



Journal of Media and Communication

© 2021 Department of Media and Communication, School of Communication
Central University of Tamil Nadu, Thiruvarur, India

eISSN: 2581-513X

Peer-reviewed open access journal

JM&C is in the UGC-CARE List of Approved Journals

Volume: 5

Issue: 1

Period: June 2021

Pages: 31-47

Comparative-Disparaging Advertisements by Social Media Influencers in India: A Theoretical Insight

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Abstract. Companies are actively making use of modern marketing by hiring social media influencers to increase their brand's reputation to a much larger consumer base. In doing so, the traditional norms of advertising in recent instances gets compromised due to these influencers running disparaging content in their handles. The current study has theoretically analysed the evolving trend of 'influencer advertising' and disparaging practices in India along the lines of recent case laws and aims to give insights on why it needs further attention. Though there are imperative measures taken by the Indian government such as the new ASCI Guidelines for influencers, the study has also primarily found that there is a lack of awareness among them about intellectual property rights and due diligence. It is suggested a comprehensive regulatory framework for social media influencing can be composed and interpreted harmoniously with existing laws in this regard.

Keywords. *Product disparagement, comparative advertising, social media influencer, trademark, digital marketing, advertising standards, consumer protection*

Introduction

Comparative advertising practices resort to anti-competitive or unlawful practices by a producer (brand owners and companies) through which he compares and projects his product as superior in varied parameters such as price, quality and quantity, over another product by a competitor by reference or by representation. The graphical or visual representation of a rival brand's product in a disparaging advertisement will take a negative tone and even goes to the extent of directly mentioning the brand name. Attempts to show the competitors' products as inferior and by direct usage of their trademark/brand name will violate the basic tenets of trademark and competition policies.

Indian laws that converge with disparaging practices include the Trademark Act of 1999 and 2019 enacted Consumer Protection Act.

While the Indian courts have actively adjudicated vide various case laws since the time of the establishment of press and broadcasting houses on how it is influencing the younger demographics in social media and how the traditional restrictions on such advertising have to be interpreted in a modern setup. On the other hand, there are opposing contrasting opinions on why comparative advertising can help consumers in taking a rational decision to buy the product.

With the rise of social media users by all age groups particularly teenagers and college-goers, the brand owners have discovered a new way of inducing comparative advertising into the minds of the target audience at the cost of compromising advertising ethics which are enshrined under various laws. While the traditional advertising has been

using ‘celebrity influencers’, the online businesses which have purely made social media platforms as their marketplaces have also started hiring many self-proclaimed third-party ‘social media influencers’ to engage in trademark disparaging practices such as reviewing trademarked brands and false testimonial advertising to tarnish the brand’s trademark.

Objective of the study

The objectives of the current study are to:

- Emphasise the role of social media influencers from a legal standpoint.
- Analyse when comparative advertising becomes product disparagement through case-laws.
- Address the impending issue of influencers not being aware enough of their due diligence and rights.

Scope and structure of the study

The current study has been structured in a theoretical model to explore the objectives at hand. The structure starts by providing existing knowledge on traditional advertising and how it evolved into social media influencing.

Product or commercial disparagement is a grey area since it is allowed to some extent through comparative ads. There are instances where it crossed the legal lines which the study has supported with legal precedents and how the Indian courts have tackled the issue. Being one of the modern platforms for marketing, social media ought to be scrutinised under the lens of existing legal advertising regulations as much as it is applied to traditional advertising. The study has laid out the relevant laws under which social media influencers ought to practice due diligence, specifically while carrying comparative advertising.

Research problem

Influencers using disparaging techniques to advertise and promote content/products will have a chilling effect on the existing advertising standards. The new guidelines passed by the Advertising Standards Council of India in May 2021 adhering to influencers in India needs to be made legally binding through interpretation congruent with existing laws. The study wishes to point out the exclusion of intellectual property perspectives in the ASCI guidelines. Influencers and businesses are not sufficiently sensitised of their intellectual property rights and the legal implications arising out of their marketing activities on these platforms.

