

Comparative Advertisement In India

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Abstract: *This article emphasis on the concept of comparative advertisement and when such advertising results into infringement of trademark. It further elucidates on the existing legal mechanisms in India to control disparagement in comparative advertising and also recent judicial pronouncements in India on the same. The difference between Puffery and disparagement is also talked about. The author is of the view that more stringent and effective legal provisions should be incorporated in the existing Trade Mark Act, 1999 to prevent the commercial disparagement in comparative advertising.*

I. INTRODUCTION

Today, advertising has evolved. In a developing economy like India, advertising has an impact on consumer's choices and behaviour. Advertising market offers an opportunity for the advertisers to reach out to the people, and market their products. Comparative advertising is advertising where one party advertises his goods or services by comparing them with the goods or services of another party. Such other party is usually his competitor or the market leader of that good or service. The comparison is made in order to increase the sales and popularity of the advertiser, either by advocating that the advertiser's product is of the same or a better quality as compared to the other product or by demeaning the quality of the compared product.

Comparative advertising enables advertisers to objectively demonstrate the merits of their products. Comparative advertising expands the information available to consumers enabling them to make a rational and more informed decisions with regards to the choice between competing products/services by determining the merits of various comparable products. Comparative advertising can stimulate competition between suppliers of goods and services to the consumer's advantage.

The owner of a trademark has the sole right to use his trademark to identify the products or services, which is used by advertiser in comparative advertising, in order to classify the goods or services of a competitor by making reference to a trade mark of the proprietor. This raises several concerns like on one hand, the goodwill of the brand owners being

hampered and, on the other, the welfare of consumers that may result from the reduction in information asymmetry and the stimulation of competition.

Comparative advertising affects the:

- ✓ competitors;
- ✓ proprietary right holders;
- ✓ consumers; and
- ✓ the general public interest in undistorted competition.

II. COMPARATIVE ADVERTISING - A TRADEMARK INFRINGEMENT

Trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours. The three basic elements of Trademark infringement is the unauthorized use of a trademark or service mark on or in connection with goods and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods and/or services.

Whereas Competitive advertising is when a producer advertises his good by comparing it to the similar supplementary goods. So in competitive advertising their is unauthorised use of a trademark in an indirect manner for example when one product is compared with another, we immediately recognise the two different products (which are generally trademarked) because of their brand names, the shape of the product and the general familiarity with the way it

looks. Then there is confusion or deception caused in the minds of the consumers. Therefore, this form of advertising if used beyond a certain level fulfils the conditions of a trademark infringement. While a trader is allowed to declare his product as the best in the world, care must be taken while using the trademark of others. In this age of competition where there is aggressive marketing, comparative advertising is needed. and so in this race sometimes the advertisers cross the line which leads to infringement. In the case of *Reckitt and Coleman of India Ltd V. M.P. Ramachandran* the Calcutta High court gave certain rules which said that a producer for the purpose of advertising his goods can say that his goods are the best in the world or are better than any other goods also he can even compare the advantages of his goods over the goods of others but in order to prove his superiority he cannot say that his goods are better than his competitors' because if he says so he slanders the goods of his competitors.

In other words he defames his competitors and their goods, which is not permissible.

The United States Federal Trade Commission legalized comparative advertising in 1971 with the intention that increasing the awareness of consumers would allow them to make more well informed choices. Comparative advertising was legalized in India for the same reasons. Unfortunately, the form of comparative advertising seems to be a growing one by mocking or degenerating the other goods. The very essence of comparative advertisement which was to uplift one's own product is missing these days, all the advertisers try to pull down the other brands and by doing that they infringe in their privacy.

Comparative advertising is allowed in India if it is not a negative comparison. The section 29 and 30 of the Trademark Act, 1999 regulates unfair trade practices. Section 29(8) is a registered trade mark is infringed by any advertising of that trade mark if such advertising—

- ✓ takes unfair advantage of and is contrary to honest practices in industrial or commercial matters;
- ✓ is detrimental to its distinctive character; or
- ✓ is against the reputation of the trade mark.

This section provides for situation when there is infringement of trademark. And section 30(1) says that nothing in section 29 shall prevent the use of registered trademark for honest industrial and commercial practices. This section if analysed is an exception to section 29 which allows comparative advertising but at the same time puts limitations on it.

