

The term comparative advertising marketing essay



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In the liberalized Indian economy, as entry into production and services is no more a barrier, the thrust of competition has shifted to aggressive and vigorous promotion of products and services. These practices raise questions about truthfulness and fairness of representation of products and services. In a competitive environment, every representation of a product or service, is about what 'others are not'. In this sense, a study of evolution of law on comparative representation can give us insights in the working of law and business in the liberalized-globalised economy. The question is not whether a consumer has adequate remedies and protection against such unfair trade practices of a corporation but whether the warring corporations have adequate law against unfair trade practices, and a justice delivery system to have some 'rules of the game' for competing among themselves[1].

The term 'comparative advertising' refers to any form of advertising in which a trademark owner attempts to enjoy pecuniary benefits from a comparison between his product, service, or brand and that of a competitor. Comparative claims may vary in nature. They may explicitly name a competitor or implicitly refer to him. They may either emphasize the similarities or the differences between the products. They may also state that the advertised product is 'better than' or 'as good as' the competitor's[2]. In simple words; comparative advertising is a form of advertising in which two or more brands of same generic products are compared in terms of one or more products or attributes. These advertisements are designed to highlight the advantages of the goods and services offered by the advertiser as compared to those of a competitor.

Although, comparative advertisement has not been defined in the Indian statute, the UK Regulations define it as an advertisement which “ explicitly or by implication, identifies a competitor or goods or services offered by a competitor ”[3].

Comparative Advertising is also used in political campaigns, where it generates more counterarguments and fewer source derogations than negative political advertising does. This result may be due to the different styles of information’ processing that the two types of messages encourage. However, consumers exposed to negative political messages find them less useful for decision making and have more negative attitudes towards political campaigns than do consumers exposed to political advertising.[4]

A survey of advertisements conducted in US reveals that there are three categories into which all advertisements fall[5]:

1. Non comparative advertisements that do not refer to a competing product either directly or indirectly.
2. Indirectly comparative advertisements that refers to a competing product in an indirect manner.
3. Directly comparative advertisements in which a competing product is specifically named or recognizably presented.

Advertising falling into the last two categories could be referred to as comparative advertising. while in some countries one or both kinds of comparative advertisements are allowed, some countries do not allow either of the two kinds. Accordingly, the well known tag line in the UK(which allows <https://assignbuster.com/the-term-comparative-advertising-marketing-essay/>

both forms of comparative advertising with certain restrictions) in the advertisements for Carlsberg lager-“ Probably the best lager in the world”, cannot be used in Germany(which does not allow comparative advertisement at all), as it would lead to an implication that all other lager are inferior to Carlsberg, thereby falling into the category of indirectly comparative advertisements.[6]

Comparative advertising generally possesses two components, puffery and denigration. Puffery is where the advertiser seeks to draw the consumer’s attention by making superlative claims about his product that are assertions of opinion, rather than verifiable statements of fact. Often puffery crosses the limits of tolerance and seeks to portray the competing product in a negative light. The same is then said to amount to denigration, which the courts have strictly prohibited. Thus, the material question that often arises is to what extent comparative advertising may be restricted. The answer lies in developing a clear understanding of the conflicting interests of the various stakeholders involved, including the advertiser, the competitor and the consumer. The advertiser’s objective herein is to present his products in a manner such that the consumer is most likely to purchase it. On the other hand the competitor would always try to prevent any advertising that aims at denigrating his product or makes false claims, or uses his product as a standard which the advertiser claims to exceed. The hapless consumer finds himself in the midst of a cacophony of claims, and has the right to be accurately informed about the quality or utility of the products available in the market.[7]

STATUTORY PROVISION IN INDIA-

The onus of regulating advertising in India has been assumed by a wide array of governmental authorities and tribunals, but presently there exists no dedicated statutory mechanism to regulate the dissemination of untruthful or disparaging material through such medium[8]. Primarily, matters related to untrue and misleading advertising were adjudicated upon by the Monopolies and Restrictive Trade Practices ('MRTP') Commission, constituted under the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act'). The Act defined an 'unfair trade practice' under section 36A to include any false representation of goods with regard to their quality, quantity or utility. The provision also incorporated the clause that a warranty or guarantee of performance or durability of the product, if not adequately substantiated, would amount to an unfair trade practice[9]. 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[10]. However, the MRTP Act was subsequently repealed by virtue of section 66 of the Competition Act, 2002.

