

EXAMINING THE LEGAL PROVISIONS ON COMPARATIVE ADVERTISING IN INDIA

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INTRODUCTION

Comparative advertising provides consumers with information and can enhance decision making. It can also lead to confusion and misinformed decisions. In addition, it is also an effective promotional tool for the advertiser¹. Essentially, it can allow for a trader to receive a free ride on the reputation of another trader and in some cases may even allow for poaching of that reputation. Comparative advertising will continue to be a valuable and effective form of advertising. ‘Comparative advertising’ is the term used to describe advertisements where the goods or services of one trader are compared with the goods and services of another trader.² Article 2(c) of the Directive 2006/114/EC of the European Parliament and of the Council Concerning Misleading and Comparative Advertising defines ‘comparative advertising’ as ‘any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.’ The ideal legal framework for comparative advertising puts consumers in the position to be the judges of the comparison, with the comparison providing truthful facts about the competing products or services; such an approach will counteract the assumptions that the advertiser takes the role of judge in the same activity in which he is participating. Where such a scenario can be achieved, fears that comparisons reduce the credibility and effectiveness of advertising as an institution are untenable.³

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¹ Matthew Anthony, “Legal Aspects of Comparative Advertising and a Strategy for Its Use”, 12 Queensland U. Tech. L.J. 41 1996. Source: <http://heinonline.org>

² Uphar Shukla, “Comparative Advertising and Product Disparagement vis-à-vis Trademark Law”, 11 JIPR 409 (2006).

³ Manuel Morasch, “A comparative study of trade-mark laws and competition laws in Canada and the European Union”, (2004). University of Toronto, Faculty of Law - Dissertations, Thesis. Available at SSRN: <http://ssrn.com/abstract=685602>.

The important legal issues that can be identified in the context of comparative advertising include statutory provisions in competition law, trade-marks law and common law principles. The legal framework for potential areas of conflict is a composition of several diverse mechanisms, whereby no statutory provision explicitly governs comparative advertising in India which create a lacuna in the present system.

The present paper seeks to examine the role of the existing forms of regulation and analyze the intricacies of law involved in the concept of comparative advertising

LAW ON COMPARATIVE ADVERTISING IN INDIA

In the legal framework governing comparative advertising, there has been a shift from curbing monopolies to encouraging competition. The basic legal structure has been laid down by the Monopolies and Restrictive Trade Practices Act, 1984 (M.R.T.P Act) and the Trade Marks Act, 1999 (T.M.A.)

1. Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 and Competition law:

The Monopolies and Restrictive Trade Practices (MRTP) Act started its life in 1969.⁴ Major amendments were made to the MRTP Act in 1984; the thrust thereof is on curbing Monopolistic, Restrictive and Unfair Trade Practices with a view to maintain competition in the economy and safeguarding the interest of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices.⁵ To understand the working of the law on unfair trade practices, we would need to examine specific provisions of the present Act.

Section 36 A of the Act lists unfair trade practices. Unfair trade practices in comparative advertisement include any endorsement of goods or services that deceives or gives false information concerning the goods or services of another individual. Other instances of unfair trade practices comprise the acceptance of any unfair or misleading methods or practices in the

⁴ Now stand repealed and replaced by Competition Act, 2000

⁵ Again Dr. Chakroborty in his paper, "MRTP Act metamorphoses into the Competition Act" addresses the enactment and the change in MRTP Act in detail, available at <http://www.cut.international.org/doc>.

representation of goods and services. The intact notion of ‘disparagement of goods of another person’ thus runs from the MRTP Act.

The MRTP creates a judicial body also called the Monopolies and Restrictive Trade Practices Commission (MRTPC). The Commission, after evaluating the practice to be an unfair trade practice, could order the aberrant party to cease and stop the practice.⁶ The commission decided many cases related to unfair trade practices in the realm of advertising before the repeal of the MRTP Act. The commission was the authority to decide and provide for relief in case of disparagement and unfair practices indulged in advertising by a competitor.

