Comparative Advertisement: The Debate is Back

What comes naturally in a competitive market, as of today, is a significant increase in communication with the consumers, mainly through advertising. The offshoot of such increasing role of advertising is the phenomenon of *comparative advertising*.

Comparative advertising is a part of the brand owner's strategy. Some of the most effective advertising is comparative. However, they are not without risks. Comparative advertising can affect the way the world views a product and can generate massive sales.

Comparative advertising, as a concept, refers to the act where one party advertises his goods or services by comparing them with the goods or services of another party. Such other party is usually his competitor or the market leader of that good or service. The comparison is made with a view towards increasing the sales of the advertiser, either by suggesting that the advertiser's product is of the same or a better quality to that of the compared product or by denigrating the quality of the compared product. The concept of comparative advertising emerged in the nineties where innumerable product wars on the television sets were witnessed. The nineties era witnessed the Pepsi-Coke war which was followed by Complan-Horlicks tug of war and the latest in the basket is the Rin-Tide war. All these advertisements disparaged the competitor's product to showcase the superiority of their product in the market.

STATUTORY PROVISIONS IN INDIA:

In the legal framework governing comparative advertising in India, there has been a shift from limiting monopolies to encouraging competition. The basic legislation has been laid down by the Monopolies and Restrictive Trade Practices ("**MRTP"**) Act, 1969 and the Trade Marks Act, 1999.

The Monopolies and Restrictive Trade Practices ("**MRTP"**) Act, 1969 was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, it was amended to add a chapter on unfair trade practices. Sec 36 of the MRTP Act provided that unfair trade practices are those which lead to a false or misleading fact disparaging the goods, services or trade of another person. Further, to advertise a 'false or misleading fact disparaging the goods, services or trade of another person' too was brought within the ambit of the same. The term "disparagement" was, however, not defined by the statute. The MRTP Act was subsequently repealed by virtue of sec 66 of the Competition Act, 2002.

Trade Marks Act, 1999

The proprietor of the trademark has the exclusive right to use his trademark. Wh this is used by advertiser in comparative advertising, it gives rise to the concern among the brand owners for their goodwill being harmed.

The primary purpose of trademark is to distinguish the goods of one person from another. In case of comparative advertising, a case of trademark infringement arises only when the competitor's trademark is used.

In India, the law on comparative advertising, in relation to trademarks, is based on the law as laid down in Irving's Yeast Vite Ltd. vs. FA Horse-nail.

Section 29(8) of the Trade Marks Act provides that a registered trademark is infringed by any advertising of that trade mark if such advertising takes unfair advantage and is detrimental to its distinctive character, or is against the reputation of the trade mark.

Section 30(1) of the Trade Marks Act provides that any impugned act under Section 29 would not be considered to be infringement provided the said use of the mark is in accordance with "honest practices" in industrial or commercial matters. As to what constitute "honest practices" is a matter of debate since it has not been defined by any statute. One of the propositions is that, it may be construed in reference to the codes of conduct developed in different marks.

Section 30(1), therefore, makes comparative advertisement an exception to acts constituting infringement under section 29 of the Trade Marks Act, 1999. Hence, the use should be "in accordance with honest practices" and should not be "detrimental to the repute of the trademark".

In a nutshell, it can be inferred that in order to infringe the use of a registered trade mark, two conditions must be fulfilled: it must (a) be otherwise than in accordance with honest practices in industrial or commercial matters and (b) without due cause take unfair advantage of, or be detrimental to, the distinctive character or repute of the mark. Both these conditions appear to be entwined: Any comparison which causes detriment to the reputation of a trademark owner should be dishonest. Having said that, it should also not be forgotten that the question whether a particular advertisement is "honest or not" is to be decided from the perspective of a reasonable consumer.

Disparagement

According to Black's Law Dictionary, the word "disparage" means to connect unequally or to dishonor someone or something by comparison. Disparagement is, thus, a false or injurious statement that discredits or detracts from the reputation of another's property, product or business.

In this context, the case of ***Dabur India Limited vs. Emami Limited*****,** becomes important to note wherein it was held that even if there is no direct reference to the product of the plaintiff and only a reference is made to the entire class of "Chayawanprash" in its generic sense, even in those circumstances disparagement is possible.

In the case of ***Reckitt and Coleman India Ltd. vs. Jyothi laboratories Ltd*****.**, popularly known as the "Cherry Blossom case", the advertisement showed liquid dripping from a bottle marked "X", while the liquid does not drip from the bottle marked "Kiwi". From the shape of the bottle marked "X" it could be easily identified as the Cherry Blossom bottle, as Cherry Blossom had a design registration for this shape. The Delhi High Court held the advertisement to be a case of disparagement. In this case, the court held that disparagement arises only if the product in question is identifiable. Identification could be explicit or drawn from the facts and circumstances.

