

Language and Law

A resource book for students

Allan Durant
and Janny H.C. Leung

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Chapter C8

Misleading Language in Adverts

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C8

MISLEADING LANGUAGE IN ADVERTS

In this unit we look at a practical aspect of how advertising language is regulated: whether an advert that has been complained about is misleading. We provide a brief outline of advertising regulation, then work through three non-broadcast adverts about which complaints were made to the UK Advertising Standards Authority (the ASA; www.asa.org.uk). The disputed text of each advert is assessed in relation to the issue raised by complainants. Towards the end of the unit, the ASA judgments are summarised.

Introduction

In **free speech** theory, adverts fall within a category of **commercial speech**. Such speech is not prized as contributing as much to democratic society as political speech, but it is still protected to some degree (Barendt 2005: 392–416). Commercial speech is nevertheless regulated to some extent in all societies. Alongside consumer protection legislation, trading standards requirements and provisions related to health and safety and product liability, more general provisions regarding misrepresentation apply (Barendt *et al.* 2014: 229–73). There are also connections with other marketing communications, including use of online search keywords and the recently expanded ‘advertising function’ of trademarks (Waelde *et al.* 2014: 550–3, 702–6).

Front-line advertising regulation is dealt with in many countries by non-statutory bodies: a process often described as **soft law** because it involves codes administered by an extralegal body. But failure to comply with the relevant code can still result in litigation. The adverts we look at in this unit were displayed, and complained about, in the UK; the complaint details are adapted from reports published online on the ASA website. For reasons of space, we have removed irrelevant details and summarised where exact wording does not affect the issue in question. The gender of complainants is not indicated by the ASA; we have chosen to refer to all complainants as ‘she’ for the sake of consistency.

The CAP (non-broadcast) code and its implementation

The non-broadcast Code of Advertising Practice is drafted and periodically revised by the Committee of Advertising Practice (CAP), a body drawn from advertisers, agencies and trade organisations, and administered by the Advertising Standards Authority (ASA). The present 12th edition came into force in 2010, and contains 21 sections, including special provisions related to distance selling and shock tactics, slimming, gambling, motoring and tobacco (see the full code at www.cap.org.uk). We consider complaints dealt with under section 3, concerned with misleading advertising. Two preliminary points should be made:

- ❑ Advertising generally adopts a distinction between **product or service claims** (which are factual, and for which substantiation is required) and **trade puffs** (which are self-promoting, laudatory expressions not expected to be taken seriously and for which no evidence is needed).
- ❑ Implied meanings that give rise to claims are taken as part of the meaning of the advert. Implied meanings linked to trade puffs, or which merely evoke general positive feelings, may be complained about under other headings (e.g. that they are sexist or in some other way inappropriate).

In order to give a sense of the process through which UK advertising language is regulated, we now present the introductory subsections of section 3 of the Code, followed by three selected complaints. Each complaint concerned whether the advert was misleading. For each, we provide the company's response, then some questions. A summary of the complaint outcome is given at the end of the unit.

General provisions of section 3: misleading advertising

Section 3 of the Code consists of 57 subsections, dealing with matters including substantiation, exaggeration, prices, comparisons, denigration, endorsements and testimonials. The essential sections for analysing the complaints below are general sections 3.1–3.3. You may nevertheless find it interesting to consult the full code for fuller specification provided in other subsections.

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- 3.1 Marketing communications must not materially mislead or be likely to do so.
 - 3.2 Obvious exaggerations ('puffery') and claims that the average consumer who sees the marketing communication is unlikely to take literally are allowed provided they do not materially mislead.
 - 3.3 Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.
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Everything a pound

Text on a company's website stated 'Poundworld everything £1'.

A complainant had seen 'manager special' items in-store, costing £3 and £8.99. She challenged whether the claim 'everything £1' was misleading.

Response: Poundworld Retail Ltd saw the 'manager specials' as a service in addition to their £1 products. They said the manager specials were 'occasional' offers that usually ran during the Christmas selling period and at random and infrequent intervals

for the remainder of the year. Following discussion with their home Trading Standards authority, they had identified strategies for marketing manager specials to ensure that the items were distinguishable in store from the £1 items and separate from them.

