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SMELL-ALIKE PERFUMES ARE BACK ON TRACK: THE “WRITING THE NAME OF YOUR FAVORITE PERFUME” STRATEGY, IS STILL UNLAWFUL

Carolina Pina (Garrigues) · Tuesday, July 25th, 2017

The Alicante Court of Appeal has concluded that the use of comparison lists in the marketing of smell-alike perfumes constitutes an unlawful form of comparative advertising, even when it is the consumers themselves that are making use of these lists at a sales website.

This latest case ruled on new forms of using comparison lists that had certainly not been observed to date: the possibility of letting consumers themselves perform the comparison activity through a website's search bar.

In addition to using comparison lists in selling its products at retail establishments, in this case the defendant was also selling perfumes directly to consumers on its online sales platform. Consequently, the website's search engine invited potential purchasers to “*write the name of your favorite perfume*” as soon as the website was accessed. That is, the search bar used as search criteria the names of the brands of well-known perfumes, linking these registered trademarks with the smell-alike perfumes.

The defendant argued that its website did not incorporate a comparison list *per se*. However, the search mechanism that was offered immediately when accessing the website, was found to perform the exact same function: to exploit the reputation and prestige of the registered trademark.

Regarding both in-store and online comparisons, Alicante Court of Appeal rejected the defendant's arguments on the following grounds, in line with previous rulings on the subject:

- Competition law allows free imitation between products, but under no circumstances does this principle authorize a reference being made to the same brand that is being imitated.
- Furthermore, using a registered trademark as a reference can certainly be convenient, but it is not necessary in order to identify a fragrance or the smell of a perfume. Consequently, its use constitutes an unfair advantage.
- As in previous cases, the decision by the CJEU of June 18, 2009 (L'Óreal SA v Bellure NV) was once again brought up when explaining the grounds for rejecting the argument that there is no imitation or replication because the imitation “*does not reach the product as a whole but only the fragrance or smell of the perfume*”.
- The Court insisted on the argument that registered perfume trademarks are not descriptive terms of olfactory characteristics, but rather simply fanciful marks. As such, they do not contain

descriptive elements, and therefore cannot be used to defend consumers' right to information.

In the light of this decision offering smell-alike perfumes constitutes unfair competition even when it is the consumers themselves who perform the comparison activity through a website's search bar

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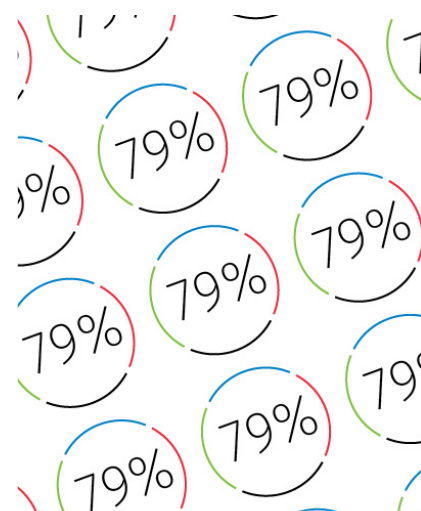
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