Research methodology and data collection

The descriptive method has been used to define and brief on the evolution of social media influencers and their impact.

Doctrinal legal research is a commonly followed research method to expound one or more legal issues in hand and if it fits with an existing legal theory, concept or set of

regulations. According to Amreet Kharel, doctrinal research begins with a proposition starting from its development and the latter part of the analysis focusing on the testing of the proposition along with the research problem of the study (2018).

This study has combined doctrinal research and case-study methods to position the legal dilemma with the relevant judgements from Indian courts on matters of disparagement and advertisements.

Primary data collected include legal precedent extracted from online databases such as Indian Kanoon and secondary data being online blogs and articles dealing with the current subject matter.

Previous studies

The relevant past research studies on the issue of comparative adverts show that though Indian courts have articulated on the acceptable parameters of 'puffing' by companies and businesses, there is not a clear standpoint if the same is effective when it happens in a digital platform. Digant Raj Sehgal in his article has pondered on such parameters by dividing comparative advertising into 'puffing' and 'disparagement' (2020). Puffing is prevalent in testimonial adverts where the company or the producer claims a statement through catchy lines and banners that their product has redeeming qualities which makes it superior to that of rival's products. He further has mentioned two judgements, (*Reckitt v. Gillette* (2017); *De Beers Abrasive v. International General Electric Co* (1998)) where Indian courts highlighted that where puffing becomes disparagement is when it discredits or disgraces the rival's products. He further adds in his blog that the elements of disparagement in a commercial includes the intent, manner and message it conveys through its advert. Even if the producer has not made a direct mention of a rival's brand name or trademark, but only a generic reference to the class of product, it can become a generic disparagement as observed in the judgement of *Pepsi Co. Ltd & Ors v. Hindustan Coco-Cola Pvt. Ltd & Anr* (2001).

Digital platforms include e-commerce sites and interactive media such as Instagram and YouTube where not just the companies but even certain individuals engage in promoting content. Rana and Srivatsava in their blog have briefed on a report titled 'The State of Influencer Marketing 2019: A Benchmark Report' that has backed up a claim that 92% of consumers rely on social media influencers which prove it is becoming an active marketing trend. Due diligence as further mentioned in their blog, means a level of care ought to be exercised by a reasonable person to avoid harm to other persons and their property. Influencers ought to be careful and aware of their duties when doing endorsements (2020). With India as a backdrop, the consumer base is doubled with the population growth and recent times of pandemic has seen rise in gigantic e-commerce dependence. E-commerce giants like Amazon and Reliance may the bigger players and who

also have tied up with celebrities and individual influencers to promote their products through paid testimonies and comparative reviews.

In this article titled 'Social Media Influencer and their Intellectual property rights', the focus has been thrown the following laws and their interaction with social media influencers: Consumer Protection Act 2019 and Rules 2020, Trademark Protection Act 1999 and its rules, Copyright Act 1957 and Competition Act of 2002. The article further makes reference to self-regulation policies carried out by online platforms, some of them being the 'Content ID' system by YouTube to ensure copyright protection and Domain name registration protected as trademarks (Kashishworld, 2020).

The Constitution of India guarantees fundamental rights to speech and privacy under the Right to Life but with reasonable restrictions. Avni Sharma in her article has analysed whether the advertising content via product reviews qualifies as freedom of speech and whether the damage can be sought by a company whose product was disparaged can invoke their right not to be defamed was explored in a recent judgement, Marico Ltd v. Abhijeet Bhansali (2020). The case involved a YouTuber who gave an alleged defamatory comparative review by comparing a branded coconut oil with another product, which led to an awareness of aligning Constitutional rights with that of social media influencers, even resulting in a lawsuit. She has highlighted the goodwill test to prove if a certain act accounts to trademark infringement and disparagement and if the court's reasoning using Social Contract theory was justified. The Bombay High Court justified that by forming a contract with the State/government people surrendered their freedom for certain rights. Though the balance between the right to reputation and free speech has to be maintained, social media influencers must have a check on the objectionability of the content (2020). The current study has referred to these articles to be relevant in their findings to put forth on the pedestal the gravity of legal implications of social media influencers. The study also attempts to compare any other issues which need to be addressed apart from the existing sources.

