

Goroditsky & Partners

Authenticity is the key

In many cases comparative advertising is lawful, but the law demands that an advertisement be authentic. Advertisers should therefore be careful when stepping into this arena

Advertising became a feature of Russian economic life about 20 years ago, almost at the same time as the advent of the market economy. Initially, advertising developed in an unregulated manner, but an advertising law was finally implemented in 1995. It underwent many changes during the following years until a substantially amended new law was passed in 2006. From time to time, new amendments have also been introduced to this law. The government's interest in advertising can be demonstrated by the fact that a further 10 laws have been passed since 2006, each making many changes to the Advertising Law.

Currently, the Advertising Law contains all necessary provisions to allow businesses to develop.

According to the law, an 'advertisement' is any information addressed to any audience and intended to attract attention to the advertised product. Advertising has many aspects; however, this article focuses on the aspects of advertising which are frowned upon under the law.

In a general sense, advertising is the only means through which to make people aware that a certain product exists. The objective of the advertisement is to make people remember the advertised product against a background of abundant information about other products of the same kind. Professional advertising agents can achieve this through a creative approach, but this requires a rare talent. It is easier to use techniques which rely on the findings of others about certain products, or are otherwise inconsistent with the law and established practices. As the law has evolved, it has closely followed the development of the advertising industry and reacted accordingly.

The law sets general requirements for

advertisements, demanding that they be authentic and fair. According to the law, an advertisement is unfair if:

- it incorrectly compares the advertised product with goods already on the market;
- it discredits the reputation of a person, including that of a competitor;
- it advertises a product whose advertising is forbidden in the given circumstances;
- it is advertised under the guise of another product, where the trademark is confusingly similar to that of the product in respect to which the limitations exist (a recent amendment to the law); or
- it constitutes an act of unfair competition under the Anti-monopoly Law.

Unauthentic advertising contains information that is inconsistent with the truth, such as the following:

- The advertised product claims to have advantages over other products on the market;
- It falsely describes characteristics of the product, such as the method and date of manufacture, consumer properties and certificate of correspondence;
- It falsely describes the product price, discounts and or other conditions of purchase which are not true;
- It mentions the intellectual property of others; or
- It contains any other untrue information.

Not only is unauthentic advertising prohibited, but so too are advertisements that fail to give information which is important for consumers.

Advertisements should not contain any

foreign words which may distort the information. In general, Russian law does not allow for the use of foreign words; a notable exception to this rule is the use of trademarks, which may be used in the same way as they are registered (including in Latin characters).

Subliminal advertising, which subconsciously influences consumers, is also prohibited.

Unfair advertising takes different forms and in many cases it cannot be termed as immediately unfair. Some advertisements claim that the product is better than a regular product of the same kind. In general, this type of technique may hardly be considered unfair, but sometimes events take a different turn. For example, one advertisement extolled the properties of a certain washing powder, which was claimed to be "better than regular washing powders". No claims were made against the advertisement until another producer placed on the market a washing powder named 'Regular Washing Powder'. The original advertisement immediately became vulnerable to a claim of unfair advertising. The producer of 'Regular Washing Powder' registered the name of the powder with a state body and packaged the powder in white packaging which was almost identical to that shown in the original advertisements. Within the framework of that scheme, the producer of Regular Washing Powder initiated a court action and won compensation from the 'infringer'. Following the court case, the production of Regular Washing Powder ceased. However, the question of which party in this situation was the more unfair remains.

Another example involved an insurance company which announced to the public that its competitor in a given geographic region was going bankrupt and proposed its

own services instead. The competitor had to go to great lengths to convince consumers that its position was stable. This case was fairly easy for the anti-monopoly body to decide.

Unfair umbrella advertising can also be problematic and is a technique characteristically employed by alcohol producers. Severe limitations are imposed on the advertising of alcoholic products in Russia and some producers attempt to work around this by using this umbrella advertising technique. A particular example is demonstrated by a vodka producer which advertised a brand of mineral water labelled almost identically to its vodka brand. A manufacturer can also register a trademark for vodka and other non-alcoholic products, and advertise those other products using the trademark. However, the law is well suited to deal with such advertisements.

Problems have additionally arisen in the past where trademarks and company names have come into conflict. If there was an existing trademark, it was possible to register a company name and advertise its services under a name coinciding with the trademark. There was no adequate remedy to deal with such situations and court practice was contradictory for about 10 years, until the concept of senior rights was introduced into the law in 2008. Such cases still occur, but present no difficulty in resolving. The law, in its zeal, initially included domain names as IP subject matter and extended the right of seniority to them too. However, it was immediately noted that this rule would nullify the registration of trademarks and bring disorder to economic life, so domain names have since been excluded from the list of subject matter covered by the senior right rule.

Perhaps the most current use of unfair advertising involves advertising a product as unique, while in fact it is commonplace. Advertising in this manner is unsophisticated – as are the measures to stop it. The anti-monopoly body resolves such cases easily and can sometimes go so far as to initiate the compulsory liquidation of such companies.

In another case, a bank advertised its loans at the exceptionally low interest rate of 3.5%. It then transpired that the interest was calculated on a monthly basis instead of an annual basis. This is one of the innovative strategies that unfair advertisers sometimes employ.

Comparative advertising is more complex than unfair advertising. All advertisements seek to single out the key properties of a given product and imply a



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comparison with other products. However, the matter is rather subtle and it is difficult to trace the distinction between what is allowed and what is not.

It is perhaps not without reason, then, that the Advertising Law contains no definition of 'comparative advertising'. The only mention to be found is in Article 5(2)(1), which provides that an incorrect comparison of the advertised product with other products is unfair – although there is no direct definition of what constitutes an 'incorrect comparison'. In order to determine this, it is necessary to refer to the general provisions of the Civil Code and the laws on unfair competition. In particular, Article 5 of the code establishes good will business rules in general terms. Article 8 of the code further states that obligations arise as a result of damage caused to another party. A party whose reputation has been damaged may apply to court to protect it. Accordingly, the Anti-monopoly Law also has some relevance when looking at comparative advertising. In particular, Article 14 has a wide scope of application

regarding the intellectual property that may be used to protect oneself against damaging comparative advertising. If the comparative advertising is damaging, there are means to protect the damaged person against it.

In many cases comparative advertising is lawful. The law demands that an advertisement be authentic. So, if the advertised product is compared to another product of inferior quality and that can be proved, the advertisement may be lawful because the comparison made is correct. Comparative advertising is a delicate matter and an advertiser should be very careful when stepping into this arena.

Other unfair advertising techniques are yet to develop in Russia – for example, so far there have been no instances of ambush advertising. Perhaps the 2014 Winter Olympic Games in Sochi will present an opportunity to address this topic. [WTR](#)