

India

RNA Intellectual Property Attorneys

Striking the right balance

Comparative advertising is allowed as long as the advertiser seeks to portray the advantages of its product in a truthful and honest manner. However, the courts have mixed views of puffery

As companies vie with each other to capture the attention of India's growing consumer base, they are increasingly resorting to comparative advertising, in a bid to enhance the visibility of their products in order to drive sales and establish the supremacy of their brands over rival products.

The courts have specifically held that there is no bar against comparing particular features of two products to claim superiority over a competitor's offering or against making a general comparison, as long as this is truthful. When making such a comparison, the advertiser cannot claim that the competitor's product is bad. In other words, the advertiser can claim that its product is superior, but cannot denigrate the competitor's product or call it inferior.

Advocates of comparative advertising argue that it helps to promote healthy competition. However, the downside is that each case is dependent on its facts and advertisers like to push the boundaries to attract consumer attention. While the laws and judicial interpretations have set some boundaries in this regard, different views and wide interpretations abound, making this a grey area.

Applicable legal provisions

Article 19(1)(a) guarantees freedom of speech and expression, including commercial speech. However, this freedom is not absolute and is subject to the provisions of Article 19(2).

Comparative advertising is permissible under the Trademarks Act 1999. Comparative advertising is permitted as long as the rights of the trademark owner are not infringed and unfair advantage is not taken of the competitor's trademark (Sections 29(8) and 30(1) of the act).

The Advertising Standards Council of India (ASCI) – a non-statutory tribunal

comprising an association of advertisers established in 1985 – has specific guidelines to ensure that ads do not violate its code of ethics. These provide as follows

- Ads must be honest and truthful;
- Ads must be decent and non-offensive to the public;
- Vulnerable sections of society must be protected and the promotion of harmful or hazardous products is not permitted; and
- Ads must observe the principle of fair competition.

However, these guidelines are merely advisory or recommendatory in nature. While ASCI members generally abide by the guidelines, there is no effective enforcement mechanism when it comes to non-members.

The ASCI has also signed a memorandum of understanding with the Ministry of Consumer Affairs and Food and Safety Standard Authority of India to tackle misleading ads and claims.

Dos and don'ts

Freedom of speech

To protect the advertiser's freedom of speech, in *Reckitt & Coleman of India Ltd v Kiwi TTK Ltd* (1996) 114 PLR 45 the court enunciated the following principles:

- An ad can state that the advertised product is the best in the world, even though this statement is untrue;
- An ad can state that the advertised product is better than the products of competitors, even if this statement is untrue;
- An ad can compare the advantages of the advertised product over the products of competitors; and
- An ad cannot state that a competitor's products are bad, as this would constitute defamation.

In another recent case, *Havells India Ltd v Amritanshu Khaitan* (Delhi High Court, March 17 2015, CS (OS) 107/2015), the plaintiff challenged an ad in which the defendant claimed to have the "brightest LEDs". The plaintiff was aggrieved by the fact that the defendant chose to compare only two parameters (lumens and price), thereby suggesting that only these two factors were relevant and excluding all other parameters.

The court observed that an ad cannot be found dishonest merely because the advantages of the competitor's product are not mentioned. The court noted that the ad claimed that the defendant's LEDs were the brightest. Since its LEDs had a higher number of lumens, they were naturally brighter than other LEDs. The court held that it is permissible to highlight a feature which sets the advertiser's product apart from competing products, provided that the comparison is honest. The court reiterated that mere puffery does not amount to disparagement.

It is thus clear that while sellers can indulge in puffery in a bid to increase their market share, they cannot resort to dishonest or unfair trade practices, or denigrate or disparage competitors' products.

Protection from disparagement or denigration

In *Dabur India Ltd v Colortek Meghalaya Pvt Ltd* (2010) DLT 278, the Delhi High Court held that the following factors should be kept in mind while deciding whether disparagement has taken place:

- What is the intention behind the ad, as deciphered from the storyline and the message ostensibly sought to be conveyed?
- Is the manner of advertisement or comparison generally truthful or does it



falsely denigrate or disparage the rival product?

