



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

AN ANALYSIS ON THE LEGAL FRAMEWORK GOVERNING COMPARATIVE ADVERTISEMENTS IN INDIA

Darryl Kleth Quadros, LL.M (Corporate and Commercial Law), Christ (Deemed to be University), Bangalore

ABSTRACT

Comparative advertising, a powerful tool for brand differentiation and consumer decision-making, is subject to a nuanced framework that balances the interests of businesses, consumers, and competitors. This paper aims to provide a comprehensive analysis of the legal regulations governing comparative advertisements in India, shedding light on the relevant statutes, case law, and the implications for businesses and consumers.

The paper begins by examining the statutory framework, primarily the key provisions of the Consumer Protection Act, 2019, and the Trademarks Act, 1999, which have a significant impact on comparative advertising. It explores the permissible limits and restrictions imposed by these laws, including issues related to false or misleading advertising, disparagement, and protection of intellectual property rights. The role of regulatory bodies such as the Advertising Standards Council of India (ASCI) is also scrutinized in ensuring adherence to ethical advertising standards.

Additionally, the paper delves into judicial decisions that have shaped the legal framework for comparative advertisements. It discusses landmark cases that have established precedents for evaluating the legality and permissibility of comparative advertising. Through a critical analysis of these cases, the paper aims to provide insights into the principles that guide the Indian judiciary in deciding cases related to comparative advertising.

In conclusion, this research paper offers a holistic understanding of the legal framework governing comparative advertisements in India, addressing the intricate balance between commercial interests, consumer protection, and fair competition. By examining the legislative and judicial landscape, it provides guidance for businesses and consumers, promoting responsible and ethical advertising practices in the Indian market.

Keywords: advertising, consumer protection, disparagement, intellectual property, Trademark

Introduction:

Comparative Advertising is a form of advertising where a party (a company / advertiser) advertises his goods or services with another good or service which belongs to the same field. This type of comparison may be made on the basis of price, quality, visual illustrations or other attributes. In other words, it is the practice of comparing goods or services of a similar nature and attributes by showing that the one is better than the other. This type of advertising grabs more attention of the consumers as they tend to psychologically manipulate the buyer with regard to the demand of the products of his choice. This therefore affects the goodwill and reputation of the enterprises or manufacturers whose goods or services they are comparing with. The two

Fundamentals of Comparative Advertising are puffery and denigration. Puffery refers to the exaggerated false praise of one's product, claiming it to be better than the other and when this is done excessively and the product of the other advertiser is brought into negative light, it leads to denigration.

The New Economic Policy in 1991 led to the emergence of many new entrants entering the market from all over the world. India further witnessed the enactment of the Trademarks Act, 1999 and the Trademark Rules, 2002 which were in compliance with the TRIPS Agreement.¹ As long as comparative advertising stays away from disparaging another manufacturer's goods and doesn't undermine it, it is acceptable. Disparagement is sometimes referred to as "slander of goods" or "trade libel." There is considerably more to the disparagement charge than just puffery. Because it is so difficult to distinguish between a claim of superiority and a disparagement, customers are quickly persuaded to change their minds. The only available remedy for infringement is an injunction; however, this remedy does not compensate for reputational harm that has already happened; rather, it merely ensures that the wrongdoing should not be allowed to continue.²

Disparagement:

Black's Law Dictionary, (Eighth Edition, 2004) defines "disparagement of goods" as "A statement about a competitor's goods which is untrue or misleading and is made to influence or tends to influence the public not to buy"³

To decide the question of disparagement, following factors should be kept in mind: Intent of commercial, (2) manner of the commercial (3) story line of the commercial and the message sought to be conveyed by the commercial. One of the above "manners of commercial" is very important. If the manner is ridiculing or condemning the product of the competitor then it amounts to disparage but if the manner is only to show one's product better or best without derogating other's product, then it is actionable."⁴

In *SC Johnson and sons, Inc v. Buchanan Group Pty Ltd*⁵, restraining the defendants from using the impugned advertisement, the High Court held that:

"Every comparison does not necessarily amount to disparagement. Consequently, what is required to be answered is:- whether there is denigration of plaintiffs' products. The answer to this question in my mind lies in what is the fundamental purpose for which the product is manufactured. Both the plaintiffs' and defendants' products are kitchen cleaners. Therefore, efficacy in cleaning tough kitchen stains with minimum effort would be the core object in manufacturing a product of such kind. The impugned advertisement undoubtedly shows that "CIF Cream" which is the defendants' product achieves this object quickly with least amount of effort in comparison to the products of its competitor. In my view in the facts of the instant case, the impugned advertisement prima facie does seem to denigrate the plaintiffs' product."

The Indian Constitution:

Article 19(1) of the Constitution of India provides for the right to freedom of speech and expression for public speaking, press, promotion etc. In the case of *Hamdard Dawakhana (WAKF) Lal Kuan Delhi v. Union of India*⁶, the court held that advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Art. 19(1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of

¹ Vandana Pai and Jyotsna Balakrishnan, *When Companies Are Odious: Comparative Advertising and Disparagement*, NLSIU Bangalore – Student Advocate, 2002

² Petty R, *Comparative Advertising in the European Union, International and Comparative Law Quarterly*, 47 (1998) 855

³ Blacks Law Dictionary, "disparagement of goods" https://blacks-law.en-academic.com/8097/disparagement_of_goods, 10.30.2023, 22.56

⁴ *Rickett and Coleman v. Kiwi TTK*, (1996) 193 PTC 399.

⁵ *SC Johnson and sons, Inc v. Buchanan Group Pty Ltd*, 2010 (42)PTC(Del).

⁶ *Hamdard Dawakhana (WAKF) Lal Kuan Delhi v. Union of India*, SCR 1960 (2) 671

freedom of speech for the object is not propagation of ideas- social, political or economic or furtherance of literature or human thought.

