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A RECENT HIGH-PROFILE MARKETING INITIATIVE BY A MEXICAN PHARMACEUTICAL COMPANY APPEARS TO BE A CLEAR EXAMPLE OF UNFAIR COMPETITION. THIS ARTICLE PUTS THE CAMPAIGN IN CONTEXT AND LOOKS AT THE LIKELY OUTCOME FOR THE ADVERTISER

A bold new television advertising and publicity campaign was launched recently by a pharmaceutical company called Genoma Lab.

The campaign was designed to draw attention to the company's newest product – a line of generic pharmaceuticals called Primer Nivel ('First Level'). This name has a particular meaning within the Mexican health system. It is not a registered trademark even though it appears to be used as such in the promotions.

Many pharmaceutical companies, both local and international, have good reason to be disturbed by this development due to the powerful nature of the advertising campaign, which appears to include false or misleading information. For instance, it seems to suggest that Primer Nivel is the product maker's brand name.

SETTING A PRECEDENT

Before elaborating on the case of the Primer Nivel campaign, it may be useful to consider a similar earlier case involving advertising that was considered by the Mexican Trademark Office and the Mexican federal courts to be unfair competition.

The case began in 1998, when Congress approved a new health law which opened the market to generic drugs, but the law's definition of "generic medicine" (a product for which patent protection has expired or is in the public domain, and is designated by the name of its active ingredients) was vague. These products were required to have a reference medicine but did not have to

prove interchangeability or bioequivalence.

Fortunately, the issue was clarified by means of a decree from the Ministry of Health modifying several provisions of the law related to health consumables, which came into force in February 2008. The amendments imposed an interchangeability or bioequivalence requirement for all generic medicine products.

However, before this new amendment was enacted one of the biggest groups of pharmacies in Mexico took advantage of the lack of bioequivalence requirement and began to sell what the group called “similar” medicines. These are medicines produced with the same active ingredient as “innovative” medicines, but that have not passed through Ministry of Health tests. Despite the fact that the similar medicines had not been tested, the pharmacies started selling them under the slogan “*lo mismo pero mas barato*” (“the same but cheaper”), making consumers believe that these medicines were generic interchangeable medicines.

This situation provoked leading pharmaceutical companies to bring unfair competition actions against the pharmacies. Prolonged litigation led to most of the unfair competition cases brought by the pharmaceutical companies being decided in their favour. The Federal Administrative Court held that advertising based on the “the same but cheaper” slogan constituted unfair competition because the phrase is deceptive and false (Case RA 126/2008).

PRIMER NIVEL CAMPAIGN

A similar situation may have occurred in relation to the Primer Nivel pharmaceutical product line. The advertising campaign is arguably misleading. The television commercials include a direct recommendation for buyers to check with their pharmacist as to whether the medication they have been prescribed is protected by a valid patent. If the medication is no longer protected by a valid patent, the announcer advises the buyer to ask the pharmacist to provide the Primer Nivel equivalent medication instead. The advertisements also portray a customer asking the pharmacist whether the medicine that appears on the prescription is still patented. When hearing that it is not covered, the customer asks for the Primer Nivel equivalent. The commercial makes hypothetical comparisons about the amount of money the buyer will save if he chooses the Primer Nivel products. Additionally, the

advertisements claim that the Primer Nivel medicines are manufactured by 30 leading pharmaceutical companies. The claims are not specific and the commercial merely shows the house marks and logos of some major players, such as Novartis, Sanofi-Aventis, AstraZeneca, Boehringer Ingelheim and others.

CAUSING CONFUSION

As stated, the term "Primer Nivel", which the company is using as a mark, is a term that has a very specific meaning in the Mexican health system. In Mexico, the medical service provided by the government is divided into three: the first level, the second level and the third level, and the medicines provided as a part of those respective service levels are also known as first-level, second-level or third-level medications.

Commercial use of the "Primer Nivel" term to distinguish medicines in television commercials risks confusing consumers and thus may breach national regulations in fields such as industrial property, health and consumer rights. From the perspective of trademark law, the advertising appears to breach the Intellectual Property Law in the following ways:

- It falsely claims that the Primer Nivel medicines are manufactured by 30 of the world's leading pharmaceutical companies, with the aim of taking advantage of the prestige of such companies by association.
- The advertising may amount to a false comparison. The advertisements are not specific as to which medicines manufactured by well-known pharmaceutical companies are being compared with the Primer Nivel medicines, so they cannot in fact ensure that the buyer is receiving medicines of equal quality at cheaper prices. The advertisements aim to make buyers believe that the quality and efficacy of the Primer Nivel medicines are the same as the unspecified comparator medicines through using the names of well-known pharmaceutical manufacturing companies. This creates the false impression that the Primer Nivel

medicines are manufactured by these well-known companies only at cheaper prices.

Both situations could be considered infringement under the Intellectual Property Law. Additionally, the term "Primer Nivel" should not be used as a trademark because the Intellectual Property Law prohibits the registration of names that are likely to deceive the public or induce error, or that are deemed to convey false indications of the nature, components or quality of the products being advertised. The law also prohibits the registration of a mark, technical name or term in common use that refers to the product the trademark intends to cover. However, "Primer Nivel" is a technical name given by the Mexican health regulations to a specific type of medicines, prescribed under the local healthcare system.

HEALTH DANGERS

The advertising may also breach the regulation for medical supplements, which clearly prohibits companies from including any type of false information in marketing related to such products.

Additionally, the rights of buyers are also likely to be breached by this kind of advertising, where false information may lead to consumers being medicated with a product which might not be the most suitable for their particular condition and could jeopardise their health.

The fact that the advertisements recommend that consumers ask pharmacists whether a prescribed medicine is patented, or if the patent is still in force, may also be deceptive, because pharmacists are not in fact able to provide this information.

Section 32 of the Law for Consumer Protection establishes that information or advertising in any medium related to goods or services shall be true and free of words or trademarks that induce, or may induce, error or confusion due to their use being deceptive, inexact, false, exaggerated, partial, artificial or tendentious.

CLEAR CASE OF UNFAIR COMPETITION?

The seemingly false information conveyed in the advertising of Primer Nivel appears to constitute a case of unfair competition, which harms the interests of many competitors and consumers, and which will certainly spark a reaction from pharmaceutical competitors, agencies in charge of consumer protection and health regulators.

We expect action in the near future. Some probable actions may include:

- An opposition with the trademark office against the trademark application for Primer Nivel;
- Infringement actions on the basis of unfair competition;
- Complaints filed with the Ministry of Health or the Federal Bureau for Consumer Protection by consumers who feel they have been misled by the advertising; and

Actions by the Ministry of Health and the Federal Bureau for Consumer Protection. (The Ministry of Health has already requested a ban on the advertisements. For example, on 14th September 2009 the Ministry of Health ordered the Mexican company Genoma Lab to stop airing television commercials that include misleading or false information.)

Source: World Trademark Review, December/January 2010.