Traditionally the trademark protection under the law guarantees exclusive right to use the mark for the purpose of identification of his goods and services. Trade mark laws do not prohibit the non-confusing use of another's trade mark. An interesting situation is when a somebody else's trademark is used not with the intention of causing confusion as to the origin but causes harm to the trademark owner. Use of rival company's trademark in comparative advertising is one such instance. A comparative advertisement is when there is use of trademark of the compared product to throw light on the product quality and not origin and thus such use cannot violate the right of the trademark owner. However, considering the secondary function of trademark as a tool of advertisement and promotion, it is interesting to see whether the use of

competitor's trademark while comparing it with one's own amounts to trademark infringement or not. The general approach in deciding such cases has been to permit comparative advertisement so long as such advertisement was not damaging to and did not take unfair advantage of a registered trademark.

III. COMPARATIVE ADVERTISING IS NOT A COPYRIGHT INFRINGEMENT

Another issue which came up with competitive advertising was that it is not only an infringement of trademark but also copyright because the slogans or music which is shown in the advertisement for comparison are also copyrighted as they come under the ambit of creative work. Copyright is the exclusive and assignable legal right, given to the originator for a fixed number of years, to print, publish, perform, film, or record literary, artistic, or musical material. So when in an ad a particular music or any tagline which belongs to other rival companies it is also unauthorised use of their property and can be an infringement of copyright along with the trademark.

But it seems that court has a completely different view in this particular matter as seen in *In Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.* which along with trademark also dealt with copyrights related issues. The plaintiff in the instant case claimed disparagement of trademark and copyright in two advertisements of the defendants. Both advertisements allegedly made with derogatory remarks about the plaintiff's products. One of the advertisements depicted a thinly veiled substitute of Pepsi as a "bachhon wali drink" while mocking Pepsi's advertising slogan by saying "Yeh Dil Mange No More". The entire commercial portrayed to the viewers that kids should drink 'Thums Up' over 'Pepsi' if they want to grow up. The following factors have to be kept in mind, while deciding the questions of disparagement:

- ✓ Intent of the commercial;
- ✓ Manner of the commercial;
- ✓ Story line of the commercial and the message sought to be conveyed by the advertisement.

The second factor, that is if the manner in showing the commercial is only to show that the product is better without derogating somebody else's product, then no actionable claim lies. Therefore, the Court gave a judgement that there was no disparagement and also went on to take a stand, without precedent, that Pepsi's advertising slogan was copyrightable. The Court nevertheless also mentioned that mere use of the trademark protected Pepsi logo and parody of the slogan does not ipso facto leads to infringement.

IV. VIOLATION OF CONSTITUTIONAL RIGHTS

In order to decide if punishing a corporation or putting restrictions on them for competitive advertising will violate their freedom to speech under the constitution we first have to throw light on 19 (1) (a) of the constitution which is the *Right to Freedom of Speech And Expression* and means that everyone has the the right to express one's own convictions

and opinions freely. The word “freedom” means that a citizen has the right to express his views and opinion in any means including by words of mouth, writing, printing, banners, signs, and even by way of silence.

In *Tata Press Limited vs Mahanagar Telephone-Nigam* case the Supreme Court decided that the "commercial advertisement" comes within the concept of "freedom of speech and expression" guaranteed under Article 19(1)(a) of the Constitution of India. In the same case it was further mentioned that the commercial speech has to be privileged and curtailed only to the extent it is reasonable for protection of general interests. Court was of the view that advertisement of ones product with purpose of boosting sales is a permissible marketing strategy also Court has laid down various principles in deciding about the extent of comparative advertisement. Advertising is a form of communication to drive consumer behaviour with respect to a commercial offering.

The principles, as stated in the case of *Reckitt & Coleman of India Ltd V. Kiwi TTKLtd (63 (1996) DLT 29)*, are as follows:

- ✓ An advertisement can declare that the advertised goods are the best in the world, even though this declaration is untrue;
- ✓ An advertisement can state that the advertised goods are better than those of competitors, even if this statement is untrue;
- ✓ An advertisement can compare the advertised goods with those of competitors;
- ✓ An advertisement cannot, while stating that the advertised goods are better than those of a competitor, state that the competitor's products are bad, as this would be defamation;
- ✓ In a case of defamation, damages can be claimed. The court can also grant an injunction against repetition of the defamatory action.

