

# Comparative advertising

[Business](#), [Marketing](#)



Advertising aims to promote the sales of the company, its products and services, and making the consumer informed about what all the product or services are meant to be. It is a way to make the public aware about what exactly the company is selling. The fundamental determination of success of advertising is intended on sale probability of a product or service. Advertising is the promotional method of supplementing the purchasing of a product by a prospective consumer by making him aware of the dimensions and properties of such product. Advertising actuates the buyer through consecutive stages such as awareness, comprehension or recognition, conviction and action. Advertising objectives may be divided into four stages of commercial communication which are explained below:

1. **COGNIZANCE:** The prospect must be informed about the subsistence of the brand or company in the market.
2. **CONCEPTION:** The prospect must understand what the product is and what it will do for him.
3. **CONVICTION:** The prospect must be mentally convinced to buy the brand or the product.
4. **ACTION:** The prospect takes meaningful action. Purchase decision is duly taken. An act of advertising can also amount to unfair trade practice and it is not necessary that a business which has obtained adequate protection for its intellectual property against infringement and theft cannot be a victim of unfair competition by way of advertising. It is not required for the advertising to be completely false in order to come under the purview of unfair competition, an act of advertising which misleads or deceives customers

resulting in damage to the competitor can be termed as unfair. In general, businesses are prohibited from placing ads that either unfairly disparage the goods or services of a competitor or unfairly inflate the value of their own goods and services. False advertising deprives consumers of the opportunity to make intelligent comparisons between rival products. False advertising deprives the consumers of the opportunity to make intelligent comparisons between rival products. It also drives up the costs for consumers who must spend additional resources in examining and sampling products. Two types of advertising, which are considered as unfair in different jurisdictions of the world under the trademark law, will be discussed hereafter:

- 1) Comparative advertising; and
- 2) False advertising.

## CHAPTER 2: WHAT IS COMPARATIVE ADVERTISING?

The opening up of the Indian economy has led to a plethora of brands in the market with each one out to capture a portion of the market. While comparative advertising may be one of the best ways of relaying relative information to the consumers, advertisers should tread carefully as it often leads to a clash of legal and ethical principles. Honest, non-misleading and fair comparative advertising is generally viewed positively by law as well as by the public. Comparative advertising can play the role of a salesman who helps remove and clarify doubts about a brand. A person who has already gone through the various processes like need, recognition and information search may be stuck because he is not able to make a comparative evaluation between the brands on which he has zeroed in.

It is at this stage that comparative advertising helps him to make a better decision. If it gives very compulsive reasons to a potential consumer to buy a product, it cannot be faulted. Thus, it can be seen that comparative advertising affects three parties - the advertising company, the rival company or companies and the consumers. In a specific case where the Hindu and the Times of India were involved, the abuse on the respective trademarks was very clear. In the first advertisement by the Times of India, it had been clearly communicated to the consumers that it was the Hindu, an Indian daily newspaper published in English, which supposedly stood as 'supremely boring', putting people to sleep all the time. In the counter response, the advertisement by the Hindu pinpointed that it is the Times of India, an Indian daily newspaper published in English, which supposedly had 'no substance but only style'. The advertisement showed how a bunch of youngsters (their preferred newspaper being the 'Times of India') were unable to answer basic questions of national importance whereas they answered without fail when questioned on Bollywood basics.

The subtlety employed by the Hindu in the form of the 'bleeping out' process was loud enough to convey the message to its consumers that it is no other newspaper but the 'Times of India'. It ended with a signature message 'Stay ahead of the Times'.<sup>1</sup> On May 3, 2007, the Times of India published an advertisement for the promotion of the website timesjob.com. The campaign line was "It took us 25 days to move 1, 28, 370 steps further ahead of our competitor", and this was followed by some comparative graphs and charts without mentioning specifically who their competitor was, although it was quiet obvious to all who read it as to who their unnamed

