

ADVERTISEMENTS: CREATING PERCEPTIONS IN MINDS

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INTRODUCTION

“Good advertising does not just circulate information. It penetrates the public mind with desires and belief.” – Leo Burnett.¹

Advertisement plays an important role in business. Be it a street vendor or a multi-national corporation, everyone uses advertisement for the promotion of their products. With remarkable changes in techniques and strategies, from hawking to internet, advertisements have come a long way.

Advertisement persuades people to buy product induced in commercial. It works on the consumers' mentality which affects their behaviour for better influence. They build consumers' choice by building a psychology of what is better for the consumers because of which they tend to buy the product so advertised. A brand image is formed in the minds of the consumer through advertisements, which enhances the goodwill and significance of the brand's trademark.

Earlier, advertisements tried to present the product highlighting its own merit, to influence the consumers. However, today, a new strategy is prevalent among the advertisers wherein comparative advertisement came in picture. With the coming of comparative advertisement issues like disparagement, infringement of trademark and unfair competition has increased. These issues arise when during comparison, the advertisement instead of promoting one's good tries to defame or denigrate other's good.

¹ Apoorva Sharma, *Comparative Advertisement and Infringement of Trademarks: A perspective from consumers*, SSRN (Sept. 19, 2018, 11:05 PM), <https://ssrn.com/abstract=1896367>.

The paper tries to study the intricacies of comparative advertisement in connection with infringement of trademark and product disparagement.

COMPARATIVE ADVERTISEMENT

Promotion of various products, organisations, services and even thoughts, through different media platforms, generally, with the help of a recognised support is called advertising. For a business, it is seen as an essential element of promotional strategies. Not only advertisement aids in promotion of a product but also, helps in creating a brand name in the market. However, in recent years, it is being noticed that companies are more inclined towards making their brand look superior to that of their competitors through the help of advertisements. This inclination has led to emerging of a new type of advertisement, generally referred to as Comparative Advertisement.

Comparative advertisement can be defined as a kind of advertisement where two or more recognised brands are compared with each other over a similar product or service, in order to show one's product superior to that of others. Such comparisons in a comparative advertisement can be made either by a clear-cut direct comparison of the product/service with similar product/service of different brands or by comparing ones product/service with that of a rival brand, indirectly or impliedly, without disclosing the name of the rivals.²

The crux of such advertisement is to influence customers and make them believe that the product induced in the advertisement is much better than that of other brands, and also it provides with better money value in comparison. All of it is with a basic agenda of expanding their market and making more of loyal customers. It is, however, important to mention that one of the most crucial element essential for comparative advertisement is a genuine and honest comparison of products. Such advertisement should not intend to belittle the compared product of the competitor.

Comparative advertisement is being used as a tool for promotion pretty often in Indian market, especially after liberalization and globalisation of the economy. Various examples can be cited

² Stephen B. Ash & Chow-Hou Wee, *Comparative Advertising: A Review With Implications For Further Research*, 10 ACR 370, 370-376 (1983), <http://acrwebsite.org/volumes/6143/volumes/v10/NA-10>.

showing comparative advertisement prevailing in the market, like Rin-Tide, Volini-Moov, Pepsi-Coke-Thumbsup-Sprite-Mountain Dew, Cherry Blossom-Kiwi, Saffola-Fortune etc.

However, many a times while comparing two products, advertisement cross their legal ambits and limits and turns out to be misleading. Not only during such crossing of limits they mislead the consumer but also, often infringe trademarks of rival brands and sometimes also, disparage competitor's product. All of such instances, may make them attract lawsuits for themselves leading to them bearing with heavy compensation charges.

PUFFERY

In the case of *Tata Press Ltd. v. MTNL*,³ Supreme Court, by its decision, made “commercial speech” a fundamental right. Hence, advertising is now within the ambit of Article 19 (1) (a) of the Indian Constitution.

Various techniques are used by advertisers to make the advertisement more influential and appealing, puffery is one such common technique. Puffery refers to the use of exaggerated adjectives and superlatives, like, “best”, “unmatched”, “unbeatable”, etc., to advertise a product.

Puffery was talked of for the first time in English Court in the year 1893, in a case where a manufacturer through his advertisement promised a compensation to any individual who gets infected by flu even after using Carbolic Smoke Balls as per directions given.⁴ The court observed that the promises made in advertisements should not be viewed as per the traditional rules of promises, as such promises are clearly not meant to be taken seriously.⁵

Puffery is an important tool for advertisement as it grabs the attention of the consumer through its bold claims which need not be substantive. Even though puffery is an essential tool it needs to be used with utmost care and precautions.