The Monopolies and Restrictive Trade Practices Commission, with reference to intensifying competition in the post-liberalised India, was describing a case before it as 'another legal battle between two multinational corporate giants making this Commission as a battlefield for the purpose[11].

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 contrary to honest practices in industrial or commercial matters, is detrimental to its distinctive character, or is against the reputation of the

trade mark[12]. Section 30(1) of the same act provides an exception to the above rule stating that such advertisement would not amount to infringement if the use of such mark falls within purview of honest practices'. This implies that honest practices are mandatory for comparative advertising without which it would amount to trademark infringement

In the absence of an established statutory mechanism dedicated to the regulation of advertising, the industry itself has sought to develop a model for voluntary self-regulation in the form of the Advertising Standards Council of India (ASCI)[13]. The same is a non-statutory tribunal comprising an association of advertisers established in 1985. The ASCI position on the form and manner of comparative advertising has been laid out in Chapter IV of the body's Code for Self Regulation in Advertising[14]. It is stated herein that advertisements containing comparisons with competing manufacturers and sellers are permissible in the interests of vigorous competition and free dissemination of information, subject to the following requirements being satisfied:

- a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.
- (b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
- (c) The comparisons are factual, accurate and capable of substantiation.

(d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.

(e) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements, directly or by implication.[15]

COMPARATIVE ADVERTISEMENT AND TRADEMARK INFRINGEMENT

In an era where the whole world is considered as one global village, trademarks play an important role to distinguish the products of one business house from another. Trademark can be defined as a mark or symbol which distinguishes one product from other product of similar nature[16]. Its aim is to identify the source of a product and to distinguish that product from product of similar nature. It lends individuality to a product which helps the customers to identify the product placed with products of similar kinds. Trade mark not only identifies the product of its origin but it also guaranties its unchanged quality and further helps to build a brand image by advertises the products. In a rat race to present their products as the best, companies adopt advertising techniques that make use of trademarks, trade names, and other trade symbols combining informational and persuasive elements. Not only has the use of their own trademark gained popularity also the use of their counterpart's trade mark is fast catching up. In Advertising and Public Interest[17], Ralph Brown argues that trademarks by themselves were worthless to the public; the public's interest inhered in the ability of trade symbol to inform and prevent confusion. He further asserts that the legal protection surrounding trade mark should be

driven by analysis of the degree to which advertising itself served public interest.

The law on comparative advertising and product disparagement, in relation to trademarks, in India, is based upon the law as laid down in Irving's Yeast Vite Ltd v FA Horse-nail[18]. Section 29(8) of The Trademarks Act, 1999 enunciates situations, when the use of a trademark in advertising can constitute infringement. It says that any advertising which is not in accordance with honest practices; or is detrimental to the distinctive character, or to the repute of the mark, shall be an act constituting infringement. At the same time Section 30 (1) makes comparative advertising an exception, to acts constituting infringement under Section 29. It provides that any advertising which is in accordance with honest practices, and does not cause detriment to the distinctive character or to the repute of the trademark will be permissible and will not constitute infringement.

