

## **Influencer marketing: A study of new dimension in E-commerce in light of recent case law**

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### **Abstract**

Advertisement is the effective mode of communication between traders and consumers. Over a period, it has been evolving as per the market trends. With an advent of technology and digital innovation advertising on social platforms like YouTube, Facebook, Twitter, and many more like is gaining popularity. The social media as a marketing platform is not only preferred by the brand owners but also by the consumers. However, this social media platform lacks effective governance. The instance of unfair trade practices wherein consumers are lure with false or misleading claims are rising. Also, in this process traders/influencers try to disparage competitor's product or services and often cross the thin line between mere puffery and comparative advertisement. The Indian Trademark law permits comparative advertising provided it is in consonance with honest industrial practices. But, in India there are no specific guidelines to deal with it. The use of social media for marketing and trademark right violation is one of them. The present article traverses through the legality of advertisement by social media influencer in the light of recent landmark case. This is first case of its kind or perhaps the starting point of new era of legal battle to address the concerns of disparagement and influencer advertising on digital platform.

**Key words:** Advertisement, Disparagement, Comparative advertisement, E-commerce, Influencer marketing, Social media marketing, Trademark infringement.

### **Introduction**

The advertisements *per se* are not a problematic. Advertisement can have various shades depending on how it is used. It can be misleading and/ or false when fact is concealed and can be disparaging when advertiser tries to malign competitors' brand. But when based on truth and factual data it can be useful for dissemination of information. Advertisements were always important in a marketplace. In traditional form of advertisement there were hardly any legal complication. The intention was sharing information about the product, services, or business. Even in the comparative form of advertisement competitor's name was hardly used. The technological development and digitisation have resulted in restructuring of entire marketing and advertisement model. This has posed complex intellectual property rights related issues. And trademark infringement via advertisement is one of them.

Today, businesses are coming up with inventive ways to advertise and market their products. In this process comparative advertisement is often resorted due to its recall memory and brand impression in the minds of consumer. In comparative advertisement the comparison is selectively done on parameters which are unrelated and based on partial data. If it is repetitively screened on television or broadcasted on radio in a flashy and attractive way that, the product you are purchasing is bought only by the losers and that the product that advertisement advocated is one that winners buy- are you sure you would not purchase the defamed product hesitantly. (Singh, 2008). Such comparison not only mislead consumers but also the disparage the competitor business and damage its goodwill of the trademark compared. Thus, along with the interest of consumers, interest of honest trader is also at stake.

With increasing advertisement on social media, new issues are coming before Indian judiciary. This created a need to analyse the concerns of trademark owner and advertiser (social media influencer) due to increasing popularity of social media marketing. The Instagram rich list compiled by UK social media management company Hopper HQ recently said Chopra charges about Rs 1.87 crore per post on the Facebook-owned photo-

sharing app, while Kohli charges about Rs 1.35 crore (Economic Times, 2019). In furtherance of these details, author have made an attempt to understand the legal position in India and governance policy present in current scenario. The recent case of Marico Limited v/s Abhijeet Bhansali analysed to shed a light on influencer marketing and trademark right violation. The said case is landmark judgement which has addressed and warned of future repercussion of social media marketing. The judgement can serve as guiding principles for influencer marketing. Additionally, author has also deliberated use of software tools available for brand management and tracking use of trademark by third party in on-line world.

### **Marico Case [2020] and Influencer marketing**

The '*influencer marketing*' is new buzzword in advertisement world. Generally, when we think of influencers, Instagram comes to mind - pretty people, Instagrammable products. While Instagram is the favoured channel, there are plenty of influencers influencing on Twitter, Facebook, YouTube, LinkedIn, etc. And it is not restricted to social media. There are more influential bloggers online than you can swing a cat at (Talkwalker, 2020). In short, these 'influencers' are one who advocate about the brands and have potential to influence the buying preferences. These can be experts from industry, a celebrity, or a blogger. It's perhaps the recent trend in marketing world and here to stay for long. But our legal system is yet to equip with this field.