competitor was. This type of non-disclosure is commonly employed nowadays to avoid legal pitfalls regarding the veracity of the published information. This form of advertising, promoting one product/ service or brand by comparing it to similar products is known as comparative advertising. As defined in EU directive 97/55/EC, it is “ any advertising which explicitly or by implication identifies a competition or goods or services offered by a competitor”.<sup>2</sup> A survey of advertisements conducted in US reveals that there are three categories into which all advertisements fall: 1. Advertisements that refer only to one brand of product and make no reference to competing products either directly or indirectly – ‘ non-comparative’ advertisements (‘ NC’); 2. Those that refer only to attributes of one brand of product but that refer indirectly to the attributes of rival or competing goods – ‘ indirectly comparative’ advertisements (‘ IC’); 3. Advertisements that directly compare attributes of one product with attributes of a specifically named or recognizably presented, competing brand – ‘ directly comparative’ advertisements (‘ DC’).<sup>3</sup> Although it is common for both IC and DC advertisements to be referred as Comparative Advertising, it is essential to distinguish between these different categories, as in some countries neither IC nor DC advertisements are allowed, whereas in others one or both are permitted.

The United Kingdom is an example of a country that allows both (within limits), whereas Germany is an example of one which allows neither IC nor DC advertisements. Accordingly, the tag line with which UK residents are familiar in relation to advertisements for Carlsberg lager-‘ Probably the best lager in the world’ – is not one that is heard in Germany where it would be

regarded as an IC advertisement, since it implies that all other lagers are inferior to Carlsberg lager. 4 Comparative Advertising can be defined as the advertising in which a trader compares his products or services with that of another trader, by using the trade mark or trade name of such trader. Such advertising by a trader usually compares the prices and qualities of the products or services, in a manner representing that the product or services of the trader is superior to those of another trader. Such advertising methods mostly target the major players of products or services in the market. There are different methods of Comparative Advertising which are usually taken up by the traders to promote their products or services, which include: a) Reference to a competitor's name;

b) Reference to a competitor's trade mark;

c) Reference to the major brand instead of referring to the competitor by name directly, but such reference makes the customer recognise the major brand. Comparative Advertising refers to the advertising of a product or service, by comparing or drawing an analogy with similar products or services. More often than not the product being advertised is being compared to its closest rival, depicting itself to be about what “ others are not” or “ characteristics others are devoid of”. The key to Comparative Advertising lies in the depiction of the rival goods in a discreet yet explicit fashion.

Comparative advertising benefits the consumer as it usually compares the price, value, quality or other merits of different products, thereby enhancing the awareness of a consumer. However, there is an important proviso attached to this: The improvement of consumers' knowledge can only be

achieved for long as the advertising does not contain misinformation, which is always a risk if the education of the consumers is entrusted to entities with vested interests. Thereby, legally speaking, comparative advertising is allowed to the extent: A trader is entitled to compare his goods with the goods of another trader and to establish superiority of his goods over that of others, but while doing so he cannot say that the goods of his competitor are inferior, bad, or undesirable. In case he makes such statement it would be an act of “product disparagement”. Such comparison leading to disparagement of a rivals’ product is not allowed.

5 Comparative advertising is often supported on the basis of an argument that advertising is commercial speech and is therefore protected by Article 19(1) (a) of the Constitution. In Tata Press Ltd case<sup>6</sup>, it was concluded by Shri Arun Jaitley, learned senior counsel that “Right to freedom of speech” includes commercial speech, and that no restriction could be placed on the said right in view of clause (2) of Article 19 of the Constitution.

However, 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 garb of freedom of speech

7. 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.

## CHAPTER 3: COMPARATIVE ADVERTISING USA AND UK

## UNITED STATES OF AMERICA

The law surrounding advertising in the United States of America is both regulatory and statutory; comparative advertising is also governed by traditional common law notions of “ fair-use” of trademarks, since codified in various provisions of the Lanham Act. Under the US law, use of competitor’s trademark in accurate and non-deceptive comparative advertising is legal and does not constitute trademark infringement. In fact, truthful comparative advertisements- even those that display the competitor’s trademark are considered to be informational to the consumers and beneficial to competition, provided that the competitor’s mark is accurately depicted. The United States being guided by the objective of maximising consumer welfare and promoting free and competitive economy has well recognised and accepted this form of advertising, which enjoys the additional protection of freedom of speech laws. The 1969 Federal Trade Commission (FTC) Policy Statement on Comparative Advertising also advocates the use of comparisons involving the name of the competitor or the competitive product. However, the negative consequences of false and confusing comparative claims led the FTC to bring in the parameters of “ clarity, and, if necessary, disclosure to avoid deception of the consumer” to be fulfilled.