CONSTITUTIONAL VIEW-

Article 19 (1) (a) of the Constitution of India protects the right to freedom of speech and expression. It is very important for us to analyze article 19 (1) (a) of the Constitution in relation to comparative advertising. The freedom of speech and expression also has limitations but the same is restricted by imposing reasonable restrictions by the state under article 19 (2) of the Constitution[19]. Now the question is that whether the commercial speech can be protected under article 19 (1) (a) of the Constitution. In the case of “ Tata Press Ltd. vs Mahanagar Telephone Nigam Ltd.”[20], the Supreme Court held that “ commercial speech cannot be denied the protection of Article 19(1) (a) of the Constitution merely because the same is issued by

businessmen". Court took a very wide interpretation of the Article 19(1) (a) of the Constitution. Supreme Court held that advertising as a 'commercial speech' has two facets. Advertising which is no more than a commercial transaction is, nonetheless, dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of 'commercial speech'. Supreme Court also stated that the public at large has a right to receive the 'commercial speech'. Article 19(1) (a) not only guarantees freedom of speech and expression; it also protects the rights of an individual to listen, read, and receive the said speech. So the Supreme Court held that a party has a right to advertise its product making commendation about its quality. Advertisement being a commercial speech which is a part of the freedom of speech is guaranteed under article 19(1). (a) of the Constitution and it can also be restricted under Article 19 (2) if it fulfils its elements.

Court was of the view that publicity and advertisement of one's product with purpose of boosting sales is a legitimate marketing strategy. Court has laid down various principles in deciding about the extent of comparative advertisement.

Comparative advertising must compare products meeting the same needs or intended for the same purpose.

Comparative advertising should explicitly or implicitly make clear what comparison is made.

A case of disparagement arises only if product in question is identifiable.

Comparison with another or ordinary product that does not allude to particular brand, cannot give rise to disparagement.

For disparagement, a direct reference to competitive brand is not necessary.

Even an indirect referencing that can identify a particular brand may lead to a case of disparagement.

Comparative advertising should not mislead consumers about competitor's product with which comparison is made.

A manufacturer is entitled to make exaggerations like his goods are the best, or in puffing manner compare his goods with competitors', and the same even if untrue, will not give a cause of action to other manufacturers of similar product, unless in doing so the manufacturer says that his competitor's goods are bad, or disparages and defame them.

This makes clear that freedom of speech and expression does not permit defamation and it would be a little far-fetched to say that an advertiser has the liberty to disparage the product of his competitor without any check, under the grab of freedom of speech. The irony remains, that although it is one thing to say that your product is better than that of a rival and it is another thing to say that his product is inferior to your product, still while asserting the latter, the hidden message may be the former, but that is

inevitable in the case of a comparison. While comparing two products, the advertised product will, but naturally, have to be shown as better.[21]

Comparative Advertising-Consumer's Perspective

Comparative Advertising if seen in a consumer perspective it tells the difference between two goods in the market and tell the consumer why he should opt for the advertisers product.[22]

One of the most effective methods for advertising a product is to compare it with competitive offerings. Side-by-side or "A-B" comparisons can provide prospective customers with compelling reasons to buy from the company. They can also help build credibility for its product. Subconsciously, the prospective customer says: "Who would risk making a direct comparison if they didn't have something truly superior?" Johnson and Johnson found this out the hard way when Proctor and Gamble introduced Whisper with a direct comparison of the various features that were new in their product as opposed to Carefree without once naming Carefree directly.[23]

The comparison of goods and services provides more information and thus educates consumers in taking a better decision. The advertisers in India generally compare the prices that cater to the status appeal of the maximum populations as 30% of Indians live under the category of middle class which is the most growing consumer market and they are also benefitted with the comparative advertisements.

From the research done in India and abroad regarding the consumer reactions to the comparative advertising, it is clear that it helps in informing customers on the comparative features of two competitive brands. It is an <https://assignbuster.com/the-term-comparative-advertising-marketing-essay/>

effective positioning tool as well.[24] Few advertisers view the comparative advertising as offensive but from the practical experience so far, it is an accepted fact that consumers are being benefitted by the comparative advertisements. In Indian market, as mentioned above there has been a sea-change after the introduction of LPG policies. Brands that were considered to be of very high quality with practically no competition have lost out to other international brands, with the opening up of our markets and with the increasing awareness of the consumers about the products. Comparative advertisement truly gives an opportunity to help consumers not only to decide on which product is better but also what is best suited for him.[25]