Major findings of the study

'Traditional advertising' versus 'Digital advertising'

Traditional advertising is the most researched and relied on form of marketing by most consumers and producers until the advent of computers and digital media. It also remained as the only option for market players, whether offline advertising or other promotional activities. It was and is still in existence as a practice but questioned due to its inability to reach all the target buyers. The offline format is a disadvantage compared to digital advertising which allows the producers to employ technological means to reach the select buyers. Some forms include:

- Newspaper ads & product placements
- Broadcast advertisements (Televised ads)
- Telemarketing (Telephone calls)

- Outdoor marketing at marketplaces (Banners, Fliers, Billboards)

Digital advertising simply put together all the product placements, endorsements, merchandising, promotions and third-party collaborations taking place via the Internet or virtual marketplace, particularly social media platforms accessible through mobile phones and modern computers. Synonymously known as ‘online advertising’, it gives the producers the advantage of knowing and streamlining their target consumer base and selectively reaching out to them. Some of the upcoming digital marketing tactics include:

- Email marketing (Direct emails, catalogues, Spamming)
- Website advertisements (click-baiting, framing, linking)
- Keyword advertising through digital and social media
- Content marketing (Paid pop-ads)
- Automated advertising using artificial intelligence (Amazon’s AI which can detect consumer’s activity and user data to send personalised ads)

However, the latest form to join the digital bandwagon is the ‘social media influencing’ tactic taken by companies/businesses by hiring select individuals called ‘influencers’ who act as testimonies (buyers, users of such products) and promote the products. The two types of marketing have their own pros and cons but the parameters adopted by both are almost similar, namely the four P’s: Price, Product, Promotion and Place (Sherman, 2019). At the current juncture, digital advertising is the most sort for promotional activities by brand owners for its effective flow of information disseminated to the brand-owners and producers in knowing who their target consumers are, where they are concentrated and how they can reach such consumers.

The role of influencers

As defined by the new 2021 ASCI guidelines, ‘influencers’ are individuals who can affect the purchasing decisions of consumers and have built a reputation for themselves out of expertise and knowledge about a specific area or topics or even learn marketing skills for a specific market or many

They make regular social media posts which can be blog write-ups, video-logging and other content creations about such areas in their respective social media channels.

Based on their popularity and usage of social media platforms including YouTube, Instagram, Facebook and TikTok to generate many followers for themselves is what determines their ‘influencing’ power. It is this influencing power and social media presence of these individuals that drives the well-known brands to approach and hire them for sponsoring, featuring and promoting their trademarks products through paid agreements.

Social media influencers are mostly categorised based on follower counts, locality, expertise and market influence. Mega-influencers are those with the highest number of followers and can also comprise well-reputed celebrities (actors, journalists, politicians, sports players) who promote these brands in their social media handles in spite of being well-known in other media. Macro-influencers and micro-influencers both are influencers (Industry experts, thought leaders, market specialists) who can be either be common people or third-party individuals who have comparatively sizeable, above-average social media recognition and known for their specific market expertise; For instance, a fashion designer who endorses clothing brands. Another important parameter to categorise influencers is depending on their social media handle and content creation, examples can be Bloggers, YouTubers and Instagram influencers. There is also a new category called 'virtual influencers' who are not real persons but fictional characters who are created by the companies themselves in their social media handles.

Social media influencing is a type of 'testimonial' in which the social media influencers act as potential buyers or a customer of a brand and endorse it through word-of-mouth testimony or written statements. Testimonial ads are traditionally seen in televisions where an actor posing as a fictional user/buyer of such brands and recommending it based on the quality, quantity and price. Traditional testimonials also have unknown persons featuring as customers who vouch for the product which are questioned for its credibility and validity. Advertisers and brand-owners might evaluate their trademark's repute, brand value, brand image, target-consumer base, location, amount of influence the endorsee/influencer will have before approaching a social media influencer.