A café, in Ranchi, named “OMG Café” is situated above “The Best” restaurant, in the same building. After the opening of “The Best”, OMG changed its tagline to “We are above the

³ AIR 1995 SC 2438.

⁴ *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (U.K. Ct. of Appeal 1893).

⁵ *Ibid.*

best.” Use of such tagline would not lead OMG to any kind of lawsuit because such advertisement comes within the ambit of puffery. OMG did nothing but, used an exaggerated superlative claiming itself to be “above the best” to advertise. Also, through this tagline, there is no defamatory statement made towards “The Best” restaurant per se.

There’s a fine line difference between permissible and impermissible kinds of puffery in any advertisement. Studying recent judgments and case laws, it is evident that the more an advertisement is inclined towards being a comparative advertisement, the more is the chance of the court not accepting and acknowledging the claim so made to be just a mere use of puffery.

DISPARAGEMENT

As per the Black Law Dictionary, the term “disparage” means “to connect unequally.”⁶ Product disparagement can be said to be an act of making a misleading or an untrue statement, about a product of a rival, which would have an impact on the consumers influencing them not to prefer or buy that product. There are certain principles which are essential in the matter of disparagement. These are mentioned below:⁷

- Commercial speech comes within the ambit of Article 19 (1) (a) of the Indian Constitution and hence, is protected under the same.
- False, unfair, misleading or/and deceptive advertisement are not appreciated and must be avoided.
- Certain grey areas may be present but is should be taken as an attempt merely to glorify a product and not as a serious fact or otherwise.

If an advertisement amounts to be false, unfair, misleading or deceptive, then in such a case, the same advertisement is not protected under Article 19 (1) (a). Such advertisements may amount to product disparagement, creating doubts in the mind of the consumers for a particular product, through their false statements, with an aim to cause monetary harms. In a leading case,⁸ Delhi High Court was in a view that when one says his product is better than the others

⁶ Garner Bryan, A Black’s Law Dictionary, 2nd edn (West Publishing Co.) 2001.

⁷ Madhavi Goradia Divan, FACETS OF MEDIA LAW, 2nd edn. (Eastern Book Company) 2018.

⁸ Dabur India Ltd. v. Wipro Ltd. (2006) 32 PTC 677 (Del).

and when one says others product is worse/inferior to that of his, both are two very different statements.

Calcutta High Court, in 1999, laid down certain principles in respect to disparagement in the case of *Reckitt & Colman of India Ltd. v. M. P. Ramchandran*,⁹ which are enumerated below:¹⁰

- A businessman has the right to claim his product to be the best amongst all, no matter if such a claim isn't really true.
- A businessman can even declare his product to be comparatively better than that of his rivals, even if such a declaration holds no truth.
- In order to uphold above declarations, a businessman may compare the merits of his product with that of his rivals.
- However, during such declarations he cannot make a statement claiming others product to be bad/worse. Such statements may make him liable for slander.
- In cases of slander, a suit for defamation may lie, wherein, court may restrain further repetition and usage of such defamatory statements by granting injunction.

TRADEMARK INFRINGEMENT

Any symbol, words, sign or any combination of these, used by a businessman in order to differentiate his product from those of his competitors, can be termed as “trademark”.¹¹ Trademark is an important advertising asset for both, the traders as well as the consumers. Use of trademarks for products by the trader, restricts his rivals to use his mark and also, stops them from making profits by using similar or duplicate marks. Apart from traders, trademarks protects the consumer's interest. This is done as consumers can relate the product with its trademark and can be sure of its quality. Goodwill and reputation is obtained by the businessman through trademarks.

⁹ (1999) 19 PTC 741 (Cal).

¹⁰ Madhavi Goradia Divan, *FACETS OF MEDIA LAW*, 2nd edn. (Eastern Book Company) 2018.

¹¹ Sujay Dixit, *Comparative Advertisement & Infringement of Trademark*, LEGAL SERVICE INDIA (Sept. 29, 2018, 05: 51 PM), www.legalservicesindia.com/article/604/Comparative-Advertisement-&-Infringement-of-Trademark.html.

Seeing the importance of trademarks, competitors often try to imitate and duplicate trademarks and use it to make profits by doing business on goodwill on others trademarks.

Misuse, use without permission and/or illegal use of someone's trademark and violation of the exclusive trademark rights vested with the actual owner of the trademark, constitutes the offence of trademark infringement.¹²

The above discussed topics are, in one way or the other, inter-linked with one another and hence, is accordingly dealt with in the paper, henceforth.

