Comparative advertisement and Trademark Infringement

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Have you come across advertisements while watching TV that compare one product with another and it is quite obvious which the contender is despite them having “blurred” the brand name? The Pepsi and Coke disputes and one-upmanship have been going on for several years. What’s generally noticeable is that when one product is compared with another, we immediately recognise the two different products (which are generally trademarked) because of their brand names, the shape of the product and the general familiarity with the way it looks. So, the next question that comes to our minds is, is this even ethically and legally right? Well, leaving ethics aside, this post aims to answer the question from a legal perspective. In this era where the whole world is considered as one global village, trademarks play an important role to distinguish the products of one business house from another. So, is it not a violation of the trademark holder’s rights, among other rights? It may be, but first what needs to be understood is what comparative advertisements are.

What are comparative advertisements?

As one may gather, comparative advertisements are nothing but comparing your product/service with that of another’s in the same field, which mostly focuses upon the price, quality and durability of the products. This is done obviously to increase their visibility in the market in order to generate more profits.

Is comparative advertising permitted under the Trademarks Act, 1999?

Up to a certain extent, it is. Section 30(1) of the Trademarks Act, 1999 states that it is not infringement to use a registered trademark with the
purpose of identifying goods or services as those of the proprietor, provided the use: – a) is in accordance with the honest practices in industrial or commercial matters, and b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark. So it is trademark infringement if the advertisement falls under any of the above three categories as per Section 29 (8).

What is the purpose of comparative advertisement?

Primarily, it is to increase your profits by declaring that your goods are the best in the world, even though the declaration is untrue. This was held in the recent case of Reckitt Benckiser (India) Ltd. vs Hindustan Unilever Ltd, where the Court stated that while a trader is allowed to declare his goods as the best, the comparison done by the defendant in his ad, between his product “Lifebuoy” and the petitioner’s product “Dettol” crossed the thin line between puffery and disparagement and the advertisement was held to be violative of Section 30(1).

Puffery is where the advertiser seeks to draw the consumer’s attention by making over-generous claims about his product, which is nothing but his opinion about his own product rather than verifiable statements of fact. This is allowed under Section 30(1) of the Trademarks Act, 1999. On the other hand, many a times puffery cases crosses the line and seeks to portray the other product in negative light. The same is then said to amount to denigration which, in simple words, is infringement of multiple rights of the other person, including trademark infringement as per Section 29 (8) of the Act.

So, the true purpose of these ads should be for the benefit of the consumers; to enable them to make an informed choice between two products, as held in Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd where the Supreme Court said that “Public at large is should be benefited by the information made available through the advertisement.” As a matter of fact the very basis of the law relating to Trademarks is also the protection of public interest only, since the courts think of an unwary purchaser, who may buy a spurious product on the mistaken impression that it was brand ‘x’. The same logic should form the basis for an action in respect of disparaging advertisements also.”

Conclusion
While a trader is allowed to declare his product as the best in the world, care must be taken while using the trademark of others. Many of the ads portray the design trademark of their rival’s product in a negative light by damaging the reputation of the product by belittling it. What the aim of comparative advertising should be is consumer welfare and not a business strategy to make more money; because that does not always go well.

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Tags: comparative advertisements disparagement puffery trademark infringement

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