★ **Activity**

- ❑ How is it possible to assess whether ‘everything £1’ is misleading in this context? Consider first the conventional meaning of ‘everything’. Then consider inferences likely to be drawn from ‘everything £1’ in this sales context.
- ❑ Be as specific as you can about how much support for your assessment of inferences can be drawn from linguistic approaches you are familiar with (e.g. from work on speech acts, or work by Grice).
- ❑ Would a complainant have equivalent grounds for making a section 3 ‘misleading’ complaint if she found products costing *less* than £1 in the shop? If not, why not?

Trading in

The website of a furniture and carpet company included a link to a leaflet headed ‘We will pay you £500 for your old 3 piece suite’. Further text stated ‘Trade your old furniture in for the furniture of your dreams, available on everything in store with absolutely no exceptions . . . we will pay you £100 per seat for your old sofa . . . on everything in store, nothing will be excluded, not even the famous brand names.

A complainant who asked to trade in her sofa against an item of bedroom furniture was told that this was not an option. She challenged whether the claim that the trade-in offer was ‘available on everything in store with absolutely no exceptions’ was misleading.

Response: The company said a dictionary definition of a ‘trade-in’ was obtaining a fixed value for a like-for-like transaction. They believed customers would expect to need to trade in an item of the same kind as the one they wanted to obtain.

★ **Activity**

- ❑ Do you agree with the company’s meaning of *trade-in*? How useful is dictionary evidence in relation to such a claim?
- ❑ What features of the wording of their leaflet seem in tension with that claim? Consider in particular the use of the word *furniture*.
- ❑ Taking both the complaint and the response into account, should this claim be upheld? Briefly describe your reasoning.

Single travellers

A national press advert for a travel company stated ‘The First Choice for Single Travellers’.

A competitor company challenged whether the claim ‘The First Choice for Single Travellers’ was misleading and whether it could be substantiated.

Response: The company said that ‘Solitair – First choice for single travellers’ had been a registered trademark since 2008. They provided evidence to demonstrate that, and said no issues had been raised when they registered the trademark and that they had not received any complaints about it since. The company argued that the claim did not relate to sales, but indicated that their services were the perfect fit for single travellers. They believed their company was the best choice for single travellers, and said repeat booking figures were approximately 60 per cent.

- ❑ Words and phrases such as *favourite* (famously used in adverts by British Airways), *foremost* and *first choice* are difficult. Does ‘first choice’ in this context convey a specific claim? Or could it be read as merely a trade puff, along the lines of ‘best’, ‘outstanding’, etc.?
- ❑ If the slogan ‘First choice for single travellers’ conveys a specific claim, how would you paraphrase that claim? Is such a claim necessarily a comparative claim in relation to other travel companies?
- ❑ The primary function of a registered trademark is as a badge of origin. It distinguishes goods or services originating from one commercial source from those that originate from another; in doing so, it prevents consumer confusion between products or services that may differ in quality. In your view, should the fact that ‘First choice for single travellers’ is used in this way as a trademark affect the outcome of the complaint?*

Activity

The complaint rulings

Everything a pound

The complaint was upheld. The ASA took the view that the advert suggested every item in the store would be priced at £1. It noted the precautions issued internally intended to ensure the price of items priced at more than £1 should be clear to consumers. Nevertheless, it considered that a significant draw of the claim would be that consumers would expect to pay no more than £1 for any item in the store.

Trading in

The complaint was upheld. The ASA considered there was likely to be a general expectation among consumers that a trade-in offer normally related to broadly similar products. However, it also took the view that the references to ‘available on everything in store with absolutely no exceptions’ and ‘nothing will be excluded’, in conjunction

with photographs of other furniture in addition to sofas and armchairs and the logos of companies unlikely to be associated with sofas, suggested that the offer applied across the broad range of furniture, and that it would be possible to trade in one category of furniture against another category.

