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The importance of being fair

While India has no specific legislation governing comparative advertising, statutes on unfair trade practice and common law need to be considered. Additional lessons can be found in case law

In the fast-moving consumer goods sector, many brands are vying to win consumer attention, and comparative advertising is one technique used to drive sales. However, it remains debatable whether comparative advertising benefits consumers, since it presupposes that facts are not misrepresented.

India has no specific legislation governing comparative advertising and no directives or guidelines outlining the boundaries of what is permissible. However, the Indian Supreme Court holds that commercial speech, which includes advertising, constitutes free speech as guaranteed under the Constitution. Reasonable restrictions are laid down in Article 19(2) of the Constitution, demonstrating that comparative advertising is permitted if it can be shown that it is not an unfair trade practice by statute and under common law. The various statutes and directives employed by warring parties in comparative advertising cases are outlined below. The self-regulating Advertising Standards Council of India (ASCI) promotes the following:

- honesty and truthfulness in advertising;
- decency in advertising, as per the generally accepted norms of society;
- safety and protection of vulnerable sections of society, especially children; and
- fairness in competition.

The ASCI guidelines take the form of a self-regulatory code for members, but the ASCI is not a statutory body and thus the guidelines are advisory only. The ASCI does run a complaint process, but this is generally lengthy and as a result, parties often resort to litigation. From September 1 2011 the ASCI adopted a fast-track process to provide a platform for member advertisers to quickly resolve intra-industry complaints, which is expected to reduce litigation.

In comparative advertising cases a competitor's registered mark is often used for comparison. The use of a registered mark qualifies as fair use if it falls within the parameters of Section 30(1) of the Trademarks Act 1999. If the use accords with honest practices in industrial or commercial matters, and does not take unfair advantage of or be detrimental to the distinctive character or repute of the trademark, then it is not considered objectionable.

The infringement provisions under Section 29(8) of the act provide that use of a registered trademark by an advertiser results in infringement if it:

- takes unfair advantage of the mark's reputation;
- is contrary to honest practices in industrial or commercial matters;
- is detrimental to the mark's distinctive character; or
- damages the reputation of the trademark.

These provisions are often the subject of debate in comparative advertising cases. In particular, the court is often asked to determine whether the comparison has been made with a view to disparaging the goods of the proprietor. Advertisers have adopted several innovative ways to overcome the infringement provisions and avoid a claim, such as not referring to a brand name, but showing the trade dress or packaging of a product.

The courts have tried not to curtail freedom of speech and expression, and have allowed advertisers ample leeway when making 'puff' statements – that is, exaggerated claims about their products. Even untrue claims about a product are often allowed, with the line being drawn only at disparagement or slander of another producer or its goods. As a result, these exaggerated claims regularly feature in comparative advertising, and over time the courts have developed a set of principles to assess the legitimacy of such claims. Some important principles laid down by the Delhi High Court in its landmark judgment in *Reckitt & Coleman of India Ltd v Kiwi TTK Ltd* include the following:

- An advertisement can declare that the advertised goods are the best in the world, even though that declaration is untrue;
- An advertisement can state that the advertised goods are better than those of competitors, even if this statement is untrue;
- An advertisement can compare the advertised goods with those of competitors; and
- An advertisement cannot state that a competitor's products are bad, as this would constitute defamation.

The court held that a manufacturer is entitled to state that its goods are the best and to make statements 'puffing' its goods, but at the same time it must not give a cause of action to other traders or manufacturers as there is no disparagement or defamation to the goods of the manufacturer. However, a manufacturer cannot say that a competitor's goods are bad in order to puff and promote its own goods.

GlaxoSmithKline and Heinz battled recently over disparaging advertisements in relation to their respective health drinks Horlicks and Complan. GlaxoSmithKline objected to Heinz's advertisements for Complan, which allegedly stated that Horlicks was made of cheap ingredients and that Complan contained 23 vital ingredients that promote growth in children. GlaxoSmithKline also objected to another advert in which a Horlicks mother asked a Complan mother how her son had grown so tall and strong. The Complan mother then expounded on the virtues of Complan and asked the Horlicks mother to read the Horlicks label, suggesting that it provided less nourishment and protein.

