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Comparative Advertising: Legality, Implications and Need for Stricter Regulations

KAJAL CHANDRA¹ AND ANANNYA GUPTA²

ABSTRACT

Advertising is an important aspect of every business and with the increasing competition in today's market, brands rely heavily on advertisement to gain consumer's attention. Comparative advertising has become the most commonly used form of advertising to engage consumers in purchasing products of the advertiser who is indulged in this form of advertising. It works by outlining the comparison of different brands on variants like price, quality and other distinctive attributes. However, there is a thin line to cross to turn comparative advertising to product disparagement which is not permitted. Comparative advertising though an effective method to engage consumers, is the riskiest as it involves deliberately comparing a competitor's product and sometimes also leads to treading on a competitor's intellectual property right. Since there is no specific legislation regulating comparative advertising in India, the precedents set by courts are followed for matters arising in this regard. The Advertising Standards Council of India (ASCI) has developed a model to regulate the advertisements and along with this the Ministry of Consumer Affairs has also released the draft guidelines called Central Consumer Protection Authority (Prevention of Misleading Advertisements and necessary Due Diligence for Endorsement of Advertisements) (CCPA guidelines 2020) recently in August 2020 which will aim to curb misleading ads along with protection of consumers affected by such advertisements. Though comparative advertising increases awareness, there are high chances it may also lead to misleading advertisements. Also, in the process of comparative advertising many a times, brand steps into the realm of Trademark Infringement which is violation of the Intellectual Property rights. It becomes extremely difficult to judge whether the comparison of products portray the competitor's product in negative light. In this paper we will discuss comparative advertising and the legal provisions related to it through Indian perspectives as well as the International perspective. Also, the paper focuses on the need for regulations to keep a check on comparative advertising for public interest keeping in mind interest of all stakeholders while pronouncing a decision on the same.

Keywords: *Comparative advertising, Product disparagement, judicial precedents, Indian*

¹ Author is a student at School of Law, University of Petroleum and Energy Studies, Dehradun, India.

² Author is a student at School of Law, University of Petroleum and Energy Studies, Dehradun, India.

perspective, International perspective, CCPA guidelines 202.

I. INTRODUCTION

Economic expansion has given Indian Consumer the choice of wide range of products and services to choose from. Having access to almost all brands and products, it becomes a challenging task for the seller or the manufacturer to gain maximum amount of consumers attention and make a position for itself in the market. Brands, therefore, heavily rely on advertising as it is the only road to reach consumers faster. The most commonly and convenient form of advertising in this case is Comparative Advertising because it conveys to its customers that they must purchase the product of the advertiser engaged in Comparative Advertising than product of other competitors for reasons explained in the advertisement itself.³ The comparative advertising enables the consumer to make right choices based on the comparison between the products. This advertising in itself, is not forbidden but mislead the consumers by disparaging competitor's product is not permitted in India. Though the introduction of Comparative Advertising has left behind the concept of traditional way of advertising. it has also introduced some new issues related to trademark infringement, product disparagement and unfair competition. According to the Black's Law Dictionary "disparagement" means an act of dishonouring, lowering, belittling something or someone by comparison. "Disparagement of good" refers to statements about a competitor's good which is misleading and is said to influence the consumers to not buy.⁴ Therefore as long as the comparison of products does not result in harm of reputation, it is justified and not a problem. However, this concept of comparison of one product with another is not as straightforward as one can assume.

The comparison is made between the products with a view to increase sales of the advertiser's product. Comparative advertising compares product of different brands on variants including quality, price and any other distinctive attribute. Advertisers boasting about their product and claiming it superior to their competitor's product is regarded as puffery and this is permissible to a certain extent. Disparaging and making slanderous statements about the product of the competitor in the process of claiming one's own product as superior amounts to Product Disparagement and is not acceptable. The exclusive right to use trademark for product and services identification lies with the holder of the trademark

³ Ms.Abha Shah, Mr.Suraj Sanghani & Ms Kashyapi Desai, *Comparative Advertising and Product Disparagement*, Naik & Naik Advocates, 1 (2020).

⁴ Black's Law Dictionary (6th Edition 1990).

which the advertiser uses while advertising for product comparison. This gives rise to various concerns such as brand owners being concerned about their goodwill being harmed and consumer welfare resulted from scaling down information and stimulation of competition.

(A) Comparative Advertising and Categories

There are following categories into which Comparative Advertising can be divided. Some of them are:

- i. Advertisements which have asserting statements that their product is better than a specific class of products or services available in the market.
- ii. Advertisers claiming themselves better in the market without referring to the product of the competitor.
- iii. Advertisements which state the drawback of the competitor's product through their product and along with that stating the information of the product.
- iv. Advertisements making an objective comparison with products and services.
- v. Advertisements which show the trademark of the competitor as blurred and thus avoid any kind of infringement.