In the present case, the honourable J. Kathawalla made an apt observation, that, the rapid expansion, and commercialisation of the Internet has brought forth novel legal disputes which challenge the conventional principles and precedents which apply to them. The present matter is an example of just that (Marico Limited v/s Abhijeet Bhansali, 2019). Marico case is where a YouTube blogger was caught in legal battle for expressing his views for PARACHUTE hair oil. This case outlines a legal boundary for freedom of expression and extends the definition of '*manufacturer*' to include the '*influencer*' for liability of disparagement. The case also brings out distinction between concepts of defamation, malicious falsehood, and slander of goods.

### **Facts of case in nutshell**

The aggrieved party, plaintiff (Marico Company) is the manufacturer of the Fast-Moving Consumer Goods (FMCG) in India. PARACHUTE is one of their leading brands for coconut oil for which trademarks are registered in relevant class. The said brand is extensively promoted by plaintiff and complies with prescribed rules and regulation. As per the facts of the case, Plaintiff claims to be market leader in the category of edible coconut oils and holds 46.7% of the marketshare in respect of the same. While the party on the other side (defendant) is social media influencer (YouTuber/ V-Blogger) who has his own channel titled '*Bearded Chokra*' on the YouTube (online platform). He published a video titled '*Is Parachute Coconut Oil 100% Pure?*'. In this video, he reviewed the Plaintiff's PARACHUTE coconut oil. According to the Plaintiff the language used, test conducted, and statements made in the impugned video was disparaging and denigrating in nature and based on false and unsubstantiated claims. Initially cease and desist notice was sent to which defendant paid no heed and claimed it as right to raise voice under freedom of speech and expression. Hence the suit was filed for injunction against the Defendant, restraining him from following.

- i. publishing or broadcasting or communicating video to the public
- ii. disparaging or denigrating the Plaintiff's product 'PARACHUTE' or any other product of the Plaintiff or the Plaintiff's business and
- iii. infringing the registered trademarks of the Plaintiff.

### **Contentions of both parties**

According to the Plaintiff the defendant has intentionally made a video to portray the plaintiff's goods as of inferior quality in light of competing products. The comments and visuals used are disparaging and denigrating the reputed trademark 'PARACHUTE'. The reviews published through videos are favouring the party who paid for it and hence not reliable. The comments on package of product are also baseless. Such videos may mislead consumers and public at large. Also, the parameters used for comparison are incorrect and between unrelated

category. Overall, the act of defendant is objectionable and hence plaintiff intends to seek legal remedy for the same.

In reply to the allegations made, the defendant stated that the intention is to educate the consumers about the facts and not malign or defame any brand. Further, the defendant submitted email communication along with his bank statements as an evidence to show that the reviews through videos were not for monetary gain and he is not a mouthpiece of any competing brand as alleged. Further, the defendant also submitted the scientific publications on which he relied and made the statements which according to plaintiff were baseless. Instead he alleged that plaintiff is fooling the consumers by showing a wet coconut alongside its product in order to fool consumers into thinking that its product was derived from wet coconut instead of copra.

The defendant relied on case *Tata Sons Ltd*, to draw an analogy that the statement ‘the smell of the Plaintiffs product is akin to “a dried or rotten coconut” is hyperbole /exaggeration and not meant to be taken literally’ (*Tata Sons Ltd. vs. Greenpeace International & Anr*, 2011). However, the plaintiff argued that reliance on the said precedent is not applicable in present case as the statements made are assertive. The defendant further submitted that he is neither a trader/manufacturer nor a rival of the Plaintiffs goods and as such, the tort of disparagement of goods/slander of goods will not be applicable to him. Plaintiff also alleged trademark infringement as the use of registered mark PARACHUTE amounts to unauthorized use and is contrary to honest practices. Also, the use of said mark is detrimental to distinctive character and is against the reputation of the mark which may cause loss of customers and loss of reputation and good will.

### **The ruling**

The case was decided in favour of Marico, wherein it was held the video made was of disparaging nature. This was a landmark case wherein it was held that ‘in an action for disparagement/malicious falsehood/ slander of goods it is irrelevant whether the Defendant is a trader or not so long as the necessary ingredients are satisfied’.