Monopolies and Restrictive Trade Practices Act, 1969:

The Act was enacted in 1969 and later in 1984, the amendment was made in the Act to introduce the chapter on 'Unfair Trade Practices'. The powers of Director General of Investigation and Registration allowed it to take actions on the complaints made or on its own to investigate the matters related to restrictive or unfair trade practices in India.

Section 36 A (1) (x) of the MRTP Act contains the provisions pertaining to comparative representation. According to this, comparative advertising would come under the ambit of this section if any of the following practices is adopted, namely:

- Make an oral, written or a visible representation which gives false or misleading facts.
- To advertise a false or deceptive statement disparaging the goods, services or trade of another person.
- Make false representation of goods with regard to their quality, quantity or utility.

However, there is no provision in the MRTP Act for seeking prior approval of the commission (authority) as to the contents of an advertisement, which may be issued by a business enterprise for the promotion of the sales of its products.⁷

The Consumer Protection Act, 1986:

The Consumer Protection Act, 1986, is an important piece of legislation in India designed to safeguard the interests of consumers and protect them from unfair trade practices, including deceptive advertising. In the context of comparative advertisements, the Consumer Protection Act, 1986 plays a significant role by providing consumers with a legal framework to seek redressal for false or misleading claims in advertisements.

- **False and Misleading Advertising:** The Act prohibits false or misleading advertisements, which includes comparative advertisements that make false claims about a product, its attributes, or the competitor's product. If a comparative advertisement misleads consumers and affects their purchasing decisions, it can be challenged under this law.
- **Right to Seek Compensation:** The Act gives consumers the right to seek compensation for any loss or injury suffered due to misleading advertisements. If a comparative advertisement leads consumers to make a purchase that results in harm or loss, they can file a complaint with the appropriate consumer forum.
- **Unfair Trade Practices:** Section 2 (r) of the Act defines Unfair Trade Practices. Comparative advertising that disparages a competitor's product unfairly or deceives consumers can be considered an unfair trade practice under the Act.⁸ Such practices can be challenged, and businesses engaged in such practices can face legal consequences.
- **Jurisdiction of Consumer Forums:** The Consumer Protection Act provides for the establishment of consumer forums at different levels, from district to national commissions. Consumers can file complaints against misleading comparative advertisements at the relevant consumer forum, depending on the value of the claim. These forums have the authority to award compensation and issue orders to stop misleading advertising practices.
- **Legal Recourse:** Consumers have the right to seek legal recourse under the Act if they have been harmed by false comparative advertisements. They can file complaints, seek compensation, and hold businesses accountable for their advertising practices.

⁷ NAHAR MAHALA AND ADI TALATI, COMPETITION ACT, 2002: LALW, PRACTICE AND PROCEDURE (Commercial Law Publishers, 2006)

⁸ The Consumer Protection Act, 1986, §2(r).

Trade Marks Act, 1999:

The Trade Marks Act, 1999 and Trademark Rules, 2002 came into existence in 2003 in order to protect the trademarks of domestic and international proprietors. Infringement can be claimed under the following grounds:

- Likelihood of confusion
- Likelihood of dilution

Advertising Standard Council of India:

The Advertising Standards Council of India (ASCI) is a self-regulatory organization in India responsible for ensuring the ethical and responsible conduct of advertising. In the context of comparative advertising, ASCI encourages self-regulation by advertisers, emphasizing certain guidelines and principles to maintain fairness, honesty, and transparency in advertising practices.

ASCI's Code for Self-Regulation: ASCI has developed a comprehensive Code for Self-Regulation in Advertising, which outlines the ethical standards and principles that advertisers should adhere to. This code is a key document that serves as a guiding framework for self-regulation in advertising, including comparative advertising.

Principle of Truthfulness and Honesty: ASCI's code emphasizes the importance of truthfulness and honesty in advertising. In the context of comparative advertising, advertisers are encouraged to provide accurate and verifiable information about their products or services and those of their competitors. This ensures that consumers receive truthful and reliable information to make informed choices.

Disparagement Guidelines: ASCI provides guidelines on disparagement in comparative advertising. Advertisers are encouraged to avoid making disparaging statements about competitors or their products. While comparative advertising is permitted, it should not unfairly tarnish the reputation of other businesses or their offerings.

Self-Regulatory Mechanism: ASCI operates a self-regulatory mechanism where individuals and organizations can file complaints against advertisements that they believe violate the ethical standards set by ASCI's code. ASCI's Consumer Complaints Council (CCC) reviews these complaints and, if necessary, takes action against the advertisers, which may include asking them to modify or withdraw the advertisement.

Industry Participation: ASCI works closely with the advertising industry, including advertisers, advertising agencies, and media organizations, to promote self-regulation. It encourages industry stakeholders to follow ethical advertising practices and support the self-regulatory framework. In summary, the Advertising Standards Council of India promotes self-regulation in advertising, including comparative advertising, by setting ethical standards, emphasizing truthfulness, fairness, and transparency, and laying down standards of guidelines against disparagement. This self-regulatory approach allows the advertising industry to maintain high ethical standards and address concerns related to misleading or unethical advertising practices without the need for immediate government intervention.

Conclusion:

Although India's current legal system is robust, it does not fairly balance the interests of competitors and consumers. When an advertiser wishes to tell the public about a product's distinctive qualities and set it apart from competing offerings, they should be permitted to do so through comparative advertising. The presumption is that generally the competitors who face against comparative advertising are the well-known reputed brands and have enough sources to rebuke back and fight on the competitor's claim. Hence, the

responsibility of fair trade and healthy competition is not only on the government to bring about more specific ways to determine disparagement, but also on the competitors to ethically engage in trade practices.