Most influencers are paid but some are also unpaid. Prevalent paid-advertising agreements between brand owners and social media influencers are paid endorsements, sponsorship, display advertainments and merchandising. All of them are analogous to conventional methods one can encounter in television and print media ads.

In recent times, if the online advertiser has gained an amassing number of followers and has at least an above-average influence on a consumer's purchasing decision, it can come under endorsements. However, even if an influencer is not yet famous, they are resorting to paid-endorsement agreements offered by companies for benefitting both themselves and the brand.

When influencers create disparaging advertisements

Social media influencers devote significantly of their time to create content and doing various promotional activities in the form of reviewing, endorsing or advertising for brands that often attract ire of consumer protection activists and other rival brand owners. This sort of negative response arises when these influencers and brand-owners fail to uphold the objectives of certain legal barriers laid down while advertising and carrying out a business,

especially at times when influencers take ‘disparaging advertisements’ as their technique while creating content and promoting.

To disparage is to tarnish or dilute a rival or another market player’s brand or trademark as inferior in terms of quality and quantity in comparison with one’s own brand or trademark, such comparison can be misleading the consumers through false claims, misrepresentation, or comparative advertising that are likely to damage the market gains of the disparaged brand. This practice of unlawful advertising can be called ‘product disparagement’ in the general sense and trademark disparagement provided the disparaged items being a brand’s trademark.

Disparaging practices are not allowed in Indian laws while there are acceptable levels of comparative advertising. Comparative advertisements become a product or trademark disparaging practice when the comparison by one brand to that of another resorts to ‘misleading’ consumers and derogates the trademark of another brand beyond the standard advertising limits. The comparison can be direct or indirect.

While the purpose of ‘influencer advertising’ is for the social media influencer to aid in conveying the brand’s message to be perceived by the consumers through their advertising, it should not directly or indirectly resort to disparaging comparative advertisements and disturb healthy competition among rival brand-owners.

Both social media influencers and celebrity ambassadors have to be held equally liable along with the companies when adjudicating cases of trademark disparagement and misleading comparative advertisements since they have a duty as an endorsee to uphold the objectives of legal barriers that converge with advertisements. The regulatory barriers are needed to streamline and balance the role of advertisers, endorsees, consumers and market players, particularly in this context, a market-based economy like India. Though the 2021 guidelines can act as such barriers, the effectiveness can only be observed on how well the influencers are aware of them and how much care is being taken on their part.

Legal framework applicable

ASCI guidelines for influencers in 2021

Advertising Standards Council of India (ASCI) is acknowledged by the Consumer Protection Act 2019 as a self-regulating body and in the wake of digital advertising and social media endorsing, it needs to take fair action on extending its watch even on these platforms.

As ASCI is not regulatory, any entity has a choice whether to adopt the guidelines or norms provided by them. In May 2021, ASCI unveiled ‘Guidelines for Influencer Advertising in Digital Media’ has added the new definitions for ‘influencer’, ‘virtual influencer’ and ‘digital media’. It has also introduced a new concept of ‘material connection’ between influencer and the advertise or company where the influencer has to put up a disclosure label to let the consumer differentiate between normal content. Some of the requirements to establish a material connection include:

To enable the disclosure in an upfront form and mention what type of material connection it has with the brand owners, either in the first two lines of the post description or superimposed on the content. For instance, hashtags mentioning if it is a paid collaboration, paid promotion or if they received any freebies in exchange for such advertisement. In the case of audio-only advertising, the disclosure should be mentioned in the beginning. If the influencer or advertiser has to be diligent with regards to technical claims of the product being endorsed, and the brand-owner must, if necessary, must be able to prove it with scientific substantiation.

Puffery or filters should not be added on advertisements in the form of images or videos containing products with claims to have a certified positive impact on the consumer. For instance, 'bright teeth' or 'smooth hair'.

Under unfair trade practices

Comparative and disparaging adverts were directly regarded as unfair trade practices for the fact it adopts any unfair method or deceptive statements for promoting their products. The deceptiveness can appear in the consumer's mind on seeing the depiction of both advertised brand and competitor's brand, logo, caption, symbol and mark. A consumer who is a victim of these misleading adverts will be led to avail deficient and counterfeit goods and services. He has the right to get access to high-quality and trusted brands which is only possible as long as brands do not fall victim to disparagement and bad repute.