Thus, for deciding the question of disparagement, court considered following three factors;

- a) statements are false;
- b) statements were made and published maliciously / recklessly;
- c) statements caused special damages.

It was observed that, in such cases the reputation of the plaintiff’s product is impacted whereby its customers are induced to not purchase the product of the plaintiff. It is impossible to precisely ascertain how many customers, because of the disparaging action / slander of goods, have refrained from purchasing the product of the Plaintiff’.

It was for the first time, ‘*social influencer*’ was held liable for disparagement. The court also warned of future issues, that it would create havoc since all the manufacturers or traders would then hire people like the present defendant to make disparaging statements about their competitors’ products under the garb of making a “review” and thereby cause serious damage to its competitors who would be left remediless.

The judge rightly pointed out that, not all material available on the internet is reliable and hence such material cannot by itself constitute research or due diligence to justify the denigrating statements in the Impugned Video.

The concept of ‘*special damage*’ was considered where it was explained that special damage does not mean special in terms of quantum but special in terms of the nature of the damage which is simpliciter monetary loss that cannot be valued and compensated. The inference of special damage can be gathered from the comments, number likes and viewers. The impact analysis of the comments can reveal quantum of damage caused.

### **Influencer and Legality in India**

The use of digital marketing is increasing and so is the marketing on various social media. Initially, to be an 'influencer' was just a hobby. Even the association of influencer with the brand owners was of limited to specific assignment or a contest. But now brands are ready to pour in more money for endorsement. This has made the influencer marketing a full-fledged job and not just a hobby. The influencer marketing is getting lucrative day by day for the influencers. Now the agreements are signed for defining the roles and responsibilities. Also, the influencers are getting smart and getting themselves indemnified for future contingencies.

The popularity also attracts the malpractices in any sector. And the same is true in this case as well. Under the grab of reviews some of the influencers becoming puppets in the hands of big companies. The script and content are completely provided by the companies. So, this becomes a paid advertisement than an honest review. The trust factor on which people follow any influencer is shaken when their opinions and reviews are influenced by the brand owners.

The obvious question which comes to the mind is, '*will all influencer be held responsible for every endorsement they make?*' The answer is off course, *NO*. Provided the influencer has made his research thoroughly. In addition, the influencer needs to follow few guidelines mentioned below as gathered from the case above to avoid landing in any legal battle;

- i. The comparison must be genuine and based on real facts.
- ii. The information shared should be substantiated by appropriate evidence/test report/relevant parameters.
- iii. Any reckless statement or derogatory representation of brand must be avoided.
- iv. the entire script/ content intended to be published on web may be in any form, much be well researched and genuine.
- v. False and derogatory representation of competitor brand/trademark must be avoided.

Influencers should keep in mind that '*negligence cannot be pleaded*' – *basic principle of law*. So, every word/phrase must be uttered with caution by influencers or any advertiser. A thorough due diligence is expected from the advertiser (influencer).

The digital innovation and technological development have always been a double-edged sword. It does have advantages if wisely used, but act as curse if misused. In coming period, the digital innovation is need of an hour and should be used for betterment of society. The materialist approach needs to be avoided. The global pandemic has brought world to standstill and made to re-structure entire approach of marketing strategy. In short, the entire script/ content intended to be published o web may be in any form, much be well researched. Based on honest trade practices.

As per the precedent laid down by the Bombay High Court '*influencer*' are construed as '*manufacturers/traders*'. And hence, the sections under the Trademark Act, 1999 will be applicable to them as well. The act permit comparison between two or more brands provided its accordance with honest trade practices. However, what are honest trade practices is grey area and often is disputable topic. The comparison between brand is encouraged to promote healthy competition and for consumers to gets clear information about the product or services. But when this provision is misused by traders to show their competitors in bad light it leads to disparagement. The Trademark Act or any other Indian statute do not provide the definition of the term '*disparagement*' or '*comparative advertisement*'. The definition of '*comparative advertisement*' can be referred in UK Directive which is read as comparative advertisement as any advertisement which explicitly or by implication, identifies a competitor or services offered by a competitor (EU Directive Art 2, 2006).

