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Comparative advertising in India – puff under scrutiny

In a landmark decision, the High Court of Madras has attempted to tighten the rules on comparative advertising. However, the ruling may have opened the door to inconsistency in the interpretation of the law in this area

Indian courts have traditionally allowed advertisers ample leeway when making 'puff' statements (ie, 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, puff statements regularly feature in comparative advertising and, over time, the courts have developed a set of principles to assess the legitimacy of such claims.

The principles, as stated in the case of *Reckitt & Coleman of India Ltd v Kiwi TTK Ltd* (63 (1996) DLT 29), are as follows:

- An advertisement can declare that the advertised goods are the best in the world, even though this 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;
- An advertisement cannot, while stating that the advertised goods are better than those of a competitor, state that the competitor's products are bad, as this would be defamation; and
- In a case of defamation, damages can be claimed. The court can also grant an injunction against repetition of the defamatory action.

The laws

Until it was repealed by the Competition Act 2002, Section 36A(x) of the Monopolies and Restrictive Trade Practices Act 1984 provided a basis upon which a claim could be made against disparagement of goods. Section 36A(x) limited comparative advertising by recognizing that the publishing of any misleading or disparaging facts about a competitor's goods or services amounted to 'unfair trade practice'.

In addition to the Monopolies and Restrictive Trade Practices Act, the Trademarks Act 1999 (Section 28(9) – notified with effect from September 15 2003) mandates that the 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 practice in industrial or commercial matters;
- is detrimental to the mark's distinctive character; or
- damages the reputation of the trademark.

The Constitution of India explicitly protects freedom of speech and expression in Article 19(1)(a). In reference to this article, the Supreme Court of India has held advertisements to be commercial free speech (eg, *Tata Press Ltd v Mahanagar Telephone Nigam Ltd* (1995 (5) SCC 139)). As with all freedoms under Article 19, commercial free speech is subject to certain reasonable restrictions by Article 19(2) of the Constitution.

Interestingly, the definition of 'unfair trade practice' used by the now repealed Monopolies and Restrictive Trade Practices Act is found with a substantially similar meaning in the Consumer Protection Act 1986. This act protects two key rights, namely:

- the right of the consumer to be informed about the quantity, potency, purity, standards and price of goods to guard against unfair trade practices; and
- the right to consumer education.

A departure from the norm

One case, however, has marked a significant departure from the traditional approach to commercial puffery (where there is no disparagement). In the case of *Colgate-Palmolive (India) Limited v Anchor Health & Beauty Care Private Limited* (Case (2008) 7 MLJ 1119) a judge at the High Court of Madras held that false claims by traders about the superiority of their products, either directly or by comparing them against the products of their rivals, were not permissible.

In this case, an advertisement was telecast by the defendent, Anchor, claiming that:

- its product was the only toothpaste containing the ingredients calcium, fluoride and triclosan;
- it was the first all-round protection toothpaste;
- the fluoride in Anchor toothpaste gave 30% more cavity protection; and
- the triclosan contained in Anchor toothpaste was ten times more effective in reducing bacteria.

The plaintiff, Colgate, objected to these claims, stating that it was the pioneer in the field and that its own toothpaste contained the three ingredients prior to Anchor. Colgate claimed that Anchor's statement with regard to fluoride protection, and the efficiency of tricloan, was false and misleading as the amount of fluoride in toothpaste is mandated by Rule 149-A of the Drugs and Cosmetics Rules.

Colgate claimed that "a false statement which stops at being a mere puffery may be within the tolerance limits permitted by law. A claim which exceeds the said limit would amount to disparagement of the other people's product and that, therefore, the same cannot be allowed to continue".

In its interim order, the court restrained Anchor "from using the words 'only' and 'first' in the offending advertisement, in a manner sending a message as though the respondent's product is either the only one containing all three ingredients, or the first to provide all-round protection".

The court asserted that consumer interest is an element which must be considered when assessing comparative advertising.