Earlier under the MRTP Act (Monopoly and Restrictive Trade practices) of 1969, comparative advertising was addressed through section 36A that the portrayal of a rival's brand with misleading information beyond the parameters will result in disparagement.

In 'New Pepsodent' v. Colgate (1998), the plaintiff advertised its toothpaste brand 'New Pepsodent' that it is better than that of respondents'. MRTP commission where the advertiser's actions were deemed to be disparaging under MRTP Act though there is no explicit reference to the defendant's brand 'Colgate'. They have attained recognition among Indian consumers that they will be able to associate the words 'leading toothpaste' with that defendant's brand. The factors that were overseen while interpreting MRTP Act and comparative adverts in this case:

- Correctness of representation of data and relevant information
- Presence of misleading statements leading to disparagement
- Conclusive proof of scientific and technical claims in the adverts
- Guarantee of interim injunction which is possible only if the identity of the brand is evident.
- How identifiable a brand is with the good/service it is associated with

Celebrity and third-party influencers directly might have been held liable if this Act were to exist now but having repealed the MRTP Act by Section 66 of Competition Act, 2002, these provisions were directly adopted into Consumer Protection laws.

Trademarks Act, 1999

Trademark protection is given to the brands, commercial establishments associated with classes of goods/services to distinguish one from other producers from the same market.

Trademark is also used as a marketing tool and a measure for consumers to identify one good/service associated with a trademark, source of a product/service with that of another. The factors that guarantee a trademark registration include having distinguishable features, an acceptable form of trademark, goodwill and reputation.

Brand protection is important for both welfares of buyers and producers.

Trademark Act 1999 addresses the advertising practices that hinder effective trademark protection like the likelihood of confusion, deceptive similarity, trademark dilution and unauthorised use of trademarks of rival brands, elucidated in Section 9(2)(a). When third party influencers in social media depict a brand's trademark in their promotional content in comparison with the promoted brand's trademark, there are a plethora of problems that may come into play from the nature of such representation, legality and capacity of influencers to have such representation and grounds on which it becomes misrepresentation, potentially a trademark infringement.

The brands alleging disparagements also must be well-known traders, registered users of claimed trademarks and products associated with it, along with recognition among consumers. It is a norm to primarily obtain written permission or to have license or assignment right for using a logo, name, trademark or symbol of a brand. In this milieu, the promotional activities by influencers will become a trademark infringement, if, in their social media handle, they compare two brands by direct reference to their trademarks, direct references to trademarks, become a branded content.

To prove the infringement on influencers and brands, the references to trademarks must be without a brand's permission and also claiming a false statement. The reference to a trademark can be direct or indirect, with or without showing it as inferior as compared to their endorsed brand. It also is important to have established that his followers believed the false claims, perceived the rival brand in a negative light.

The plain representation of a rival brand's trademark through influencer advertising is allowed and a little bit of puffery of one's own brand, applying even to the individuals promoting a brand. For instance, the producer of Complan can graphically represent resembling a coloured drink similar to rivals like Horlicks without featuring their caption, name or mark. It amounts to indirect comparative advertising which puts one drink's

superiority over all other rival brands but in a plain sense. If any influencer adopts this type of indirect but plain representation, the chances of confusion might be low.

The test to find 'likelihood of confusion' is applied when analysing two registered trademarks of brands in a trademark infringement suit.

Aggrieved brand owners of registered, well-known and unregistered trademarks can opt for remedies under Section 29 of the Act against these influencers and manufacturers. Section 29(8) of the Act elucidates that a commercial establishment will be infringing one's trademark when it proceeds to do advertise in a manner contrary to honest trade practices in business. The intention of the disparaging advert will be evidently to tarnish the trademark of another brand by taking unfair advantage.

