Comparative advertising is often said to be one of the riskiest forms of advertising in a legal context, as it typically involves deliberately rankling your competitor and sometimes treading on their intellectual property rights. Incensed competitors may jump at the chance to skewer you with legal proceedings to protect and enforce their rights and their brand, so you should carefully evaluate your risk exposure before launching a comparative advertising campaign.

1. Potential Sources of Liability

Not only does comparative advertising put your company directly in the crosshairs of your competitor's legal enforcement team, but the sources of potential liability that can arise from a comparative advertising campaign are also numerous and complex. Here is a brief overview of some of them:

A. Trademarks Act

The first thing you may be tempted to do in your comparative advertisement is refer to your competitor, using their name, logo, or pictures of their product.

Be aware that if your competitor has a registered trademark, liability can arise under the Trademarks Act if you reproduce their mark, particularly in a manner that depreciates the goodwill attached to it. Even if your competitor's mark is not registered, your competitor may still have enforceable rights outside the Trademarks Act at common law if it has developed a sufficient reputation in association with use of its mark.
There are complex discussions in the case law that suggest that the risk of reproducing your competitor's trademark may be lower if you are distinguishing your goods or services from theirs, rather than highlighting similarities. If a competitor's registered trademark is registered for services, there appears to be a greater risk associated with reproducing it in your comparative advertisement than reproducing a competitor's trademark registered only for goods, since use of a services mark in advertising is deemed to be "use" as a trademark.

The Trademarks Act also prohibits false or misleading statements that discredit your competitor's business, goods or services or that misrepresent the quality, origin or performance of their goods or services. It is another a breach of the Trademarks Act to pass off a competitor's goods or services as your own or to generally cause confusion as to the source of their goods or services.

B. Copyright Act

As with the Trademarks Act, liability can arise under the Copyright Act if your advertisement reproduces a competitor's label, logo or design. Copyright infringement under the Copyright Act occurs when a work or substantial part of a work is reproduced without the consent of the copyright owner.

C. Tort Law

Your comparative advertisement may also cause a risk of liability under tort law, such as for the tortious wrongs of trade libel and intentional/unlawful interference with economic relations.

Note that for all tortious wrongs, there must be evidence that the comparative advertisement caused actual damage to the business of the competitor.

D. Competition Act

Civil or criminal liability may arise under the Competition Act if your comparative advertisement makes unsubstantiated, false or misleading claims or is misleading as to the impartiality of the author.

For example, you may be tempted to create a fake online review comparing your
company’s goods and services to your competitor’s and make it appear to be authored by an "independent third party" (which is actually you); however, this would have serious legal implications.

The Competition Bureau has stated that the civil and criminal provisions of the Competition Act directed at false or misleading claims can be triggered by this practice, which is known as "astroturfing". Astroturfing is viewed as a form of misleading advertising, as it creates the false impression that independent consumers have had positive experiences with a product or service when in fact the marketer of the product or service is behind that advertisement. This behaviour is viewed as problematic, and is increasingly attracting regulatory attention, given the weight consumers typically give to independent product reviews and ratings, and the growing popularity of review websites and apps.

In the US, the Federal Trade Commission has implemented amendments to its guidelines to combat astroturfing. The FTC Guides now mandate that when there is a "material connection" between an endorser and the marketer of the product or service that would affect how people evaluate the endorsement, the material connection must be disclosed.

Similarly, Canada’s Competition Bureau recently released the Deceptive Marketing Practices Digest Volume 4 in June 2018, which advises marketing professionals, businesses and social media influencers that any "material connection" between an influencer and the companies whose products and services they endorse should be disclosed. The Competition Bureau has also brought actions against "astroturfers" under the Competition Act provisions. Moreover, the Canadian Code of Advertising Standards administered by the industry’s self-regulatory body Advertising Standards Canada (or "ASC", discussed below) was amended in 2016 to require the disclosure of a "material connection" in a manner similar to the FTC Guides. ASC now has the power to report violations of the Code to the Competition Bureau, who may launch an investigation under the Competition Act provisions.

E. Canadian Code of Advertising Standards and Advertising Standards Canada Guidelines

Last but not least, your comparative advertisement could be the subject of a complaint to ASC that may result in a request for you to take down your advertisement with the consequence that your violation will be publicized if you refuse.

ASC is the industry's self-regulatory body that administers the Canadian Code of
Advertising Standards, known as the basic principles of acceptable advertising in Canada. The Code prohibits unfair disparagement of competitors and the exaggeration of competitive differences between one’s own product and a competitor's product. In general, the relevant provisions aim to ensure that comparative advertising claims can be properly substantiated.

ASC has complaint procedures for both consumers and for other advertisers. Consumer complaints are reviewed by the ASC’s Standards Council and adjudicated based on the Code. If a violation is found, the Standards Council may ask the advertiser to amend or withdraw the advertisement in question. If the advertiser refuses to amend or withdraw the advertisement, ASC reserves the right to release to the media the details of the violation and adjudication.

Other advertisers can lodge a complaint under ASC’s Advertising Dispute Procedure (formerly the Trade Dispute Procedure) if they have material evidence of Code violations. The Advertising Dispute Procedure provides for mandatory resolution meetings between the parties, and if mutually acceptable resolution cannot be reached, there will be a hearing before a five-member Advertising Dispute Panel who will impose its own decision. At any point in the Advertising Dispute Procedure, the defendant advertiser has the option to voluntarily withdraw the advertisement in question or appropriately amend it.

ASC also publishes the Advertising Standards Canada Guidelines for the Use of Comparative Advertising, which have specific provisions relating to comparative advertising. Like the Code, these provisions are generally directed at ensuring that comparative advertising claims can be properly substantiated and may be very helpful to you in structuring your comparative advertising campaign.

2. General Guidelines

If you decide to proceed with a comparative advertising campaign, here are some general guidelines that will help you mitigate your risk exposure:

- Be truthful - the comparison must be fair and factual.
- All claims must be properly substantiated (e.g. with proper testing or survey data, measurements, etc.) and support should be available on request.
- Do not unfairly disparage competitors. Disparagement need not be only in writing; it can take many forms, including visually portraying a competitor's product in a negative light or verbally denigrating a competitor's product.
- Comparisons should be made between similar products (i.e., comparing "apples to
Do not engage in excessive cherry-picking when comparing products’ features - for example by ignoring a significant advantage of your competitor’s product or a significant defect in your own.

The individual benefits of a product’s certain features or components cannot support a claim of a product’s overall superiority. In general, avoid blanket statements of overall superiority.

Claims about the superiority of a product require adequate and proper tests, and/or an adequate qualifying statement stating the conditions under which the statement of superiority is true.

Actual testing is required - results cannot be inferred from available technical data or specifications.

When products are compared by way of demonstration, the tests must be performed under equivalent conditions, and must be suitable to the product being tested.

Avoid depicting a competitor’s trademarks, particularly when they are trademarks registered in respect of services (as opposed to goods). Avoid depicting a competitor’s logos.

Avoid superlatives and puffery (e.g. "fastest ever").

Be aware of timing - for example if your comparative advertisement disrupts a competitor’s product launch, the greater inconvenience suffered by your competitor as a result could weigh against you if the case goes to court.

To summarize - assess your risk exposure, remember that your competitor is always watching, and do what is in the best interest of your business. Legal professionals are always available to assist you in evaluating a comparative advertising campaign you may be considering.
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