In **Reckitt & Colman of India Ltd. vs. M.P. Ramachandran & Anr,** the Hon'ble Calcutta High Court (Barin Ghosh, J.) laid down five principles for granting an injunction in case of comparative advertising. The Court summarized the law on comparative advertisement as under:

- A tradesman is entitled to declare his goods to be the best in the world, even thought the declaration is untrue.
- He can declare that his goods are better than his competitor's, even though such statement is untrue.
- For the purpose of such declaration, he can even compare the advantages of his goods over the goods of the others.
- He, however, for the purpose of such declaration, cannot say that his competitor's goods are bad. If he says so, he is defaming his competitors and their goods, which is not permitted.
- If there is no defamation to the goods or the manufacturer of such goods, no action lies.

If a company makes truthful factual claims in a comparison of its goods or services to its competitors, the company can use comparative advertising and will have arguments against any claims of trademark infringement or unfair competition. Unfair trade practice can be ascertained only in the presence of false or misleading facts through scientific or technical assessment. However, each comparative advertisement should be carefully reviewed from a competitor's point of view and should be reviewed often to make sure all facts are still relevant. Therefore, courts have taken the view that "publicity and advertisement of one's product with a view to boosting sales is a legitimate market strategy."

Conclusion

An analysis of the law on comparative advertising reveals that there is an absenc of dedicated legislation regulating the same. The Consumer Protection Act, 1986, though commonly viewed as an effective mechanism to regulate the subject, proves insufficient when the parties are firms, whose products are advertised, which would not come in the ambit of "consumers" to approach the consumer forums. Thus, the Trademarks Act, 1999, at present, becomes the primary legislation which is adhered to in cases of comparative advertisement. However, even on the stand of "honest comparative advertising", the Indian position remains ambiguous. However, the recent set of judgments seems to take the law on comparative advertising in the right direction restoring some uniformity with the international position. Nonetheless, the onus of ensuring healthy competition should not merely lie with the courts. It is important that the product owner's engage in comparative advertising within the permissible limits. It is of utmost importance that the companies as well as the judiciary work in tandem to restore fair practices.

CCI's order against Cement Companies

The CCI through its order dated 20 June 2012, imposed a penalty of approximately six thousand crores (approx. USD 1.1 billion) on cement manufacturers in India after holding them guilty of cartelisation in the cement industry. Additionally, the Cement Manufacturer's Association (the CMA) has been fined 10% of its total receipts for the past two years for its role as the platform from which the cartel activity took place.

CCI seeks partnership agreements with global counterparts

To strengthen its extra-territorial jurisdiction, the Competition Commission of India (CCI) is entering into cooperation agreements with its counterparts in other nations. India's competition watchdog is close to signing a memorandum of understanding (MoU) with the US Federal Trade Commission's Bureau of Competition, said a CCI official with direct knowledge of the development. A draft MoU was prepared in November and is awaiting the foreign ministry's approval.

DLF's plea seeking clarification posted for hearing on Jul 18

Real estate major DLF's plea in Competition Appellate Tribunal seeking a clarification on a stay order last year on CCI's Rs 630-crore penalty will come up for final hearing on July 18. DLF has filed an application seeking a clarification on tribunal's order of November 9 last year staying CCI's Rs 630 crore penalty on DLF for abuse of dominant market position. On August 12 last year, Competition Commission of India (CCI) had imposed a penalty of Rs 630 crore on DLF after finding the realty major guilty of abuse of the dominant market position.

INSIDER TRADING

After a month long trial in Federal District Court in Manhattan, Mr. Rajat K. Gupta, the retired head of the consulting firm McKinsey & Company and a former Goldman Sachs board member, was found guilty of conspiracy and securities fraud for leaking boardroom secrets to a billionaire hedge fund manager. The conviction of Mr. Gupta for insider trading reinforced the stringent US laws on securities fraud, paving an opportunity for us to examine the regulations provided for insider trading in India.

Insider trading, in simplest sense of the terms, refers to the use, rather misuse of material and non-public information in trading the shares of the company by a corporate insider or any other person who owes a fiduciary duty to the company.

Insider trading is most often associated with illegal conduct, the abuse of a fiduciary position held by a person possessing price sensitive and unpublished information used for their personal gains. More often than not, insider trading occurs when corporate insiders—officers, directors, employees and large shareholders, buy and sell stock in their own companies. To address the sensitivity of the issue, the Indian watchdog, Securities and Exchange Board of India (‘**SEBI**’) lays down a legal mandate that when corporate insiders trade in their own securities, they must report such trades to SEBI.

