

Comparative Advertising in the UAE: A legal perspective

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The purpose of comparative advertising is to compare one entity's products to those of a competitor as part of a marketing campaign. In a nutshell, it allows a competitor to highlight why the consumer should select its product over another. However, it is often the case that such competitors will have intellectual property rights; including those that arise through trademark registrations. It is due to this fact that the discussion of comparative advertising also crosses over into intellectual property rights.

Finding an equilibrium between two legal principles

In the UAE, there is no specific law regulating comparative advertising. Therefore, in theory, there is a legal presumption that all acts, including such promotional campaigns, are permitted. Furthermore, arguments of free competition may suggest that one should be permitted to use another's mark if the use of such mark is for merely descriptive purposes. In theory, this implies that an entity should be permitted to use another's trademark while engaging in comparative advertising.

On the other hand, the provisions of Federal Law No. 37 for the year 1992 concerning trademarks (as amended; "UAE Trademark Law") prohibit unlawful use of a registered trademark. In a broader scheme, therefore, it can be argued that using a competitor's trademark with the aim of merely comparing similar products could be interpreted as unlawful use; thus exposing the entity to liability for unauthorised use of another's trademark. Further adding ambiguity to the debate is the fact that the UAE Trademark Law does not contain a specific provision as to the fair use principle.

What is at stake?

To uphold a trademark infringement claim, the onus of proof is on the claimant to demonstrate that the infringer's use of its mark induces confusion or deceives the public. The campaign should not fall short of unequivocally conveying the independence of the trademarks concerned. An in-depth legal scrutiny of the relevant advertisement must be conducted to ensure that reference to a competitor's trademark neither implies an affiliation nor explicitly or implicitly endorses the advertiser's products. Furthermore, advertisers must ensure that all underlying claims as to their product and compared to those of their competitors are substantiated, verified and accurate and are not misleading representations or exaggerations.

In addition, the UAE Trademark Law also recognises the concept of famous/well-known trademarks which also add to the debate of comparative advertising. Famous trademarks are those that enjoy a high degree of consumer recognition. Due to the famous nature of the mark/brand, the Courts usually award a greater ambit of protection to such marks. Simply-stated, the Courts are willing to protect famous trademarks from 'dilution' or, in other words, to forbid others from using the mark in a way that would lessen its uniqueness. In light of the uncertainties around the topic of comparative advertising, companies must be attentive to the characteristics of the campaign to avoid potential legal implications of interfering with the reputation of a competitor's trademarks/name. It is therefore constructive to note the importance of ensuring that a competitor's mark is accurately reproduced, if need be. The Court is likely to award

damages for unlawful use of a competitor's trademark if it has otherwise been altered or portrayed in a negative manner.

What should be done?

Interest in comparative advertising is growing, given the potential market share that can be obtained. While noting the lack of clear legal regulation concerning this particular topic, it is advisable that entities wishing to engage in such valuable promotional campaigns consult with their legal experts, to find a legal route between the principles involved so as to avoid serious challenges in the long-run.