

Comparative Advertising and its Status in India

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Abstract

After liberalization of Indian Economy competition among different has increase many folds. Now every brand wants to be in the evoked set of consumer's brand. Comparative advertising is one way by which they can grab the attention of the consumer. Comparative advertising helps the consumer in taking decision if it is fair. But many comparative advertising is unfair. To stop such practices many laws are enacted in Indian constitution from time to time. Initially MRTP (Monopolies and Restrictive Trade Practices) Act came into existence then it was amended to Director General of Investigation and Registration (DGIR) and now Consumer Protection Act is enacted. Under the existing law, a manufacturer whose goods are disparaged has no locus standi to seek a remedy. Even if a firm succeeded in getting an advertisement stopped through this route, it would not get any compensation for loss of profit. Due to complication and complexities in accessing the exact loss due to comparative advertising, courts are not awarding any penalties but just stop that advertisement.

Key Words: Comparative Advertising, MRTP, DGIR and Consumer Protection Act.

Introduction

Comparative advertising is the practice of either directly or indirectly naming competitors' in an ad or comparing one or more specific attributes. Advertisers use comparative advertising primarily to promote their product at the expense of another in terms of price, quality, features, performance etc. It is beneficial for consumer since they receive better product information that can help in making rational purchase decisions. Comparative advertisements are more attention grabbing and have high recall rate than non comparative advertisements. It is a matter of concern for the competitors whose products are compared since it affects their goodwill and reputation. Comparative advertisements are useful for the brands having less market share to position itself against the more established brand and to promote its distinctive advantage. Comparative advertisements are not much effective in response

marketing like brand attitude and purchase intention. But direct comparison can help a brand in evoked set of consumer's brands. Such advertisements sometimes create confusion in the mind of the consumers.

As per Indian constitution there are many acts to deal with the subject. Initially, the MRTP Act, 1969 was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, it was amended to add a chapter on unfair trade practices. It resulted a body called Director General of Investigation and Registration (DGIR). On a complaint, or its own, the DGIR could investigate into a claim of a restrictive or unfair trade practice. It also created a judicial body called MRTPC. The DGIR takes cases before the benches of commission. The commission, on judging a practice to be unfair trade practice, could order the offending party to cease or desist the practice. Section 36 A of MRTP Act listed several actions to be 'unfair trade practices'. The provisions pertaining to comparative representation was contained in section 36 A (1) (X) which reads as follows: "Unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any product, adopts any unfair or deceptive practice including in any of the following practices, namely ...the practice of making any statement, whether orally or in writing or by visible representation, which gives false or misleading facts disparaging the products or trade of another person'. Since the MRTP Act has been repealed, consumer protection act covers unfair trade practices. However, one of its major limitations is that firms can not claim relief against unfair comparative advertising under this Act. This can only be taken up by consumer associations, central government or state governments, and in that sense, it does not make good the repealing of MRTP Act. Thus under the existing law, a manufacturer whose goods are disparaged has no locus standi to seek a remedy. Even of a firm succeeded in getting an advertisement stopped through this route, it would not get any compensation for loss of profit.

Examples of some of the companies in India are as follows:

Pepsi Co. Inc. vs Hindustan Coca-Cola Ltd.

Pepsi alleged mockery and derogatory remarks about its product. In a television commercial, Thums Up mocked Pepsi by calling it “Bachchon Wali Drink,” “Wrong Choice Baby,” etc. Although there was no direct reference to Pepsi, it was quite clear which competitor was referred so since the kid in the commercial was shown muttering the word “Pepsi,” which could be seen from his movements although it was muted. Identity was further established with the word “Pepi” written on the competitive bottle with a glob logo in the colour of Pepsi. The commercial was shown to mockingly convey that grown up kids should prefer Thums Up instead of Pepsi, which is sweet and meant for small children. It was held that Thums Up depicted Pepsi in derogatory and mocking manner, which could not be called “puffing up.”

