

Enrique Diaz and Dhania Portilla of Goodrich Riquelme y Asociados explain potential problems with the practicality and rigour of Mexico's new guidelines on comparative advertising

New guidelines may fail to protect the public

In recent years, the amount companies are prepared to invest in their advertising has increased significantly. The needs and rights of consumers have forced companies to create and disseminate realistic and factual advertising that specifically highlights the qualities of their goods or services, and that particularly demonstrates their advantages over competitors' products.

The objective of comparative advertising is to inform and persuade the public about certain goods or services over others offered by the competition, through objective comparisons. However, at times, advertising does not show the true characteristics of the goods it promotes, provoking the public to consume products based on an inaccurate, false, or exaggerated portrayal. It is this that constitutes misleading advertising, which is a breach of the consuming public's right to information.

Profeco: a ruling body

Advertising exerts a direct and powerful influence over the public that determines consumption habits. This influence is embodied in various forms (for example, marketing, brochures, and advertisements) which seek to highlight the characteristics of certain products and their advantages over others.

In Mexico, the Federal Consumer Protection Office (Profeco) monitors such strategies, and seeks to establish minimum regulations for comparative advertising so as not to cause impairment among providers, but to still encourage a competitive market. The rules are based on a principle of truth, according to which any statements that refer to characteristics, such as qualities, quantities, and prices of goods or services offered to the public, must be true and verifiable.

New guidelines: a subjective authority

However, Profeco needs to reassess and update its regulations in order to counteract and prevent misleading advertising, which breaches consumers' rights, and affects other providers in the market. Consumers are misled when the message in the advertising generates a distorted representation of reality. The difficulty is when what is conveyed is not simply literally false, but is an overall image which is false. This is much harder to prove.

The Mexican state instructed Profeco to create regulations to avoid misleading advertising practices that lead to deception, consumer confusion, and trade mark dilution between providers.

Misleading advertising involves the comparison of two different products that leads to consumer confusion about the nature of those products, and which generates uncertainty about their characteristics. This practice directly affects the consumer's right to make responsible choices about their consumption. If they do not receive all the information in a clear, truthful and objective way, then the regulatory principles of comparative advertising have been violated.

Misleading advertising also affects competing providers by not providing security for the protection of their trade marks. This leads to the dilution of distinctive elements of a trade mark, and may mean a provider loses its position in the market.

In order to avoid these misleading and deceptive practices, Profeco has changed its guidelines governing comparative advertising. These guidelines are aimed at pro-

Enrique Diaz



Enrique Diaz is senior partner at Goodrich Riquelme y Asociados, and head of the IP department.

Enrique is a 2001 attorney graduate of the Centro Universitario Mexico (Mexico City), and specialised in IP law at the Universidad Panamericana (Mexico City).

His practice areas include patents, trademark and copyright, registration enforcement and licensing.

Enrique was admitted as an attorney at Goodrich in the same year he finished law school and ever since has been dedicated to playing a key role in his firm's development, achieving the highest standards of excellence in all his enterprises. He was made junior partner in 2006, and then senior partner in 2010, becoming the youngest lawyer to have been made senior partner in the firm's history.

He is currently a foreign expert on Latin-American intellectual property, managing the prosecution of over 3500 trade marks and more than 1000 patents per year; regularly filing and handling over 400 litigations in both fields, in Mexico alone.

Enrique is a member of INTA, LES, FICPI, the Mexican Bar Association, AIPPI, ASIPI.

Dhania Portilla



Dhania Portilla is an associate at Goodrich Riquelme y Asociados in the IP department. She attended the Universidad La Salle (Mexico City).

Her practice areas include copyright licensing and registration, trade mark filing and prosecution of Mexican trade names, trade dress protection, entertainment law and comparative advertising.

viding protection for consumers and providers alike, so that the market reflects reality and upholds transparency and fair competition.

However, how clear these new guidelines are is up for debate. If they do not meet the current market need, they may generate more problems among consumers and suppliers.

Profeco's new guidelines' scope of protection is designed entirely to regulate the interests of consumers and any group directly affecting providers' interests. Key areas of the new guidelines involve (i) vulnerable groups and (ii) factual statements.

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Vulnerable groups

The new guidelines seek to look after the interests and protection of vulnerable groups, namely children, the elderly, and sick people. Advertising directed to these groups should take into consideration the special characteristics, needs and statuses of such groups in the creating, planning and transmitting stages of their campaigns. Providers should take into account these groups' possible inexperience and sense of trust, they should use a plain language, and not abuse their psychological or emotional conditions.