8 Finally, a discussion of comparative advertising law in the United States would be incomplete without an examination of the relatively newly codified concept of dilution of trademarks. Dilution is fundamentally different notion than likelihood of confusion in that it seeks to protect the owners of famous marks rather than protecting the consumers. Dilution protects famous



trademarks, namely those that are “ widely recognised by the general consuming public of the United States as a designation of the source of the goods or services of the mark’s owner” from weakening through association with products or services which do not originate from the owner, eg BUICK for Aspirin, DUPONT for shoes, and KODAK for pianos would be actionable under this legislation. The owners of a famous mark may seek injunctive relief for dilution by “ blurring” which “ impairs the distinctiveness of the famous mark”, as in the examples above, the owner may also seek relief for dilution by “ tarnishment” which “ harms the reputation of the famous mark” through association with an inferior or offensive product. “ Fair-use “ of a famous mark is a defence to an action based upon dilution, including, expressly “ advertising or promotion that permits consumers to compare goods or services”. Notably, this is the only express mention of comparative advertising in the Lanham Act. Little case law exists exploring this defence, as most cases in which “ tarnishment” is the claim have been more prone to the second explicit defence under fair use, namely, that the junior use is a parody, or criticism or commentary upon the famous mark owner or her goods or services. For example, Kraft Foods successfully protected its mark VELVEETA for cheese from tarnishment by defendant’s use of the moniker “ King Velveeda” in connection with an adult website, while dog chew toys made to resemble Louis Vuitton handbags were protectable parody. 9 The law of trademark dilution remains the subject of much controversy, particularly among famous brand owners, and many questions remain unanswered. Dilution law has expanded the traditional trademark notions of

unfair competition outside of the realm of likelihood of confusion and false advertising. The limits of such expansion remain to be seen. 10

UNITED

KINGDOM

Comparative advertising is governed by European Directive 2006/114/EC (Misleading and Comparative Advertising Directive), the purpose of which is “to lay down the conditions under which comparative advertising is permitted”. These are set out in Article 4, and are referred to as the “Comparative Advertising Conditions” (CAD)<sup>11</sup>. Comparative advertising was further complicated in the UK by section 10(6) Trade Marks Act 1994, which states: (6) Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or a licensee. But any such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark. The effect of this has been to permit comparative advertising in the UK, but its status has been unclear as the wording is not derived from the Trade Marks Directive. Given the clarifications of the law set out below, this provision is now largely regarded as being redundant in the UK. Both UK and European Community trade mark legislation already recognise that it is permissible to use another’s registered trade mark without consent in limited circumstances; for example, where the mark constitutes an individual or business’ own name or address, or is merely being used to indicate the kind, quality or purpose of goods, products or

services, provided always that such use is, generally, “ in accordance with honest practices in industrial or commercial matters”. The policy is clear; certain uses should be kept free for basic moral or free-market purposes, such as the ability to honestly use one’s own name or address, or to honestly indicate that a trade-marked product must be used for certain purposes, like a repair. In addition, under UK law a registered mark may be also used to simply identify goods or services as “ those of the proprietor”, providing, again, that such use is generally in accordance with honest practices. And, again, the policy goal is obvious: advertisers, and in particular competitors, should be free to honestly compare one another’s goods and services by reference to one another’s trading names and / or brands, either or both of which will frequently be registered as trademarks. For example, in the supermarket price wars: “...X number of our products were cheaper than Y’s last week...” However, further European legislation, such as the Comparative Advertising Directive (“ CAD”) has tried to define “ honesty” by requiring that advertisements comply with a checklist of characteristics if a registered mark is to be used without risk. Under the CAD, any comparative advertisement must basically be true, accurate and above all “ fair”.