The commission in course of deciding cases evolved certain standards as to what would constitute unfair trade practice and amount to disparagement⁷.

In **Investwell Publishers (P) Ltd., Bombay**⁸ the commission interpreted the following five necessary ingredients of unfair trade practice- a) there must be a “trade practice”; b) the trade practice must be employed for the purpose of promoting the sale, use, supply of any goods or the provision of any service; c) trade practice should fall within the ambit of one or more of the categories enumerated in clause (1) to (5) of section 36A; d) the trade practice should cause loss or injury to the consumers of goods or services; e) the trade practice under clause (1) should involve making a ‘statement’ whether orally or in writing or by visible representation.

In **M. Balasundram v Jyothi Laboratories**,⁹ A television advertisement promoting Ujala liquid blue showed that 2-3 drops were adequate to bring striking whiteness of clothes while several spoons of other brands were required though no label of any other brand was shown. A lady holding a bottle of Ujala was looking down on another bottle and exclaiming „chhi, chhi, chhi! in disgust. The manufacturers of Regaul, a competing brand, approached the MRTP Commission that the advertisement was disparaging its goods. The Commission was of the view that a mere claim to superiority in the quality of one's product“ by itself is not sufficient to attract section 36(1) (x) of MRTP Act. The Commission elaborated the meaning of the

⁶See Akhileshwar Pathak, “Legal response to Economic liberalization: The case of unfair trade practices”, Vikalpa, Vol.29, No.3, July-Sept 2004, p.61.

⁷ As per New International Webster's Comprehensive Dictionary the term “disparagement” means the act of depreciating, aspersing, slighting, or undervaluing, derogation, or a reproach; disgrace.

⁸ UTP Enquiry no. 146/1987, order dated 05/10/1988 quoted from M. L. Sachadeva & N. Ranganathasamy, *Unfair Trade Practices: Cases & Materials*, Bahri Brothers, New Delhi (1992).

⁹ M. Balasundram v Jyothi Laboratories, judgement of the MRTP Commission, 10/10/1994. Citation: 1995 (82) CC 830.

provision: *In order to bring home a charge under clause (x) of section 36A (1) it must be established that the disparagement is of the goods, services or trade of another. ... the words "goods of another person" have a definite connotation. It implies disparagement of the product of an identifiable manufacturer. Further, the bottle did not have similarity with bottle of any brand.* The Commission, thus, was of the opinion that it could not be a case of disparagement of goods.

In the case of **Palmolive (India) Limited v Vicco Laboratories**¹⁰, Hindustan Lever Limited advertised its toothpaste, 'New Pepsodent' in print, visual and hoarding media, claiming that its toothpaste 'New Pepsodent' was '102% better than the leading toothpaste'¹¹. The Commission was of the view that the word toothpaste has become synonymous with Colgate over the years. The Commission in addition noted that the jingle in the background was a familiar one. The comparative manufactured goods in the television commercials could, therefore, be identified as Colgate dental cream. Thus, it became a case of comparative advertisement and a claim could be made of disparagement of Colgate's products.

The principle, thus, emerged that a case of disparagement arises only if the product in question is identifiable. Identification could be explicit or from the facts and circumstances.

Thus MRTP Act in its ultimate truncated shape was dealing with only three aspects of the market, namely, monopolistic, restrictive and unfair trade practices. All these aspects are fully reflected by the packed-up four sections¹² of the competition law¹³. The experience in administering the MRTP Act, for about three decades since 1969, the deficiencies noted in the said Act, the difficulties that arose out of different interpretations and judgments of the MRTP Commission and the superior Courts of Law and the new and changing economic milieu spurred by the LPG paradigm and the economic reforms of 1991 (and thereafter) impelled the

