

COMPARATIVE ADVERTISING: PROBLEMS AND POTENTIALS UNDER TRADEMARK LAW IN INDIA

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Abstract: *This article emphasis on the concept of trademark infringement, comparative advertisement and when such advertising results into infringement of trademark. It further illustrates the existing legal mechanisms in India to control disparagement in comparative advertising and also recent judicial pronouncements in India on the same. 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. The Author also suggests some measures to prevent disparaging in comparative advertising.*

Keywords: *Comparative advertising, advertiser, competitor, trademark, unfair trade practice, disparagement*

Introduction

In this epoch of ferocious competition, antagonistic promotion and battle of brands, comparative advertising is a very relevant and definitely an interesting phenomenon. We are living in this global village where advertisers are continually trying to dominate the fame by promoting their brand and stating their own products are better than any other in the market. Advertising has become a serious and big business where brands compete with each other by top notch marketing and constant comparison of the merits and demerits of the other brands to prove that one is better than the other. The motive behind such marketing is to create more consumer demand and therefore more sales henceforth more profit, like a chain reaction. Advertisements build up a psychology in consumers mind of what is good an appealing to the

eye as a consequence of which the consumer generally get attracted to the more advertised product and ignore the less advertised one. Advertisements create brand image and reinforce it time and again. It intends to create brand loyalty amongst the users of a particular brand.

Advertising has become an omnipresent phenomenon. From the unknown street vendor to the multi-billionaire multinational corporation, everybody is advertising their goods and services. From drum beating to YouTube, advertising has definitely come of age. It has become a glamorous multibillion dollar business. A sophisticated, fascinating, eye-catching and larger than life industry with the ultimate purpose of standing out amongst others in public eye and making money out of the same. Described as the life blood of free media, it has now become the life blood of competition in market.

It is seen that a tradesman is entitled to declare his goods to be best in the world, even though the declaration may be untrue, the reason being that every individual has the right to believe he is the best and his product is also the best. For the purpose of proclaiming his goods as being the best in the world he might be tempted to compare the advantages of his goods over the goods of others. However, while saying his goods are better than his competitors', can one be allowed to say that the competitors' goods are bad? Another issue here is that whether a seller's use of a competitor's trademark in advertisement which compares the relative qualities of the competitive goods would constitute trademark infringement? The paper seeks to analyse the intricacies of law involved in the concept of comparative advertising in relation with trademark infringement.

TRADEMARK LAW IN INDIA

A trademark is a word, name, or symbol that a seller uses to distinguish goods from those manufactured or sold by others. It simply 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. Registration of trademark is not mandatory but in the present day scenario there is increasing infringement and a lot of cases are challenged so it is advisable to register Trademarks. There is also a need for trademarks to be globally protected. This is said because most have regional or local name brands and most constantly push these weak names while struggling to get global clearance. A trademark can thus be called a device that gives distinctiveness and a mode of identification to a particular product or service.

The main rationale behind trademark is to differentiate the goods of one person from that of another. Therefore a trademark enables a consumer to identify the goods and their origin. This source and identification being the primary function, the secondary function of trademarks is signifying quality, advertising the product and provide information to the budding consumers. Trademarks categorize products and services to the consumer and the advertiser endorse its products and services through the use of trademarks. The advertising function aids in preventing of the distraction of sales to other undertakings. Trademarks also play an important role in providing consumers with the essential amount of information that needs to be communicated.

In reality, some of the functions of advertising can be said to be identical with the function of trademarks and when a consumer buys an advertised product it is because of the acknowledgment of the trademark of the product.

Advertising is extremely significant for businesses, since it is the medium through which companies communicate their brand and products to consumers. Advertisements help companies to build brand equity. It is important to project brand image correctly in an advertisement, as this can leave a lasting impression in consumers' minds. Care must be taken not to use the brand in a descriptive or generic manner, and use of the trademark must be consistent. In case if the mark is so close to its rival that the average buyer is likely to be deceived or confused regarding the source of goods or services then it would raise issues related to trademark infringement.

