

COMPARATIVE ADVERTISING : IS IT LEGAL ?

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A Pepsi Ad portrayed young people in the distant future finding a relic (a Coke bottle) so ancient they could not identify it, Subway claimed its sandwiches are healthier than McDonalds, Jovan's Second Debut Moisture Retention products claimed to maintain higher levels of moisture in the skin than "the leading beauty fluid" are some of the examples of comparative advertising.

What is comparative advertising?

Comparative advertising is the advertising of the products of a Company by comparing with the products of another Company. That other party being his competitor in the same field of the market. The comparison is usually based on quality, price and durability of the products. This is done with a view to increase the sales of one's own products. When we talk about comparative advertising there are many concerns raised such as the concern of brand owners for their goodwill being harmed, whereas on the other hand, benefits of the consumers. The extent of comparative advertising being legally permissible depends on how it affects various parties like consumers, competitors, proprietary right holders and ultimately the general public. The regulations come, when the advertising oversteps the ethics of generally acceptable competitive behaviour in comparing goods by denigrating another's product.¹

Why is it important?

It is important, as it includes believability, which can be referred to the extent the consumer can rely on that specific information provided in the Ad, the level of involvement and the convenience of evaluations provided to the consumer to know on the first look of the Ad. But such extent of information provided in the Ad should be fair and honest and not with the intention of disparaging the reputation or goodwill of the other brand. Such fair practices are not only advantageous to the companies in competitive environment of the world but also to the consumers.

Regulations:

The Advertising Standards Council of India (ASCI) was established in the year 1985 to self-regulate advertising. The term 'Comparative Advertising' is not defined in the ASCI Code. Chapter IV of the ASCI Code permits comparative advertising containing comparisons with other products, manufacturers and suppliers and that comparison must be factual, accurate and capable of substantiation but there should not be any likelihood of the consumer being misled and the advertisement must not affect the goodwill and reputation of the products of other brands either directly or by implication. In the Trademarks Act 1999, section 29(8) chalks out the situations which constitute infringement of trademark when an advertisement is contrary to honest practices in industrial and commercial matters; detrimental to its distinctive character or is against the reputation of the mark. And section 30(1) allows comparative advertising as an exception to section 29 that in accordance with honest practices in industrial and commercial matters and is not taking any unfair advantage or is detrimental to the distinctive character or reputation the another trademark will not constitute infringement and thus is allowed by the law.

Judicial response to comparative advertising:

In a case of Reckitt Benckiser (India) Ltd. V. Hindustan Lever Limited, [MANU/DE/0967/2008] where the plaintiff filed a petition for restraining the defendant from telecasting the Ad or from denigrating the goodwill and reputation of the plaintiff of the trademark DETTOL. The plaintiff averred that the defendant depicted the soap similar to that of plaintiff's soap in its Ad. It is alleged that the shape and size which is depicted in the Ad is identical to the plaintiff's product but the only thing is the name and the logo are not shown in the Ad. It is alleged that the intention of the defendant is to give an impression that the offending soap is DETTOL. The advertisement disparages the soap thus, starting with a wife proceedings to take new soap to bath with and then the husband who is a doctor and the children telling the lady not to use the soap stating that it is a normal antiseptic soap and such soaps will make skin dry thereby the germs enter the cracks in the skin and so she should use LIFEBOUY as it fights germs and keeps the skin protected.. The vocals use the sound 'dawa' intending to draw the attention of the consumers to DETTOL; and finally the lady is then shown to go and have a bath with LIFEBOUY and comes out satisfied. The Court in this case ruled on two issues:

1. Whether the depiction in the Ad refers to DETTOL soap?

Court held that the two soaps- DETTOL and the offending soap used in the Ad were identical in every respect except the name and the logo are not shown but it is very clear that the defendant meant to refer to DETTOL.

2. Whether the Ad disparages the soap and constitutes an attack on the goodwill and reputation of the soap DETTOL?

The Court finally held that the disparagement made by the defendants in the ad against the plaintiff's soap constitutes an attack on the goodwill and reputation of the soap DETTOL by stating that puffing up one's own product is permissible in law but at the same time slighting or rubbishing or disparaging or denigrating others product is not.

Colgate-Palmolive (India) Limited V. Anchor Health and Beauty Care Private Ltd,
[MANU/TN/0980/2008]

In the Ad telecast by the defendant the actress tells her daughter that the "Anchor" toothpaste is the first toothpaste providing all round protection and the only toothpaste containing Triclosan, Calcium and Flouride. The plaintiff objected mainly on the following:

1. It is the ONLY toothpaste;
2. It is the FIRST toothpaste;
3. The fluoride in the toothpaste gives 30% more cavity protection and
4. The Triclosan contained in the toothpaste is ten times more effective in reducing the bacteria.

Court said that the words FIRST and ONLY falls within the meaning of the Unfair Trade Practice under the Consumers Protection Act 1986. Therefore the respondents are restrained from using the words ONLY and FIRST in the offending advertisement.

Comparison with the laws of other countries:

Like the Indian laws even the laws in UK and US allow comparative advertising to a certain extent as such advertising would help consumers to go through a quick comparison by having a glance at advertisements and as a result this will effectively lower the prices, encourages competition and prevents monopoly in the relevant market.

A US case, Tommy Hilfigher Licensing Inc. V. Nature Labs LLC, (2002),ⁱⁱ where Nature Labs is a pet perfumery selling shop which used “Timmy Holdigger” as its trademarks and used the slogan “ If you like Tommy Hilfigher then your pet will love Timmy Holedigger” in its advertisements. As we all know Tommy Hilfigher is one of the renowned US fashion labels filed a petition against Nature Labs for trademark infringement, unfair competition, trademark dilution and commercial fraud. The Court held that the above would not constitute any fraud as the use of the Tommy Hilfigher by the defendant is a fair parody, a type of freedom of speech which is protected under the First Amendment of the United States Constitution. And also the consumers would laugh at the humour of the parody rather than thinking about the origin of the products. Moreover, this comparison made by the Nature Labs did not bring down the claimant’s products in any way. Thus, the case was dismissed by the US Court.

Whereas in Australia and Argentina no specific law governs comparative advertising.

Conclusion:

Comparative advertising has become the marketing strategy for the manufacturers to show the superiority or better value of its products over the products of it’s competitors in the market. But comparative advertising is acceptable only upto a certain extent where the competitors or other party’s products are not infringed or disparaged. The ASCI allows the comparisons keeping in mind the fairness in competition.

End Notes:

ⁱ NupurKumar, Article on “Comparative Advertising: Accepted competitive behaviour and law disparagement”, Junior Associate, Lakshmikumaran and Sreedharan, New Delhi.
(<http://www.lakshmisri.com/NewsandPublications/Publications/Articles/IPR/comparative-advertising-acceptable-competitive-behaviour-and-law-of-disparagement>)

ⁱⁱ Comparative Advertising laws, by Rashi Saraf and Yamini Das
(<http://www.legalserviceindia.com/article/l182-Comparative-Advertising-laws.html>)