



LAW OF COMPARATIVE ADVERTISING UNDER TRADEMARK LAW : *IS EVERYTHING FAIR IN AD AND WAR?*

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Abstract : *Comparative advertising and product disparagement are the most crucial topics for goods and service manufacturers. Comparative advertising is a marketing tactic that allows advertisers to portray their goods as superior to that of other competitors in the market. When a comparative advertising makes a comparison that is both inaccurate and disparaging, it is referred to as “product disparagement”. Clearly, there is a narrow line to be drawn between the two notions, one that attracts substantial attention from trademark owners, especially because customer behavior may be readily changed to a brand's favor or disadvantage through such marketing. Since advertising in India is primarily self-regulated, there is no oversight of how companies sell their products. When comparative advertising are considered infringement under trademark law, and when conflicts get out of hand, the courts have to get involved in this. In light of Sections 29(8) and 30(1) of The Trademarks Act, 1999, this article examines the law of comparative advertising and product disparagement with regards to trademark law. Section 29(8) specifies scenarios in which the use of another's trademark in advertising might be considered infringement if it does not meet the section's requirements. Section 30(1), on the other hand, makes such use an exemption if it is done in conformity with the circumstances set out in this section. The goal of the legislature in this case was to let comparative advertising be a little more relaxed over the strict rules for trademark protection which will be critically examined in this paper.*

Keywords : Comparative Advertising, Product Disparagement, Trademark Infringement

I. PROLOGUE

"False words are not only evil in themselves, but they infect the soul with evil".

-Socrates

In India, the regulation of the advertisements related aspects is done by a self regulating body and the regulations formed by this body is known as the Advertising Standards Council of India (ASCI). Its primary

goal is to encourage responsible advertising, hence increasing public trust in advertising. ASCI therefore strives to fulfil its own ultimate mission, which is to preserve and enhance public trust in advertising.¹ The ASCI's ultimate goal is to promote honesty, public decency, social values, and oppose harmful products.² The word 'comparative advertising' is used to define advertising in which the goods or services are advertised when the goods and services of one trader are compared, with another trader's services.³ The comparative advertising consists of two components i.e. puffery and denigration. When puffery goes too far and the advertiser paints a recognisable competitor product in an unfavourable light, the aggrieved competitor suffers badly by such advertisements. The Courts have forbidden both explicit and implicit denigration of the rival competitors' product, thus, need of developing consolidated laws to limit the comparative advertising while maintaining the interests of the various parties such as consumers, competitors and genuine advertisers concerned is crucial.

II. WHAT IS COMPARATIVE ADVERTISING?

The word "comparative advertising" refers to any kind of advertising in which a trademark owner seeks to profit financially from a comparison of his product or service to that of a competitor. The nature of comparative assertions might vary. They may expressly or implicitly refer to a rival competitor. They may highlight the similarities or distinctions between the products. They may also claim that the marketed product is "better than" or "as excellent as" the competitors'.⁴

Comparative advertising is usually lawful and permitted if some fundamental requirements are met. "The Advertising Standard Council of India (ASCI) provides a few guidelines for establishing comparison claims in its Code for Self-Regulation of Advertising Content in India".⁵ For instance, there is likely to be minimal or no concern as long as advertisements are clearly in the spirit of fierce competition and public knowledge, and the features being compared are clear. Comparative advertising is also commonly used in the case of similar items that suit the same demands and are designed for the same reason. "The comparison of competing products must also be honest and correct, with evidence to back it up". Most significantly, the product comparison should not deceive customers about the marketed product or the goods to which it is compared, and the advertisements should not unjustly criticise, insult, or denigrate other products.

1. Negi Mohita, *Objectives and Role of the Advertising Standard Council of India*, YOURARTICLELIBRARY (May 1, 2022, 8:30 PM), <https://www.yourarticlelibrary.com/advertising/objectives-and-role-of-the-advertising-standard-council-of-india/5568>.

2. Manya Chhabra, *What is the Advertisement Standards Council of India (ASCI) and what does it do?*, iPLEADERS (May 1, 2022, 8:37 PM), <https://blog.ipleaders.in/advertisement-standards-council-india-asci/>.

3. Uphar Shukla, *Comparative Advertising and Product Disparagement vis-à-vis Trademark Law*, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 409 (2006), <http://docs.manupatra.in/newsline/articles/Upload/597132AB-96EC-4DB0-8A82-8D732D603A14.pdf>.

4. Parth Gokhale & Shriyani Datta, *Comparative Advertising in India : Evolving A Regulatory Framework*, 4 NUJS L. REV. 133, 133-134, (2011), <http://nujlawreview.org/wp-content/uploads/2016/12/parth-and-sheryani.pdf>.