II. COMPARATIVE ADVERTISING AND PRODUCT DISPARAGEMENT

Comparative Advertising is used by Brands and Companies for promotion, to compare and bring out the superiority of the product with respect to its competitor but many a times in doing so the advertisers cross the thin line and step into the realm of Product Disparagement. Both these concepts are sensitive subjects to the manufacturer. During the process of comparison, if the statement is misleading and derogatory it falls under disparagement of product. In a very recent instance, Hindustan Unilever Limited filed a commercial suit in Bombay High Court claiming that the advertisement by USV comparing the PH level of its soap "Sebamed" with allegedly high pH level of HUL'S soap was misleading, malicious and lead to disparagement of HUL's soap. Further HUL also said that the campaign would create a wrong impression on the consumers mind by out rightly disparaging its products. In its defence USV argued that the advertisements are based on facts and supported by research reports. The Bombay High Court held that USV could continue its advertisement with a modification that is not to compare bathing soaps with a detergent soap and also put light on the settled law of disparagement underlining its essential element that is intent, manner and storyline of the advertisement. However, the court is yet to pass a final order in the said matter.

Fine line between both the concepts invites considerable attention from the owners of trademark as consumer behaviour and attention gets influenced by these advertisements either in to buying the goods or stands as a disadvantage. The vigilance in the advertising industry is very limited for the way corporate entities market their brands. The sections of Trademark Act, 1999⁵ provides as to when comparative advertising becomes trademark infringement, and the courts have to intervene. The case of **Horlicks Ltd v. Heinz India Private Limited**⁶ envisages the concept between comparative advertising and disparagement. In this case, the plaintiff (Horlicks limited) claimed that the advertisement of the defendant (Heinz India Private Limited) deliberately and intentionally disparaged its health drink. However, the Court was clear that there existed no falsification of the distinctive character of Horlicks mark and there existed clear distinction between both products. Further the court put forth that the plaintiff cannot prevent use of trademark for purpose of product identification. It was also noted that comparative advertising is permissible by law as long as competitor's mark is used in a fair and honest way. The court further added that the test, used in true and honest sense, is an objective test which relies on whether the use is considered just and honest by reasonable audience.

(A) Disparagement in Comparative Advertising

Advertising Standards Council of India that is the ASCI offers some guidelines in respect to Comparative Advertising which is discussed below however the legal test as to when Comparative Advertising turns into Product Disparagement is decided by the courts in few cases. In the case of **Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd**⁷ it was held that a trade puffery is acceptable to a certain level while comparing products provided the competitor's product is not portrayed negatively. In such a case no actionable claim can be taken against such advertiser. Thereafter in **Havells India Ltd. v. Amritanshu Khaitan**⁸ the High Court stated that it is a well settled law that an advertiser while advertising his products can claim his products to be best but in the process cannot rubbish the products of a competitor.

III. STATUTORY PROVISIONS GOVERNING COMPARATIVE ADVERTISING IN INDIA

There has been a significant shift in the statutory framework governing comparative advertising in India from restricting monopolies to laying down provisions that will

⁵ The Trademarks Act, 1999, No.47, Acts of Parliament, 1999 (India).

⁶ 2017 CS (COMM).

⁷ 2014 (57) PTC 47 (Del).

⁸ 2015 (62) PTC 64 (Del).

encourage healthy competition. Monopolies of Restrictive Trade Practices Act, 1984 that is the MRTP Act and the Trademarks Act, 1999 (T.M.A) laid down the basic legal structure.

(A) Constitution Perspective of Comparative Advertising

Article 19 (a) of the Constitution of India envisages right to freedom of speech and expression and many advertisements give an argument on the same. Analysing Article 19 (1) (a) of the constitution for better clarity to the concept of Comparative Advertising becomes imperative. Under this article freedom is available for radio, public speaking, television and press however there are certain reasonable restrictions imposed on this freedom of speech and expression which is stated under Article 19(2) of the Constitution. The Supreme Court in the case of **Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd**⁹ held that commercial speech cannot be denied protection just because the same is issued by businessman under Article 19(1) (a)¹⁰ of Constitution. A wide interpretation of the Article 19(1) (a) of constitution was taken by the court. Supreme Court further held that advertising as a commercial speech has two aspects:

(i) Advertising provides information about the product which is advertised.