Trademark Infringement is a violation of exclusive rights attaching to a trademark without the authorization of the trademark owner or any licensee. There are two types of remedies accessible to the holder of a trademark for unlawful use of its replication by a third party. These remedies are: an action for passing off in the case of an unregistered trademark and an action for infringement in case of a registered trademark. An infringement action and an action for passing off are quite different from each other, an infringement action is a statutory remedy and an action for passing off is a common law remedy. If trademark owners do not hold registrations for their marks, the extent to which they will be able to enforce their rights through trademark infringement proceedings will therefore be limited. The Trademark law is very comprehensible about the infringement of trademarks. Section 29 of the Trade Mark Act, 1999 deals in detail about the infringement provisions. Section 29 (1) says that a trademark is infringed by a person who uses the trademark despite not being a registered proprietor and not having the right to use that particular trademark. Moreover, this mark should be used in the course of the trade. This use should in a way mislead the consumers making them believe that the goods belonged to the registered proprietor of the trademark. The other sub provisions also deal with various aspects of infringement, such as the rights of the company whose trademark has been infringed by other company who uses the trademark without any lawful right to use it.

On the other hand comparative advertisement constitute trademark infringement if it is without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trademark

CONCEPT OF COMPARATIVE ADVERTISING

"Anything his can do, mine can do better!" This adage sums up the essence of comparative advertising. There was a time when it was customary in the advertising trade not to even hint at the identity of competitors. But times change and so does the practices of trade and business. This custom too changed and many advertisements now show the competitor's goods, identify them by the trademark, and even invite the buyer to make comparisons. It is a marketing strategy used by the companies in promotion of their products to attract instant attention. '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. 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.'

Typically, comparative advertisements contain more or apparently more information than "normal" advertisement that rely upon traditional salesman "puffery", and that raises the possibilities of benefit to the public as well as the chances of abuse of the same. Comparative advertising enables advertisers to objectively demonstrate the merits of their products. It improves the quality of information available to the consumers enabling them to make more informed decisions relating to the choices available to them as between competing products/services by means of demonstrating its merits over various comparable products. Based on this information, consumers may make informed and therefore efficient choices. Comparative advertising aiming to inform the consumer, objectively and truthfully, promotes the transparency of the market. Market transparency is deemed to benefit the public interest as the functioning of competition is improved resulting in keeping down prices and improving products. Comparative advertising stimulates competition between suppliers of goods and services to the consumer's advantage.

The concept of comparative advertising is construed broadly to include personal comparative advertising, objective comparative advertising, positive or parasitic comparative advertising, negative or critical comparative advertising. It is not necessary for the express or tacit, direct or indirect, reference to the competitor to be identifiable. It can occur without any use of the competitor's trademark at all. Comparative advertising may refer to an indeterminate number of competitors. Thus, advertising claiming the superiority or uniqueness of a product constitutes a form of comparative advertising.

ANALYSIS OF COMPARATIVE ADVERTISING UNDER TRADEMARK REGIME

An important aspect of advertising is the use of trademark of the product or service. What is most conspicuous in an advertisement is the trademark of the product. What sells is the brand name or the trademark. It is the trademark with which the consumers associate the product shown in the advertisement. For example seeing the symbol "M" which is the distinct trademark of McDonalds on a hoarding or on television what flashes in the minds of the public is the famous American fast food chain. Consumers associate product/goods /service with the symbol/trademark that is marketed for ease of promotion. It wouldn't be an exaggeration to say that we live by symbols and buy goods by them as well. A trademark is a form of a merchandising shortcut which induces a purchaser to select what he wants or made to believe that he wants.

The advertisement uses the power of the symbol/mark to draw the prospective consumer towards his product. It is through the advertisement of the mark that the desirability of the commodity is conveyed to the minds of the potential customers. The trade mark has become the outward expression of goodwill, the inanimate, intangible thing that has come to connect the goods with a person. Trademarks create goodwill for the trademark owner as the owner puts his efforts into the promotion of the mark. When a purchaser wants or believes he wants the goods or services symbolized by the trademark, that desire is created by goodwill.