Therefore, as stated under Article 19(2) of the Constitution of India, the State may make a law imposing “reasonable restrictions” on the fundamental rights like the right to freedom of speech and expression in public interest, restrictions can be levied on comparative advertising if it affects the growth of similar products negatively or if it misleads consumers. Hence punishing or limiting comparative advertising is not a violation of fundamental right as all rights are subject to reasonable restrictions. The restrictions are needed as comparative advertising is often exploited in order to earn more money. it not only affects the market and lower the sales of the rival product but at the same time affects the goodwill and brand image. Moreover, it has a much deeper effect on the consumer who have a deeper interest in the advertisement than the businessman who is behind the publication and violates consumer rights to safety and choice. Comparative advertising is a necessary for business and specially for new brands or small producers and thus cannot be totally thrown out of the market but imposing reasonable restrictions is for maintaining a balance the market.

V. PUFFERY VERSUS DISPARAGEMENT

Disparagement means the act of speaking about someone

in a negative or belittling way and on the other hand means In law, puffery is a promotional statement or claim that expresses subjective rather than objective views, which no "reasonable person" would take literally. Puffery serves to "puff up" an exaggerated image of what is being described and is especially featured in testimonials. There are multiple interpretations and approaches with the law regarding comparative advertisement in India by various courts in the absence of a specific legislation dealing with it. The position, as of now, is that the comparing of products is allowed but denigrating of such products is not allowed, even if such claims are truthful. There need of the hour is that the legislators need to look into the issue and come up with a framework, or there should be an authoritative disposition on the issue by the highest court of the land.

There are so many landmark cases which show us the thin line of difference between puffery and disparagement, in *Pepsi Co. Inc. vs Hindustan Coca-Cola Ltd.*, the commercial was shown to mockingly convey that grown up kids should prefer Thums Up instead of Pepsi, which is sweet and meant for small children. It was held that Thums Up depicted Pepsi in derogatory and mocking manner, which could not be called —puffing up.

In *Dabur India Limited vs. Emami Limited Honourable Delhi High Court* held that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods but the same would not give a right to the other traders or manufacturers of similar goods to institute proceedings. As there is no cause of action or disparagement or defamation to the goods of the manufacturer so doing. Though, a manufacturer is not permitted to say that his competitor's goods are bad so as to puff and promote his own goods.

Regaul vs Ujala Case is another instance in which the commission was of the view that a mere claim to the superiority in the quality of one's product by itself is not sufficient to attract clause. In the commercial, neither the bottle had any label nor it was similar to any other brand. The commission, recommended that it should not be classified as a case of disparagement of goods. In *Reckitt & Colman of India Ltd. vs. M.P. Ramachandran & Anr Hon'ble Calcutta High Court (Barin Ghosh, J.)* laid down five principles for granting an injunction in case of comparative advertising:

- ✓ A tradesman is entitled to declare his goods to be best in the world even though the declaration is untrue;
- ✓ He can also claim that his goods are better than his competitors, even though such statement is untrue;
- ✓ For the purpose of saying that his goods are the best in the world or his goods are better than his competitors he can even compare the advantages of his goods over the goods of others;
- ✓ He however, cannot, say that his competitor's goods are bad while saying that his goods are better than the competitors. If he says so, he really slanders the goods of his competitors, which is not permissible.
- ✓ If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the court is also competent to grant an order of injunction restraining

repetition of such defamation.

In *Glaxo Smith Kline Consumer Health vs Heinz India Private Limited* the court herein adhered to the principle holding that an advertiser was at liberty to engage in puffery so long as the product of a competitor was not slandered in any manner. On the other hand it also sought to regulate such representations of opinion by introducing a broad requirement to substantiate their tenability.

VI. TEST AND RELEVANT LEGISLATIONS

The question whether a particular advertisement is 'honest or not' is very open ended, and is to be decided by putting oneself in the consumer's position. Still there are a large and clearly shared concepts of honest conduct in trade, which is used by the courts easily and without any excessive danger of greatly diverging interpretations. Statutory or industry agreed codes of conduct are not sufficient guide as to whether a practice is honest for the purposes of Section 29 (8) and Section 30 (1). Honesty has to be assessed as to what is reasonable for the relevant audience of advertisements. Also, the burden of proof is not upon the user of the mark but on the owner that the use of his mark is unauthorized and not honest.

