



INTERNATIONAL JOURNAL OF RESEARCH IN COMMERCE AND MANAGEMENT

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COMPARATIVE ADVERTISEMENT AND INFRINGEMENT OF TRADEMARKS

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ABSTRACT

Trademark law is an emerging field of study with various dimensions. The main purpose of this paper is to analyse the link between the comparative advertisement and the trademark law regime. It is well known notion that the decisions of the consumers are influenced by the comparative advertisements. An attempt has been made in this paper to analyse whether or not this notion is right. In this paper, an attempt has been made to analyse the meaning and the relation between comparative advertisement, trademark infringement and consumers. In the first section of the paper the general introduction is given to the topic, in the second section the questions such as whether the comparative advertisements help the consumers in making rational decisions and secondly assuming that they do provide whether it is worth to have it at the cost of court battles which take place as a result of the infringed trademarks. The third section shall be dealing with the conclusion. The consumers have become more sceptical and do not get carried away by the comparative advertisement. It can also be said that even though the comparative advertisements do provide a remote benefit to the consumers, it ends up in a legal battle between the two brand owners. Hence, the effectiveness of the advertisement becomes very low.

KEYWORDS

Comparative advertisement; Consumers; Legal Battles; Trademark infringement.

INTRODUCTION

Advertisement helps in the good decision making of the consumers and helps the brand owners to promote their product. It is basically used to make the products and services familiar to the consumers or in a nutshell it is a medium of communication between the owners of various brands and the consumer in the market place. Comparative advertisement is used in many countries for the purpose of the commercial advertising. This kind of advertisement is done with an aim to influence the consumer behaviour and to attract the consumers. Comparative advertisement is that kind of advertisement which compares goods and services of one party with the goods and services of the other party, where the advertising party tries to showcase its goods to be superior. The increase in competition between companies has also increased the rate of the comparative advertisements.

Registration of a trademark gives an exclusive right to a person to use that particular mark. But many a times this is violated by the way of comparative advertisements to influence the consumer behaviour. This infringement of the trade mark increases various concerns of the brand owners as well as the consumers. In this paper an attempt has been made to analyse the meaning and the relation between comparative advertisement, trademark infringement and consumers. In the first section of the paper the general introduction is given to the topic, in the second section the questions such as whether the comparative advertisements help the consumers in making rational decisions and secondly assuming that they do provide whether it is worth to have it at the cost of court battles which take place as a result of the infringed trademarks. The third section shall be dealing with the conclusion.

WHAT IS COMPARATIVE ADVERTISEMENT?

Before understanding what is comparative advertisement it is very important to know about advertisement. Advertisement is a marketing tool which is used for publicity and promotion of the product among the consumers. The main aim is to make the consumers aware that product has a good utility and is effective. Whereas, comparative advertising is a kind of advertising where the goods or services of one party are compared with the goods and services of another party, where the advertising party places its product in a more favourable position. Moreover, there are various conditions or factors effecting the comparative advertisement (Terence A. Shimp, 2008).

Comparative advertising is advertising in which a trademark owner compares its product or service with that of a competitor and this is usually done to show that the advertiser's product is of a superior quality. It is a form of advertising in which two or more recognizable of the same product or class are compared with the help of the product attributes (Batra, 2006). There are many types of comparative advertising, the advertiser can stress similarities or differences; it can refer to a competitor directly or indirectly (Belinda Issac, 2000). The comparisons can be to more than one product or service. In the entire above cases one thing which is similar is that the purpose is to show the advertisers own product in a favourable position in the market place. If comparisons are direct then it is basically called the Direct Comparative Advertisements in which the trademarks or the service marks of the goods are usually used. Comparative advertisement refers to identifying the competitor's products with its trademarks and comparing it to an advertised product (Ryan W. O'Donnel & John J. O' Malley, 2008).

Comparative advertisements have a tendency to evoke string of emotions on both the sides in the form of court cases. This specially happens when the comparative advertisement causes the infringement of the trademarks. When the trademarks are infringed then the parties go to the courts. Hence, there is a very important nexus between the infringement of trademarks and comparative advertisement which is discussed in the next segment.

WHAT IS INFRINGEMENT OF TRADEMARKS?

The use of a mark that creates a likelihood of confusion amongst the relevant public as to the source of goods bearing the mark constitutes infringement (American Bar Association, 2008). The Trademark law is very clear about the infringement of trademarks. Section 29 of the Trade Mark Act, 1999 deals in detail about the infringement provisions. Section 29 (1) says that a trademark is infringed by a person who uses the trademark despite not being a registered proprietor and not having the right to use that particular trademark. Moreover, this mark should be used in the course of the trade. This use should in a way mislead the consumers making them believe that the goods belonged to the registered proprietor of the trademark. The other subsections also deal with various aspects of infringement, such as the rights of the company whose trademark has been infringed by other company who uses the trademark without any lawful right to use it. According to Section 29(9), the infringement can either be through words or even visual. These infringement provisions also apply to the internet advertisement as well (Kevin Lee & Catherine Seda, 2009).