The traditional trademark protection doctrine is based on the identification of the source of particular goods and services. The orthodox justification for protecting trademarks is that trademarks enhance the efficient functioning of a competitive marketplace by ensuring that consumers can either find goods from the same source as goods they have enjoyed previously, or can find goods whose reputation has been advanced through advertising. This source and identification being the primary function, the secondary function of trademarks is indicating quality, advertising the product and providing information to the potential consumers. Trademarks identify products and services to the consumer, and the advertiser promotes its products and services through the use of trademarks. The advertising function assists in preventing of the diversion of sales to other undertakings. Trademarks also play an important role in providing consumers with the necessary amount of information that needs to be communicated. In fact, some of the functions of advertising can be said to synonymous with the function of trademarks and when a customer buys an advertised product it is the because of the recognition of the trademark of the product.

As per the traditional theory of trademark protection the law guarantees the owner, the exclusive right to use the mark for the purpose of identification of his goods and services. This right is protected by the trade mark law against the commercial use of the mark by others, if the use is in any ways likely to deceive the consumers or susceptible to cause confusion. Trade mark laws in general do not prohibit the non-confusing use of another's trade mark. Now this poses an interesting situation when a competitor uses somebody else's trademark not with the intention of causing confusion as to the origin or source but still may cause harm to the trademark owner. Use of rival company's trademark in comparative advertising is one such instance. A comparative advertiser uses the trademark of the compared product to identify product quality and not product source and in seen in light of the traditional theory of protection of trademark 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 of the courts while deciding such cases has been to permit comparative advertisement so long as such advertisement was not detrimental to and did not take unfair advantage of a registered trademark.

The Trade Marks Act, 1999, has incorporated provisions relating to comparative advertising under Sections 29(8) and 30(1). Section 29(8) of The Trademarks Act, 1999 enunciates situations, when the use of a trademark in advertising can constitute infringement. It says that any advertising which is not in accordance with honest practices; or is detrimental to the distinctive

character, or to the repute of the mark, shall be an act constituting infringement. At the same time section 30(1) makes comparative advertising an exception, to acts constituting infringement under section 29. It provides that any advertising which is in accordance with honest practices, and does not cause detriment to the distinctive character or to the repute of the trademark will be permissible and will not constitute infringement.

Thus, non honest practices or the use of trademark that is detrimental to the reputation or distinctiveness of the mark is the only grounds of infringement. The term "honest practice" is nowhere defined. By its very nature, the concept must allow of a certain amount of flexibility. Its detailed contours may vary from time to time and according to circumstances as well as the changing perceptions of what is acceptable. According to Kerly, the term 'honest practices' is a hybrid derived originally from the Paris Convention (article 10 *bis*), "honest practices in industrial and commercial matters" (and now in article 6 of the Trademarks Directive of European Union) and words found in articles 4 and 5 of the Directive: "where use of sign without due cause takes advantage of, or is detrimental to, the distinctive character or repute of the trademark."

The meanings of the expressions 'in accordance with honest practices' and 'is not such as to be detrimental to repute of the trademark' appear to be intertwined- any comparison, which causes detriment to the reputation of a trademark owner, should be dishonest. At the same time, while making a comparison a trader cannot say that the goods of a competitor are undesirable or bad because that would amount to slandering or defaming the competitor and his goods, which would not be in accordance with honest practices, as it would be detrimental to the reputation of a trademark. In case, if no derogatory reference has been made, no action lies against the advertiser, even if the advertisement does not compare like with like and is untrue, as an advertisement has to be 'significantly misleading' in order to be dishonest. Thereby in case, the substance of the comparison remains true, the fact that representation is 'literally false' will not render the advertisement dishonest.

Further, the question whether a particular advertisement is 'honest or not' is greatly open ended, and is to be decided from the perspective of a reasonable consumer i.e. whether a reasonable consumer presumed to ignore claims that are considered to be exaggerated, hyperbole, would be likely to say that the advertisement is honest. There is, however a large and clearly shared core concept of what constitutes honest conduct in trade, which may be applied by the courts without great difficulty 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 gauged against as what is reasonable for the relevant public of advertisements for the goods or services in use. Also, the burden of proof remains upon the trademark owner that the unauthorized use of his mark is not honest, and not upon the user of the mark.