PUFFERY AND DISPARAGEMENT

Hyping of one's own product does not amount to any offence when such exaggeration is merely a puff. In most of the cases, over-exaggeration and apparently untrue statements are acceptable as a part of commercial speech in an advertisement, provided that such statements is clearly suggestive of being a hyperbole and not a false claim in regard to the product so advertised. "Trade puffery" is legal as per Section 36 A (1) (x) of MRTP Act.

In cases of disparagement, the tool of puffery is used to compare two products. Till the time such comparison is made to show the advertised product to be better instead of castigating the compared product, nothing amounts to disparagement. But, when any statement, possibly false, is made in an advertisement which may amount to causing harm to the goodwill and reputation of the rival company/brand, disparagement is said to be done.

However, in practice, it is difficult to distinguish between puffery and disparagement. A classic case which can illustrate the fine line difference between the two is *Pizza Hut Inc. v. Papa John's International Inc.*¹³

Papa John's in its marketing campaign used the slogan "Better Ingredients. Better Pizza." Not only this, in its campaign Papa John's claimed they used "clear filtered water" for making dough whereas its rivals, which includes Pizza Hut, for preparation of dough used "whatever

¹² *Trademark Infringement*, COMPANY LAW INDIA (Sept. 29, 2018, 06:14 PM), www.companylawindia.com/trademark-infringement/.

¹³ 80 F. Supp. 2d 600 (N.D. Tex. 2000).

comes out of tap.”¹⁴ Pizza Hut sued Papa John’s in respect to its marketing campaign accusing it for false advertising and disparagement of its competitor’s product. It was held by the jury, during the trial that, the claims and statements made by Papa John’s even if were true, they misled the consumers and hence, an injunction from using the same was granted.

An appeal was made by Papa John’s with respect to the slogan contending that it was within the ambit of puffery and thus, non-actionable. It was observed that prima facie, the slogan used by Papa John’s was mere exaggerated advertising and was not a claim customers would reasonably and solely rely on.

Even then, the jury’s observation, that the slogan used in the marketing campaign was misleading, was upheld by the court. The court was of the view that the slogan of Papa John’s when seen together, along with its entire marketing campaign and its filtered water claim, did not remain a case of a mere use of non-actionable puffery but became a case of product disparagement, where the statements were made in regards of rival’s ingredients which harmed the reputation and good will of the same.

This case very well provides a caution while using puffery in advertisements. This case is a classic example as to how an obvious puffery changes to false statements and results in offence like disparagement.

COMPARATIVE ADVERTISEMENT AND USE OF RIVAL’S TRADEMARK

In this highly competitive market, every business man wants to get the best of the market and for this they prefer using advertisement and often use trademarks, and other symbols with certain information which may influence the consumers. Recent trends have shown businessmen not only use their trademarks in advertisement, but the use of competitors’ trademarks in advertisements is also, piling up.

As per the laws, trademark is considered to be an intellectual property and the company owning a particular trademark, therefore, is entitled to all the intellectual property rights vested on

¹⁴ Roger Colaizzi et al., *The Best Explanation and Update on Puffery You Will Ever Read*, 31 (No. 3) ANTITRUST 86, 87 (2017).

them, which also include protection of those rights. A company can use his rivals' trademark in accordance with honest commercial matters as long as such use does not damage the goodwill and reputation of the rivals' trademark or such use is not to gain unfair advantage over the rivals' product.¹⁵ It is to be kept in mind that use of puff to the extent of calling one's own product to be the best is permissible but using it to show that the competitor's product is bad leads to product disparagement.

COMPARATIVE ADVERTISEMENT, DISPARAGEMENT AND TRADEMARK INFRINGEMENT

Interlink between comparative advertisement, disparagement can be best explained through various case laws in relation to the same. Hence, some of the landmark cases with respect to the comparative advertisements and disparagements are discussed below:

i) **New Pepsodent v. Colgate**¹⁶

In an advertisement, new Pepsodent claimed that their product was 102% better than that of the leading brand of toothpaste. This comparison was made in commercial TV ad, where saliva of two boys were examined after they brushed their teeth. One boy was made to brush his teeth by Pepsodent toothpaste and the other by the toothpaste of the leading brand. The experiment with the saliva showed that the saliva of the latter had a great amount of germs. Then, the boys were asked which toothpaste did they use, the first boy said Pepsodent, while in the case of latter, the voice was muted. However, the lip movement of the boy clearly showed that Colgate was being referred. Also, as Colgate has been a recognized and very old brand of toothpaste and is often used as a synonym to toothpaste, it is obvious that Colgate was being referred to as the leading brand in the advertisement.

