

COMPARATIVE ADS: BALANCING INTEGRITY AND IMPACT

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Introduction:

Advertisements serve as a powerful means to capture public attention towards products and services. Beyond merely promoting offerings, they drive customer engagement, increase sales, and bolster brand recognition, ultimately enhancing business outcomes. Comparative advertising stands out as one of the most widely adopted strategies by brands. This approach showcases a brand's product superiority by highlighting advantages over competitor's offerings, whether in terms of cost, value, quality, or other attributes. However, *it comes with a critical caveat: while advertising can enhance consumer awareness, it must avoid misleading consumers—a concern particularly pertinent when consumer education rests in the hands of entities with vested interests.*

Regulatory Standards, Ethical Boundaries and The Role of ASCI:

The Advertising Standards Council of India (ASCI) Code for self-regulation in Advertising stipulates strict guidelines for comparative advertising. It permits comparisons only if they are based on factual accuracy and refrain from denigrating competitor's products. The Supreme Court has underscored that advertisements fall under the ambit of *Article 19(1)(a)* of the Constitution. These advertisements must uphold truthfulness, fairness, and transparency, acknowledging that some degree of exaggeration or “puffery” is permissible but should not mislead consumers.

The guiding principles laid down by the Supreme Court relating to comparative advertisements are-

- i. *An advertisement falls under the ambit of commercial speech and is, therefore, protected by Article 19(1)(a) of the Constitution.*
- ii. *An advertisement must not be false, misleading, unfair or deceptive.*
- iii. *there would, undoubtedly, be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product”.¹*

Under the Consumer Protection Act, 2019, misleading advertisements are defined as those that provide false descriptions or guarantees about products or services, potentially deceiving consumers about their nature, substance, quantity, or quality. Such practices are deemed unfair trade practices and can lead to legal

¹ *Dabur India Ltd. vs M/S Colortek Meghalaya Pvt. Ltd.*, 2010 SC Online Del 391.

repercussions for the advertiser. As per **Section 2(28)** of the Consumer Protection Act, 2019 “*any advertisement which gives a false description of a product or service; or gives a false guarantee to customers or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or make such a representation, either expressly or impliedly, which would be considered as unfair trade practice had they been made by the manufacturer or seller or service provider.*”

Disparagement, as defined by Black’s Law Dictionary - “*A derogatory comparison of one thing with another; or a false and injurious statement that discredits or detracts from the reputation of another’s character, property, product or business.*”

Therefore, advertisements must be based on factual claims and should not mislead or distort consumer understanding, as misleading advertisements undermine consumer rights and may cause financial loss or mental distress.

Navigating Comparative Advertising - Balancing Benefits and Risks:

While comparative advertising inherently involves some degree of implicit disparagement, it is permissible only when it involves exaggeration or “puffery” about one’s own product, without disparaging competitor’s goods. In the legal precedent of *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*², the Supreme Court upheld that simple praise should be viewed as an invitation to consumers, rather than a guarantee of product quality, acknowledging the competitive nature of advertising claims.

The Delhi High Court in case of *Havells India Ltd. v. Amritanshu Khaitan & Ors.*³ has established two critical criteria for determining misleading advertising: firstly, it must either deceive or have the potential to deceive its target audience; secondly, its deceptive nature should influence consumer purchasing behavior or unfairly impact competitors.

Trademark Considerations in Comparative Advertising:

Under the Trademarks Act, 1999, comparative advertising that includes a competitor’s trademark must adhere to honest practices and should not harm the distinctive character or reputation of the mark as per the principle laid down in Section 29(8) of the Trademarks Act, 1999 whereas Section 30(1) of the Act provides an exception, allowing the use of a registered trademark to identify goods or services as those of

² *Colgate Palmolive Company & Anr. vs. Hindustan Unilever Ltd.*, 2014 (57) PTC 47 [Del](DB).



³ *Havells India Ltd. v. Amritanshu Khaitan & Ors.*, 2015 (62) PTC 64.

the trademark owner, provided it is done honestly and without detrimental impact on the mark's reputation. This provision permits comparative advertising as long as it avoids disparaging or denigrating the competitor's products.

Case Analysis: BEIERSDORF AG v. HINDUSTAN UNILEVER LIMITED (HUL)⁴

In the legal dispute between Beiersdorf AG (plaintiff) and Hindustan Unilever Limited (HUL, defendant), the focus was on trademark infringement and disparagement issues arising from comparative advertising.

- Beiersdorf's "NIVEA" brand, with its distinctive blue background ('Pantone 280C'), established in 1925, served as a primary identifier for its products.
- HUL's marketing campaign for "Ponds Superlight Gel" involved a comparative demonstration using an unmarked "blue tub" similar to Beiersdorf's "NIVEA Crème" tub. This comparison aimed to showcase superiority by highlighting differences in product performance.
- Beiersdorf argued that HUL's comparison between their heavy moisturizer ('NIVEA Crème') and HUL's light gel was misleading, as it misrepresented product qualities and unfairly portrayed "NIVEA Crème". Beiersdorf contended that HUL's use of the "blue tub" without branding or disclaimer infringed upon their trademark, which had achieved distinctiveness over decades. The produced comparison submitted by Beiersdorf is produced herein below:

Beiersdorf AG's Products	Hindustan Unilever Limited's Products
	

⁴ *Beiersdorf AG v. Hindustan Unilever Ltd.*, 2024 SCC OnLine Del 3443.



- The court acknowledged Beiersdorf’s “Pantone 280C” as a distinctive trademark, acquired through extensive use and brand recognition and emphasized that while comparative advertising is permissible, it must not mislead or disparage a competitor’s product. Puffery of one’s own product is acceptable, but undermining a competitor’s product is not.
- The court ruled in favor of Beiersdorf⁵, restraining HUL from further using the ‘blue tub’ in a manner that could disparage or dilute Beiersdorf’s trademark. This decision underscored the importance of protecting trademark distinctiveness in marketing practices and ensuring fairness in comparative advertising.

Conclusion:

Advertisements are recognized as a form of commercial speech under *Article 19(1)* of the Constitution of India, granting them the status of a fundamental right. However, this right is not absolute and is subject to certain restrictions. Indian legislation permits comparative advertising to uphold the public’s right to information but prohibits depicting a rival’s product negatively to promote one’s own. Advertisements must be honest and truthful, avoiding any form of customer deception. While exaggerated claims, known as puffery, are permissible, they should not mislead consumers or manipulate their purchasing decisions. As brands innovate their advertising strategies, it is crucial to ensure that these do not infringe upon competitor’s rights or mislead customers, as such actions could undermine consumer trust and distort market dynamics. In *Beiersdorf AG v. Hindustan Unilever*

⁵ https://www.livelaw.in/pdf_upload/59709052024sc3002021144345-539607.pdf

Limited (HUL), Beiersdorf AG claimed HUL’s marketing campaign for “Ponds Superlight Gel” disparaged its “NIVEA Crème” by using an unlabelled blue tub similar to NIVEA’s distinctive packaging has become a landmark case of misleading advertisement. The court’s observations that HUL’s comparison was misleading, juxtaposing a heavy moisturizing cream with a light hydrating gel, creating a false impression has once again set the distinction between permissible puffery and impermissible disparagement.