The court held that the advertisements were disparaging and beyond the realm of permissible puffery. It opined that the repeated use of the words 'cheap' and 'compromise', along with other insinuations, would harm the reputation of Horlicks. The case analysed the permissible levels of puffery and concluded that puffery is allowed, but must not disparage a competitor's claims: "while it may be permissible to state that Product A is better than Product B, it is not permissible to state that Product B is worse than Product A."

In *Dabur India v Colortek Meghalaya*, the court rejected Dabur's claims that the advertisement for Colortek's Good Knight product disparaged its Odomos product. It held as follows: "we feel that notwithstanding the impact that a telecast may have, since commercial speech is protected and an advertisement is commercial speech, an advertiser must be given enough room to play around in (the grey areas) in the advertisement brought out by it. A plaintiff (such as the appellant before us) ought not to be hyper-sensitive as brought out in Dabur India. This is because market forces, the economic climate, the nature and quality of a product would ultimately be the deciding factors for a consumer to make a choice."

It further held that: "there is nothing in the commercial that suggests disparagement of the plaintiff's product. That the commercial simply highlights virtues of the respondent's mosquito repellant that it has certain ingredients which perhaps no other mosquito repellant has."

When a product or brand name is not specifically mentioned and a product class is intentionally denigrated, the advertisement indirectly attacks the company that holds the dominant position in that market. In such cases (depending on the facts), the court has restrained such use, while balancing the need for free speech and looking at the intention behind the advertisement.

In *Dabur India Ltd v Emami Limited*, the Delhi High Court considered an advertisement which stated (in English translation), "Forget Chyawanprash (health tonic) in summer – eat Amritprash instead." The judge held that the advertisement made insinuations against the use of Chyawanprash during summer, and that since Chyawanprash, in its generic sense, was disparaged so too was the Chyawanprash manufacturer Dabur.

In *Dabur India Ltd v Colgate Palmolive India Ltd* Colgate advertised its white tooth powder by showing a celebrity stopping purchasers of competing product Lal Dant Manjan, a red tooth powder, and informing them of its ill effects by rubbing it on a pair of spectacles. The rubbing process was shown to leave marks on the spectacles, and was described as akin to the effects of sandpapering.

The advertisement endorsed Colgate's product as 16 times less abrasive and non-damaging to the spectacles. The celebrity was further heard telling the purchaser that it is easy to replace spectacles, but not teeth. This was held to be disparaging of Dabur's Lal Dant Manjan product, and an injunction was granted against the advertisement. The judge reiterated the principle that when praising its own product, an advertiser cannot describe a competitor's product as inferior, thereby damaging its reputation.

The law seems to be clear on the limitations of permissible puffery, but the Chennai High Court in *Colgate Palmolive (India) Ltd v Anchor Health and Beauty Care Pvt Ltd* took a different view and held that all puffery is an actionable wrong. Colgate was unhappy that Anchor had claimed its toothpaste was "the only and first toothpaste to offer all round dental protection", but the court held that this statement did not amount to disparagement. However, it did rule that superlative claims that are false and misleading are harmful to consumers and are therefore not permitted. The court took the view that the Constitution and the Consumer Protection Act contain reasonable restrictions, and that the interests of consumers must be protected against misleading advertisements. It also held that any puffery amounts to an 'unfair trade practice' under the Consumer Protection Act, and that allowing competitors to puff their products is not in the public interest and should not be permitted. The decision seems to have changed the scope of its enquiry in such cases to finding out whether the puffery is true and whether it has any benefit for consumers. This represents a shift from the line of enquiry in other cases, which has so far focused on whether an advertisement is to be deemed disparaging.

In the absence of dedicated legislation regulating comparative advertising, puffery and denigration have been examined without a uniform standard. The courts' view on denigration, to a large extent, has been consistent, while the view on puffery has seen diverse laws come into play. To balance the interests of all stakeholders, it appears that there is a need for dedicated legislation. WTR

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