

# “Smell-alike perfumes” It smells dangerous...

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The Alicante Appellate Court has confirmed that the use of lists comparing fragrances to well-known perfume brands is illegal.

Comparison lists compare smell-alike perfumes with the respective high-priced original perfume brand. These lists are distributed among retailers to inform customers of the “equivalence” between their fragrances and the well-known brand.

Lately, retailers have been using digital applications in stores to compare the fragrances in order to avoid mentioning well-known brands in advertising materials explicitly. In many cases the retailer only refers to the well-known brand in the store verbally.

## **What conclusion did the Alicante Provincial Appellate Court reach?**

- Comparison lists are comparative advertising which do not meet the requirements to be considered lawful, mainly: (i) the comparison should be made objectively between one or more material, relevant, verifiable and representative features of the goods and services; and (ii) should not be misleading or unfair.
- When giving the reasons for the decision, the judgement refers to the decision by the CJEU of June 18, 2009 (L’Óreal SA v Bellure NV), concluding that even where such use is not capable of jeopardizing the essential

function of the mark (since there is no likelihood of confusion), it may constitute infringement.

- Such use seeks to ride on the coattails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. The advantage gained by the advertiser as a result of such unlawful comparative advertising must be considered to be an advantage taken unfairly of the reputation of that mark.
- The judgement held that this practice constitutes **free riding** and cannot be considered lawful under article 12 of the Regulation, since it is not necessary in order to describe the aromas of the perfumes sold by the defendants.

## **Conclusion**

These cases may have an important economic impact because the businesses based on comparison lists have flourished successfully in Spain over the last few years. Evidence of this is the large number of franchisees existing in Spain based on this business model and which may be jeopardized in the future.