While section 30(1) places a limitation on the previous provision when interpreting comparative advertisements and trademark infringement. Thus, read together, substantially points out that on honest and fair representation means, such comparison is allowed.

Social media influencers can also be held liable if they are passing registered trademarks as domain names. Although there is no mention of social media influencers vide any clauses or definition, social media influencers also come within the ambit of 'trademark infringers' along with brand-owners in misleading advertisements.

Consumer Protection Act of 2019

Every player in advertising and brand marketing from social media influencer to brand owners needs to exercise 'due diligence' which comes under common laws and torts. Due diligence simply can be understood as "the care that a reasonable person exercises to avoid harm to other persons or their property." (Merriam-Webster, 2021)

To realise their big role in respecting consumers, the 2019 Act allows the imposition of a penalty of 1 lakh rupees in amount on endorsees, ambassadors and manufacturers for misleading advertisement. Repeated offenders attract penalties up to 5 lakhs rupees in amount and 5 years of imprisonment. The main advantage of the Act is that it sets up a central consumer protection authority (CCPA) and an investigation wing led by the Director General and other authorities to conduct inquiries, class action suits, recall licenses, product and order reimbursements of prices of goods/services on the complaint of a consumer before the authority. They can also take *suo-moto* cognition of any incident.

The 2019 Act gives an exhaustive list of practices as 'unfair trade practices' in its section 2(47) covering 'false statements of standards, quality, quantity, grade, composition, style, sponsorship, affiliation, approval, performance, characteristics, benefits and uses' of the goods. The 2020 draft CCPA guidelines on due diligence passed by the Ministry of Consumer Affairs poses also requires the social media influencers to do research on product liability and authenticity before endorsing or advertising it. The 2019 Act is the first

legislation to directly address the liability of influencers albeit without any definition but nevertheless, raise the role of a responsible endorsee.

Discussion

Case studies

The previous studies though having focused on this issue has not implored much on the precedent history behind disparaging parameters in commercials. The current study has compared and traced the following case laws to support that judicial creativity can be an effective measure to regulate social media marketing as exercised earlier in these cases.

Judicial creativity aims to close the gaps left by the redundant laws which have lost their relevance to the evolving society. The fact that social media influencers are engaged by businesses to adopt new-age marketing calls for laws surrounding them to be adapted as well. In *Reckitt & Colman of India Ltd v. Kiwi T.T.K Ltd (1996)*, the court took the stand that comparative advertising stops at the limit where any claimed statement or depiction discredits a competitor's good, even if the depiction of a competitor's trademark is not explicit. The plaintiff and defendants were engaged in manufacturing and marketing of shoe polish, with the plaintiff's brand being sold under the trademark 'CHERRY BLOSSOM' and the defendants' trademark being 'KIWI'. On their website, the defendant had inserted images of their own wax polish bottle as not dripping next to a bottle named 'BRAND-X' dripping with a red blob on its surface representing the plaintiff's trademark. Advertising circulars were also distributed among target users with these images. They have alleged in all these advertisements that the plaintiff's trademarked shoe polish contained more acrylic content which will damage the user's shoes while their own KIWI polish will be more ideal.

The Delhi High Court took the stand of deeming the defendant's advertisements as disparagement since comparison and hype must not come at the expense of defaming the competitor's brands. Therefore, comparative advertising stops at the limit where any claimed statement or depiction discredits a competitor's good, even if the depiction of a competitor's trademark is not explicit.

In *Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd (2014)*, a division bench of Delhi High Court commented that misrepresentation data can be any false statistical claims, percentage about a brand's success rate or profits, with or without a depiction of a competitor's goods as failing in sales.

The commercials carried out by 'COLGATE' was alleged to be a misrepresentation of data, by the plaintiff, as the defendant's commercial caption 'Suraksha Chakra' (cleanliness) was used to mean their product effectively fighting tooth decay and germs. The tunes used in the advertisement, caption and data were further alleged to be misleading to the consumers according to the plaintiff. But the court did not find their commercial to be disparaging or misleading as it found no solid proof is existing to show cause even a single consumer to have been misled by such representation of data.

