

LAWS GOVERNING COMPARATIVE ADVERTISEMENT IN INDIA

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ABSTRACT: *Advertisements are designed to make potential buyers aware of the goods and services. In the short period of an advertisement, each business intends to change the most effect on the consumer's mind, and thus, advertising wars between market players trading in similar products/services are nothing new. This is referred to as "comparative advertising" in popular language. Often these similarities are veiled but sometimes explicit. This article addresses the law in India concerning comparative ads and the issues involved in it. In addition to the recent development of case law in which courts have taken into account consumer interest in considering comparative advertising cases.*

KEYWORDS: *Comparative Advertising, Trademark, Trademark Infringement, Unfair Competition, Injunction, Trade Marks Act, 1999, Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, Competition Act, 2002, Advertising Standards Council of India, Consumer Complaints Council.*

INTRODUCTION

The focus of the Trademark Act is to safeguard customers from uncertainty about the source of their purchases. When it comes to advertising any products or services, the customer is still the focal point. The Trade Marks Act, 1999 includes clear provisions dealing with the question of infringement of a trade mark by comparative ads. The aim behind this provision is to ensure that, through ethical comparison between the goods, an advertiser can promote his/her products. If products/services are diligently compared, this could be done. Advertising should also be conducted in good faith and on a factual basis to help customers make educated and impartial decisions about the use of goods and services. With rapid economic growth and technological changes, the average Indian customer today has a large range of goods and services to choose from, causing uncertainty. This is where comparative advertising will come to the rescue, as the contrast of two items helps the customer to make the right decision.¹

DISCUSSION

Impact of comparative Advertisement on Trademark Infringement

Advertising can be defined as "representing a trade, company, craft or profession in order to promote the supply of goods" and comparative advertising is "any advertising that explicitly or implicitly mentions a competitor or products or services offered by a competitor." In Article 19(1)(a), the Constitution of India guarantees freedom of speech and expression by referring to "advertisements for commercial freedom of speech" held by the Supreme Court of India. The concept behind comparative advertising is to show the customer why the products/services of the advertiser are superior and must be chosen over the products/services of its competitor by contrasting its specific pros and cons critically with that of the competitor. Comparative

¹Gilson J, Trademark protection & practice 1-1'1.03 (Mathew Bender), Cited in The antitrust model of extra territorial trademark jurisdiction; Analysis and predictions after F. Hoffmann –la Roche, Emory International Law review, 20 (2013) 651-698.

advertising plays a critical role from the viewpoint of an advertiser in explaining specific features of his product/service. However, comparative advertisement plays a critical role in determining products/services according to the requirements from the viewpoint of a customer. Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, which controlled competition in India prior to the Competition Act, 2002, which included provisions relating to 'another person's dispersal of products.' Under the MRTP Act, any portrayal that disparages or offers misleading information about another person's goods or services constitutes unfair trade practises in comparative advertising. 'Unfair competition' is characterised by the Competition Act, 2002, as the implementation of practises such as deliberate reduction of production to increase prices, collusive price fixing, establishment of barriers to entry, tie-in sales, market allocation, predatory pricing, discriminatory pricing, etc.

'Trademark means, in accordance with section 2(zb), any mark and was capable of being graphically interpreted and is thus capable of distinguishing the products or services of one person and those of others.' Section 29 of the Trademarks Act 1999 notes that 'any advertising of this kind of mark is infringed by a registered trademark if it takes undue advantage of such advertising and is counterproductive to honest market standards or is harmful to the unique quality of the mark.' There are some exceptions to this clause, which states that 'nothing shall preclude any person from using a registered trademark in order to distinguish products or services as those of the proprietor, given that the use is in compliance with honest practises in industrial or commercial matters and is not intended to take undue advantage of, or to be harmful to, the distinctive character of the trademark.' If the use of a trademark is bonafide and is in compliance with honest standards and if it does not take undue advantage of the goodwill and credibility of the trademark or is detrimental to its character, the Act permits comparative advertisement. It is appropriate to note that the Act does not describe "honest practise."

The advertising standards council of India code on advertising

A self-regulating cooperative body of the Indian advertising industry is the Advertising Standards Council of India ('ASCI'). A Code for Ads was drawn up by ASCI. According to Rule 7 of the "Program and Advertising Codes prescribed under the 1994 Cable Television Network Rules, no advertising in contravention of the Advertising Standards Council of India Advertising Code shall be broadcast on cable services." Chapter 4 of the ASCI Code deals with comparative advertising, stating that comparative advertising is acceptable in the interests of cable services. The objective of the code is that the advertisement shall not take unfair advantage of the goodwill and the reputation of the advertised mark. Secondly, the subject matter should not be picked in a way that confers a competitive advantage on the advertiser. The ads should clearly represent the aspects of the goods under comparison. Thirdly, contrast should not deceive the customer either and should not undermine the other marketed product.