While the definition of '*disparagement*' is interpreted as per Black's Law Dictionary, Eighth Edition reads as under, 'a derogatory comparison of one thing with another; the act or an instance of castigating or detracting from the reputation of, esp. unfairly or untruthfully; a false and injurious statement that discredits or detracts from the reputation of another's property, product or business'. Thus, it means that 'the common-law tort of belittling someone's business, goods, or services with a remark that is false or misleading but not necessarily defamatory. To succeed at the action, a plaintiff must prove that; the defendant made the disparaging remark;

the defendant intended to injure the business, knew that the statement was false, or recklessly disregarded whether it was true; and the statement resulted in special damages to the plaintiff, by passing off (Havells India Ltd. v. Amritanshu Khaitan, 2015).

The statements made by influencers are protected under the fundamental right to freedom of speech and expression as granted under the article 19 (1) of the Constitution of India but at same time the right is also subjected to restriction as mentioned under Article 19(2). This restriction is required to maintain social order in society. Its settled law in India that commercial speech is also a part of the freedom of speech and expression. But if it is abused to harm any party then reasonable restriction can be issued. This stand was reaffirmed in the present case law. So, influencers cannot in all case claim immunity under freedom of expression if the right is used to defame any individual or entity. They need to be cautious before making any public statements.

### **Legality under amended Consumer Law, 2019.**

‘Influencer Marketing has drastically risen in the past decade with the massive growth in popularity of social media. There has been a rise of 150-200% in earnings of influencers across platforms in the country’ (Economic Times, 2019). The observations and opinion of the influencer certainly impact the buying intentions of the followers who are prospective buyers. At present the marketing on social media is completely unregulated, with proper rules of governance for this space.

Consequently, the amended Consumer Protection Act, 2019 has provisions for on-line market including endorsement and advertisement which are specifically defined under the said Act. Section 2 (18) defines the endorsement, which covers statements made by endorser and influencer can undoubtedly be brought under legal scanner under these provisions. The definition of misleading advertisement is also broadened which authorise authorities to penalise the wrong doers and take investigate the matter. Even the penalty amount is increased up to one lakh and with subsequent offence it is increased further.

### **Software tools for market analysis and monitoring.**

The Marico case has extended the definition of ‘*manufacturer*’ to ‘*social influencer*’. This is perhaps is apt as social media handles are turning into billboards for Companies. The governance of information over web traffic will be a new challenge for judiciary. Post Covid, use of digital platform is gaining popularity. This has accelerated the growth of e-commerce.

Now wide variety of analytics tool are available to identify influencers on social media apt for specific promotions. The software tools for finding correct influencer across the globe is just a matter of click now. With the rise of this growth, it will become incumbent for the Company to keep an eye on the potential use and abuse of its goods/services and goodwill over the web. In order to keep a surveillance in global marketplace, many software tools have been designed to monitor the competitor’s movement and marketing strategies. There are also tools for cyber-fingerprinting and detecting cybercrime. Several patent applications have been also filed to measure, analyse, and track the brand of interest on the internet. The image recognition technology identifies the logo and related images of company’s interest. The data retrieved by using these tools can be used to devise the road map for overall business activities. Such tools provide a shield for brand protection and management in online world. Infact it is a virtual platform to control online presence in global market. Thus, new segment is available for software industries to device tools for locating right influencer also to monitor the abuse of trademark in on-line world. These tools enhance ease of marketing and act as virtual police for the owner to monitor inappropriate use of trademark/brand. So, along with the law even software tools will evolve in this advertising space.

These tools will assist in market vigilance and in formulating marketing and advertising strategies by probing competitor movement. But when dispute between the traders reach at doors of courts, even judiciary need be equipped with the possible legal challenges. The legal definitions need to be reinvigorated, considering the disputes pertaining to brands on e-commerce platform.