The three land mark cases in this regard are as follows:

1. THE ‘ BUBBLES’ CASE<sup>12</sup>

O2 v Hutchison was in respect to O2’s UK trade mark registrations for static pictures of bubbles, which it used to advertise its mobile phone services. O2 was unhappy with the way a rival mobile phone service provider, Hutchison 3G, used images of bubbles in water when comparing its charges with those of O2 in its television advertising campaign, launched in 2004. The bubbles

in the Hutchison 3G advertisement were similar to O2's trade-marked images of bubbles. O2 issued proceedings in the UK for trade mark infringement, complaining that the bubbles in Hutchison 3G's advertising were not necessary to make the price comparison between the two companies' services. The ECJ noted in particular that when a comparative advertisement includes a sign likely to cause confusion on the part of the public, which includes the likelihood of association between the sign and the mark, that advertisement would not satisfy one of the conditions laid down in Article 3a CAD. In this scenario, it would then be for the courts to consider whether there was trade mark infringement. However, in this case, given that O2 itself had admitted that the bubble imagery in Hutchison's advertising was not misleading, no question of trade mark infringement arises. 2. INTEL V CPM13

The concept of 'unfair advantage' is also contained in the TMD as a ground for refusal to register a trade mark or as a ground on which to invalidate a registration. It is also a concept that is relevant to trade mark infringement. 'Unfair advantage' therefore plays an important role in both comparative advertising and trade mark law. The meaning of these words was one of the issues considered in this case which involved an application by Intel, the owner of the trade mark 'Intel', to invalidate the later mark 'Intelmark', registered in class 35 for marketing and telemarketing services. The 'Intel' mark was registered in classes 9, 16, 38 and 42 for computers and computer-linked goods and services. The UK courts recognised that Intel had a 'huge reputation' for the 'Intel' word mark in respect of computers and computer-related goods and services, even before 1997 when the '

Intelmark' registration took effect. Sharpston AG referred to the concept of 'unfair advantage' as 'free-riding', where the focus is on benefit gained by the later mark from being linked to the well-known earlier mark, rather than on whether the earlier mark is harmed by being linked to the later mark. In her view, what must be established is some sort of boost given to the later mark by its link with the earlier mark and explained it by giving the example that a select range of expensive hand-made jewellery being sold under the mark 'Coca-Cola' would not inevitably mean that the marketing of the jewellery would benefit unfairly from the Coca-Cola Company's trade mark. In her view, it could not be concluded that the later mark takes unfair advantage of the earlier mark from the mere fact that the earlier mark is unique. The greater the reputation and distinctiveness of the earlier mark and the greater the similarity between the goods or services covered by the two marks, the more likely it will be that the later mark will derive advantage from any link established between the two in the mind of the public. In addition, if the later mark is to derive unfair advantage, the associations with the earlier mark must be such as to enhance the performance of the later mark in the use that is made of it. However, ECJ's final ruling on the issues raised is still awaited. 3. L'Oréal v Bellure<sup>14</sup>

In this case the defendants were importing, distributing and selling products that aped the fragrances of the claimant's luxury perfumes. One of the defendants used a comparison table that listed a number of luxury brands against a list of its own products, each product appearing in the list against the luxury brand with a similar smell. It was accepted that sales of the defendants' cheap, smell-alike perfume had no impact on sales of the

claimants' luxury perfumes and that no one would be confused into thinking that the cheap smell-alikes were produced by the claimants. *L'Oréal v Bellure* is the first time the ECJ was asked to interpret the concept of 'unfair advantage' under the CAD. The ECJ therefore agreed with Sharpston AG's Opinion on unfair advantage in *Intel v CPM* in relation to the TMD, but decided that a different test should apply under the CAD in view of the fact that it is in the nature of a comparative advertisement for the advertiser's product or service to take advantage of the reputation of the trade mark used in the comparison. The ECJ decisions in these cases will be vital to establishing the limits within which brand owners can use their registered trade mark rights to prevent competitors from linking their well-known brands to the competitor's own products. The ECJ has traditionally taken a fairly narrow approach to the protection afforded by a trade mark registration, preferring to limit this to what is required to guarantee the origin of the goods and services that are the subject of the trade mark. The ECJ has also ruled that the conditions required of comparative advertising must be construed in the sense most favourable to such advertising. An interesting issue will be whether the ECJ elects to interpret 'unfair advantage' consistently between the two directives. The answer should be provided in the coming months. 15