The Trademark is said to be infringed in the following cases when we talk about advertisement (Rodney D. Ryder, 2003) -

1. Uses a mark identical to the registered trademark for the goods & services identical to those covered by registration.
2. Uses a mark similar to the registered trade mark of the goods and services identical to those covered by registered trademark for goods and services identical to those covered by the registration. (where the public is likely to be confused)
3. Uses a mark identical to the registered trademark for goods and services similar to those covered by registration. (where the public is likely to be confused)
4. Uses a mark similar to the registered trademark for goods and services similar to those covered by registration. (where the public is likely to be confused)
5. Uses a mark identical or similar to a registered trademark for goods or services dissimilar to those covered by registration (where the use of unfair advantages of, or is detrimental for the registered marks, distinctive character or reputation).

The above are the grounds on which persons can be held liable for infringement. However, when we talk about comparative advertisement we usually consider the first four grounds. Moreover, the infringed trademark can be of two kinds-

1. Unregistered Trademark - Use of a these kind of trademarks in a comparative advertisement brings with it the risk of an action for passing off (Narayana P., 2006) if the plaintiff can show that there is a misrepresentation, i.e., that customers are deceived into believing that the defendant's product is that of the plaintiff. Belinda Milla, 1996) For Example, Burger King discovered this when McDonald's brought a passing off action against it following Burger King's use of the phrase "Not just Big, Mac" in an advertisement for its Whopper burger. Trademark law applies to the well known unregistered trademarks.
2. Registered Trademark - When the trademark is registered then the scenario is totally different. All the provisions of the Trademarks Act, 1999 will apply. Even though the consumers are misled, a party cannot be charged for comparative advertisement unless the infringed trademark is registered. Hence registration is very important. The exception to this rule is the well known trademarks.

RELATIONSHIP BETWEEN COMPARATIVE ADVERTISEMENT AND THE TRADEMARK INFRINGEMENT

The main function of the trademark is to distinguish the goods of one person from the goods of the others in the market place. Hence trademark is a way by which the consumer can easily identify the product. Hence, when the advertising party uses the trademark of the goods of another party and puts his goods in a favourable position then it is known does not only fall a part of the comparative advertisement but it also invokes the provisions of the trademark infringement. Comparative advertisement constitutes trademark infringement if it is without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trademark (Jeremy Philips, 2006). It was also held in the case of *Pepsico Inc. and ors. vs. Hindusthan Coca Cola Ltd. and Anr.*, (2003) 27 PTC 305, that if a trader compares his goods with the goods of rival without in any way advertising that the trade mark is used in relation to his goods, there is prima facie no infringement.

Moreover, in the case of *Wander Ltd. and Anr. vs. Antox India P. Ltd.*, 1990 Supp. Scc727, the Supreme Court was of the view that using somebody else's trademark can be deceptive and can be regarded as an unfair tradepratic. The action will be regarded as an action for deceit.

The most important case in this context is the case of *Reckitt & Colman of India Ltd. vs. Kiwi T.T.K. Ltd.*,63 (1996) DLT 29, The Hon'ble Court laid down the following guidelines for comparative advertising:

1. A tradesman is entitled to declare his goods to be the 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.

Hence by above mentioned guidelines it can be clearly said that a person cannot promote his goods by degrading the quality of other person's goods.

STATUTORY POSITION REGARDING THE TRADEMARK INFRINGEMENT AND THE COMPARATIVE ADVERTISEMENTS

Comparison is almost impossible without reference to a mark which refers to a particular product, service or business. In these cases, not only the unfair competition law will apply, but also the trademark law has to be taken into account. In India the advertisements are regulated by the Advertising Standards Council of India which is the regulatory body and it has laid down a code which has to be followed for advertising. This council has also laid down provisions regarding the comparative advertisement. Trademark Act, 1999 provides protection for the registered trademarks. However, to the well known unregistered trademarks the trademark act applies. Trademark Act, 1999 permits comparative advertising u/s 30(1) which is an exception to Section 29.

CONSUMER, COMPARATIVE ADVERTISEMENT AND TRADEMARK INFRINGEMENT

DO THE COMPARATIVE ADVERTISEMENTS HELP THE CONSUMERS TO MAKE RATIONAL DECISION?

With the Liberalization Privatization & Globalization (LPG) policies of the government there has been an increase in competition which has resulted in a greater use of comparative advertising by companies to tell consumers why their products should be bought. The consumers are confused as there is wide range of brands sold in the market and it is here when comparative advertisement plays the role of a salesman by catering to the emotional, status and other consumer behaviours. The comparison of goods and services provides more information and thus educates consumers in taking a better decision. The advertisers in India generally compare the prices that cater to the status appeal of the maximum populations as 30% of Indians live under the category of middle class which is the most growing consumer market and they are also benefitted with the comparative advertisements.

