unfair Competition regulating acts of deception (Article 9^o) establishing that the use or broadcast of incorrect or false indications, the omission of true ones, and any other kind of practice which due to the circumstances in which it takes place is susceptible to induce the person to which it is directed or which it reaches, to error, with respect to the nature, means of manufacture or distribution, characteristics, aptitude for use, quality, quantity, and in general, the advantages truly offered by the goods or services, is considered unfair.

The Tribunal of Defense of Competition and Intellectual Property revoked Resolution N^o 029-2003/CFD-INDECOPI and sustained the claim for violation of Article N^o 8 of the Norms of Advertisement in the Defense of Consumers.

(4) Basis of this rejection was the Tribunal's interpretation that comparison was being based on a subjective element such as taste, meaning that the advantages of product B vis a vis product A were not verifiable by consumers producing that the ad lost its informative character along with the consequent benefit to consumers. Defendant was sanctioned with admonition and cease in broadcasting the infringing advertisement.

Resolution N^o 029-2003 set forth the following precedent of mandatory compliance (5) :

1. Comparative advertisement has two characteristic elements:

(4) Resolution N^o 0547-2004/TDC-INDECOPI dated 10 December 2003.

(5) Legislative Decree N^o 807, Art. 43 provides that Resolutions from the Tribunal which in resolving specific cases interpret expressly and generally the meaning of legislation, will constitute precedent of mandatory compliance while such interpretation is not subject to modification.

a. The joint reference to the own offer and to that of one or various specific competitors, and,

b. The purpose that such joint reference is to present the advantages of the own offer vis a vis the disadvantages of the competitor's offer.

2. Article N^o 8 of Legislative Decree N^o 691 allows for use of comparative advertisement as an instrument to competition. This modality of advertisement is subject to the principles ruling advertising activity meaning that comparative advertisement which complies with such principles will qualify as a lawful, while that which infringes these principles will qualify as unlawful.

3. The damage suffered by the competitor due to the use of lawful comparative advertisement constitutes a lawful concurrencial damage, in application of the social model of repression of unfair competition adopted by Peruvian Law on Repression of Unfair Competition, which justifies such damage based on the superior interest of consumers who benefit from the information conveyed through advertisement. (6)

4. Comparative advertisement becomes unlawful when it infringes the principle of loyalty. This takes place when comparative advertisement loses its informative character, meaning that it ceases to transmit information to consumers, and seeks to or has the effect of unduly advantaging from the reputation of the competitor in order to enhance alleged advantages of the own offer over alleged disadvantages of the offer of others.

5. Comparative advertisement loses its informative character when the advertiser utilizes opinions or assertions which are not verifiable, being of a

	<p>subjective nature, since it is impossible for consumers to verify if the alleged advantages exist in the real world. This lack of informative character or lack of objectivity produces damage in the competitor which is evidenced on the potential or real detraction of clientele without any benefit to the consumer. The net effect of comparative advertisement is negative and, for this reason, not</p> <p>(6) Law on Repression of Unfair Competition, Article 5°: In order to qualify an act of unfair competition, evidence of effective damage or deceitful conduct will not be required, being sufficient the potential and unlawful to competitors, consumers and public order. Acceptable in the social model of repression of unfair competition within which Peruvian rules on advertising are framed.</p> <p>6. Use of testimonies in comparative advertisement is lawful so long as the advertiser presents the testimony objectively and holds documental proof which sustains the existence, content and meaning of the assertions expressed in the advertisement.</p>
<p>Comments:</p>	<p>The importance of Resolution N° 0547-2004 and in particular of the precedent of mandatory compliance adopted thereby resides on the setting of a new standard of lawfulness applicable to comparative advertising, modifying the previous standard according to which lack of objectivity in a comparative context was not considered per se unlawful insofar as the advertisement complied with the principle of veracity applicable to general commercial advertisement.</p> <p>In accordance with the new standard, it is required that comparative advertisement be based on information of an objective nature, that is, information (opinions, assertions, testimonies, etc) that may be verifiable by consumers and from which consumers should ultimately benefit. Absent this objectivity, the ad is reputed unlawful.</p>