The ECJ decisions in these cases will be vital to establishing the limits within which brand owners can use their registered trade mark rights to prevent competitors from linking their well-known brands to the competitor's own products. *O2 v Hutchison* has at least preserved the right of trade mark proprietors to sue for trade mark infringement if the advertisement does not

comply with the conditions of the CAD. The forthcoming cases will hopefully define the scope of ‘unfair advantage’ under both directives, which may well prove fundamental to understanding what action trade mark owners can take to prevent comparative advertisements from using their marks. If a liberal definition is adopted, this should provide trade mark owners with greater power to prevent use of their marks in comparative advertising. However, the ECJ has traditionally taken a fairly narrow approach to the protection afforded by a trade mark registration, preferring to limit this to what is required to guarantee the origin of the goods and services that are the subject of the trade mark. The ECJ has also ruled that the conditions required of comparative advertising must be construed in the sense most favourable to such advertising. An interesting issue will be whether the ECJ elects to interpret ‘unfair advantage’ consistently between the two directives. The answer should be provided in the coming months.

## CHAPTER

## 4

### PRODUCT DISPARAGEMENT AND COMPARATIVE ADVERTISING

According to Black Law Dictionary the word “disparage” means: to connect unequally; or to dishonour (something or someone) by comparison; or to unjustly discredit or detract from the reputation of (another’s property, product or business); or a false and injurious statement that discredits or detracts from the reputation of another’s property, product or business. 16 Comparative advertising is often supported on the basis of the argument that advertising is commercial speech and is therefore protected by Article 19 (1)(a) of the Constitution. However, 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 garb of freedom of speech<sup>17</sup>. 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. <sup>18</sup> Product disparagement is not limited to comparative advertising. Even an act on the part of a third party could constitute product disparagement e. g. a newspaper article criticizes a particular good and in the process disparages it. <sup>19</sup> Disparagement by a third party is a common phenomenon. The advocates of comparative advertising often argue that trade rivalries and economic battles should remain confined to marketplaces; however the courts have been reluctant to accept this proposition. The courts have in fact also condemned acts of “ generic disparagement”. Initially comparative advertising was perceived as free riding on the other trader’s goodwill and thereby was treated as an infringement upon the owner’s rights. However, under the present statute comparative advertising is permitted within certain limitations. The law on product disparagement and comparative advertising can be summarized as follows: a) A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue. b) He can say that his goods are better than that of his competitors, even though the declaration is untrue. c) For the purpose of saying that his goods are the best in the world or his goods are better than that of his competitors’ goods, he can even



compare the advantages of his goods over the goods of others. d) He, however, cannot, while saying that his goods are better than that of his competitors' goods, say that the competitors' goods are bad. If he says so, he really slanders his competitors' goods or defames competitors' goods, which is not permissible. e) If there is no defamation to the goods or to the manufacture of such goods, no action lies, but in the contrary situation, where there is defamation, then the court is also competent to grant an order of injunction restrain. In order to succeed in an action of product disparagement, the plaintiff has to establish the following key elements: i. A false or misleading statement of fact has been made out about his product; ii. That the statement either deceived, or has the capacity to deceive, substantial segment of potential consumer, and iii. The deception is material, in that it is likely to influence consumers' purchasing decisions. The intent of the advertisement; its manner; and the theme of advertisement should be borne in the mind by the Court while deciding whether the impugned advertisement disparages the plaintiff's product or not. Out of these, "manner of the advertisement is of primary importance because, if the manner is such that it ridicules or condemns the competitors' goods, then it would amount to product disparagement. But, if the manner is only to show one's product better or best without derogating other's product then that is not actionable. 20

CHAPTER

5

COMPRATIVE

ADVERTISING

IN

INDIA

The history of comparative advertising goes back to the history of economy

and commerce itself. It was common for a trader to compare the good qualities of his products over the products of his competitor and promote his own product by doing such comparison. The initial form of comparison used to be in the form of actually listing out the characteristics/ features of a particular product and comparing the same with another by merely listing the features. But when the traders started crossing the limits of comparative advertising and started to compare and deprecate competitor's products, the law has stepped in. India has witnessed a large number of litigation in this area in the last few years. May it be in the form of car manufacturers comparing the features each other's' cars or one cola manufacturer comparing his product with the other<sup>21</sup>. The growth of economy resulted in large number of disparaging advertisements which has led to large number of cases. In the recent times, the judgement of Calcutta High Court in *Reckitt & Colman of India Ltd V. M. P. Ramachandran & Another*<sup>22</sup> clearly rules out the principles in comparative advertising. The Ld Single Judge of Calcutta High Court laid down that a person is entitled to puff up his own goods but cannot in the process defame the goods of the competitors. This judgement also held that if any product claims to be based on new technology, such a trader can positively say that such product consisting of new technology is superior to the existing technology but in the bargain cannot say that the product using the old technology are bad and harmful. This judgement was cited with the approval of the Ld Single Judge of Delhi High Court in *Reckitt & Colman v. Kiwi T. T. K. Ltd*<sup>23</sup>. <sup>24</sup> In this case the defendant was asked to modify the commercial so that the commercial becomes less damaging and disparaging. However, against the grant of only partial injunction, this was