¹⁰ Palmolive (India) Limited v Vicco Laboratories 1997 (5) CTJ 488

¹¹ In the television advertisement, samples of saliva are taken for testing from two boys, hours after brushing. One boy has brushed with the New Pepsodent while another has brushed 'with a leading toothpaste'. The saliva of 'the leading toothpaste' shows large number of germs. While the slide of the New Pepsodent shows negligible quantity of germs. While the sample was being taken from the boys, they were asked the name of the toothpaste with which they had brushed in the morning. One boy had said Pepsodent. The response of the second boy was muffled. However, lip movement of the boy would indicate that he was saying 'Colgate'. Also, when the muting was done, there was a sound of the jingle used in the Colgate advertisement.

¹² See Section 3 to 6 of Competition Act, 2000

¹³ Avtar Singh, "Competition Law"; Eastern Book Company, 1st Ed. 2012, Preface page.

need for a new competition law. The need for a new law has its origin in Finance Minister's budget speech in February, 1999:

“The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions.”

Hence the act now stand repealed but its provision still continue to persuade the court of law. The new law that came into being was the Competition Act, 2000. The modern competition law seeks to protect the process of free market competition in order to ensure efficient allocation of economic resources. It is commonly believed that competition law is ultimately concerned with the interest of the consumers.¹⁴

The Competition Act, 2002, provide for the establishment of Competition Commission of India (CCI) and takeover the regulatory authority from the MRTP commission¹⁵ Along with a number of other amendments to the Act made by the Competition (Amendment) Act, 2007, the date of initiation of which was October 12, 2007, a new Section 66 was replaced by the original section 66. According to the new amended Section 66, the central issue is that the Monopolies and Restrictive Trade Practices Act, 1969 has been repealed and the Monopolies and Restrictive Trade Practices Commission established under section 5(1) of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved. Nevertheless, under said section the MRTP Commission is allowed to continue to exercise jurisdiction and control under the MRTP Act for a period of two years from the date of the commencement of the Competition (Amendment) Act of 2007, which means two years from the notification of section 66 as being brought into force. But the MRTP Commission cannot decide or adjudicate any case or proceeding ensues under the MRTP Act on or after the said commencement.¹⁶

¹⁴ Sanchit Agarwal, “Competition Law and Protection of Consumer Interest”, Research paper submitted to Competition Commission of India on 11th Aug,2011, available at <http://cci.gov.in/images/media/ResearchReports/SanchitInt260811.pdf>. (Last visited on 20th Aug 2013)

¹⁵ As stated under Section 66 of the Competition Act,” The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved

¹⁶ T. Ramappa, “Repeal of the MRTP Act, 1969: Reducing the Twilight Period”, available at www.lawyersclubindia.com/articles/print_this_page.asp?article_id=14092/5. (Last visited on 20th April 2013)

It also elucidate that on suspension of the MRTPC, the cases and other matters pending either before the MRTPC¹⁷ will be reassign to only three authorities i.e. (i) Competition Appellate Tribunal, (ii) Competition Commission of India and (iii) the National Commission comprised under the Consumer Protection Act, 1986.

It is considered that if Unfair Trade Practices are put into Competition Act would augment the load on the Competition Commission and would deflect the commission from its main purpose. The commission is designed to develop and encourage competition in the market and it is supposed that addition of unfair trade practices in the Competition Act will distract its proficiency or resources towards unfair trade practices while anti-competitive issues will take a backseat. While the cases of unfair trade practices *vis a vis* business transactions are concerned; they are covered under the domain of Competition Act, 2002 if they harm competition in the market. Thus it is argued that there is no need of inclusion of unfair trade practices in Competition Law.¹⁸

The provisions on unfair trade practices had a life for two years under the MRTP Act. Since a consumer needed protection not only from being supplied with defective good and deficient service, but also unfair trade practices, the provisions on unfair trade practices were copied from the MRTP Act into the Consumer Protection Act.