5. This Code for Self-Regulation was developed by people in advertising professions and industries in consultation with representatives of people affected by advertising, and it has been accepted by individuals, corporate bodies, and associations engaged in or otherwise concerned with the practise of advertising, with the following as basic guidelines, with the goal of achieving the acceptance of fair advertising practises in the best interests of the ultimate consumer : (a) To ensure the accuracy and honesty of advertisements' statements and promises, and to protect consumers against misleading advertisements; (b) To guarantee that advertisements do not offend commonly recognised public decency standards ; (c) To protect against the indiscriminate use of advertising to promote goods that are deemed to be detrimental to society or to people to an extent or of a sort that is unacceptable to society at large ; (d) To guarantee that advertising adhere to competition fairness so that both the consumer's demand to be informed of marketplace options and the canons of commonly acceptable competitive behaviour in business are met. https://ascionline.in/images/pdf/code_book.pdf (last visited May 2, 2022, 9:35 AM).

III. PRODUCT DISPARAGEMENT IN COMPARATIVE ADVERTISING

A false comment about a product that harms its producer is known as product disparagement, also known as commercial defamation, trade libel, or slander of products. "One technique that companies use during advertising their products and services is drawing comparison against their competitor's product or services"⁶. Comparative advertising is the name for this type of advertising. Comparative advertising is successful, but it can also result in deceptive advertising, resulting in legal concerns for the advertiser who makes such derogatory advertisements. Disparagement can come from the exploitation of comparative advertising. A significant criterion for deciding "whether a comparative advertising has become derogatory or not by examining whether it provides deceptive information or not. As per an European trademark decision⁷, a misleading advertisement must meet two requirements that it must have the potential to manipulate the people to whom it is directed; and that as a result of its deceptive nature, the misleading advertising must be likely to influence the people to whom it was directed or harm a competitor.⁸ This test was then utilized by the Delhi High Court in the matter of *Havells India Ltd. v. Amritanshu Khaitan*."⁹

While the ASCI Code provides certain guidelines, the legal test for whether the comparative advertising causes disparagement is left to the courts. A Division Bench of the Delhi High Court held that "in comparative advertising, a certain amount of trade puffery is permitted as long as it does not cast the competitor's goods in a negative light, and therefore no actionable claim can be made against it."¹⁰ In another case, the High Court held that it is acceptable that an advertiser can declare his product as the finest while also criticising competitors' products but not disparaging them.¹¹

IV. PROTECTION FOR COMPARATIVE ADVERTISEMENTS UNDER CONSTITUTION OF INDIA

The Constitution of India under Article 19(1)(a)¹² discusses "the right to freedom of speech and expression", which includes "commercial speech" but it is subjected to certain restrictions as enumerated in Article 19(2) of the Indian Constitution¹³. It is critical to examine Indian Constitution Article 19(1)(a) with respect to comparative advertising. The freedom granted by this Article applies to public speech, radio, television, and the media, although the state has placed restrictions on it. Commercial advertisements were once thought to be outside the realm of free speech and expression. In the case of *Hamdard Dawakhana v. Union of India*¹⁴ The Supreme Court ruled in this instance that an advertising is, without a doubt, a form of communication and expression of ideas. In this case, the advertising was deemed to be about commerce or trade rather than

6. Shivam Goel, *Trademark Disparagement & Advertising Ethos-Pathos: India*, SSRN Electronic Journal (2015).

7. *Lidl SNC v. Vierzon Distribution SA* [2011] E.T.M.R.

8. Saadiya Suleman, *Comparative Advertising, Disparagement and Trademark Infringement: An Interface*, SSRN Electronic Journal (2011).

9. *Havells India Ltd. v. Amritanshu Khaitan*, 2015 (62) PTC 64 (Del).

10. *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd.*, 2014 (57) PTC 47 [Del](DB).

11. *Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd.*, 2010 (42) PTC 88 (Del).

12. INDIA CONST. art. 19 cl.1(a).

13. INDIA CONST. art. 19 cl. 2, *amended by* The Constitution (First Amendment) Act, 1951.

14. *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

spreading ideas. Thus, advertising for illegal pharmaceuticals would not fall under the purview of Article 19(1)(a).¹⁵

However, the Supreme Court later ruled that even advertisements were protected under Article 19(1)(a) of the Constitution of India. In *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*¹⁶, the Supreme Court declared that "commercial speech cannot be denied protection under Article 19(1)(a) of the Constitution just because it is published by business people." The Supreme Court interpreted Article 19(1)(a) of the Constitution broadly, concluding that advertising, as a "commercial communication," had two sides. Firstly, the advertising disseminates product information and secondly, advertising knowledge benefits the entire public. In a democratic economy, the free flow of business information is crucial.