taken to the division bench by the plaintiff on the ground that the commercial had to be completely restrained. The Ld Division Bench of Delhi High Court held as under: " We are of the opinion that the advertisement is prima facie disparaging to the appellant's product. The respondent may highlight the quality of its product and may proclaim that it is the best in the market but cannot be permitted to openly condemn the other products available in the market the way it is being done. Aggressive advertising is permissible to a limited extent, exaggeration is also permissible to a certain extent, but not to the extent of disparaging the goods of others." In Tata Press Ltd<sup>25</sup>, there is no doubt, " Right to freedom of speech" includes commercial speech, we are unable to accept that the contention of Shri Arun Jaitley, learned senior counsel that no restriction could be placed on the said right in view of clause (2) of Article 19 (2) of the Constitution. Subsequently, in recent times, the Delhi High Court was seized with a dispute between Pepsico Inc and Hindustan Coca Cola Ltd <sup>26 27</sup>, wherein the Ld Single Judge held that the mere mocking at a particular product by calling the plaintiff's product a drink meant for children was not by itself disparaging. However, this judgement got reversed in appeal and the Division bench of Delhi High Court held that it is not the mere terminology used in the commercial which is relevant but also the manner in which the commercial is portrayed which is important. The expression used, feelings portrayed, etc in the above cases related to instances wherein the product which was compared was clearly identifiable in the commercial and the competitor's product was being specifically targeted. However, the problem did not stop here. Competitors found new ways of indulging in

comparative advertising. They started condemning a whole class of products of a specific competing product. This started a new species of disparaging advertising called “ Generic Disparagement”.<sup>28</sup> In this new form of comparative advertising, the competitor would not merely disparage a specific product but would indulge in disparagement of a complete class of products. One of the first few cases of the Generic Disparagement is the judgement of the Dabur India Ltd v. Emami Ltd<sup>29</sup>. In this case the court was concerned with a commercial wherein the entire class of products, namely, Chyawanprash was shown in a negative campaign. One of the market leaders manufacturing Chyawanprash objected to the commercial by filing a civil suit for injunction. The Hon’ble court held that the plaintiff enjoyed a market share of more than 63% for this class of products and thus has a vital interest in ensuring that its product/ class as a whole is not condemned in any manner. Thus the Plaintiff had a clear cause of action to maintain the suit irrespective of the fact that there may or may not be a direct reference to the product of the Plaintiff but the reference to an entire class of Chyawanprash. The Ld Single Judge of the Hon’ble Court recognised the concept of Generic Disparagement and granted an injunction. This was followed by another case decided by the Delhi High Court itself in the Dabur India Ltd v. Colgate Palmolive India Ltd.<sup>30</sup> In this case the defendant sought to disparage the tooth powder manufactured by the plaintiff. In another judgment, Justice Ravindra Bhat of the Delhi High Court had passed interim orders in longstanding litigation between Glaxo Smithkline & Horlicks on one hand and Heinz, the manufacturers of Complian, on the other hand. This particular ad-war took a rather ugly turn with the competitors calling each