- Does the ad have the overall effect of promoting the advertiser's product or showing the competitor in a poor light?

In this case, the court held that the expression "an apprehension of getting rashes and allergy with the use of mosquito repellent creams" was a general proposition which suggested that when a mosquito repellent cream is applied to the skin, there may be an apprehension of rashes and allergy. In no way did this expression denigrate all mosquito creams by suggesting that such creams cause rashes or allergies. It merely suggested that there was less risk of the consumer suffering side effects due to the presence of exclusive ingredients.

The court further held that "an advertiser should be given enough room to play around the grey areas. A plaintiff should not be hypersensitive". The court also stated that while a catchy commercial might cause transient damage, it is the consumer who must make a choice. In the present case, since the appellant's product was referred to neither overtly or covertly, an injunction was refused.

This view was further substantiated in *Marico Limited v Adani Wilmar Ltd* 199 (2013) DLT 663. The plaintiff alleged that the defendant had disparaged the plaintiff's products by making unsubstantiated statements and maliciously comparing the defendant's products with those of the plaintiff. The defendant was selling oil which was solely composed of rice bran oil, whereas the plaintiff was selling a blended oil. Since the oil sold by the plaintiff was blended, it was bound to contain less oryzanol. The defendant's ad claimed that its oil was healthiest in the world and was better than other oils. The court observed that the ad in question aimed only to inform consumers that the defendant's product had a higher oryzanol content, and that while the plaintiff's product did not meet the daily oryzanol requirement, its own product did. Nowhere did the defendant claim that the plaintiff's product was bad. The court further observed that the defendant's failure to point out the cholesterol-lowering abilities of oryzanol and claim that its product was better than that of the plaintiff



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did not warrant the grant of an injunction; a party cannot be held liable for not disclosing each and every detail.

Consumer rights

The principles laid down in *Reckitt & Coleman of India Ltd v Kiwi TTK Ltd* allow an advertiser to enhance the perceived image or utility of its product, even at the expense of factual accuracy. While this approach protects the interests of the advertiser and its competitors (where the competitors' products are not disparaged or denigrated), it does not take account of the interests of consumers. The decision in *Colgate-Palmolive (India) Limited v Anchor Health and Beauty Care Private Ltd* 2009 (40) PTC 653 (Mad) significantly developed the law on puffery. Colgate was unhappy with Anchor's claim that its toothpaste was "the only and first toothpaste to offer all round dental protection". While the court held that this statement did not amount to disparagement, it did rule that puffery that is false and misleading is harmful to consumers and therefore is not permitted. In reaching this conclusion, the court cited the Consumer Protection Act 1986, which aims to curb unfair trade practices.

Conclusion

No specific legislation governs comparative advertising, although relevant provisions

are set out in the Trademarks Act, the ASCI guidelines and the Consumer Protection Act 1986. Advertisers often seek innovative ways to circumvent the infringement provisions of the Trademarks Act, avoiding referring to competing brands and showing a competing product's trade dress or packaging only incidentally. As a non-statutory body, the ASCI has limited enforcement power. And while consumer complaints will be investigated under the Consumer Protection Act, competitors cannot make complaints under that statute. Further, the law suggests that comparative advertising is allowed as long as the advertiser seeks to portray the advantages of its product in a truthful and honest manner. The courts have mixed views of puffery and its impact on consumers. Finally, the denigration or disparagement of competitors' products is an absolute violation and may incur legal consequences. The underlying intent or overall effect of the ad in the minds of consumers will be considered in this regard. If the ad seeks to reflect the competitor's product in a negative light, it is a clear case of disparagement. Thus, a balance must be struck between the advertiser's right to free speech, the competitor's right not to be disparaged and the consumer's right to protection from misleading or vague claims. **WTR**