It was held that Pepsodent was liable for disparagement.

¹⁵ Apoorva Sharma, *Comparative Advertisement and Infringement of Trademarks: A perspective from consumers*, SSRN (Sept. 19, 2018, 11:05 PM), <https://ssrn.com/abstract=1896367>.

¹⁶ Hindustan Lever Ltd. v. Colgate Palmolive Ltd. and Anr., AIR 1998 SC 526.

ii) Pepsi v. Coca Cola¹⁷

In an advertisement, a lead actor asks a kid about his favourite drink and his answer is muted. However, his lip movements makes it clear that Pepsi was being referred. Then, kid is asked to taste two different drink and asks him again, which drink the children will like. The kid pointed towards one of the two drinks. When the lid of both drinks are opened, it is shown that the drink pointed by the kid reads “Thumbs Up” and the other drink reads “Pappi” which has resemblance to “Pepsi”. The kid is shown to be embarrassed for choosing Pepsi before. In some other advertisement, Coca Cola used the slogan as “Wrong choice, baby. Thumbs Up is the right choice.” Pepsi sued Coca Cola on grounds of misuse of trademark and product disparagement. It was held by the court that the advertisement was disparaging and harming the goodwill of Pepsi. Also, use of the term Pappi which is similar to the trademark of Pepsi is deceptive and amounts to infringement of trademark.

iii) Britannia v. Unibic Biscuits India¹⁸

Unibic launched a new biscuit “Great Day” with a tagline saying “Why to have a Good day, when you can have a Great day.” This was a direct comparison made by Unibic to the Britannia’s biscuit “Good Day”. The tagline clearly tried to say that consumers should not go for something which is merely “good” when they have the option for “great”.

Britannia sued Unibic on the ground of infringement of trademark. The court held that the tagline used by Unibic tried to use certain facts to make an image in the mind of consumers that no other facts are true and thus, such over-exaggeration of facts amounts to disparagement of the “Good Day” biscuit of Britannia. Such disparagement, therefore, amounts to trademark infringement. Hence, injunction on further use was granted.

iv) Dabur India Ltd. v. Wipro Ltd. Bangalore¹⁹

Wipro, in its commercial showed a lady holding a bottle of honey which pretty much resembled the bottle of Dabur, but the label on the bottle was not there. Also,

¹⁷ Pepsi Co. Inc. v. Hindustan Coca Cola Ltd., 2003 (27) PTC 305 (Del).

¹⁸ Unibic Biscuits India Pvt. Ltd. v. Britannia Industries Ltd., MIPR 2008 (3) 347.

¹⁹ Dabur India Ltd. v. Wipro Ltd., Bangalore. 2006 (32) P.T.C. 677.

the voice over said that the bottle was brought around 2 years ago but still is “jaisi ki waisi.” And then, there is another woman holding a bottle of honey of Wipro Sanjivini saying that it got immediately consumed. Dabur filed a complaint against Wipro claiming product disparagement as the consumers will recognize the bottle held by the first woman by its distinctive size and shape.

The court held that there is no disparagement made by the advertisement of Wipro honey. It is clearly evident that the commercial tried to intend that product of Wipro is better than that of Dabur. In this case, the commercial merely compares the two products and claims one to be superior, it did not disparage the other product.

Case Example	Issue	Court's Finding
New Pepsodent v. Colgate	Claim of Pepsodent to be of superior quality in comparison to Colgate through a TV commercial.	Disparaging
Pepsi v. Coca Cola	TV commercial comparing Thumbs Up with Pepsi, with the use of deceptively similar word “Pappi”.	Disparaging and infringing trademark
Britannia v. Unibic India	Direct comparison of Good Day biscuits with Great Day biscuits through tagline.	Disparaging and infringing trademark
Dabur v. Wipro	TV commercial comparing two bottles of honey, one resembling the bottle used by Dabur, however, it was without any label/tag.	Not disparaging

Table 1: Indian Judiciary's approaches on cases of Comparative Advertisement

LEGAL PROBLEMS

i) No proper definition of comparative advertisement

Comparative advertisements brought with them a great deal of advertisement misuses, like false claims, misrepresentation and disparagement of products. When an advertiser claims of something which is not fulfilled by the product it amounts to false claim. Product disparagement is when the advertisement defame or calls the product of the rival to be inferior. Where the advertisement is misleading, it results in misrepresentation. The issues relating to commercial advertisement is settled through judicial pronouncements only as there is no specific laws regarding the same or any statute that defines and regulates the use of comparative advertising.

ii) No identification of role of advertisement under trademark regime

As per the trademark law, protection is given to the trademark owner against the misuse/ illegal/ commercial use of trademark by anyone which may result in confusing the consumer and thereby, cause harm to the reputation and goodwill of the brand. However, the law, in general, does not talk about the use of rival's trademark in a non-confusing manner.