India is a member of the International Organization of Securities Commission (‘**IOSCO**’), an association regulating world’s securities and futures markets. IOSCO members are typically the securities commission or lead financial regulator from each country. IOSCO has members from over 100 different countries, which regulate more than 90 percent of the world's securities markets. The objectives of IOSCO are:

- Cooperate to promote and implement internationally recognized standards of regulation, in order to protect investors and maintain fair, efficient and transparent markets;
- To strengthen information exchange and cooperate in enforcement against misconduct as well as supervise markets and market intermediaries;
- To exchange information about their experiences with a view of assisting the development of markets, strengthen market infrastructure and implement appropriate regulation.

In addition to the above mentioned objectives, IOSCO has also successfully executed a Multilateral Memorandum of Understanding (‘**MMoU**’) of which India is a signatory. The MMoU provides guidelines that envisage how the signatories are to consult, cooperate and exchange information for securities regulatory enforcement purposes. It also lays down the specific requirements regarding the confidentiality of

the information exchanged, and ensures that no domestic banking secrecy, blocking laws or regulations prevents securities regulators from sharing this information with their counterparts in other jurisdictions. It may be worthwhile to highlight the activities falling within the scope of the MMoU:

- insider dealing and market manipulation;
- misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives;
- solicitation and handling of investor funds, and customer orders;
- the registration, issuance, offer, or sale of securities and derivatives;
- the activities of market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and
- markets, exchanges, and clearing and settlement entities.

To provide for a framework on regulation of insider trading, SEBI enacted the SEBI (Prohibition of Insider Trading) Regulations, 1992 ('**Regulations 1992**'). Regulations 1992 prohibit an insider from dealing in the securities of a company listed on the stock exchange on the basis of unpublished price sensitive information. It also prohibits communication of such information to any person except when required under the law.

As per the Regulations 1992, two things should be established in order to establish the fact that there is a substantial disclosure of the price sensitive information; (a) the fact that there is a divulgence of the price sensitive information concerning the issuer company, and (b) the person who dealt, had the information in a position of trust or was tipped about so much information by a person in fiduciary capacity or in any position of trust.

Reg. 2 (e) of the Regulations 1992 defines *"insider"* to mean any person who,
(i) is or was connected with the company or is deemed to have been connected with the company and is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company, or;
(ii) has received or has had access to such unpublished price sensitive information.

Reg. 2 (ha) of the Regulations 1992, defines "*price sensitive information"* as any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.

Explanation.—The following shall be deemed to be price sensitive information:—

(i) periodical financial results of the company;
(ii) intended declaration of dividends (both interim and final);
(iii) issue of securities or buy-back of securities;

(iv) any major expansion plans or execution of new projects;
(v) amalgamation, mergers or takeovers;
(vi) disposal of the whole or substantial part of the undertaking;
(*vii*) and significant changes in policies, plans or operations of the company.

Chapter II of the Regulations 1992, *inter alia* sets out guidelines prohibiting the dealing, communicating or counseling on matters relating to insider trading.

Reg. 3 of the Regulations 1992 prohibits an insider from dealing in securities of a company listed on any stock exchange on his behalf or on behalf of any other person when in possession of unpublished price sensitive information or from communicating, counseling or procuring any unpublished price sensitive information to any person. However nothing mentioned under Reg 3 of the Regulations 1992 shall be applicable to any communication required under the ordinary course of business or under any law.

Reg. 3A of the Regulations 1992 provides that no company shall deal in the securities of any other company or associate of that other company while being possessed with any unpublished price sensitive information.

Reg. 3B of the Regulations 1992 provides certain cases exempted from Reg 3A of the Regulations 1992. In a proceeding against a company in respect of Reg 3A of the Regulations 1992 it is a cogent defense for the company to prove that it entered into a transaction in the securities of a listed company when the unpublished price sensitive information was in the possession of an officer or employee of the company, if:

- the decision to enter into the transaction was taken on its behalf by a person other than that officer or employee of the company .
- The company has put into place such systems and procedure which demarcate the activities of the company in such a way that the person who enters into the transaction on behalf of the company has no access to the information possessed by that officer or employee of the company.
- It had in operation at the time such arrangements that could reasonably ensure that the no information or advice was communicated to the person or persons who made the decision with respect to the transaction by that officer or employee of the company.
- In a proceeding against a company in respect of regulation 3A which is in possession of unpublished price sensitive information, it shall be defense to prove that acquisition of shares of a listed company was in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

Chapter IV of the Regulations 1992 contains policies of disclosures and internal

procedures to be adopted by the company in order to prevent insider trading.

CONCLUSION:
The Indian legal environment condones the practice of insider trading vide the Regulations 1992. It is worthwhile to mention India's active participation in international forums like IOSCO and making affirmative steps in combating the issue of insider trading, with accurate measure and substantially maintain the global standards.

