

BRAND AND TRADEMARK DISPARAGEMENT: INSIGHTS FROM THE ONGOING 'FOODPHARMER' VS. 'MONDELEZ' CASE

by Rajlatha Kotni, Partner and Swagita Pandey, Associate & Isha Arora, Intern, Lexport

Introduction

In a competitive marketplace, advertising and brand positioning often lead to disputes involving brand disparagement and trademark protection. *Brand and trademark disparagement refers to false or misleading statements that harm the reputation or value of a brand or its trademark.* These statements can take various forms, such as unsubstantiated comparisons, defamatory remarks, or baseless claims about a product's quality, performance, or safety. In today's digital age, where opinions spread rapidly, businesses face challenges in balancing trademark protection with respecting free speech. Brand and trademark disparagement is not a new concept, it has existed in the market for several decades, closely tied to the evolution of advertising, marketing, and competitive business practices.

The following are examples of some notable cases of brand and trademark disparagement:

1. Colgate Palmolive Company v. Hindustan Unilever Ltd.¹

The Hon'ble Court held that while it is permissible to exaggerate claims in advertisements to some extent, it is impermissible to denigrate the goods of another. This case clarified the thin line between competitive advertising and brand disparagement. An image from the disputed ad film is produced herein below:



¹ Colgate Palmolive Company v. Hindustan Unilever Ltd., 2014 (57) PTC 47 [DEL(DB)]

2. Pepsi Co. Inc. v. Hindustan Coca-Cola Ltd.²

In this case, the Court emphasized that the intent and overall context of the advertisement matter. The purpose of an advertisement should be to promote one's product rather than degrade a competitor. The judgment provided guidance on balancing competitive promotion with ethical advertising practices.



3. Dabur India Ltd. V. Dhruv Rathee³

This case arose when YouTuber Dhruv Rathee criticized Dabur India's "Real" packaged fruit juice in a video. Dabur filed a case in the Calcutta High Court, alleging trademark and copyright infringement under Section 29(9) of the Trademarks Act. The Court found that the unauthorized use of the "Real" logo, label, and packaging in the video violated Dabur's intellectual property rights. As a remedy, the Court ordered YouTube to remove the video. The ruling highlighted that intent is not the sole consideration; any misuse that causes confusion or misrepresentation suffices for liability.

4. Hamdard National Foundation v. Hussain Dalal⁴

The Delhi High Court interpreted Section 29(9) of the Trademarks Act, stating that spoken words causing misrepresentation, confusion, or deception could constitute a violation. It held that the intent to defame or harm the character of a mark is secondary; the primary consideration is whether the alleged conduct results in misrepresentation or dilution of the mark's distinctiveness. This case further reinforced the principles of passing off and trademark infringement.

² *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.*, (2003) 27 PTC 305 (DB)

³ *Dabur India Ltd. V. Dhruv Rathee*, 2024 SCC OnLine Cal 6114

⁴ *Hamdard National Foundation v. Hussain Dalal*, 2013 SCC OnLine Del 2289



5. Beiersdorf AG v. Hindustan Unilever Limited⁵

This case arose when Beiersdorf AG, owner of the NIVEA brand, filed a lawsuit against Hindustan Unilever Ltd. (HUL) over misleading comparisons in marketing campaigns. The Delhi High Court found that HUL's in-mall promotions comparing Ponds Superlight Gel with NIVEA Crème violated NIVEA's intellectual property rights by misusing its distinctive blue colour and creating consumer confusion. The Court issued a permanent injunction restraining HUL from using misleading comparisons and disparaging NIVEA's products. The ruling emphasized that comparative advertising must be factual and non-misleading to avoid liability.



6. M/S Dabur India Ltd. v. M/S Patanjali Ayurved Ltd.⁶

This case arose when Dabur India Ltd. filed a lawsuit against Patanjali Ayurved Ltd. in the Delhi High Court, alleging disparagement and trademark infringement in advertisements for Patanjali's Chyawanprash. Dabur

⁵ *Beiersdorf AG v. Hindustan Unilever Limited*, (CS (COMM) 300/2021

⁶ *M/S Dabur India Ltd. v. M/S Patanjali Ayurved Ltd.*, FAO(OS)--249/2017

claimed that Patanjali's ads implied that Dabur's Chyawanprash contained harmful chemicals, damaging its reputation. The Court found that the advertisements were disparaging and issued an injunction restraining Patanjali from airing any content that disparaged Dabur's products. The ruling highlighted that comparative advertising must not mislead consumers or tarnish the competitor's goodwill.



Trademark disparagement involves any action or statement that directly or indirectly damages the reputation, goodwill, or trust associated with a brand. It includes claims that mislead consumers or denigrate competing products in a way that causes material harm. Courts have outlined that the intent, manner, storyline, and message of any commercial are critical factors in determining whether a case of disparagement exists. Indian law considers disparaging statements as unfair trade practices, punishable earlier under **Section 36A** of the erstwhile *Monopolies and Restrictive Trade Practices Act, 1969* and now under **Section 2(1)(r)** of the *Consumer Protection Act, 1986*, these provisions prohibit advertisements that harm a trademark's reputation or use unfair practices while ensuring that honest commercial practices are protected⁷.

