

Comparative advertising: Choosing the best "take"

Mark Adams examines the Makita Case and finds that it illustrates the principle that in comparative advertising, accuracy is essential

One of the most effective forms of advertising available today is comparative advertising. Whether it is the endurance of a battery, the power of a motor vehicle or sugar content in food, if your product can outmatch a competitor's product in an important area, then it's worth letting the buying public know "what-ever he can do, I can do better"

Comparative advertising has its greatest impact on television viewers when the competing products are tested and compared before the viewer's eyes so that one product can be seen outperforming a competing product.

It is imperative therefore that an advertiser engaging in comparative advertising ensures that the advertisement is an accurate representation of the facts. Given the positive impact of such advertisements in favour of the advertiser's product, and the adverse effect on the competitor's product, an advertiser who fails to present facts truthfully may find itself on the wrong end of a law suit for breach of Section 52 of the *Trade Practices Act* which prohibits misleading or deceptive conduct. Such a suit was recently brought by Makita against Black & Decker for misleading and deceptive conduct after Black & Decker screened a television commercial comparing its new drill with a Makita product already on the market.

The advertisement

In the *Makita* case, Black & Decker made a television commercial comparing the power of a new Black & Decker 1166 industrial drill with a Makita 6010BVR. Despite attempts made to obscure the name "Makita" on the drill, the court found that the Makita was readily recognised because of its distinctive blue colour.

In the commercial, the drills were mounted facing each other and linked by a 10mm shaft. The Makita was turned on first, followed by the Black & Decker a few seconds later. The latter almost instantaneously reversed the Makita's drills shaft rotation.

In the televised commercial smoke was shown to be emanating from the Makita drill after 2.7 seconds. In the four "takes" edited to make up the final version, smoke emanated from the Makita after a period of between 5.84 and 9.57 seconds. Furthermore, on two occasions during the "takes", the Black &

Decker drill had stalled, and on another it commenced to smoke at the end of a demonstration. None of the "take" incidents were shown in the final commercial.

The above visuals were accompanied by the following "voice-over":

"Here is an amazing demonstration. Two 10mm industrial drills are linked by a command shaft. The blue drill is turned on first. Then, the new Black & Decker industrial. With superior power, it's actually reversing the spin of the other drill."

The court's findings

The main issue to be decided by the court was whether the advertisement was misleading or deceptive in breach of Section 52 in presenting a visual image more favourable to Black & Decker than the results of the four "takes" and expert testing had indicated. These expert tests showed that the Makita drill had taken somewhat longer than 2.7 seconds before emitting smoke. Furthermore, the Black & Decker drill had emanated smoke in five out of six tests.

The court held in a judgment handed down on 30 May 1990 that the advertisement was in breach of Section 52 for being misleading. It was acknowledged that the main thrust of the advertisement was to show the overall superior power of the Black & Decker drill over the Makita drill, and in this respect the advertisement was accurate. However, the court said:

"... smoke emanating from the Makita drill provides a striking visual image. The impression given by the advertisement is not merely of a contest between two drills in which one of them demonstrates its superior power by reversing the turn previously achieved by the other; but, rather, of a contest in which one drill is completely devastated, quickly overheating and smoking, whilst the other drill is apparently unaffected by the ordeal ... to state that one boxer is capable of eventually knocking out an opponent is one thing; to suggest that he is able to do almost immediately, without injury or even raising a sweat, is another"

Accuracy essential

The *Makita* case demonstrates that, particularly in relation to comparative

advertising, the impression created in the mind of the viewer by the advertisement must accurately reflect the true state of affairs. Undoubtedly, as was argued in the *Makita* case, the main point of the advertisement was to drive home the superior performance of the Black & Decker and the visuals merely assisted in creating what was in fact a true impression regarding the Black & Decker drill. The court was not, however, prepared to accept this. It held that the visual images (such as the smoke or lack thereof on the part of the Black & Decker drill) were important parts of the advertisement and had to be accurately portrayed.

The *Makita* case also serves as a warning to those editing advertisements for the purpose of creating the most favourable impression for the advertiser. It is not sufficient to screen as the final commercial what took place in a comparative test on one occasion if the commercial does not accurately reflect the true state of affairs. The clear lesson in the *Makita* Case is that advertisements must be accurate in all respects and advertisers ought to choose their "takes" carefully.

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