From the research done in India and abroad (Linda, 2011) regarding the consumer reactions to the comparative advertising, it is clear that it helps in informing customers on the comparative features of two competitive brands. It is an effective positioning tool as well (Ashok, 2011). Few advertisers view the comparative advertising as offensive but from the practical experience so far, it is an accepted fact that consumers are being benefitted by the comparative advertisements. In Indian market, as mentioned above there has been a sea-change after the introduction of LPG policies. Brands that were considered to be of very high quality with practically no competition have lost out to other international brands, with the opening up of our markets and with the increasing awareness of the

consumers about the products. Comparative advertisement truly gives an opportunity to help consumers not only to decide on which product is better but also what is best suited for him.

Moreover, it was also seen in many cases that the comparative advertisement does not hold much good when we talk about the consumer behaviour. The case in this context is the case of Persil Powder and P&G's Ariel, in this case the comparative advertisement was regarding the new 'manganese accelerator' which is an ingredient of the Persil Powder, which P&G Ariel warned the consumers that this ingredient will result in the ruining of the clothes. At the time of the advertisement Persil had a market share of 27.9%, whereas P&G's Ariel had a market share of 28.4%. By June 1994, the figures had considerably changed. Persil's market share value increased to 28.4%, whereas the P&G's Ariel's Market value decreased to 26.4% (Figures taken from Marketing Week, 1994).

Hence it can be seen that the consumers are usually not influenced by the advertisements where the direct advertisement is made using the trademark and which is negative in nature. Hence, the consumers are not always taken in by the claims of advertisers and are likely to be particularly sceptical about comparative advertisement (Boddewyn and Marton, 1978). The consumers who have the brand loyalty start developing a negative attitude towards the brand indulging in Comparative advertisement.

Many studies also indicate that the comparative format is suspect and less believable than the non-comparative advertisement (Barry, 1993). Hence it can be concluded that the non comparative advertisements can boost the market share in most of the cases as compared to the comparative advertisements using trademarks.

COMPARATIVE ADVERTISEMENTS AND LEGAL BATTLES

It is seen many a times that Direct Comparative Advertisements do have an effect on the market share of a particular product, but a legal battle often comes in between which affects the effectiveness of the comparative advertisement as a whole. For example in the case of Schick Inc, this company used a comparative advertisement mechanism to promote its product. This comparison was done with another company also having a Flexomatic shaver. As a result of this the company's market share increased from 8% to 24% - it was followed by a legal battle in the court. The result of this legal battle was the withdrawal of the advertisement on the ground that it was false and misleading. Hence there was loss to the company and the consumers.

It is further important to note that the different stages of decision making processes are affected by the Comparative advertisement. All these together collectively help us to determine the overall effectiveness of the product (Wilkie & Faris, 1975). Hence if at the end of the day the advertisement is withdrawn due to the legal battle between the parties then the overall effectiveness of the advertisement will be affected.

HOW SHOULD THE COMPARATIVE ADVERTISEMENTS BE KEEPING IN MIND THE TRADEMARKS AND THEIR INFRINGEMENTS?

Comparative advertisement is a very useful in the market place for the consumers. If we see it in a consumer perspective it tells the difference between two goods in the market and tell the consumer why he should opt for the advertiser's product (Randal L. Ross *et al.*, 1975). Hence to a large extent the consumer behaviour is affected when the comparative advertisement is done through infringement of the trademark. Trademark protection is commercially important as it embodies consumer good will created through extensive, costly and skilful advertising (Graeme B. Dinwoodie & Mark D. Janis, 2008). The Law does not prohibit the informational use of the trademark of others, rather, punishes uses that confuse the consumers (Lee Wilson, 2008).

One of the most important things to be seen while a comparative advertisement is done through the usage of trademark is that it should be an honest approach. The visual comparative advertisements are valid as long as there is no misrepresentation if the trade has been used to cause confusion and is not portraying the accurate facts of the consumer then this results in false advertising and infringement of trademark. Hence there should not be any attempt to cause confusion among the consumers.

Another important point while doing comparative advertisement with the help of trademarks is that there should not be useless assumptions made, as this will mislead the consumers. Moreover the comparisons need to be comparable in nature. Any type of information which is physical in nature is usually should be in the form of the additional information which is in the bottom of the page.

Special reference is also given to the consumers while talking about the 1997 European Council Directive. It says that comparative advertising which is truthful, not misleading and which is consistent with principles of fair competition can be permitted as long as it helps consumers in making their decisions.

CONCLUSION

Comparative advertisement has its own advantages and disadvantages. But as we analyse it from the sides of the brand owner and the consumer we come to know that it is not beneficial for either of them. The consumers have become more sceptical and do not get carried away by the Comparative advertisement. This can very well be seen in the case of Persil and Ariel, where the market share of Persil had increased despite of a negative comparative advertisement against it.

It can also be concluded that even though the comparative advertisements do provide a remote benefit to the consumers, it ends up in a legal battle between the two brand owners. Hence the effectiveness of the advertisement becomes very low. It is true that the state of the market in an economy can be told by the state of the comparative advertisement; India in this sense needs to develop its law and make them more consumer friendly because at the end of the day, the consumer is the king.

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