Reckitt Benckiser (India) Ltd. vs Naga Limited and Ors.

Defendant Naga showed a television commercial which depicted a woman in an advance stage of pregnancy needing urgent medical assistance during a train journey. A doctor called for hot water and is handed cake of soap, which she rejected stating that antiseptic soap was needed. It was clearly established that the soap handed over to the doctor was identifiable by viewers as plaintiff's product, namely Dettol soap. The doctor further stated in the commercial, “at a time like this, you do not need just antiseptic, you need a protector.” The defendant's ayurvedic soap was then shown and it was stated that it was a body rakshak soap, the first ayurvedic soap that completely removed all seven kinds of germs and protected from infection. The plaintiff alleged that the commercial disparaged its soap and that the intention behind the commercial was malicious, especially in the view of the act that Dettol was the leader in brand equity. The court held that the defendant had made false statements. Thus, if a competitor makes the consumer aware of his mistaken impression, the plaintiff cannot be heard to complain of such action. It matters little whether consumers' misunderstanding has been contrived by manufacturer or has developed in consumers' minds independently. If any party such as the defendant helps in correcting the error, it commits no illegality.

Regaul vs Ujala Case

A TV advertisement promoting Ujala liquid blue showed that four drops of this brand were adequate to bring striking whiteness of clothes while several spoons of other brands were required for the same effect. A lady holding a

bottle of Ujala was looking down on another bottle without any label, exclaiming ‘chi, chi, chi!’ in disgust. The manufacturers of Regaul, a company brand, complained to the commission that advertisement was disparaging its goods. The commission elaborated the meaning of the provision:

In order to bring a charge under clause (X) of section 36 A (1) it must be established that disparagement is of goods, services or trade of another --- the words ‘goods of another persons’ have a definite connotation. It implies disparagement of the product of an identifiable manufacturer.

The commission was of the view that a mere claim to the superiority in the quality of one's product by itself is not sufficient to attract clause (X). In the advertisement, neither the bottle carries any label nor did it have any similarity with any other brand. The commission, thus, was of the opinion that it could not be classified as a case of disparagement of goods.

New Pepsodent vs Colgate

Hindustan Unilever Ltd. Advertised its toothpaste, ‘New Pepsodent’ in print, visual, and hoarding media, claiming that this particular brand was 102 percent better than the leading toothpaste.’ In the television advertisement, samples of saliva of two boys were taken for testing hours after brushing. One boy had brushed with the New Pepsodent while the other one had used, according to the commentary, leading toothpaste. The test of two samples was visually depicted side by side. The slide carrying the sample of ‘the leading toothpaste’ showed a large number of germs while that of New Pepsodent showed negligible quantity of germs. While the sample was being taken from the boys, they were asked the name of toothpaste they had used for brushing. While one boy said Pepsodent, the response of second boy was muted. However, the lip movement of boy indicated ‘Colgate’. Also, when muting was done, the music played in the background resembled that of the jingle used in the Colgate advertisement.

The market share of toothpaste for Colgate and Hindustan Unilever Ltd. was 59% and 27% respectively. The commission was, thus, of the view that a reference to a ‘leading and famous brand’ implied Colgate. A doubt, however, arises from the fact that the statistics on market's share are produced by market research agencies and consumers may not be aware of this. Thus, a viewer need not necessarily interpret ‘leading brand’ to mean Colgate. The commission, however, was of the view that Colgate has been in business of manufacturing and selling toothpaste in India for more than 50 years. According to the Commission, the word toothpaste has become synonymous with Colgate over the years. In addition, it noted that the jingle in the background was the familiar

one of Colgate. The comparative product in the television commercial could, thus, be identified as the Colgate Dental Cream. Thus, it became a case of comparative advertisement and a claim could be made of disparagement of Colgate's products.

