RNA Intellectual Property Attorneys

Treading a fine line

Comparative advertising is permitted if it can be shown that it is not an unfair trade practice by statute and under common law

In a bid to capture market share, rights holders are increasingly resorting to competitive/comparative advertising. As each class or category of goods and services in the fast-moving consumer goods sector becomes crowded with brands, comparative advertising can be extremely effective at driving sales. However, it remains debatable whether comparative advertising benefits consumers, since it presupposes that the facts are not misrepresented.

India has no specific legislation governing comparative advertising and no directives or guidelines outlining the boundaries of what is permissible. Thus, case law has evolved through various court rulings. 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.

ASCI guidelines

The Advertising Standards Council of India (ASCI) guidelines take the form of a self-regulatory code for members. However, the ASCI is not a statutory body and thus its guidelines are advisory only. While the ASCI does offer a complaint process, this is generally perceived to be time consuming. As a result, parties often resort to litigation. The ASCI guidelines promote the following:

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

Trademarks Act

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 prove detrimental to the distinctive character or reputation of the trademark, then it is not considered objectionable.

The infringement provisions under Section 29(8) 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 mark's reputation.

These provisions are often the subject of debate in comparative advertising cases. In particular, courts are asked to determine whether the comparison has been made with a view to disparaging the rights holder's goods. Advertisers often adopt several innovative ways to overcome the infringement provisions and avoid a claim, such as not referring to a brand name, but showing the product's trade dress or packaging. It is becoming increasingly common for advertisers to make general disparaging remarks against the entire product class or category, with the aim of taking pot shots at the market leader in that category. An example of this sort of indirect attack was seen in *Dabur India Ltd v Emami Limited*, where 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 its manufacturer Dabur.

The courts have generally 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.

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 its 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 puff statements. At the same time, it must not give a cause of action to other traders or manufacturers by disparaging or defaming their goods. A manufacturer cannot say that a competitor's goods are bad in order to puff and promote its own goods.

In *Horlicks v Complan* GlaxoSmithKline (GSK) and Heinz battled over disparaging advertisements in relation to their

respective health drinks, Horlicks and Complan. GSK objected to Heinz's advertisements for Complan, which allegedly stated that Horlicks was made of cheap ingredients and that Complan contained 23 vital ingredients, which promoted growth in children. GSK also objected to another ad 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 *Dettol V Vim* Reckitt Benckiser and Hindustan Unilever Ltd (HUL) fought over a series of advertisements concerning their respective brands Dettol and Vim. Both parties made puff statements through their advertisements, but at the same time made insinuations about the other party's brands that were held to be unfair and in contravention of Section 30 of the Trademark Act.

Protecting consumers

The law seems to be clear on the limitations of permissible puffery. However, in *Colgate Palmolive (India) Ltd v Anchor Health and Beauty Care Pvt Ltd* the Chennai High Court 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". While the court held that this statement did not amount to disparagement, 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.

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Honesty in disparagement claims

The Delhi High Court Division Bench decision in a dispute between Colgate and HUL – over an ad for Pepsodent toothpaste that used Colgate's name and claimed that Pepsodent offered 130% better protection – raised some interesting issues. The decision also examined the extent of an advertiser's determination of subjective claims which, it seems, fall outside the scope of established legal principles on comparative advertising. The single judge who heard the case at first instance dismissed it, finding that HUL had not denigrated Colgate's toothpaste. According to the court, too much should not be read into the expressions of each individual character in the advertisements. The court noted that the camera did not zoom in on the teeth of the Colgate boy and no gaps or cavities could be seen. The expressions and effects used in the advertisement showed only that Pepsodent was a better product, but did not disparage Colgate's product. Also, the court observed that as there was a comparison between products and an attempt to show that one was better than the other, both boys obviously could not have happy faces. Finally, it held that the word 'attack' in the print advertisement related to Pepsodent's germ-fighting capability and was not an attack on Colgate.

The court reiterated the principles laid down in earlier case *Dabur India Ltd v Colortek Meghalaya Pvt Ltd*, in which it was held that the following factors must be kept in mind while deciding a question of disparagement:

- The intent of the advertisment – this can be understood from the storyline and the message sought to be conveyed;
- The manner of the advertisment – is the comparison largely truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible; and
- The overall effect of the advertisement – does it promote the advertiser's product or does it disparage or denigrate a rival product?

Colgate appealed the decision to the two-judge bench (division bench). The bench also agreed that the ad promoted HUL's product and did not disparage Colgate's product. However, it found that the use of a voiceover at the end of a television ad which said, "In comparison to Colgate, New Pepsodent Germi Check has 130% Germ Attack Power" was questionable. The bench remitted the matter to the single judge to look into "whether Pepsodent was really 130% better than Colgate". This seems to suggest that the court was looking into the advertiser's subjective claims, whereas it should have applied the established principle of whether Colgate's reputation would have been harmed in the eyes of the average consumer by the use of this expression.

While a rights holder may exaggerate claims and indulge in puffery, it may not denigrate or disparage the goods of another. In case of comparative advertisement, a certain amount of disparagement is implicit. If a rights holder claims that its goods are better than those of its competitors, it is implicit that the goods of its competitors are inferior in comparison. To this extent, puffery in the context of comparative advertisement does involve showing the competitors' goods in a bad light. However, as long as the advertisement is limited to puffery, there can be no actionable claim against the same. WTR