


# Switch marketing; the challenges of brand owners

Oxford, May 28th, 2010

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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

Tesco.com - Superstore - Windows Internet Explorer

http://www.tesco.com/superstore/frames/default.asp?showBasket=Y&leftNav=/superstore/leftnav/2636/A.htm%253FdeptC

File Edit View Favorites Tools Help

Tesco.com - Superstore

Tesco.com | My Orders | My Account | Basket | Checkout | Help | Logout

TESCO

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**Food & Drink**

**Fresh Food**

- Bakery & Cakes
- Fresh Fruit
- Vegetables, Salads, Dips
- Meat, Fish & Poultry
- Dairy, Eggs & Cheese
- Fresh Meals, Pizza&Pasta

**Kitchen Cupboard**

- Biscuits, Crisps & Sweets
- Breakfast Cereals
- Cooking Ingredients
- Tins, Packets & Jars

**Frozen Food**

- Frozen Chips & Veg
- Frozen Meat/Fish/Poultry
- Frozen Ready Meals, Pizza
- Frozen Desserts

**Drinks**

- Soft Drinks
- Hot Drinks
- Beer, Cider & Alcopops
- Wine
- Spirits

Write a note

How many:

William Grants Scotch Whisky 1 Litre **£16.96** (£16.96/litre)

**See Cheaper Alternatives!**

Write a note

How many:

William Grants Scotch Whisky 70cl **£10.98** (£15.69/litre)

**SAVE** SAVE £2.00 Was £12.98  
Then £11.00 Now £10.98 -  
valid from 29/10/2008 until 18/11/2008

Write a note

How many:

*Every little helps*

[Price Watch](#) | [Price Check](#) | [Accessibility](#)

[General Terms & Conditions](#) | [Product Terms & Conditions](#)

© Tesco.com 2007

**I'm looking for**

Enter product name

**Shopping Basket**

**Home**

[Book a delivery slot](#)  
[Start an order to a new address](#)

You have no items in your basket

**Guide price: £0.00**

[About the guide price](#)

This excludes savings from multi-save offers. Don't worry, they'll be taken off your final bill from your driver.

Don't forget, you can collect Clubcard Points just like you would in-store.


Internet 100%

Tesco.com - See Cheaper Alternatives!... - Windows Internet Explorer

http://www.tesco.com/superstore/product/prodlink.aspx?pageType=1&prodId=50684507

## See Cheaper Alternatives!...

Cheaper alternatives are items we think might help you spend less. They aren't always exactly the same product, they might even be a different size, but they could help you manage your budget!

	<p>Tesco Special Reserve Scotch Whisky 1 Litre</p> <p><a href="#">Write a note</a></p>	<p><b>£13.47</b> (£13.47/litre)</p>
		<p>How many</p> <p><input type="button" value="-"/> <input type="text" value="1"/> <input type="button" value="+"/> <input type="button" value="Add"/></p>
		<p><input type="button" value="Close"/></p>

Done Internet 100%

**save  
£13.08**

**Switch to  
Sainsbury's own brand  
and save on these products**

**BIG BRAND  
QUALITY  
OR YOUR  
MONEY BACK**

**Look out for own brand products in store**

sainsburys.co.uk

**Sainsbury's**  
*Try something new today*

**Switch to  
Sainsbury's own brand  
and save**

**Switch and  
save**

Sainsbury's Non-biological liquid gel 1.5l	£2.48
Sainsbury's Antifungal moisturising handwash 250ml	£0.71
Sainsbury's Sunflower spread 500g	£0.79
Sainsbury's Soft cheese 300g	£0.98
Sainsbury's Real fruit jam tarts x 6	£0.53
Sainsbury's Maltines 750g	£1.34
Sainsbury's Full roast instant coffee 200g	£1.31
Sainsbury's Strawberry conserve 340g	£1.20
Sainsbury's High juice blackcurrant squash 1L	£1.17
Sainsbury's Tomato ketchup top down 485g	£0.75
Sainsbury's Baked beans in tomato sauce 4 x 420g	£1.19
Sainsbury's Wholewheat biscuits 24's 430g	£1.15
Sainsbury's Red label tea bags 80's 250g	£1.29
<b>Total</b>	<b>£14.89*</b>
<b>Comparative leading brands: Total</b>	<b>£27.97**</b>
<b>Total saving</b>	<b>£13.08**</b>

Everyone likes to save a few pounds on their shopping bill. See how much you can save on your shopping above by making a few small changes.

With Sainsbury's own brand, you can be sure that lower prices don't mean a compromise on quality. Our Red label tea bags are 20% cheaper than the leading brand\*\* and are also a sustainable, Fairtrade product with recyclable packaging. The great taste is also a favourite with Sainsbury's shoppers.

With thousands of own brand products to choose from – including everything from cereal to washing powder – you can make substantial savings on your whole shopping list, across the store.

\*Prices correct at time of print 01/09/08. Comparison excludes promotions. Based on unit price of product.  
\*\*Nielsen Scantrack; Leading brand based on brand market share in UK Grocery Multiples, 52we 13/08/08. Subject to availability.

## 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 insufficient, 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.**

**Chocomel. Al 75 jaar de enige èchte.**



Als wij Nederlandse dames een echte chocolademelk kan zeggen, we Chocomel. En dat is niet te vergelijken met andere melk. Want we zijn er. Nieuw en nu samen, chocolade, verspreiden met de beste smaak.

van het origineel. Weten of niet, weet heel, de melk smaken smaken van Chocomel, zij het tijd de enige melk: Chocomel. De enige èchte.



**ALLEN & OVERY**

## 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



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**BIG BRAND  
QUALITY  
OR YOUR  
MONEY BACK**

Look out for own brand products in store

[sainsburys.co.uk](http://sainsburys.co.uk)

**Sainsbury's**  
*Try something new today*

**AH Huismerk. Minstens zo goed,  
stukken goedkoper.**

Deze week: AH Huismerk chocolademelk gratis bij een bezorging




## 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