V. STATUTORY FRAMEWORK OF COMPARATIVE ADVERTISING

Although being protected under the Constitution's provision of free speech and expression, advertisements cannot be given blanket immunity purely on the basis of their capacity to raise awareness. It's critical to double-check that advertising don't deceive consumers or disparage a competitors goods.

There are certain statutory laws framed for the purpose of dealing with the comparative or misleading advertisements :-

1. Monopolistic and Restrictive Trade Practices (MRTP) Act of 1969

Section 36 A of the Monopolies and Restrictive Trade Practices Act of 1969¹⁷ (MRTP) dealt with unfair trade practises and banned misleading or deceptive ads. The MRTP Act was, however, repealed by Section 66 of the Competition Act of 2002¹⁸. "Unfair trade practices" under Section 36 A (x) of the MRTP Act, 1969 expressly states that advertisements "*gives false or misleading facts disparaging the goods, services or trade of another person.*"¹⁹

2. Consumer Protection Act, 2019

The definition of "unfair trade practices" was taken from the MRTP Act, 1969. Section 2(47)(j) of the Consumer Protection Act, 2019²⁰ clearly defines that "*trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.*"²¹ But it should be taken into consideration that the purview of the Consumer Protection Act of 2019 is limited in providing relief to customers exclusively and not to traders, service providers, companies, or merchants.

15. Tanvi Sapra, *Freedom of Press & Media : All the Important Cases and Landmark Judgments*, LAW CIRCA (May 3, 2020, 4:53 PM), <https://lawcirca.com/freedom-of-press-media-all-the-important-cases-and-landmark-judgements/>.

16. *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

17. Monopolistic and Restrictive Trade Practices Act, 1969, § 36 A, No. 54, Acts of Parliament, 1969(India).

18. Competition Act, 2002, § 66, No. 12, Acts of Parliament, 2002 (India).

19. https://www.mca.gov.in/Ministry/actsbills/pdf/The_Monopolies_and_Restrictive_Trade_Practices_Act_1969.pdf (last visited May 4, 2022, 9:35 AM).

20. Consumer Protection Act, 2019, § 2(47)(j), No. 35, Acts of Parliament, 2019 (India).

21. <https://egazette.nic.in/WriteReadData/2019/210422.pdf> (last visited May 4, 2022, 9:43 AM).

3. Trademarks Act, 1999

Sections 29(8)²² and 30(1)²³ of the Trademarks Act, 1999 further provides protection against infringement of trademarks through comparative advertising. Despite the fact that Section 29(8) prohibits advertisements from infringing trademarks, Section 30(1) exempts the use of trademarks in business and industrial affairs when done in good faith. In circumstances, "when a producer makes a comparative advertising to promote his or her products or services, the Trade Marks Act, 1999 safeguards the interests of other manufacturers whose trademarks are at danger of being damaged as a consequence of unjust competition."²⁴ But these provisions are not sufficient in dealing with product disparagement issues in comparative advertising as there are no consolidated laws with regards to comparative advertising.

Advertising Standard Council of India (ASCI)

The ASCI is a self-regulatory body established in response to the lack of a sufficient legal vehicle for the aggrieved competitors and consumers to address their issues. ASCI's mission is to preserve and improve public trust in advertising. Their duty is that all advertising content be truthful, lawful, and honest, decent and not objectify women, safe for customers - particularly children - and, last but not least, fair to competitors. The ASCI principles ensured that competitive advertising is handled equitably and that all parties' requirements are met. This is to say that ASCI does not have efficient statutory enforcement and is merely a self-regulatory body due to which it stands ineffective even after having reasonable and efficient regulations.²⁵

The ASCI perspective on the form and manner of comparative advertising is outlined in Chapter IV of the organization's Code of Self-Regulation in Advertising.²⁶ Advertisements involving comparisons with competitor manufacturers and dealers are permitted in the interests of aggressive competition and free transmission of information, provided the following conditions are met :-

- (a) It is pertinent to note as to what features of the advertiser's products are being compared to that of the features of the other competitors' products.
- (b) The subject matter of comparison is not chosen in such a way as to provide the advertiser an unfair advantage or to imply that a better deal is being given than is actually the case.
- (c) The comparisons are factual, accurate, and verifiable.
- (d) There is no risk of the consumer being deceived as a consequence of the comparison, whether regarding the marketed product or the product being compared.