(ii) Advertisements help the consumers and public at large with the information they provide. In the absence of freedom of commercial speech, the economic system inside a democracy would get hampered. Taking the protection of "public interest" Mahanagar Telephone Nigam Limited cannot come in the way of Tata Press Yellow pages as no such ground is mentioned under Article 19(2)¹¹ of Constitution. No other speech has as much freedom as commercial speech enjoys. However if comparative advertising is done in a manner which will lead to infringement of the other person's right or will result in hampering their trade or goodwill of the brand then in such case the advertisement showcased will get no protection under Article 19(1) of the Constitution of India.

(B) Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 and Competition law

The MRTP Act was laid down in 1969. Section 36 A of the Act states about unfair trade practices. In Comparative Advertising Unfair Trade Practices includes endorsement of any goods or services that gives untrue information about the goods or services of another individual. The MRTP Act dealt with only three aspects of the market that is restrictive, monopolistic, and unfair trade practices. However, with the shift in the focus from restricting

⁹1995 AIR (SC) 2438

¹⁰INDIA CONST. art.19, cl 1.sub cl.a.

¹¹INDIA CONST. art. 19, cl.2.

monopolies to promoting competition post economic reforms of 1991 there was a need for a modern competition law to examine the issues. Thereafter the MRTP Act now stands repealed and is replaced by the Competition Act, 2000. The Competition Act of 2002¹² empowers for establishment of the Competition Commission of India that is the CCI. This commission is formed to ensure competition in the market, and it is considered that the addition of Unfair Trade Practice in the Competition Act will divert the commission from its primary purpose. The cases related to Unfair Trade Practices which arise out of business transaction come under Competition Act 2002 if they affect competition in market. Thus, there is no need of including unfair trade practices in Competition Law.¹³ Further the provisions related to trade practices being unfair are now governed by the Consumer Protection Act.

(C) Comparative Advertisement and Trademark Infringement

The Trademarks Act, 1999 was introduced after the Trade and Merchandise Act, 1958 was repealed. The Trademarks Act, 1999 and the Trademark Rule, 2002 introduced a new phase in regulating unfair trade practices in comparative advertising and prevention of trademark infringement in India. The new act was enacted for ensuring required protection to domestic and international brand owners this was in compliance of the TRIPS agreement.¹⁴ The Act balances the conflicting interests of the rights of registered trademark owners and a gripping consumer interest in informative advertising. Trademark is used to distinguish the goods of one person from those of another.¹⁵ Section 29¹⁶ and Section 30¹⁷ of Trademarks Act, 1999 states about advertising that will lead to Trademark infringement and the exceptions to the provision of Section 29. It states that a registered trademark is infringed by any advertising of the mark, if such advertising takes unfair advantage and is considered contrary to honest practices in industry or is detrimental to the trademark's distinctive character. Whereas Section 30(1) of the Act provides for exception to the rule stating how Comparative Advertising can be in harmony with honest practice in industrial matters so as not to take unfair advantage of or be detrimental to the repute of the trademark. Such advertisements would not lead to infringement of Trademark.

Section 29(8) of the Trademarks Act, 1999 is considered to be an articulation of laws of

¹² Competition Act 2002, No.12, Act of Parliament, 2002 (India).

¹³ Shikha Sharma, Prof.M Afzal Wani, *Examining the Legal Provisions on Comparative Advertising in India*, 2 JLSR, 6.

¹⁴ Indralina Sen, *Comparative Advertisement and Trademark Infringement: A Comparative Analysis*, 1, JLSR 6.

¹⁵ The Trademarks Act, 1999, § 2(zb), No.47, Acts of Parliament, 1999 (India).

¹⁶ The Trademarks Act, 1999, § 29, No.47, Acts of Parliament, 1999 (India).

¹⁷ The Trademarks Act, 1999, § 30, No.47, Acts of Parliament, 1999 (India).

unfair trade practices and unfair competition that has set consideration for the use of trademarks in comparative advertising.¹⁸ The addition of provision related to Comparative Advertising in the Trademark Act ensures balance between two main interests one being unfair practices and presentation and freedom of competition. Comparative Advertising is done digitally and electronically as it has a greater impact on a larger number of audiences. However, product disparagements of the competitors' product in the process of claiming one's own product best is not allowed as it would lead to product disparagement and trademark infringement of the competitor. Comparative Advertisement is allowed in India only till the stage where it does not ridicule competitor's trademark in course of advertising his/her own product.