Consumers generally do not observe quality before purchase. Prices cannot signal quality. The firms compete for customers by advertising their quality. We first analyze a pure disclosure framework. If a firm advertises, it discloses the truth; it cannot falsify as such. Compare two scenarios. In the first firms can only engage in non-comparative advertising, i. e., a firm may disclose its own quality but not the competitor's. In the second scenario, the firms can also engage in comparative advertising. In both scenarios advertising is costly and firms may, therefore, choose to remain silent.[26]

Some studies have questioned the effectiveness of comparative advertising. Swinyard found that when it is one-sided, comparative advertising loses credibility and generates sympathy for the brand being attacked.[27] A study by Ogilvy-Mather, a large ad agency, found that consumers frequently confuse the sponsor for the competitor in many comparative ads.

Furthermore, there was no persuasiveness of comparative and non-comparative ads.[28] On the other hand, other studies have found that if the

source is credible, comparative advertisement is effective. For example, Gotlieb and Sarel found that credible comparative ads were more likely to be noticed and were more likely to influence intentions to buy the advertised brand compared with non comparative ads. They also found that credible comparative ads were particularly effective for new products. Swinyard found that credibility can best be achieved by making comparative ads two sided-that is, a comparative ad that names a competitor, cites some of the advantages of the comparative brand, and then points out the arguments for the advertised brand.[29]

Marketers should also consider consumer's goal when preparing comparative ads. Promotion-focused consumers, whose goal is to maximise their gains and positive consumers, will be more responsive to claims that Brand X is superior to Brand Y; prevention-focused consumers, who want to minimize their loss and risk, will be more sceptical of superiority claims and more responsive to claims that Brand X is similar or equivalent to Brand Y. Note that positively framed comparative messages (Brand X performs better than Brand Y) are more effective for promotion-focused consumers, whereas negatively framed messages (Brand Y has more problems than Brand X) are more effective for prevention-focused consumers. Positively framed comparative messages encourage more cognitive processing and prompt consumers to consider other brand information-sparking their buying intentions if the additional information supports the positive arguments.[30]

But the comparative advertisement should extend to the limit that it misleads the consumer. Any misinformation will be prejudice to the consumers.

Abuses in advertising can obviously have unfortunate effects on consumers

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ranging from money on item that did not live up to the standard, expectation, quality and effectively but results in hazardous accidents resulting from the misrepresentation of faulty goods.[31]

Humour In Advertising[32]

Marketers use humorous messages because they attract attention and because advertisers believe that humour can be persuasive. The use of humour in advertising has been increasing to the point where the majority of ads use humour. one reason is that a 2002 survey by Roper, a large marketing research firm, found that 85 percent of respondents said they like ads with humorous themes.

There are pros and cons for the use of humour in advertising. On the positive side, humour is likely to increase attention and memorability. It is also likely to enhance the advertiser's credibility. Humour may create a positive feeling towards the advertisers and increase the persuasiveness of the message. It may also distract consumers who use competitive products from developing arguments against the advertiser's brand and may lead them to accept the message.

Humour may also be considered inappropriate based on the economic and political climate. When is the use of humour most effective? Researchers have found that humour is most effective in gaining message acceptance- when consumers are not involved- because humour is peripheral to the message, it is more likely to influence consumers who are not involved with the product than those who are.

for existing products- advertising new products require conveying information. Humour is a more effective means of establishing a mood than of conveying information.

When consumers have a positive attitude towards the brand- humour can reinforce positive feelings towards a brand, but is unlikely to reverse negative feelings.

Why Consumer Protection?[33]

Consumer has no voice in the product which is manufactured for his consumption.

It is very difficult to effectively organize consumers in country as vast as India.

A majority of the population is illiterate and ignorant.

Poverty, lack of education, lack of misinformation, traditional outlook of Indians to suffer in silence, considering poverty and misery as a god-given things-all these negative sides of our life have enabled unscrupulous businessman to exploit consumers in India.