22. Trademarks Act, 1999, § 29 (8), No. 47, Acts of Parliament, 1999 (India).

23. Trademarks Act, 1999, § 30 (1), No. 47, Acts of Parliament, 1999 (India).

24. Jordan Alexander Lewis, *The Future of Disparagement: How Trademark Law Suppresses Freedom of Speech*, SSRN Electronic Journal (2017).

25. https://ascionline.in/images/pdf/code_book.pdf (last visited May 4, 2022, 12:05 PM).

26. Parth Gokhale & Shriyani Datta, *Comparative Advertising in India : Evolving A Regulatory Framework*, 4 NUJS L. REV. 133, 136, (2011), <http://nujlawreview.org/wp-content/uploads/2016/12/parth-and-sheryani.pdf>.

(e) The advertising does not, directly or indirectly, disparage, attack, or discredit other goods, advertisers, or ads.²⁷

VI. LANDMARK JUDGEMENTS RELATED TO PRODUCT DISPARAGEMENT

The Indian Trademark Act, 1999 has not defined the term "comparative advertising", "disparagement" or "Unfair trade practices" in any of its provisions. However, there are various judgements which have interpreted the Act as well as other rules in order to define the meaning of product disparagement and enforce the necessary guidelines.

In the case of *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.*²⁸ Reckitt & Colman, the plaintiff, manufactures and sells Cherry Blossom Premium Liquid Wax Polish, a liquid shoe polish. The defendant KIWI also manufactures and markets KIWI liquid shoe polish, which it says in its advertisements to be superior to the plaintiff's cherry blossom because it contains less wax and more acrylic, which will rupture and damage the footwear over time. This is advertised on the defendant's website, which shows a bottle of KIWI that does not leak and another bottle of polish identified as brand X that drips. A red lump signifying cherry is visible on Brand X's surface, which looks identical to the cherry on the plaintiff's bottle. The defendant also distributed leaflets depicting a bottle labelled brand X with a defective applicator identical to the plaintiff's.²⁹

The Court ruled that the defendant was criticising the plaintiff's goods and ordered him to refrain from denigrating rivals' products in the future. The Delhi High Court further stated that the advertisement may puff up the products or make claims that his products are of higher quality, but this must not be done at the expense of the competitor's reputation.³⁰

In the case of *Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Anr.*³¹ In this instance, the plaintiff manufactures blue whitener under the brand name *Robin Blue* and has a registered Trademark and a registered design. The defendant also begins manufacturing blue whitener (*Ujala*) and begins marketing their product by denigrating the plaintiff's goods. The advertising depicted a container identical to the plaintiff's and said that it was priced at Rs. 10. Because no other blue whitener goods on the market were priced at Rs. 10, it was evident that the product in question was the plaintiff's Robin Blue. Furthermore, the defendant claimed that the plaintiff's goods were uneconomical and that the substance used to whiten the clothing was costly.³² The Calcutta High Court referred the five guiding principles in the *De Beers case*³³ for granting injunctions in such cases, noting that :-

27. ASCI Code for Self Regulation in Advertising (2007).

28. *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.*, 1996 P.T.C. 193 T 399.

29. Semila Fernandes, *Comparative Advertisement And It's Relation To Trademark Violation – An Analysis Of The Indian Statute*, 2(6) JBM&SSR 67, 69 (2013), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.403.2030&rep=rep1&type=pdf>.

30. Semila, *supra* note 31 at 69.

31. *Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Anr.*, 1999 PTC (19) 741.

32. Semila, *supra* note 31 at 69-70.

33. *De Beers v. International General Electric*, (1975) 2 All ER 599.

"1. A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue;

2. He can also say that my goods are better than his competitors', even though such statement is untrue;

3. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others;

4. He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible;

5. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation."³⁴

In another case of **Britannia v. Unibic Biscuits India**³⁵ Unibic India introduced the 'Great Day' cookie, with the tagline "Why Have a Good Day, When You Can Have a Great Day!" This was a striking contrast to Britannia's Good Day cookies. The plaintiff claimed that the defendant infringed on their registered trademark 'Good Day,' which they intended to underline through their tagline. The defendant was awarded an injunction by the Bangalore City Civil Court for denigrating Good Day cookies by misrepresenting the facts. While reviewing this issue, the Court considered three factors: the intent, the method in which the advertisement (story line) was promoted, and the message that was delivered to the public.³⁶