2. Consumer Protection Act, 1986

The Consumer Protection Act 1986 is a social welfare legislation which was enacted as a result of widespread consumer protection movement.¹⁹ The main object of the legislature in the enactment of this act is to provide for the better protection of the interests of the consumer and to make provisions for establishment of consumer councils and other authorities for settlement of consumer disputes and matter therewith connected.²⁰ While the consumer forums have adjudicated large number of cases on 'defect in good' or 'deficiency in service', the provisions on unfair trade practice have almost never been taken before the Consumer forums. These cases and investigations were taken by the MRTP Commission. The provisions on Unfair Trade Practices, in the way of being imitated from the MRTP Act into the arrangement of the

¹⁷ Also see section 66 (3) and (8) of the Competition Act, 2000.

¹⁸ Sanchit, Supra Note 14, pg 54.

¹⁹ "Consumer Rights", Available on <http://www.business.gov.in>, (Last visited on 8th March, 2013)

²⁰ As provided under the Statement and Objective clause under Consumer Protection Act, 1986.

Consumer Protection Act, have obtained a new meaning²¹. Within the Consumer Protection Act, a ‘consumer’²² cannot take up a case of an Unfair Trade Practice before a consumer forum. It can only be taken up by a consumer association, central government or the State Governments. Thus, within the existing law, a manufacturer whose product is disparaged has no locus standi to seek a remedy. The only choice available is to bring it to the notice of a consumer association or represent to the Central or State government. These are merely slanting course of seeking justice. Even if a firm were to succeed in getting an advertisement blocked through this route, as it is not a party to the case, it would not get any damages for loss of profit. Thus, in actual fact, the ground of comparative representation has become unfettered.²³

3. Trademarks Act, 1999

India enacted its new Trademarks Act, 1999 and the Trademarks Rules 2002, with effect from 15th September 2003, to guarantee protection to domestic and international brand owners, in conformity with the TRIPS Agreement.²⁴

It has opened a new phase in regulating unfair Trade practices in comparative advertising and preventing trademark infringement in India. The Trade Marks Act is an attempt to balance the conflicting interests of the rights of registered trade mark owners and a compelling consumer interest in informative advertising.²⁵ According to the present Act a registered trademark is infringed by a person if he exploits such registered trademark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trademark is registered

²¹ Paolisa Nebbia, “Competition Law and Consumer Protection against unfair Commercial Practices: A more than complimentary relationship” in *The Global Limits of Competition Law*, edited by Ioannis Lianos, D. Daniel Sokol, Stanford University Press, 2012, pg 127.

²² Consumer is defined under section 2(d) of the Consumer Protection Act, 1986. Also see S. Krishnamurthi, *Consumer and Law: Redressal of Grievances*, Vinod Law Publication, 2001, pg 44.

²³ Akheleshwar Pathak, *Supra* Note 6.

²⁴ Priya Bansal, “Use of trademark in comparative advertising: Situation in India”, available at <http://www.legalserviceindia.com/articles/tadv.htm> (Last visited 8th March, 2013)

²⁵ Rashi Saraf, “Overview of Comparative Advertising Laws”, available at <http://www.legalserviceindia.com/articles/tadv.htm>. (Last visited on 10th April 2013)

Section 29(8) of the Trademarks Act outlines the situations in which use of another's trademark in advertising amounts to infringement. At the same time, Section 30(1) provides an escape route for what would otherwise have been an infringing act under Section 29.

According to Section 29(8), a registered trademark is infringed where an advertisement:

- takes unfair advantage or considered to be contrary to honest practice in industrial or commercial matters;
- is detrimental to the trademark's distinctive character; or
- is harmful to the trademark's reputation.