When a producer will try to advertise his goods and establish its superiority, by pure logic he obviously will make the other similar products look less appealing but this does not come within the ambit of infringement. According to law if any type of commercial which directly detracts to the distinctive character, reputation of the mark and gives unfair advantage to third party in such a case it will be infringement.

The three major points that have to be kept in mind are:

- ✓ Intention by which the commercial was made;
- ✓ Manner of the commercial;
- ✓ Story line of the commercial and the message sought to be conveyed by the commercial.

Comparative advertising is permitted only when the goods are supplementary goods i.e. that they target audience with similar needs. A new side of comparative advertising was seen in the case of *Reckitt Benckiser (India) Ltd. vs Naga Limited and Ors.* Defendant showed a television commercial which depicted a woman in an advance stage of pregnancy needing urgent medical assistance during a train journey. And the doctor calls for hot water and is handed over a cake of soap, which she rejects affirming that antiseptic soap was needed. It was clearly established that the soap handed over to the doctor was Dettol. Then the doctor further specifies in the commercial, that at a crucial time like this, you do not need just antiseptic, you need a protector. The court held that the defendant had made a false statement. So in a case if the competitor makes the consumers aware of their mistaken impression then no illegality is committed but if he makes false statements in such case comparative advertising is not permitted.

The three step test, namely that the trademark owner has to show that the use:

- ✓ Takes unfair advantage and is contrary to the honest practices of industrial and commercial matters;
- ✓ Causes detriment to the distinctive character of the mark;
- ✓ The advertisement is against the trademark's reputation.

There are not many judicial precedents in the area of comparative ads, the courts mostly give the judgments in favour of the competitors. The scope of Comparative Advertising very narrow. Various provisions that have guided comparative advertising in India are:

- ✓ Advertising standards council of India

It is a non-statutory tribunal comprising an association of advertisers established in 1985. The ASCI position on the form and manner of Comparative Advertising has been laid out in Chapter IV of the body's Code for Self-Regulation in Advertising. ASCI has been able to ensure a reasonable degree of adherence to its norms from members, a difficulty arises when complaints are filed with regard to the activities of non-members.

In the *O2 case*, the court formulated a four step test of trademark use in order to stop the use of a trademark by a trademark owner under the Council Directive 89/104/EEC., which are as follows:

- ✓ The use should be in the course of trade;
 - ✓ Without its consent;
 - ✓ In respect of identical or similar goods or services; and
 - ✓ Leading to a likelihood of confusion among the public.
- ✓ The Trademarks Act, 1999

This act provided the safety against the infringement of trademarks. The act said that "A registered trademark is infringed by any advertising of that trademark if such advertising takes unfair advantage, contrary to honest practices in industrial or commercial matters which is against the reputation. Presently there exists no statutory mechanism to regulate the advertisements that disparage the other producers.

VII. COMPARATIVE ADVERTISING IN OTHER COUNTRIES

A. UNITED KINGDOM

UK has a liberal legal system in regards with the comparative advertising. UK viewed this type of advertising, legitimate as debated by the European Standing Committee of the Parliament of UK in 1995. The Section 11(2) of the UK Trade Marks Act, 1994 permits only fair comparison related to price and quality of goods. Also it imposes a condition that the comparison ought to be an honest one.

Then there is the Misleading and Comparative Advertising Directives lays certain guidelines as long as they are followed such kind of advertising is allowed. The Monoley Committee on Consumer Protection, 1962 suggested for a separate regulatory body or institution. This was followed by the formation of Advertising Standard Authority.

There are quite a few differences between the Advertising Standard Authority (ASA) AND Advertising Standards Council of India (ASCI) like the former cannot enforce its directives but the latter can. Moreover, the ASA can refer persistent cases to the Director General of Fair Trading. Some of the very important cases that are the pillars of Comparative Advertising are in the case of *British Airways v Ryanair*, British Airways ("BA") has a trade mark containing of the letters BA registered for, amongst other services, "air travel

services". Ryanair did not contest the validity of this registration and the Judge pointed out that their advertisements actually relied upon people knowing that the letters BA implied the claimant. BA sued Ryanair, a low cost airline, for trade mark infringement and malicious falsehood in response to a series of advertisements that appeared in the English press. The Judge decided that one can be attacking about other parties name without falling outside the defence in s.10(6). He held that the "BA***DS" advertisement was just such a case.