JUDICIAL APPROACH

Indian judiciary has been very vigilant in guarding in the interest of the consumers as well as that of the corporations whose products are seeks to denigrate. The courts have over the time

evolved certain guidelines to check whether there has been any infringement of the rights of the owner or his goods are disparaged through comparative advertising. In *Reckitt & Colman of India Ltd. v Kiwi T.T.K. Ltd.* the court held that –

“I.)A tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue. II) He can also say that my goods are better than his competitors', even though such statement is untrue. III) 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. IV) He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible. V) 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.”

The above principle that while praising its product, an advertiser cannot describe the competitor's product as inferior, thereby damaging its reputation has been reiterated in many cases.

In *Eureka Forbes Ltd., v. Pentair Water India Pvt. Ltd.*, while reiterating the principle laid down in *Reckitt* (1996) held that advertisement is a disparaging one, even in generic sense and hence is actionable and a disparagement can be restrained even at instance of a party who manufactures or trades in that class of goods.

In *Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr.* the court held that

“In the electronic media the disparaging message is conveyed to the viewer by repeatedly showing the commercial everyday thereby ensuring that the viewers get clear message as the said commercial leaves an indelible impression in their mind and so in order to decide the question of disparagement, the following factors have to be kept in mind: (i) intent of the commercial; (ii) manner of the commercial; (iii) story line of the commercial and the message sought to be conveyed by the commercial. Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable.”

In *Reckit Benckiser (India) Limited v. Naga Limited and Ors* the court while expressing its disappointment over not having an authority to check false advertising held that .

“If a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action. I find it difficult, nay impossible, to hold a party liable for libel when all that has been stated by the competitor is the truth. Truth is always a complete defense against any assault or challenge regardless of whether any damage is sustained as a result of it”.

In *Dabur India Ltd v. Wipro Limited*

In comparative advertising, a consumer may look at a commercial from a particular point of view and come to a conclusion that one product is superior to the other, while another consumer may look at the same commercial from another point of view and come to a conclusion that one product is inferior to the other. Disparagement of a product should be defamatory or should border on defamation, a view that has consistently been endorsed by this Court. A manufacturer of a product ought not to be hyper-sensitive in such matters. It is necessary to remember that market forces are far stronger than the best advertisements. If a product is good and can stand up to be counted, adverse advertising may temporarily damage its market acceptability, but certainly not in the long run. The court also said that matter regarding truthfulness of the content of advertising has to be considered (if it at all arises) at the stage of trial but until then the defendant cannot be allowed to go on defaming the Plaintiff on its submission that what it is saying is the truth.

CONCLUSION

“All that glitters is not gold” goes the old adage. And this is apt for advertising industry. Advertisements luring people with subtle truth and lies are inundating the mass media. In times of cut throat competition warring corporations are coming up with more and more sophisticated means of advertising. Comparative advertising is one of the most fascinating techniques adopted by them. Comparative advertising is no doubt one of the most effective methods for advertising. It arouses consumer interest in the product and at the same time promotes competition in the market. It encourages the producers of goods and providers of services to raise their standards to meet the competition. It also helps the consumers in making informed choices. But it is not always that what the consumers are being told is the truth. It can be false, misleading and deceptive.

In the interest of consumers it is highly desirable to have a regulatory advertising regime. In case of disparagement the corporations have only recourse to the trademark Act for protection of infringement of trademark and common law remedies for disparagement. What are honest practices under the trade law is a subjective term. There should be a body to lay down guidelines as to what constitutes such practices. We have High courts Judgements regarding disparagement in comparative advertisement. What is evident from the judgments is that the courts approach has been to protect the goodwill of the owner. We do not have comparative advertisement directives like that in Europe. There should be a commission to regulate advertising practices in the mass media.

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