International Contribution

Document: Legal Update - New ICC Arbitration Rules
As international arbitration becomes increasingly sophisticated, users require rules which cater fully for their needs.
» download document [pdf, 370 KB]

News 10 @ a glance

Benami exemption list likely to be pruned

The government is likely to curtail the list of entities exempted from the proposed Benami Transactions (Prohibition) Act to give more teeth to the new legislation. The finance ministry has accepted suggestions made in this regard by the parliamentary standing committee on finance. The panel had asked the government to tighten the law and only exempt property deals in the name of wife or unmarried daughter. It had recommended that a person standing in a fiduciary capacity for the benefit of another person including a trustee should not be exempted from the law to give it make it more effective. The panel had also asked the government to create an in-built mechanism within the ambit of the law to look at suspicious

transactions and incorporate proper definitions in the law to remove any scope for ambiguity and interpretation. The committee also wanted the government to have a provision for an appellate body for expeditious disposal of cases registered under the law.

Delhi, Mumbai to be first provided with missile defence shield

Delhi and Mumbai, the two most vital metros of India, have been chosen for DRDO's BallisticMissile Defence system that can be put in place at short notice. The detailed proposal is being prepared for final clearance from the Cabinet Committee on Security (CCS). The BMD system will require minimum human intervention due to the complete automation of tracking devices and counter-measures. After successful implementation in Delhi and Mumbai, the system will be used to cover other major cities in the country, they added.

TCS signs MoU with AP police

Tata Consultancy Services (TCS) has signed an MoU with the Andhra Pradesh Police to implement “The Crime and Criminal Tracking and Network System (CCTNS)” in the state. The system is meant to improve connectivity and enhance crime fighting capabilities of the Police by facilitating collection, storage, retrieval, analysis, transfer and sharing of data by the police in

the country. Under CCTNS project, investigating officers will have technology and information to facilitate investigation of crime and detection of criminals through use of IT. It will also help in tracking progress of cases at ground level and in Courts and help in speedy disposals.

Sterlite, Sesa Goa gain as shareholders approve merger

Shares of Sterlite Industries and Sesa Goa gained momentum as shareholders approved their proposed merger. The companies will now require the Bombay High Court's approval for the merger. The combined entity, Sesa Sterlite, will be one of the largest diversified resources players in the world with operations in iron ore mining, copper, aluminium, zinc, lead, silver and oil and gas.

RBI eases ECB norms, ups FII investment cap in corporate bonds

The existing limit for investment by Securities and Exchange Board of India (SEBI) registered foreign institutional investors (FIIs) in Government securities (G-Secs) has been enhanced by a further amount of $5 billion. This would take the overall limit for FII investment in G-Secs from $15 billion to $20 billion.

Government plans to convert 523 crore IFCI debt into equity

The government has revived a plan to convert its 523 crore debt to Industrial Finance Corporation of India into equity, an effort seemingly aimed at acquiring greater control of the country's oldest development financial institution. According to estimates, the government will get over 40% equity stake in IFCI, in which state-owned insurers and banks hold a 29.3% stake.

Govt makes third-party liability cover mandatory for ships calling at ports

India has made it mandatory for foreign-registered ships entering the country's ports to hold a valid third-party liability cover against maritime claims such as oil pollution and wreck removal. The Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore facilities) Rules, 2012, were framed under the Merchant Shipping Act, 1958. Indian-registered ships are exempted from these rules. The rules are applicable to foreign-registered ships of 300 gross tonnes or more.

Natco Pharma plunges after NY court verdict

Shares of Natco Pharma are witnessing selling pressure after a New York court ruled in favour of Teva in a patent case against the company. Teva had opposed the generic versions of Copaxone, a drug used for the treatment of multiple sclerosis, and filed cases

against Momenta Pharmaceuticals, Mylan and Natco. Teva will be able to continue with the patent until 2014 According to analysts, Natco had pinned its hopes on a positive outcome. The ruling will effectively prevent any launch before the patent expiry, and Natco is likely to appeal it.

Govt to impose 5% customs duty on power equipment

India will shortly impose a 5% import duty on power generation equipment in a move that will benefit domestic firms including Bharat Heavy Electricals Ltd (Bhel) and Larsen and Toubro Ltd (L&T). In addition, the government will also impose a 10% countervailing duty (CVD), a sort of equalization levy to make up for the excise on local products, and 4% special additional duty (SAD), taking the total to 19%, according to government officials. That duty structure will apply only to the so-called mega projects, or those generating at least 1,000 megawatts (MW).

States agree to bring petroleum products under GST ambit

India moved a step closer to implementing the goods and services tax (GST) after state governments agreed to allow petroleum products under its ambit. Until now, the states were against including petroleum products under GST fearing they would lose revenue. For many states,

petroleum products contribute to more than one-third of their tax revenue.The constitutional amendment Bill, too, excludes petroleum products from GST.But industry lobby groups are demanding that petroleum be brought under GST so there is no break in the credit chain.