The march of science and technology has increased the difficulties of the consumer along with his opportunities of selection from a very wide variety of goods.

JUDICIAL PRONOUNCEMENTS

Indian Judiciary has defined certain limitations for comparative advertising. Certain cases discussed below will help us to clarify more on this term.

The role of puffery as a facet of comparative advertising was substantively dealt with by an Indian court for the first time in *Reckitt & Colman of India Ltd. v. M. P. Ramchandran and Anr.*[34] In the concerned matter, the plaintiff and defendant were manufacturers of clothing detergent brands 'Robin Blue' and 'Ujala', respectively. It was contended by the plaintiff that the defendant, in its advertisement, had intentionally displayed a container that was similar to the one in which the plaintiff's product was sold, and in regard to which the plaintiff had a registered design. A further insinuation to the product of the plaintiff was in the fictitious product being priced at Rs. 10, which was known to be the price at which 'Robin Blue' was sold. The advertisement went on to state that the said product 'Blue' was uneconomical, and depicted that the same was a product of obsolete technology and hence ineffective. There was also an implication that the product failed to dissolve effectively in water, and hence damaged clothes by leaving blue patches on them. It was argued by the defendant that the bottle depicted in the advertisement did not bear any resemblance to 'Robin Blue', and that the object of the portrayal had been merely to assert the technological superiority of 'Ujala' over other competing products. Hence, it was denied that there was any specific disparagement of 'Robin Blue' in the concerned advertisement.

In *M. Balasundram v Jyothi Laboratories*[35], A television advertisement promoting Ujala liquid blue showed that 2-3 drops were adequate to bring striking whiteness of clothes while several spoons of other brands were required though no label of any other brand was shown. A lady holding a bottle of Ujala was looking down on another bottle and exclaiming chhi, chhi,

chhi! in disgust. The manufacturers of Regaul, a competing brand, approached the MRTP Commission that the advertisement was disparaging its goods. The Commission was of the view that-“ a mere claim to superiority in the quality of one’s product by itself is not sufficient to attract section 36(1)(x) of MRTP Act”. In the advertisement, the bottle did not carry any label. Further, the bottle did not have similarity with bottle of any brand. The Commission, thus, was of the opinion that it could not be a case of disparagement of goods.

On a different note decision given by the court in case of Hindustan Lever Limited v Colgate Palmolive (I) Limited[36]and Pepsi Co Inc v Hindustan Coca Cola Ltd[37], where both Colgate and Hindustan Coca Cola Ltd liable for disparaging their competitors’ products, respectively. Even though in both advertisements the competitor’s product name could not be heard but could clearly be made out from lip movement. Such a method of circumventing the law was held to fall clearly within the ambit of disparagement. The courts further stated that any claims made in comparative advertisements must be backed by verifiable statistical data.

Precedents like the one laid down in Dabur India Ltd. v. Emami Ltd[38]. could severely curtail the scope of comparative advertising. Jurisprudentially speaking, the concept of defamation has to be specific or individualized in nature[39]. In the present case, the courts seem to have overlooked this premise, as the court’s ruling in the case laid down that even a reference to a generic class of products could be potentially disparaging. This could be viewed as dangerous precedent as it would disallow a competitor to even make comparisons on a general basis. Hypothetically if the newly launched

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Tata Nano were to put out an advertisement giving out the impression that bike owners could ' progress' in life by graduating to a car, then based on the ratio of this case, any bike company would be able to successfully sue Tata for disparagement[40].

CONCLUSION

In India there's no doubt that the law regarding to comparative advertising is well settled, but is it settled in the required manner? By copiously allowing puffing up in marketing strategies, until a competitor is not adversely affected, the courts have turned a blind eye towards the equally important consumer and his interests. Today in the Indian sphere the focus only seems directed towards the grabbing of eyeballs, without providing any productive information for the consumer to utilize. The objective behind comparative advertising was not only being informative and an important tool to promote competition but for comparisons to serve as benchmarks to help consumers focus on the product's main qualities.

Compara