### **Reforms – need of an hour**

It has always a tough task for the courts to demarcate act of mere puffery or disparagement. The comparative advertising is allowed by courts with view that it would provide beneficial information to the consumer and might be helpful in the buying decision. The approach seems to be only consumer centric. Because relying on the information provided by a competitor who has a vested interest in the same is itself doubtful. Further, in such cases, it is a tedious task for the complainant/honest competitor to gather scientific and technical data to support the contention and prove damage caused to its goodwill and reputation. The time taken by the courts to analyse the facts and evidence adduced is lengthy as they are not equipped to handle them. It was appropriately pointed by the court that, 'the courts are not ordinarily a forum which should determine as to whether the plaintiffs or the defendant's goods or services are better' (Dabur India Ltd. v. Colortek Meghalaya Pvt Ltd, 2010).

In this scenario there should be specialised machinery to deal with advertisement related issues. As time is essence in such cases. The damage to the trademark can be compensated only by timely remedy and corrective measures. At present, the remedy in majority of cases is injunction. But by the time it is granted, the advertisement might have already harmed the traders mark (brand). The judiciary have efficiently handled the cases till present. Nevertheless, it is extremely necessary now to have uniform guidelines to govern comparative advertisement related issues. The digital and technological growth has opened new challenges and concerns. With new approach like '*influencer marketing*' new task is posed before judiciary. The impact of advertisement on digital media is fast, thus timeline becomes an important factor in justice delivery. The '*special damage*' though considered in cases is just on paper. There is also a necessity to have standard parameters to quantify damages which is still unexplored by Indian courts. Applicability of corrective measures as present under Lanham Act(US) to repair the loss caused to the trademark during advertisement should be considered in Indian judiciary.

According to report published by few agencies the count of followers as listed below the name of influencers are many times a fake number. These are actually a bot who also add false comments. These acts mislead consumers and even brand owners who hire influencer for their product endorsements. The Advertising Standards Council of India (ASCI) which is a self-regulatory body for advertisement sector recently tweeted that – We do need guidelines as it will bring more transparency and help protect consumer interest as they trust what bloggers/vloggers recommend. The guidelines should include rightful disclosure of paid partnership, different types of promotions/collaborations.

### **Conclusion: future challenges of influencer marketing**

Trademarks are an important aspect of commercial laws. Any damage to its image by way of advertising has a long-lasting impact not only on sales figures but also on its goodwill and reputation. The Trademark law across the globe confers the right to the owner not just for his logo or label but also for the goodwill and reputation associated with the said trademark. Hence, when the competitor directly by himself or any influencer indulges in unfair practices by way of advertising with an intent to disparage the rivals mark then it not only constitutes infringement, but also hampers the goodwill of the trademark for that particular business.

The case discussed in the present article should be taken as guiding parameter by the influencers before reviewing or commenting on any brand. The comments should be based on factual and correct data. The comparative analysis should be within appropriate category or class. This case has highlighted absence of specialised machinery and standard guidelines to govern the advertisement related issues for real and on-line world.

With the software tools as shield and effective laws along with enforcement machinery the advertisement related issues can be efficiently taken care of. As the threat to trademark evolves, the law cannot stay static. Fair-trading practices are the foundation of trade irrespective of territory and economic model. So, the legality of comparative advertisement should be reconsidered globally in light of changing marketing policies and global pandemic.

It takes decades for a business to build reputation and goodwill for its goods or services. But when a competitor misuses a trademark through comparative advertisement and projects the rival trader in bad light, it not only causes economic loss but also tarnish the good of a mark.

Presence on social media is becoming inevitably for most of brands. Rather, due to global pandemic the digital platform would be exploited rigorously. On such platform, influencer marketing is gaining popularity. Therefore, it is need of an hour to set rules and carve out responsibilities of each stake holder – influencer, brand owner, advertiser, and consumer.

### **Acknowledgement**

The authors wish to acknowledge Symbiosis Law School (Pune) and Symbiosis Institute of Technology for providing the library support.

**Conflict of Interest:** There is no conflict of interest among the authors

**Funding:** Self-funded

**Ethical approval:** Not applicable

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