other's' product 'cheap'. Hopefully Justice Bhat's order clarified the law to the advertising community. Justice Bhat had very clearly ruled in favour of Horlicks since the ad-campaign against them was clearly disparaging and also ordered Complan to pay Horlicks costs of Rs. 2. 2 Lakhs only. 31 The most recent judgement on this issue is the case of where Hindustan Lever Limited(HUL)32 aired a television commercial which depicted a child being sick because of the alleged use of Dettol as an antiseptic liquid in bathing water whilst promoting the superiority of Hindustan Lever Limited's Lifebuoy Soap. The plaintiff, Reckitt Benckiser filed a suit for an ad interim injunction against the telecast of the television commercial of defendant Hindustan Lever Limited's Lifebuoy Soap, which was disparaging and denigrating the reputation and goodwill of the plaintiff's product Dettol in the commercial market. The Court decided that the commercial telecast by the respondent indeed disparaged the product of the plaintiff and granted an interim injunction to the plaintiff against the telecast. 33 The review of the various case laws, therefore clearly states that the courts in India have gone beyond the days of *White v. Mellin*, wherein the basic principle laid by Lord Watson was as follows :- " In order to constitute disparagement which is, in the sense of law injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things be established, it must be held that the defendant has acted within rights and that the plaintiff has not suffered any legal injuria." 34 The concept of comparative

advertising has now been expanded, and disparagement to even a class of products and not merely disputes between any two individual manufacturers. The underlying principle being that no tradesman has a right to condemn any specific product or any specific class of products while advertising its own virtues. The most important question here is whether the use of trademark in comparative advertising constitutes infringement of trademark? The primary purpose of a trademark is to 'distinguish the goods of one person from another'. Therefore, a trademark enables a consumer to identify the goods and their origin. Hence in case, if an advertiser uses a competitor's trademark to make comparison between his goods and those of his competitor, and in the process disparages them, then such an act on the part of the advertiser would not only invoke issues relating to comparative advertising and product disparagement, but also would invoke issues related to trademark infringement. In the case of comparative advertising and product disparagement, trademark issues arise only when a competitor's trademark is used, e. g, in *Duracell International Ltd v. Ever Ready Ltd*<sup>35</sup>, the advertisement in question had referred to the corporate name of the competitor, Duracell Batteries Ltd while depicting the appearance of a distinctive Duracell battery and without mentioning the brand name. It was held that the defendant had not infringed the trademark of the plaintiff. Furthermore, although Duracell had registered its battery as a trademark, it was in copper and black colours, while colours used in the plaintiff's advertisement were white and black. Hence, it was held that the defendant had also not infringed that trademark. 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 36 wherein it was held that use of another's trademark in comparative advertising does not amount to infringement. 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. 37 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 the 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. 38 Section 29(8) and Section 30(1) of the Trademarks Act, are adequate to address issues related to trademark infringement, made in the garb of comparative advertising. Judicial pronouncements on the issue have also made it clear that there is no harm in comparing your goods with those of the competitor, but the comparison should be fair and should not bring disrepute to the competitor's products or trademark, i. e comparative advertising is permissible, but comparative advertising leading to product disparagement is not permissible. The position is more or less the same in almost all the countries, which allow use of another's trademark in comparative advertising.

CHAPTER

6

CONCLUSION

No doubt that comparative advertising is beneficial as it reduces the search

cost, and consequently increases consumer welfare which has been the objective of trademark law since time immemorial and therefore it should be allowed. Moreover, it enables an advertiser to establish his brand in the market by stating his superiority over the established brands. But, at the same time there have to be regulations, to check abuses. If the courts had accepted the proposition that trade rivalries should be settled in the market, it would have caused great prejudice to public interest; as the question is not of deciding which product is better, but of public awareness. Because, as we say that comparative advertising increases public awareness, misleading and disparaging advertisement should not mislead the public. In respect of the law on comparative advertising, it can be said that it has really come a long way since the early 90's. Indian courts have clearly taken a position in favour of plaintiff in these cases. However, it is required to be borne in the minds that in an appropriate case, if the defendant is merely indulging in truthful comparative advertising, merely comparing the features of the competing products and not giving any judgement on the same, such comparative advertising may find favour with the courts and may start the development of a completely new jurisprudence. Until such a thing happens and an appropriate reaches the courts, the law is titled in favour of the plaintiff and such law is going to be here for some time at least. However, we must remember that the onus of ensuring healthy competition does not merely lie with the courts. It is of equal importance that the marketers of products engage in comparative advertising within the permissible parameters of law. Establishing a brand marketing policy within a company ought to be as important as watching for use and misuse by



other competitors. If proper guidelines are followed by the product marketers, it allows for the fostering of a better corporate environment to invest in. It is of utmost importance for both companies and the judiciary to work in tandem to restore the parity in comparative advertising whereby fair trade practices; intellectual property protection and consumer interest can go hand in hand.