Single travellers

The complaint was upheld. Although the ASA acknowledged that ‘Solitaire – First choice for single travellers’ was a registered trademark, it considered that consumers were nonetheless likely to interpret the claim as a comparative claim. Consumers would therefore expect Solitaire to have a higher turnover or more unit sales from single travellers than their competitors within the travel market. Because no evidence had been produced to demonstrate that this was the case, the ASA concluded that the advert was misleading. In reaching this conclusion, the ASA instructed the advertisers to include a prominently displayed disclaimer to the registered trademark ‘Solitaire – First choice for single travellers’, which made clear that they did not have a higher turnover or more unit sales than other single-traveller holiday companies.

Advertising standards and the average consumer

There is a considerable literature on advertising language in linguistics. Some of that work describes how language has been used in specific ways in advertising (e.g. Leech 1966); some celebrates, as well as analyses, the craft of copywriting (Myers 1994, 1998); some engages more directly with issues of regulation (Geis 1982; Preston 1994). The legal literature on advertising illustrates provisions with verbal examples from case law but mostly does not dwell on linguistic points related to promotional language.

Arguably, the main issue in understanding advertising language from a regulatory perspective is this: from what position is any interpretation of the meaning or effect of an advert to be judged? As we discuss in Unit B8, some such position is essential in assessing inferred meanings or other effects that reflect socially variable standards, including taste and decency. In this respect, problems in adjudicating advertising standards resemble issues that arise in defamation law; and an equivalent interpretive standard has evolved, in some respects similar to defamation’s **ordinary reasonable reader**. In advertising (as well as in trademark law), the standard is that of the **average consumer**: a standard that emerged historically from problems of protecting credulous or gullible consumers while seeking not to limit opportunities for creative commercial communication styles. The resulting average consumer, as defined most precisely in trademark law, is held to be ‘reasonably observant, reasonably well-informed and circumspect’; he or she behaves in ways that necessarily vary depending on what kind of product or service is being purchased, since the degree and kind of attention required in buying a new car, for example, are likely to differ from those used in buying a tube of toothpaste (Davis 2005). Applying the standard of an average consumer, however, is undertaken less explicitly in decisions arrived at by an extrajudicial body such as the ASA than in a court case, though in principle it could be problematic in either. It is interesting, therefore, finally to consider how far you feel the thinking you engaged in while working through the three adverts above matches your own notion of a general standard appropriate to the ‘average consumer’.

The complaints (www.asa.org.uk):
 Everything a pound: *Poundworld Retail Ltd*, 8 October 2014
 Trading in: *Richard F. Mackay Ltd*, 15 October 2014
 Single travellers: *Solitair Ltd*, 30 July 2014

LANGUAGE DATA AS EVIDENCE

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To illustrate how linguistic evidence is analysed and presented in legal contexts, in this unit we explore some kinds of data that a forensic linguist may work with.

Who wrote this?

Consider a situation of a kind we discuss in Unit A9. Suppose, for example, that the police are trying to find out who issued a bomb threat, wrote a suicide note or impersonated someone in a faked letter. A forensic linguist might be able to help in the investigation by narrowing down the search for the writer by deploying linguistic methods of **authorship attribution** (Love 2002).

Despite people's often very careful efforts at linguistic disguise, habits of language use can still expose someone's individual and social identity. Specific features of a speaker's **idiolect**, or distinctive pattern of language use (the legal analysis of which is sometimes called **forensic stylistics**), can provide a lead.

Authorship attribution

The word *authorship* suggests written documents. But it is not essential that the texts to be examined are written. Spoken texts (e.g. a recording of a phone call) as well as written texts (SMS messages, Internet forum posts, ransom notes or wills) may become data for authorship analysis. Spoken texts call for phonetic/phonological analysis; written texts invite analysis of **handwriting** (if there are handwriting data). Either type of data, however, allows analysis of word choice, style and manner, as well as grammatical abnormalities. All of these are linguistic footprints left by the particular language user.

Authorship attribution addresses either of two issues:

- determining whether a specific Person P produced Text T (spoken/written); and
- what characteristics an unknown author of a text is likely to exhibit (this second question arises where the need is to narrow down the field of likely suspects).

If the question is whether a particular, known individual wrote a text, then a **negative identification** would be one that shows, on the basis of clear evidence, that P did not produce T. By contrast, a **positive identification** would show that P did, or probably did, produce T. A positive identification is far harder to achieve. It needs to demonstrate something to a high standard of proof that is nevertheless inevitably based