The courts have long accepted that advertisements are full of puff and such advertisements do not give rise to a cause of action to a competitor even though he can show that he has suffered actual damage in his business as a result. It is now likely that we will see more aggressive comparative advertising, until such time as an advertiser exceeds the line and the court rules against them.

B. UNITED STATES OF AMERICA

The Federal Trade Commission and the National Advertising Division are the bodies that govern or regulate the Comparative advertising in US. The FTC encourages healthy competition and its objective is to protect consumers from being misguided and misled.

Lanham Act is another major act that is concerned with the comparative advertising Under this act the liability arises when:

- ✓ The claim is false or untrue.
- ✓ The implication and assertion of claim is false.

Also the onus to prove under the Lanham Act is on the plaintiff, that the claim made or information given is untrue. Indian laws with regards to the comparative advertising are strong but as per the need of the hour they need to be balanced. Just like the US the doctrine of fair use should also be used in India, the intention should be to inform the consumers but not misinform the.

Tommy Hilfiger licensing Inc. vs. Nature Labs LLC(2002): a lawsuit was filed by Tommy Hilfiger against the Nature Labs a shop selling pet perfumery from the name of "Timmy holedigger" and with a slogan that, "if you like Tommy Hilfiger, your pet will like Timmy holedigger. The court in this case said that this case is protected under the Freedom of Speech and its just a parody and no sort of infringement. Further the court said that this type of commercial can not confuse the consumers and therefore there is no disparagement.

VIII. CONCLUSION AND SUGGESTIONS

In a developing country like India where have the population is uneducated or layman in such a scenario if all brands keep on claiming superiority over each other it will lead to confusion in the mind of customers and they will not be able to come to the right decisions therefore in such countries comparative advertising id required to create awareness but as earlier said it needs to be restricted or kept a check on so that their is a balance maintained because in this war of producers and advertisers the ultimate sufferers are the consumers of our country. In India is that brand owners can

take a sigh of relief as the laws have been in the recent past much stricter for the comparative advertisers. Advertisers use comparative advertising predominantly to promote their product at the cost of others in terms of price, quality, features, performance etc. It is beneficial for consumer since they receive better product information that can help them in making rational purchase decisions. So in a way comparative advertising has a lot of advantages specially for new brands in the market but at the same time it has a lot of disadvantages too like if accompanied with malicious intention or false intention it can lead to misleading of consumers.

The most recent case of comparative advertising *Havells v. Amritanshu* raised a question whether or not an advertisement which compares a product with its rival product is required to necessarily compare *all its features* in order for it to be an 'honest' advertisement. The Delhi High Court held that failure to compare all the features of a product would not in itself disparage the competitor's product. "*In the opinion of this Court, it is open to an advertiser to highlight a special feature/characteristic of his product which sets it apart from its competitors and to make a comparison as long as it is true*". Reckitt Benckiser (RB) and Hindustan Unilever (HUL) have very recently secured 'ad-interim injunction' against Patanjali's television commercial promoting its bath soap. The advertisement while talking about Patanjali's ayurvedic product belittles RB's Dettol soap and HUL's soap brands. After going through so many judicial decisions we can come to the conclusion that there is no harm in comparing your goods in order to establish your brand but at the same time there should be checks on abuses. At the end, it can be concluded that the Indian law, has allowed comparative advertisement on one side and on the contrary does not address the issue in a direct or comprehensive manner in any legislation.

IX. SUGGESTIONS

- ✓ Due to lack of technically sound mechanism to access the exact loss because of comparative advertising courts are not awarding financial penalties to wrongdoers. Instead courts prefer to stop that advertisement. So a method should be brought in order to precisely calculate the losses.
- ✓ The important terms like 'disparagement' and 'honest practices' are not defined in any legislation. The meaning of 'Unfair trade practices' was given in the MRTP Act which is repealed now and thus the clear meaning of these important words need to be defined in a proper legislation.
- ✓ There is no specific legislative mechanism regulating comparative advertising in India therefore more proper guidelines or set of rules like Advertising Standard Council of India is required in order to pave the way forward in this particular field.
- ✓ Stricter punishment should be incorporated in the existing legislations to prevent vices of comparative advertisement. The ads made should be informative and should not merely made in order to attack competitors. A balance should be maintained.

- ✓ There is a need of studying the foreign countries law to be able to cope up with the global economy. It is observed that there was a wide difference from country to country such as in USA the view is very liberal as opposed to China or Japan.

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