Colgate Dental Cream-Double Protection Case

Hindustan Unilever Ltd. Moved to the commission against the advertisement of Colgate Dental Cream-Double Protection (CDC-DP) saying that it disparaged tooth pastes manufactured by it under various brand names. It contended reference 'ordinary' to all other tooth paste brands other than Colgate. The commission concluded--- for the purpose of disparaging something or some product, some comparison with what is inferior is necessary--- disparagement or an act of disparaging would occur only by comparison with some identifiable product. The commission was of the view that a reference to 'ordinary' toothpaste does not identify any specific product. Thus, commission took the position that the claim of 2.5 times superiority of CDC-DP over any ordinary tooth paste did not refer to any identifiable product or manufacturer. As a result it could not be a case of disparagement of goods.

Onida to Take on Rivals with Comparative Ads

Onida is planning for comparative advertising in print and electronic media against its rivals; LG, Voltas and Daikin in Rs. 35000/ crore durable and electronic segments in India. "The idea is to provoke consumers to look out for products that are best for them rather than falling for brand names," says Vipul Mathur, marketing VP at Mirc Elelectronics which own brand Onida. The campaign is directed towards establishing Onida as a brand that provides innovative products, powerful performance and has substantial price advantage over competition brands like LG, Voltas and Daikin.

Recently advertising space saw war of words between detergent brands Uniliver's Rin and P&G's Tide war and health drink brands GSK's Horlicks and Heinz's Complian. Famous comparative advertisement of Jet-Kingfisher campaigns. When Jet Airways embarked on a campaign to announce: "We have changed", Kingfisher hit back with a hoarding right besides Jet's to proclaim: "We made them change." The duo fought literally on one of busiest crossroads of Mumbai in 2007.

As per Indian constitution commercial speech is treated as a part of freedom of speech and expression guaranteed under article 19 (1) (a) of constitution, judgment given by Supreme Court of India in 1985 on Tata Yellow Pages case. Court has further mentioned in its judgment 'commercial speech' has to be privileged and curtailed

only to the extent it is reasonable for protection of general interests. Court was of the view that 'publicity and advertisement of one's product with purpose of boosting sales is a legitimate marketing strategy.

Court has laid down various principles in deciding about the extent of comparative advertisement.

- Comparative advertising must compare products meeting the same needs or intended for the same purpose.
- Comparative advertising should explicitly or implicitly make clear what comparison is made.
- A case of 'disparagement' arises only if product in question is identifiable. Comparison with 'another' or 'ordinary' product that does not allude to particular brand, cannot give rise to disparagement.
- For 'disparagement,' a direct reference to competitive brand is not necessary. Even an indirect referencing that can identify a particular brand may lead to a case of 'disparagement'.
- Comparative advertising should not mislead consumers about competitor's product with which comparison is made.
- A manufacturer is entitled to make exaggerations like his goods are the best, or in puffing manner compare his goods with competitors', and the same even if untrue, will not give a clause of action to other manufacturers of similar product, unless in doing so the manufacturer says that his competitor's goods are bad, or disparages and defame them.

Under existing law due to complication and complexities in accessing the exact loss due to comparative advertising, courts are not awarding any penalties but just stop that advertisement. By the time this judgment is delivered, company, whose product is compared, incurred huge loss.

Comparative ads exist in other parts of the world. It is common to take on the rivals once in a while with funny ads. In India products in the ads are demonstrated by using an unbranded product. If it is Colgate toothpaste the rival toothpaste packing will be just white in color. Same is the case with any other product.

Hence it is a question of ethics that whether that advertisement is ethical or not.

Conclusion

Comparative advertising is used mainly to disparage the competitor's products sometime directly and sometime indirectly. Many laws are enacted into Indian constitution

to stop unfair comparative advertisements. Due to lack of technically sound mechanism to access the exact loss because of comparative advertising courts are not awarding financial penalties to wrongdoers. Instead courts prefer to stop that advertisement. Now it has become a question of ethics whether comparative advertising is ethical or not.

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