Indian courts also associated goodwill and using the technique of deceptive similarity for comparative advertising in major trademark infringement cases. One such example would be: In both verdicts of *Dabur India Ltd v. Colgate Palmolive Ltd* (2004) and *Britannia v. Unibic Biscuits* (2008), the respective courts have granted an injunction under S.29(8) of the Trademark Act for the defendants for taking advantage of competitor's goods by advertising in a manner detrimental to its distinctive characters.

In light of both cases, the defendants had claimed no other facts are true other than one depicted in their advertisements and degraded the quality of competitors' goods. The courts analysing the case looked at the examination of the intent and the manner of such advertisement. The point where comparative advertising becomes disparaging was the focus in the case of *Horlicks v. Heinz* (2017), where the plaintiff (Horlicks) claimed that the defendant's advertisement published in a newspaper in 2017, was intentionally disparaging their popular health drink brand by comparing one glass of their branded drink 'COMPLAN' to two cups of plaintiff's brand 'Horlicks'.

The court was clear on there being no distortion of trademarks or their distinctive character and that since it is served as a source for consumers to identify two health drinks, it is not infringement. It further allowed for comparative advertising as long as it is in honest use. The court also commented that dilution of certain features of the brand in the defendant's advertisement is not misleading as long as the puffed-up characteristic/trait claimed in their advertisement does not discredit the other. In *Havells India Ltd. v. Amritanshu Khaitan* (2015), the Delhi High court referred to a test applied to determine disparagement in a comparative advertisement and when it is said to be misleading, which was fashioned in a European trademark decision of *Lidl SNC v Vierzon Distribution* (2011). A misleading advertisement must be having the potential to deceive the consumers and also affect the economic activity of the disparaged good. The loss of goodwill will lead to lower sales which should be evidently connected with the disparagement (Agarwal, 2019).

Constitutional perspective

Article 19(1)(a) guarantees fundamental freedom of speech and expression to all citizens of India which when juxtaposed with all forms of media, becomes applicable to radio, television, press, digital media, electronic media and public speaking. However, a restriction placed in the subsequent article 19(2) allows the State to reasonably restrict the right considering if it is against:

- The security and integrity of the State
- Friendly relations with foreign countries
- Public moral and public order
- Inviting contempt of court or inciting through objectionable content

The Supreme Court of India iterated in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd* (1995) that advertisements are part of 'commercial speech' for which the right under Ar.19 cannot be denied. The Supreme court further commented that advertisements have two sides when it is regarded as commercial speech and is no more than a commercial transaction is nothing but the dissemination of information about a brand.

Arriving at the question of whether this commercial speech includes the promotional ads conducted by popular influencers, it calls for a look at article 21 under Indian Constitution which explores the right to dignity, liberty and to be respected in society. The reasonable restriction clause of Article 19(2) which opposes defamatory acts which violate one's right to reputation, needs to be balanced with Articles 21 and Article 19(1).

This was one of the issues discussed in the recent legal tussle between Marico Ltd (plaintiff) and YouTuber-cum-influencer Abhijeet Bhansali (defendant) before Bombay High court. Marico Ltd is a holder of popular trademarked brand Parachute, manufactured, promoted and sold packaged oil with a product label 'wet coconut with water splashing'. As a plaintiff, they alleged that a critical review video content posted by the defendant influencer in a popular video-sharing medium called YouTube was of disparaging nature to their reputation and goodwill of their trademarked good.

The aforesaid video has the defendant place a sample of the plaintiff's packaged oil with other oil which he calls 'organic oil' and carrying out the comparison test. He recommends a seemingly more unadulterated version of virgin coconut oil as being higher in grade at the end of his content.

He critiqued it in terms of refining, bleaching, hydrogenation, deodorization, devoid of natural nutrients and held that it is not as pure as it claims in its packaging and other ads. He even claimed that consumers are being misled into thinking the plaintiff's product is extracted from wet coconut by their product label.