The Delhi High Court stated in **Pepsi Co. Inc. & Ors. v Hindustan Coca Cola Ltd**³⁷. that "to decide the question of disparagement we have to keep the following factors in mind: (i) Intent of commercial (ii) Manner of advertising (iii) Story line of the advertisement and the message sought to be conveyed by such commercial." Using these principles, the Court determined that the respondent's advertisement titled "*Yeh Bachhon Wali Hai, Bachon Ko Yeh Pasand Aayegi*" (this is a children's drink and only children will like it) was clearly derogatory to the appellant's product and intended and would cast a negative impression of the appellant's products in the minds of the consuming public.³⁸

In **Hindustan Unilever Ltd. (HUL) v. Gujarat Co-operative Milk Marketing Federation Ltd. (GCMMF)**³⁹, the Bombay High Court barred Amul from broadcasting two specific Television Commercials ("TVCs") or publishing any other advertisement of identical ice creams and frozen treats containing 90 percent milk.

34. Swaraj Paul Barooah & Shivaji Bhattacharya, *Comparative Advertisements: Balancing Consumer Interest vis-a-vis IPR Infringement* 7(2) INJIPLaw 116, 120 (2009), <http://www.commonlii.org/in/journals/INJIPLaw/2009/7.pdf>.

35. *Britannia v. Unibic Biscuits India*, MIPR 2008 (3) 347.

36. Debalina Chatterjee, *Comparative Advertisement and Infringement of Trademarks*, 2(6) White Black Legal 5, 11 (2020), <https://www.whiteblacklegal.co.in/wp-content/uploads/2021/01/Vol-2-Issue-6-Debalina-Chatterjee.pdf>.

37. *Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd.*, [2003 (27) PTC 305 (Del)].

38. Janaki Arun, *Comparative Advertising – How To Walk The Tightrope Without Tipping Over!*, ALG INDIA, (May 12, 2022, 12:55 PM), <https://www.algindia.com/comparative-advertising-how-to-walk-the-tightrope-without-tipping-over-author-janaki-arun/>.

39. *Hindustan Unilever Ltd. (HUL) v. Gujarat Co-operative Milk Marketing Federation Ltd. (GCMMF)*, (2017) Bom 204 (2017) L 5.

According to Amul, at least 30% of frozen dessert manufacturers utilise vanaspati. Amul subsequently filed an appeal with the Division Bench, which ruled that "to judge on whether the TV commercials shown by Amul constituted to disparagement, the intent, method, and plot of the advertisement, as well as the message desired to be communicated, would have to be examined." Amul stated that 30% of frozen dessert producers use Vanaspati, but by declaring this, Amul indicated that 70% of manufacturers do not utilise Vanaspati. The bench observed that by attributing bad traits of frozen desserts in particular, the advertisements meant to discourage an entire class of customers from using frozen desserts, resulting in disparagement, which is not permitted. The court ruled in this case that, while Amul may claim superiority of its product, it cannot broadcast an advertisement denigrating frozen desserts even if it didn't explicitly mention its competitor's brand, Kwality.⁴⁰

VII. EPILOGUE

Sections 29 (8) and 30 (1) of the Trademarks Act, 1999 are sufficient to handle allegations of trademark infringement in the form of comparative advertising. Judicial pronouncements on the subject have also made it clear that there is no harm in comparing your goods to those of a competitor, but the comparison must be fair and not bring disrepute to the competitor's products or trademark, i.e. comparative advertising is permissible, but comparative advertising that leads to product disparagement is not. Almost every country that allows the use of another's trademark in comparative advertising has a similar stance. There is no question that comparative advertising is useful since it raises consumer awareness; thus, it should be permitted.

Thus, this is to say that equality between consumer interests and trademark owners' interests must be preserved, which can only be accomplished by a central body establishing consolidated laws with regards to comparative advertising with an effective enforcement mechanism in order to minimize the issue of product disparagement.

VIII. SUGGESTIONS AND RECOMMENDATIONS

It is highly suggested that a strong enforcement mechanism should be established in order to regulate the advertising sector to ensure that the interests of the competitors as well as the customers are not harmed. This can be achieved by adopting the paradigm that has adopted in the United Kingdom, where advertising guidelines are legally enforced through Misleading and Comparative Advertising Directive (MCAD) [2006/114/EC] which has been implemented in Business Protection from Misleading Marketing Regulation, 2008. The administration of such rules can help in setting basic and important standards for maintaining fair competition while putting an obstruction on disparagement of aggrieved competitors' products and services.

40. Siddharth Ratho & Puja Saha, *Comparative Advertisements vs. Product Disparagement: Walking the thin line*, LAWSTREET INDIA (May 12, 2022, 1:10 PM), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/190214_A_COMP_ADSVS_PRODUCT_DISPARAGEMENT.pdf.

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