However, these new guidelines leave providers in complete uncertainty and legal insecurity. As there are no set criteria established in the guidelines for providers, every interpretation of a particular advertising campagin directed at vulnerable groups will be entirely subjective.

Factual statements

The new guidelines state that factual statements contained in advertising messages must be true, verifiable and sufficient.

These measures are aimed at evaluating advertising messages based on objective data related to the characteristics, composition, quantity, quality, features, and price of the products. Such evaluation must take into account the campaign as a whole, and not the individual and isolated elements.

Ideas of truth fundamentally govern all factual statements in comparative advertising. Factual statements refer to the characteristics of products that consumers can measure objectively, rather than being based on opinion, which is subjective, personal and unverifiable.

The new guidelines state that factual claims in advertisements must be measurable. However, such regulations do not establish how factual statements must be quantified, and through this lack of factual, and legal security, unregulated subjectivity remains in this area.

With these new guidelines, and as the sole arbiter of comparative advertising in the country, Profeco has acquired an extreme power: all providers are now exposed to the subjectivity of its guidelines. Although the process will take place under lawful parameters, and is in theory a means of regulating advertising and encouraging the coexistence of several trade marks in one area, it could be considered as almost arbitrary if one looks at the lack of security it provides. Profeco and its officials are empowered to decide whether advertising falls within the new regulations, based on its own subjective criteria.

Nevertheless, Profeco states that claims must be verifiable, and what is promised in factual statements within advertise-

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- Industrial and Intellectual Property
- Litigation
- Licensing Enforcement
- Entertainment and Sport Law
- Copyrights

Enrique A. Diaz	ediaz@goodrichriquelme.com	(5255) 5525 1422
Jaime Delgado	jdelgado@goodrichriquelme.com	(5255) 5207 5324
Juan Carlos Suarez	jcsuarez@goodrichriquelme.com	(5255) 5207 9261

e-mail: mailcentral@goodrichriquelme.com

website: www.goodrichriquelme.com

Paseo de la Reforma 265, M2
Col. y Del. Cuauhtemoc
06500 Mexico, D.F.
Tel. (5255) 5533 0040
Fax. (5255) 5207 3150

ments must be delivered to the consumer, no more and no less. No margin of error is allowed (unless it is expressly stated in the advertising). The information contained in these listings should be scientifically verifiable, and it necessarily creates a binding relationship between suppliers and customers.

Although the law states generally how information may be verifiable, Profeco has its own variation on these norms, an interpretation of the criteria of verifiable information that leaves providers in a state of legal uncertainty.

One of the requirements of the law on verifiable information is that it should be sufficient to give consumers a clear idea of the product or service offered (and its properties and components) so they can make a decision on whether to accept or reject the offer.

However, these rules on verifiable information do not establish that the information transmitted to the consumer should indicate all aspects of the product or service offered, just that the information related to the components or properties of the goods and services advertised is enough.

This point is critical; the lack of clearness in what constitutes sufficient information leaves the door open for several interpretations. Does the advertiser have to consider what information to be transmitted is normal or extraordinary, so that the consumer understands the objective characteristics of the offer, the product or service being advertised?

It is clear that Profeco now has the authority to determine whether information stated by providers is sufficient, taking into consideration the experience or level of knowledge that consumers have about the product or service advertised, and in this way determine the level or amount of information that must be transmitted. So these new guidelines issued by the authority put in opposition the interests of the two main groups of comparative advertising, customers and suppliers, affecting both directly and inequitably.

Congress must step in

Consumers today are inundated with different types of products and services, from the everyday to occasional, and new products emerge constantly with technological developments, all of which the consumer may lack experience and knowledge of. It is therefore the provider's duty to inform the consumer about the nature and distinctiveness of its products. The provider must offer the consumer as much information as is necessary to reach an objective opinion of the good or service being advertised, so they may make a responsible choice. It is also Profeco's duty to

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ensure, for consumers' protection, that information is forthcoming from vendors, distributors and advertisers.

However the point of comparative advertising is often lost; comparative advertising aims to create fair competition in commerce by introducing new products, or improvements in products, and promoting them against other competitors' products. Profeco's new guidelines are changing all the existing rules.

The new guidelines, far from stabilising competition in the market, are violating the interests of competitors by limiting the scope of comparative advertising. Mexico has delegated authority onto Profeco, a body that maintains a subjective interpretation of advertising, and leaves it dangerously free to judge all comparative advertising matters.

In this situation, cases will be judged differently depending on the parties, and without sustaining or maintaining the same criteria, so it is indispensable for the Mexican Congress to create a new and special law for comparative advertising. This occurs in several other jurisdictions, and allows the market players to know and follow clear rules.