Section 30(1) provides exceptions to the rule, explaining how comparative advertising can concord with honest practice in industrial or commercial matters so as not to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark. Such advertising does not include infringement

Section 29(8) of the Trademark act, 1999 is considered to be unification of laws of unfair competition and unfair trade practices that has set considerations for the use of trademarks in comparative advertisements.²⁶

Therefore, it follows from the above that adding the provisions related to comparative advertising into the trademarks regime has the main objective of ensuring the highest possible balance between two competent interests-competitive freedom and acting against incorrect and incomplete presentation. Although it is probable to have clearer provisions with regard to comparative advertising, however, it has not been so easy in practice.²⁷The explanation for comparative advertising on electronics media lies into their far reaching impact on the mindset of the people at large. though there is no restriction for a tradesman for claiming his/her goods to be of the best in the world which may be an untrue claim, however, in that process disparagement of the products of the competitor is not allowed as the same will amount to infringement of competitors trademark.²⁸In context of comparative advertising it would mean making untrue and deceptive statements about the goods of the competitors to influence the

²⁶ Ashwini Kr. Bansal, "Law of Trademarks in India", (2009), New Delhi, Institute of Constitutional and Parliamentary Studies and CLIPTRADE, pg 507

²⁷ Abhirup Ghosh & Amit Kumar, "Comparative advertising: An Emerging Jurisprudence in Trademark Regime" Madras Law Journal, 248(6) 2010, pg.60.

²⁸ Supra Note, 24. Priya Bansal, "Use of trademark in comparative advertising: Situation in India".

public not to buy. In order to decide the issue of disparagement, a court must come to the deduction as to how many consumers would be influenced by such advertisement and end up purchasing the advertised products rather than the competitor's product. Therefore, from the above it may be deciphered that comparative advertising may be allowed in India to the extent it does not ridicule or take any undue privilege of a competitor's trademark in the course.

4. Advertising Standards Council of India (ASCI) and Comparative Advertising

In addition to the numerous regulations as examined above, in India the Advertising Standards Council (ASCI) was established for protecting the interests of the consumers while observing and guiding the commercial communications.²⁹

To scrutinize advertising in India, ASCI has adopted a Code for Self-Regulation (ASCI Code), which applies to all involved in the commissioning, creation, placement, or publishing of advertisements. ASCI have divided its code into four chapters, as regards the form and manner of comparative advertising is concerned the code under **Chapter IV of the Code for Self Regulation**³⁰ in Advertising stated herein that advertisements containing comparisons with competing manufacturers and sellers are permissible in the interests of vigorous competition and free dissemination of information, subject to the following requirements being satisfied:

- (a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.
- (b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
- (c) The comparisons are factual, accurate and capable of substantiation.
- (d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.

²⁹ Shubhra Deepa Moitra, "The Code of Self-Regulation in Advertising", available at <http://www.legalserviceindia.com/article/l275-The-Code-For-Self-Regulation-In-Advertising.html> (Last visited on 10th April 2013)

³⁰ ASCI Code for Self Regulation in Advertising (2007)

(e) The advertisement does not unfairly denigrate attack or discredit other products, advertisers or advertisements directly or by implication.³¹

The abovementioned principles ensure that advertising activities are conducted in a fair manner, with the interests of all associated groups being secured. Secondly these guidelines do not have the force of law there are merely recommendatory in nature.

CONCLUSION

A scrutiny into the law governing comparative advertising in India reveals that there is a nonappearance of an obvious approach with respect to the cases in which a merchant through comparative advertising extends genuine however irrelevant correlations or when he portrays precisely contenders merchandise. A to a great extent unpleasant and prepared methodology has been taken after, with differing parts of the same being resolved with reference to conflicting standards. Such a methodology is insufficient on a maintainable premise, as the specific utilization of various laws deserts a trail of lacunae in any endeavour to decide question an extensive way. It is a need of hour to reinforce the current lawful procurements and or introduce a new provision in the current Acts to limit and check and check commercial disparaging in comparative advertising.

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³¹ D.P.S Verma, “Advertising and the Law”, Journal of Indian Law Institute, Vol.48 (2), 2006, (April.-June) pp. 267-69.

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