Judicial interpretation OF Comparative Advertisement

As seen in the case of Reckitt & Coleman Of India Ltd. v Kiwi T.T.K. Ltd., the High Court of Delhi held that "the advertiser can suggest that his goods are indeed the best in the world even though it is untrue," the Indian judiciary construed the comparative advertising and also the degree to which it is permitted. The advertiser should equate his goods with those of the competitors and can state because his goods are better; but he cannot say in doing so that the goods of the competitor are poor as this will amount to defamation. If there is no defamation

of the goods because action lies where there is such defamation, no claim for damages occurs.² In this respect, the Court has the right to issue an injunction order. The advertised surly has the right to say and state that his goods are of the highest quality but cannot defame the goods from other rivals. In this case, the court has drawn a distinction in comparative ads between what can and cannot be said. The same happens in the case of Pepsi Co. Inc. & ors. ors. "Hindustan Coca Cola Ltd. v Hindustan Coca Cola Ltd., it was held that "it is equally intolerable to the generic disparagement of a rival product without clearly defining or pin picking the rival produc.³

With respect to Karamchand Appliances Pvt. Uh, Ltd v Sh. The court held that "while claiming that the goods of a manufacturer or a trader are the best, the Daiquiri Brothers and Ors may not give cause of action to the other trader or producer of similar goods." The aggrieved trader will be entitled to obtain relief, through redress, by means of a prohibitory injunction, if the rival manufacturer or trader dismisses or defames the products of that other manufacturer or trader. In Dabur India Ltd. v Wipro Ltd and Dabur India Limited v Colgate Palmolive India Ltd, the Court took the same view. "In this case, the Court noted that "there is no fixed formula to determine whether or not the products of a producer are disregarded and will depend on the facts and circumstances of each case. Similarly, the Hon'ble Court also asserted in the case of In Dabur India Ltd. v Colgate Palmolive India Ltd. that "glorifying one's product is permissible if it does not ridicule or criticise the competitors' products/services." The Godrej Sara Lee Ltd. v Reckitt Benckiser (I) Ltd decision is an important decision in which the definition of honest comparative ads was clarified by the Court. In this case, the defendants marketed 'Mortein' as their offering. This feature was illustrated in the commercial, which was intended to kill both cockroaches and mosquitoes. The plaintiff argued that their 'Hit' product, which had two distinct products for killing cockroaches and mosquitoes, was disparaged by this. The Court noted that 'the advertiser is entitled to boast of its technical supremacy over the competitor's product and found that the advertiser was able to use a single product to destroy two separate species of insects without undermining the products of the plaintiff, by no way ignoring the product of the plaintiff.'⁴⁵⁶

In conclusion, the laws laid down by the Indian judiciary on comparative advertising are that an advertiser engaged in comparative advertising should not defame or disparage his opponent's products by puffing up the advertiser's own product, the traditional view is that puffing can be performed to any degree as long as the products of the rivals are not denigrated. Although the comparative advertising scenario has been altered and substantially established, a conclusive decision by the Supreme Court is awaited to address the inconsistency in this regard.

CONCLUSION

Influential ads may alter the way a product or a service is viewed by consumers. If achieved in an objective and truthful way. However, it is very important to have an advantage in the era of cut-throat rivalry between rivals in the market. Businesses today have a presence in many

² Reckitt & Colman of India Ltd. v Kiwi T.T.K. Ltd, 63 (1996) D.L.T. 19.

³ Pepsi Co. Inc. & ors. v Hindustan Coca Cola Ltd, 2003 (27) PTC 305 Del.

⁴ Karamchand Appliances Pvt. Ltd v Sh. Daiquiri Brothers and Ors, 2005(31) PTC 1 Del.

⁵ Dabur India Limited v Colgate Palmolive India Ltd, AIR 2005 Del 102.

⁶ Godrej Sara Lee Ltd. v Reckitt Benckiser (I) Ltd, 2006 (32) PTC 307.

jurisdictions, with the Internet as a platform and globalisation playing an important role. The laws concerning comparative ads have been substantially established in India. The area of comparative advertising has now brought much-needed clarification to several years of controversy and a series of judicial pronouncements, but the road is still long ahead.