



SALES AND MARKETING - Trade Descriptions

Everything a retailer needs to know about advertising and sales promotions in the eyes of the law – Stuart Farr is on the case

Any successful trader must master the ability to market and promote their business properly, lawfully and effectively to the outside world.

Marketing and sales promotion is as much an art as a science. But as with any consumer related legislation, there are a number of legal pitfalls which any trader must navigate carefully when launching a marketing campaign. Failure to do this can give rise to serious consequences including, in the most severe or persistent cases, criminal prosecutions and sanctions against both individuals and companies.

For many years, the Trade Description Act 1968 has been an important point of reference for the trader's legal obligations. Amongst other things, it aims to ensure that a proper and truthful description is applied to goods and services offered for sale by businesses. In short, it makes it an offence to apply a false trade description to any goods or to supply (or offer to supply) any goods which have a false trade description.

The definition of a 'trade description' is wide, and can relate to the quantity, size or gauge of goods ("This shotgun is a 12g with 28" barrels"); what they are made of ("incorporating a walnut stock"); their fitness for purpose, strength, performance, behaviour or accuracy ("unbreakable with pin point accuracy every time"); or other physical characteristics ("fitted with a fully adjustable stock").

A trade description can also apply to where the goods are made, who made them and when ("Handcrafted in England in 1898 by John Smith") and to any statement about where the goods are tested or approved ("as tested and endorsed by the England Champion"). Any bluff or seller's puff will eventually be uncovered by the Local Trading Standards authorities, who have the power to enter premises, inspect and seize goods. Victims of false trade descriptions can also be compensated under the Courts' powers if a trader is convicted of an offence under the Act.

So what's new?

Despite being over 40 years old, the 1968 Act is still very much alive and kicking. However, in an effort to keep up with modern commercial practices, certain parts of the 1968 Act have been added to or transformed by new regulations. These include The Consumer Protection from Unfair Trading Regulations 2008 and The Business Protection from Misleading Marketing Regulations 2008.

The first set of regulations governs commercial practices and marketing and selling in particular. Their aim is to ensure that consumers are treated fairly. They make it an offence for traders to engage in misleading or aggressive tactics against consumers. Breaches of these regulations are enforced by the Office of Fair Trading, and you could face up to two years' imprisonment and/or a fine.

The key difference of these new regulations is that even if a corporate body is considered to have committed an offence, a company officer (such as a director) can also be held personally liable – particularly if they agreed to the unlawful act, or it occurred as a consequence of their negligence. This new layer of responsibility ensures a fool-proof safety net so that anyone who engages in misleading consumers cannot hide behind a company's legal identity.

Compare fairly

The Business Protection Regulations create similar safeguards, but they are especially aimed at those businesses who advertise their products to other businesses or traders. They also apply to those who use their adverts (for both businesses and consumers) to compare their products to those offered by competitors.

Comparative advertisements have become extremely common and have therefore been scrutinized much more in recent years.

What is a comparative advertisement? Essentially, it includes any advert which identifies a competitor or a product offered by a competitor. The reference to a competitor doesn't even have to be express – it can also be implied.

An example would be if Gun Trader A compared their products' prices with Gun Trader B's in a promotional advert. Similarly, when a gun trader compares the cost of their own-label ammunition to that of a "leading brand", this also qualifies as an implicit comparison – particularly when there is an obvious leader for such products.

To avoid falling foul of the regulations, make sure that comparative adverts do not contain false information, deceive or cause the average consumer to take a different decision about goods/services than they might otherwise have taken. You should take great care that both of the products being compared meet the same needs or are intended for the same purpose. Amongst other things, the comparison should be objective and verifiable; it should not discredit other trade names or trade marks (or a competitor's products, activities and circumstances); and you should not take unfair advantage of another trader's reputation.

The Business Protection Regulations impose strict liability on companies who engage in misleading advertisements. This means a trader's intentions or state of mind are irrelevant factors in a prosecution.

Seek advice

So where is the best place to find guidance on advertising practice?

An extremely good source of information on conduct in advertising and sales promotion is the British Code of Advertising, Sales Promotion and Direct marketing (the Code), which came into effect in March 2003. Its rules are endorsed by the Advertising Standards Authority (ASA), who deal with the general law in this area.

The Code is extensive. It includes specific rules aimed at traders in certain industry sectors (tobacco, alcohol, motoring etc) and applies to a wide variety of advertisements including newspapers, magazines, brochures, leaflets, mailings, emails, texts, faxes, catalogues, posters, promotional material in public places, sales and advertising promotions, banners, online adverts, and promotions in similar electronic media.

It stresses that marketing communications must be:

- Legal, decent, honest, reputable and truthful;
- Prepared with a sense of responsibility to consumers and society; and
- Respectful of fair competition.

As you might expect, adverts which promote unsafe practices, cause fear or distress, provide violence or anti-social behaviour or which refer to people in a negative or offensive way are also illegal.

Offer the truth

Some strategies and phrases used frequently in sales promotions come under special scrutiny in the Code.

There is specific guidance about the use of the phrase “subject to availability” in the context of promotions. The Code says that traders should be able to demonstrate that they have made a reasonable estimate of the likely response to an advert and that they are capable of meeting that response. Using the phrase “subject to availability” does not remove a trader’s obligation to take steps to avoid disappointing customers. Indeed, if the response is unexpectedly high and demand cannot be met, the trader must be able to offer refunds.

False claims in promotions – such as: “This offer is available for a limited period of time only,” when it is not, or that a trader is moving premises or closing down, when it is not – are illegal.

Even if a trader wishes to make use of free offers or trials, he/she needs to pay attention to the Code. Although a free offer can be conditional on the purchase of another item (“the “buy one, get one free”, or BOGOF, offer) any such offer must only be described as “free” if the consumer does not have to pay more than the minimum unavoidable cost of responding to the promotion (for example: the minimum cost of postage or a telephone call; the price of sending an email or text message; the incidental cost of a customer collecting the offer, or the true cost of freight or delivery to the customer). Therefore, a trader should not charge a customer for packaging, handling or administering a “free offer” item.

By the same token, a trader should not try to recover the cost of the “free” item by reducing its quality or inflating the price of any product which is bought in order to obtain the free item. The term ‘free trial’ should never be applied in conjunction with promotions where a customer must make a non-refundable purchase, such as with “buy one, get one free” offers.

Traders are advised to seek legal advice on promotions which involve prizes – including competitions, prize draws and instant win offers – so that their promotions are not counted as an illegal lottery and do not fall foul of the 2005 Gambling Act.

To reduce the risk of offending the Advertising Code when promoting products through the normal (non-broadcasting) advertising routes, there are a number of practical steps which traders can take:

- Plan your marketing campaigns carefully. Keep a record of stock monitoring and communications with outlets, and monitor responses to offers. Be prepared to withdraw a promotion if it proves to be so popular that you do not have the right level of supply.

- Obtain and carefully record accurate evidence when comparing your products with those offered by a competitor.
- Scrutinise all adverts regularly to check that the descriptions (including any photographs) accurately match the products being advertised and are up-to-date. This is especially important where adverts are re-used regularly in a similar style and format.
- Be familiar with the Code and check the mechanisms and conditions of any free offer carefully, obtaining legal advice if necessary.

If you stay aware of the various ins and outs of advertising regulations and the Code, it will be easier to keep your ads on the right side of the law.

Stuart Farr is a partner in the dispute resolution team at Layton's Solicitors www.laytons.com. Stuart is a regular contributor to Gun Trade News where this article was first published. BASC wishes to thank Blaze Publishing and Stuart Farr for their kind permission to use this article.

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