The plaintiff manufacturer prayed for an injunction against the influencer on the grounds of trademark infringement, product disparagement and misleading advertisements, restraining them from broadcasting and posting the video in contention. They also wanted the defendants not to review any of the products in the future on a social media platform. As for the criticisms in the video, the plaintiff asserted that they are well-known, prominent in sales and goodwill and possess all the licenses under Food Safety and Standards Act 2006.

The defendant must satisfy the criteria that constitute disparagement, slander/libel and malicious falsehood:

- The statements must be false;
- Presence of clear intention of causing harm;

- Evident damage caused by such action. (Dabur India Limited v. M/S Colortek Meghalaya Private, 2009)

The court found the video's content as 'misrepresentation' as he is shown to have contrasting opinions in the beginning and the last part of the video. The defendant pleaded that he was negligent in knowing the difference between 'virgin' and 'virgin organic' but was criticised by the court for purposefully masking the negligence. In essence, he knowingly misrepresented by comparing Marico's product with an organic oil without prior research.

While analysing the damages suffered due to disparagement, the court took note of the comments made by the plaintiff's customers under the YouTube video that they were going to stop using the product and held it as conclusive enough to ascertain the damages suffered. Accordingly, it orders the video to be taken down when the matter came to an interim hearing. An appeal against the direction was sought by the defendant YouTuber before the Division bench, but parties were asked to amicably settle the matter.

In light of the above-discussed case, it can be said that not only under the new Consumer Protection laws but it is also under Constitutional law, that the balance between free speech and reputation must be maintained. While realizing their right to make commercials and promotional content as endorsees, the social media influencers need to understand their duty of due diligence as well. Supreme Court in the Marico case addressed this duty as a responsibility that comes with the influence, they have over their established wide follower base. Social media influencers are individuals who are given influential power because of the credibility of their statements and content and the profound effect it has on the purchasing decisions of the consumers.

Need for awareness on IP rights and compliance

Though the 2021 guidelines have listed a plethora of requirements to have established a material connection between influencer and advertiser, it has not mentioned anything on the rights/defences available for influencers in case of disputes of such nature.

The ASCI guidelines are not compulsorily incorporated by other entities as it is not legally binding and there is no inclusion of intellectual property perspectives such as misuse of a registered trademark or copyright and handling of IP dispute between online advertisers and companies.

Hence, Central Consumer Protection Authority, operating under the Consumer protection Act 2019, must quickly promulgate and adopt the new ASCI guidelines.

Sensitisation programmes, workshops and webinars must be conducted for awareness of the rights and duties as influencers and endorsees. They need to look out for these factors before going into paid endorsement deals or any type of advertising:

- If they are using trademarks, logos, labels, domain names, slogans, captions, the brand names of a competitor, they need to obtain a written or oral statement indicating the authorised usage.
 - Obtaining licenses before such usage.
 - Realise their duty of due diligence and truthfulness of respecting competitors and consumers while creating promotional content; Not resorting to falsifying facts.
 - Educating themselves on the legal implications they ought to know before creating an advertisement or campaign.
 - Their rights, duties and liabilities when going into a contractual arrangement with popular traders, manufacturers and brand owners.

Conclusion

The norms around advertising have changed ever since the usage of digital platforms to make promotional content and endorsement deals with celebrities and third-party influencers. These individuals have managed to earn their own respected space and the follower base also need to be aware of their rights and duties when striking a deal with brand owners. Comparative advertising strategy by influencers is not bad as long they are careful not to discredit or disparage other competitors' brands blindly.

The ongoing pandemic has pushed consumers to rely on e-commerce websites and social media handles to purchase even basic necessities, and when such a situation exists, it is the duty on part of digital advertising to be more consumer-friendly. Influencers as also advertisers need to be more responsible before selling or recommending a branded product while the companies must be careful in protecting their brands' goodwill before making a deal with celebrities or individual influencers.

Not every influencer can support themselves in case of intellectual property disputes or consumer forum suits, such individuals need awareness and legal aid programmes. It is imperative that the Government of India is taking necessary steps to streamline the influx of social media influencers through regulatory measures. But whether these relatively new laws are sound enough to serve the legal issues at hand is still an ordeal yet to be witnessed.

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