There are two main functions of trademark. Primarily, identification of source of product and secondly, promotion and indication of quality.²⁰ In comparative advertisement, use of trademark is done to compare the quality and not the source of the product. Such use as seen through traditional theory, does not violate any rights of the owner of the trademark. It is a question whether the use of rival's trademark to compare it one's own should amount to trademark infringement or not, as the secondary function of the trademark is promotion and quality indication.

iii) No protection to genuine competitors under trademark law

Trademark laws discusses the permissible limits of comparative advertisement but, what it does not provide is what exactly amounts to advertisement. Not only that, various terminologies in relation to comparative advertisement is not defined under

²⁰ Trademark, ADVOCATE KHOJ (Oct. 07, 2018, 04:12 PM), www.advocatekhoj.com/library/lawareas/trade/functions.php?Title=Trademark&STitle=Functions%20of%20a%20Trademark.

the statute, like false claims, disparagement, honest practice etc. and also it does not discuss when a particular advertisement amounts to product disparagement and what remedies are to be provided in such cases. All of these ambiguities have made the law static.

iv) No proper cognizance on comparative advertisement by judiciary

Comparative advertisements, which do not disparage another's product and which do not indulge in taking unfair advantage of a registered trademark, shall be permitted, has been a general approach of the court towards the cases of comparative advertising. Provisions are made against unfair trade practices under Consumer Protection Act, 1986. However, a complaint against unfair trade practices can be filed by any consumer association, state governments or central government.²¹ Thus, in order to seek remedy, under the present law, a trader or a businessman whose product has been disparaged, because of unfair trade practice, has no locus standi. The manufacturer can only bring such disparagement to the notice of the consumer association or government. Even if they take up the case and succeed to grant injunction to such advertisement, the manufacturer or the business man will not get any compensation for loss incurred, as they are not the party in the case. All of this becomes a vague route to demand justice.

RECOMMENDATIONS

- Mere judicial pronouncements to deal with the various advertisements is not sufficient. Law needs to be made in regard to the same. Issues, like, what is comparative advertisement, what amounts to disparagement of product and the remedies for the same, needs to be dealt with a framework which amalgamate all these issues and codifies law. Statutes and provisions are made by the legislatures in the Parliament. Being a democracy, statutes so made, reflects the majoritarian will. Hence, a statute or a provision dealing with the issues in

²¹ *Consumer Court*, CONSUMER HELPLINE (Oct. 07, 2018, 04:56 PM), <https://consumerhelpline.gov.in/ConsumerCourt.pdf&ved=2ahUKEwiS06ORmvTdAhVJO48KHbeLAHMQFiAAegQIARAB&usq=AOvVaw2P6Iv7yGa4HKRF9XGvYNys&cshid=1538911261064>.

respect to comparative advertisements will have an upper hand over judicial pronouncements.

- Judicial pronouncements can be completely regarded or disregarded as per the view of the court as precedents. However, a codified and settled legislation will bring certainty in dealing with such issues.
- Various terminologies, like false claims, honest practice, etc. needs to be properly defined. Judicial interpretations and dictionary meanings causes procedural complexities in understanding and thereby, dealing with the problem.
- There is a need to come up with specific provisions which addresses manufacturers and businessman. There is an urgent need of laws that provides for the way a trader can get adequate compensations and seek remedies if their products are disparaged or any unfair trade practices are used against them.

CONCLUSION

An old saying “all that glitters is not gold,” sounds apt for the fascinating world of advertisements. Comparative advertisement is no doubt a very effective method for trade promotion, however, half-truth and hidden flaws may lead to violating consumers’ as well as rival’s rights. Though, Article 19 (1) (a) of the Constitution provides commercial speech to the businessmen as their fundamental right but that too, comes with some restrictions and are not to be lest unregulated.

Comparative advertisements are desirable in the interest of the consumers. But, such advertisements should not be on the cost of disparaging product of the rival brand or destroying the goodwill of their trademark. It is needed that a balance is made between the interests of the consumers and that of the traders, so that both their rights and interest are taken into consideration and safeguarded properly. All of this can be achieved through a proper legislation passed by the Parliament, coupled with a strong enforcing and executive mechanism.