This appears to be the first time a court has included discussion of consumer interest in its analysis of such advertising. At first glance, the decision appears to be inconsistent with earlier case law on this issue.

However, as no other rulings have referred to the interests of consumers, the *Colgate Case* is not in direct contradiction to prior decisions – though the High Court of Madras failed to notice a recent order of the Delhi High Court in the case of *Reckitt Benckiser v Hindustan Lever* (Case 2008 (38) PTC 139(Del)), which held that mere 'generic' puffery is not actionable.

The Madras High Court observed that: "Recognizing the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's products, would be to 'de-recognize' the rights of the consumers guaranteed under the Consumer Protection Act 1986."

The court also held that: "To permit two rival traders to indulge in puffery, without denigrating each other's products, would benefit both of them, but would leave the consumer helpless.

"If on the other hand, the falsity of the claim of a trader about the quality and utility value of his product, is exposed by his rival, the consumer stands to benefit by the knowledge derived out of such exposure. After all, in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit.

"Therefore, it is only on the touchstone of public interest that such advertisements are to be tested."

Based on these findings, the court crafted the following principles:

- Publication of advertisements as free commercial speech is protected by Article 19(1)(a) of the Constitution;
- Restrictions contained in statutes such as the Monopolies and Restrictive Trade Practices Act and the Consumer Protection Act satisfy the test of reasonable restrictions allowed by Article 19(2) of the Constitution;
- If a case of disparaging advertising falls within the definition of the term 'unfair trade practice', an action may be brought before a consumer court or a civil court by a consumer, a group of consumers, a consumer association, the central or state governments, a manufacturer or marketer where the advertising contains a false representation as per Section 2(1)(r) of the Consumer Protection Act;
- Section 2(1)(r) of the Consumer Protection Act categorizes four types of representations as actionable 'unfair trade practices', namely: false representations falling under sub-clauses (i), (ii) and (iii); representations which may not necessarily be false but are nevertheless incorrect under sub-clauses (iv) and (v); warranty or guarantee under sub-clauses (vii) and (viii); and false or misleading representations that fall under sub-clauses (vi), (ix) and (x).

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The court, observing the statutory basis of unfair trade practices, noted that: "It is doubtful if false claims by traders, about the superiority of their products, either *simpliciter* or in comparison with the products of their rivals, is permissible in law. In other words, the law as it stands today, does not appear to tolerate puffery anymore."

Notably, the court found to be permissible advertisements which "tend to enlighten the consumer, either by exposing the falsity or misleading nature of the claim made by the trade rival or by presenting a comparison of the merits (or demerits) of their respective products".

Interpreting such advertisements to be in the 'public good', the court cited two instances as an exception to this – namely, if an advertisement is motivated by malice, and if it is false.

The court held that this sort of advertising would benefit society because competitors are naturally better equipped to expose a rival's untrue claims.

The court also held that the benefit to society from such an exposure would "outweigh the loss of business for the person affected".

This observation was based on the court's assumption that comparative advertising, even if it did not amount to a disparagement of other goods, could result in consumers being misled.

The court held that it was ultimately to the benefit of consumers to allow truthful 'exposures' and to restrain traders from making "false representations, incorrect representations, misleading representations or issuing unintended warranties (as defined as 'unfair trade practice' under the Consumer Protection Act)".

This balancing of trader interests with consumer interests means that an advertisement which makes false claims, whether comparative or not, may be subject to an injunction or restraining orders from a court.

Legal landscape far from settled

While the Madras High Court judgment is theoretically binding on concurrent courts in Madras and on lower courts within its jurisdiction, judges who disagree with the findings in a case have the option to offer a new opinion or refer the matter to a Division Bench (of two or more judges) for a definitive interpretation.

This judgment is expected to be influential among high courts in other jurisdictions. However, it is likely that the law in this area will witness some inconsistency until the Supreme Court makes a definitive ruling. WTR