Switch marketing; the challenges of brand owners

Oxford, May 28th, 2010

Paul Reeskamp Allen & Overy, Amsterdam Would you hire Rome to defend Greece?

Would you trust McDonalds to promote your Whoppers?

Have your own retail chain?













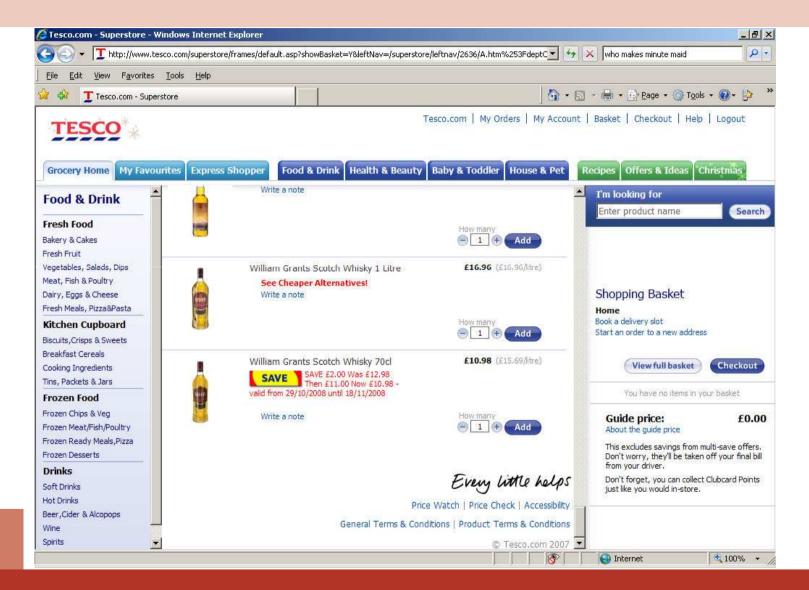


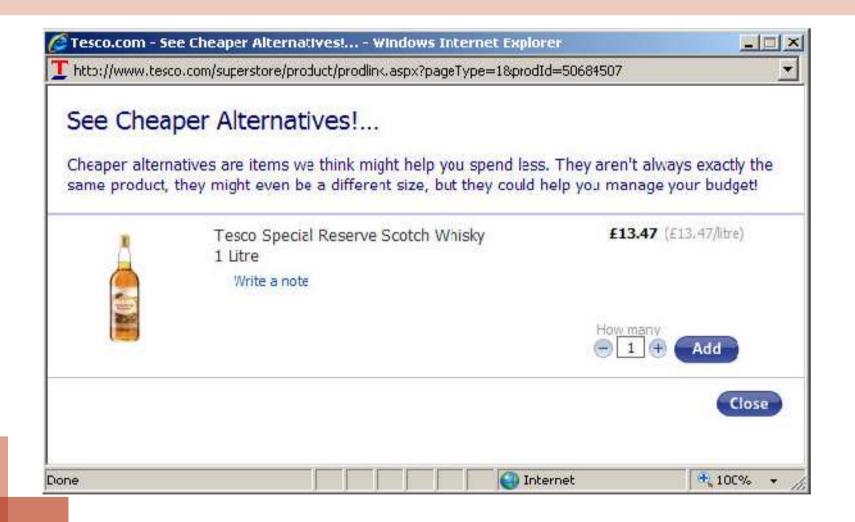




What are the challenges brand owners are facing with respect to switch campaigns?

an IP perspective









Comparative advertising?

 ECJ: very broad definition of comparative advertising, explicitly or by implication.

Burden of proof

Article 7 EC Advertising Directive

- 1. furnish evidence as to the accuracy of factual claims in a short period of time
- 2. if evidence is not furnished or is unsufficient, consider claims as inaccurate

Article 5 (3) Advertising Directive

- if inaccurate, order cessation
- even if there is no proof of actual loss or damage
- and even if there is no proof of intention or negligence on the part of the advertiser

Ah, we gaan vergelijken?



Vergelijken? Natuurlijk, dat doen wij elke dag. Onze Sun vaatwastabletten worden continu getest door diverse onafhankelijke onderzoeksinstituten. Natuurlijk op de moeilijkste vlekken, zoals ei, thee en rijst. En wat blijkt? Sun All in 1 Extra Power komt daar keer op keer als beste uit, en uw vaat dus ook.



En dus is Sun de best reinigende tablet van Nederland. Logisch, want wij hebben een heel team van experts in dienst die, dag in dag uit, bezig zijn om onze tabletten te verbeteren. Natuurlijk vinden wij het goed dat er een alternatief is. Maar beter? Die vergelijking durven wij best aan. Sun, de vaatwasexpert.



ECJ 18 June 2009, L'Oréal v Bellure

the implied message: "our perfumes smell as good as the premium perfumes, but are way cheaper"



Trésor



La Valeur



Miracle



Pink Wonder

Bellure-arguments relating switch campaigns (1)

- broad interpretation of 'imitation prohibition'
 - implicitly or explicitly
 - product as a whole or an essential characteristic







Bellure-arguments relating switch campaigns (2)

- wide interpretation of unfair advantage:
 - an attempt to ride on the coat-tails of the brand products
 - without any form of financial compensation
 - regardless whether there is proof of damages

Bellure-arguments relating switch campaigns (3)

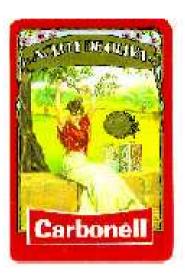
- extension of the trademark functions:
 - not only guaranteeing the origin of goods
 - but also guaranteeing the quality
 - and function of 'communication, investment or advertising'

Must the 'Bellure soup' be eaten as hot as it is cooked?

- ECJ: conditions of Advertising Directive should be applied comparative advertising friendly
- basic emotion: imitation perfumes are bad

ECJ 3 September 2009, La Española





- in supermarkets consumers tend to have a lower level of attention
- the consumer is guided by the visual impact rather than by the word marks

Recap

- private labels become stronger
- 'as good as' should be proven
- if not it should be stopped
- 'as good as' is suspicious any way (Bellure)
- overall visual impact is more important