The ongoing legal tussle between "FoodPharmer" and "Mondelez" serves as a prime example of how such disputes can escalate, highlighting the fine line between permissible competition and unlawful brand denigration. This case has not only drawn significant industry attention but also sparked a broader conversation about the balance between marketing strategies and ethical boundaries.

MONDELEZ INTERNATIONAL VS. MR. REVANT HIMATSINGKA (FOODPHARMER) CASE⁸

The Dispute

Mondelez International filed a lawsuit against FoodPharmer, a social media influencer known for critiquing nutritional products alleging influencer of disparaging its trademark in over 150 social media posts and sought an injunction. FoodPharmer's posts accused Bournvita of misrepresenting itself as a health drink despite its high sugar content and use of caramel colouring, which the influencer claimed was carcinogenic. Mondelez argued that these posts disparaged Bournvita's trademark and sought an interim injunction to prevent further posts.

⁷ Bhasin, Muskaan. "Scrutinizing the Concept of Trademark Infringement vis-a-vis Comparative Advertising and Product Disparagement: Key Provisions, Judicial Holdings & Legal Remedies". *Issue 5 Indian JL & Legal Rsch.* 4 (2022)

⁸ *Mondelez Foods Pvt. Ltd. & Ors. Vs. Mr. Revant Himatsingka*, CS(Comm)884/2024

On October 15, 2024, The Single Judge Bench of Hon'ble Justice Amit Bansal of Delhi High Court granted an *ex-parte* interim injunction restraining FoodPharmer from publishing any content that disparaged Mondelez's brands. However, from the Bar & Bench report⁹ dated 24th October 2024 as well as NDTV report¹⁰ dated 23rd October 2024 it is understood that the court on 23rd October clarified that factual, non-disparaging assertions are permitted. This raises an interesting question as to how to distinguish between factual critique and unlawful disparagement.

Legal Analysis

Mondelez alleged that FoodPharmer's posts misled consumers and damaged Bournvita's reputation. They had also relied on injunction orders passed by the coordinate benches on similar lines in cases involving factual disparagement.

From the said clarification referred to in the Bar & Bench and NDTV reports, it is to be noted that the influencer can make non-disparaging factual statements. However, this has introduced significant uncertainty regarding the boundaries of permissible speech. While the interim order allowed influencers to express factual opinions without the risk of being labelled as defamatory, it left unclear the exact limits of what constitutes "permissible" versus "impermissible" speech. This lack of clarity raises concerns that influencers may be overly cautious in their content creation, leading to **self-censorship**. In an effort to avoid potential legal repercussions, influencers might refrain from making even valid or constructive criticism. This fear of legal risk could result in the suppression of genuine feedback, thereby stifling discourse and potentially allowing misleading or harmful information to go unchallenged. Additionally, the burden of proof for disparagement typically lies with the plaintiff, but the court's ruling in subject dispute may shift this burden to the defendant. Critics argue that the court failed to examine the factual accuracy of FoodPharmer's claims, which included valid concerns about sugar content and misleading health claims. The lack of detailed reasoning in the injunction order has sparked debates about the limits of judicial intervention on freedom of speech, more so when it deals with debate surrounding public health, in case unhealthy products are alleged to be passed off as health food. In such a situation there is no substitute for factual ascertainment before any conclusion is reached, even at the *prima facie* stage. In simple terms, critics are of the opinion that the Court instead of acting in a great hurry at the *ex parte* stage, should have issued notice and heard / grilled the influencer (as to the basis of his allegation /charge) before coming to any conclusion even at the interim stage.

END NOTE

The FoodPharmer vs. Mondelez case highlights the challenge of balancing trademark protection with freedom of Speech in today's world of digital influencers and social media. Companies need to defend their brands without stifling genuine criticism or consumer feedback. This case shows the growing tension between protecting intellectual property and encouraging accountability in the market especially in respect of matters concerning public health.

It is the need of the hour to have a clearer legal framework that distinguishes between valid criticism and harmful trademark disparagement. Courts should consider the intent, evidence, and impact of statements on both brands and consumers. Brands should focus on transparency and open communication instead of relying on legal action, while influencers must ensure their critiques are fair and based on facts.

⁹ <https://www.barandbench.com/news/delhi-high-court-foodpharmer-bournvita>

¹⁰ <https://www.ndtvprofit.com/law-and-policy/foodpharmer-vs-bournvita-delhi-high-court-says-no-embargo-on-stating-facts>

Ultimately, a fair resolution can create a system where brands protect their reputation while allowing open discussion, **fostering a healthy balance between consumer rights and brand integrity in today's digital age.**
