

Fine line between Comparative Advertising and
Disparagement





Black's Law Dictionary defines Advertising as an action of drawing public attention to something to promote its sale. It also defines Comparative Advertising as advertising that specifically compares the advertised brand with another brand of the same product. However, it is important to ensure that the advertisements are legal, truthful, moral and honest. Accordingly, Advertising Standards Council of India ("ASCI") was established to regulate the advertisements.

Advertising Standards Council of India

ASCI is a self-regulatory body of the advertising industry which was formed to ensure fair advertising practices in order to protect the interests of consumers and to regulate the contents of advertisements. ASCI has also adopted a Code for Self Regulation in Advertising ("Code") and all the advertisements are expected to conform to the Code. The Code defines advertisement as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Under the Code comparative advertising is authorized and dealt with under Chapter IV, provided certain conditions specified therein are complied with. One such condition is that the advertisement should not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication. Therefore, comparative advertising is allowed, provided the same does not disparage/ denigrate product of others.

What is Disparagement

In **Pepsi Co., Inc. and Ors. Vs. Hindustan Coca Cola Ltd. and Anr.**¹, a division bench of the Delhi High Court has discussed disparagement as to speak of slighting, undervalue, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation. The Court observed that to decide the question of disparagement the following factors have to be considered. The Court observed that to decide the question of disparagement the following factors have to be considered

- Intent of commercial;
- Manner of the commercial; and
- Story line of the commercial and the message sought to be conveyed by the commercial.

The Court further observed that out of the above, the manner of the commercial is very important and if the manner is ridiculing or condemning the product of the competitor then it amounts to disparagement but if the manner is only to show one's product better or best without derogating other's product then the same is not actionable.

Laws governing disparagement

Disparagement is also covered under the Trade Marks Act, 1999 and Consumer Protection Act, 1986.

¹ 2003 (27) PTC 305 (Del)



- **Section 29 (8) of the Trade Marks Act, 1999** stipulates that when advertisement of a registered trade mark takes unfair advantage of and is against the honest commercial practices or which is detrimental to the distinctive character or which is against the reputation of the trade mark, such an advertisement would constitute an infringement. However, section 30 (1) provides that if an advertisement is in accordance with honest practices in industrial or commercial matters and which does not take unfair advantage or is not detrimental to the distinctive character or reputation of the trade mark, the same would not amount to infringement of registered trade mark.
- Further, under **Section 2 (1) (r) (x) of the Consumer Protection Act, 1986** an advertisement would amount to 'unfair trade practice' if the same gives false or misleading facts disparaging the goods, services or trade of another person.

Role of Judiciary

Although ASCI is a self regulatory body formed by members from the advertisement industry, orders passed by ASCI do not have a binding effect. Accordingly, aggrieved parties approach courts to obtain reliefs against disparaging advertisements. A lot of jurisprudence has evolved by various judgments passed by the Hon'ble Supreme Court as well as High Courts in India.

The High Court of Calcutta in **Reckitt & Colman of India Limited v. M.P. Ramchandran & Ors.**² had laid down the following proposition with respect to comparative advertising:

- a) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.
- b) He can also say that his goods are better than his competitors', even though such statement is untrue.
- c) 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.
- d) 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.
- e) 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.

However, in **Dabur India Limited v. Colortek Meghalaya Private Limited & Godrej Sara- Lee**³, the Hon'ble Delhi High Court held that propositions (a) and (b) above and the first part of proposition (c) are not good law. The Court observed that while hyped-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion, and if it does so, the advertiser must have some reasonable factual basis for the assertion made. The Court further observed that it is not possible for anybody to make an unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival.

² 1999 (19) PTC 741 (Cal)

³ 2010 (44) PTC 254 (Del)



An advertisement has also been observed as a fundamental right by the Courts. In **Tata Press Limited v. MTNL & Ors.**⁴, the Hon'ble Supreme Court held that "commercial speech" is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, advertisements being a commercial speech, courts have interpreted the same to be protected under the Constitution.

The Courts have also recognised generic disparagement. Thus, when in an advertisement a reference has been made in a generic sense i.e., without referring to any particular product but reference has been to an entire class of products, the same would amount to disparagement and would be equally objectionable. This principle has been laid down by the Hon'ble Delhi High Court in **Dabur India Limited vs. Colgate Palmolive India Limited**⁵, and in **Dabur India Limited v. Emami Limited**⁶.

However, whether an advertisement is disparaging or not depends on facts of each case and on the intent, manner and storyline of the same. In **Dabur India Limited v. Colortek Meghalaya Private Limited & Godrej Sara- Lee** the court also observed that 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 and that a plaintiff ought not to be hyper-sensitive.

Our Offices

New Delhi

14th Floor
Dr. Gopal Das Bhawan
28, Barakhamba Road
New Delhi 110 001

T: +91 11 4213 0000
F: +91 11 4213 0099

Mumbai

1st Floor, Bajaj Bhawan
226, Nariman Point
Mumbai 400 021

T: +91 22 49100000
F: +91 22 49100099

London

The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 20 7876 4848
F: +44 20 7875 5132

E: info@clasislaw.com

W: www.clasislaw.com

Conclusion

Consumers have an imperfect recollection and the visuals in an advertisement have a great impact on them. In today's world of comparative advertising while it is important that the consumers make a smart choice between the products, it is equally important that permitted form of comparative advertising should not eventually end up into disparagement. Comparative advertising has been permitted both under ASCI Code as well as by the Indian Courts, however, care should be taken that while comparing products with that of a rival, the said comparison should not derogate or disgrace the rival's products. In arriving at a conclusion whether an advertisement is disparaging or not, the parameters set out by the Hon'ble Courts are helpful and need to be considered.

-by Apoorva Gupta, Associate

⁴ (1995) 5 SCC 139

⁵ 2004 (77) DRJ 415

⁶ 2004 (75) DRJ 356

DISCLAIMER: This Article is meant for information purposes only and does not purport to be an advice or opinion, legal or otherwise. The information provided herein is not intended to create an attorney client relationship or meant to be used for advertising or soliciting. Clasis Law does not intend to advertise its service or solicit work through this Article. Clasis Law or its associates are neither responsible for any error or omission in this Article nor for any action taken based on its contents.