(D) Advertising Standards Council of India (ASCI) and Comparative Advertising

Apart from all the regulations mentioned above The Advertising Standards Council of India that is the (ASCI) is a self-regulatory body established in 1985 that has drawn up a code on advertising .Absence of a proper statutory regime to address grievances of the advertisers lead to the creation of this body .The code is divided into four chapters and Chapter IV of the Code lays down the rules and regulation along with the manner of Comparative Advertising.¹⁹ According to it Advertisements which compare products with competing sellers and manufacturers are permissible in the interests of vigorous competition and free dissemination of information, subject to following requirements being satisfied:

- a) There is clarity in terms of aspect of the advertiser's product being compared with what aspects of the competitor's product.
- b) The comparisons shown are accurate, factual and can be substantiated.
- c) The subject matter of comparison is not chosen in a way which confers an artificial advantage upon the advertiser or gives false suggestions of better product.
- d) The advertisement does not lead to unfair denigration or discredit other products, advertisers or advertisements be it directly or by implication.²⁰

The code supervises and regulates advertisement so that the goodwill attached to the trademark of another firm is not affected by the unfair advantage taken. These principles related to comparative advertising ensure that advertising is conducted in a manner that is fair securing interest of all the associated groups. However, as the principles are not implemented

¹⁸ *supra* note 14.

¹⁹ ASCI Code for Self-Regulation in Advertising (2007)

²⁰ Biplab Kumar Lenin, Arun Babu, *Comparative Advertising and the Cosumer-Changing Dynamics*, 22 JIPR 113, 114 (2017).

due to the absence of an effective enforcement mechanism they come down to being only recommendatory in nature.

(E) Consumer Protection Act, 2019

The new Consumer Protection Act of 2019 gives authority to the Central Government to set up a CCPA, i.e., Central Consumer Protection Authority whose main objective would be protecting and enforcing the rights of consumers. CCPA will be empowered with regulation of matters related to unfair trade practices, consumers' rights and misleading advertisements.

Section 2(28²¹) of the New Act defines misleading advertisement as an advertisement which-

- i. makes false description about a product or service
- ii. Misleads the consumers in respect to the substance, quality of the product, quantity and the nature and also the guarantee provided is not true.
- iii. The representation made by the seller or manufacturer or the service provider would fall under Unfair Trade Practices.
- iv. Important information is intentionally concealed in the advertisement.

Section 21 of the CP Act states the power Central Authority has to issue directions and penalties if an advertisement comes under false and misleading advertisements. It can ask the advertiser, endorser or manufacturer to discontinue the advertisement or modify it according to the order and can also issue a penalty in monetary terms for misleading consumers. Recently in August 2020 the Ministry of Consumer Affairs released draft guidelines namely "Central Consumer Protection Authority (Prevention of the Misleading Advertisements and Necessary Due Diligence of Endorsement of Advertisements) Guidelines, 2020 with an aim to regulate and keep check on misleading ads. These guidelines which are established under the Consumer Protection Act, 2019 cover all advertising and marketing communications. It also touches upon comparative advertising, bait advertising, puffery in advertising and so on. Advertisers will have to be more careful of the violations made in the advertisement. Clause 6 of the Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020 lays down condition for Comparative Advertising. It states in order for a Comparative Advertising to be considered permissible following conditions need to be satisfied:²²

- (a) The Advertisement shall be factual, accurate and capable of being substantiated.

²¹ The Consumer Protection Act, 2019, § 2(28), No.35, Acts of Parliament, 2019 (India).

²² cl. 6, Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Draft Guidelines, 2020

(b) A good or service shall not be presented as an imitation or replica of a good or service which holds a protected trademark or trade name and

(2) Advertisements which include comparisons with other manufacturers, producers, suppliers or with other products also where a competitor is named, shall be permitted for promoting competition, where-

(a) Absolute clarity is there in the advertisement on the features of the competitor's product being compared to the features of the advertiser's products.

(b) The subject matter of the comparison does not confer an artificial or unjustifiable advantage upon the advertiser.

(c) Nature of comparisons being made in advertisements is factual, accurate and capable of substantiating.

IV. EVOLVING INTERPRETATION OF COMPARATIVE ADVERTISING

Comparative advertisements have always been the most used technique for sellers to attract consumers towards their product. However, this advertising becomes risky at times due to the exaggerated claims and difficulty in judging whether or not comparison of products portrays the competitors' product in negative light. In the past, courts have provided some clarity on this point as to what amounts to Comparative Advertising and what should be construed as product disparagement. In the case of **Reckitt & Colman of India Ltd v. M.P. Ramachandran & others**²³ the defendant submitted that the product of the plaintiff was not directly disparaged as the advertisement did not mention any name or show any particular competitor's product. However, the Delhi High Court held that if the product with which the defendant compares his product belongs to a specific class of goods then any person or entity holding product in that class can file a suit. In this case, principles of Comparative Advertising were also laid down that is:²⁴

- (i) Advertiser can hold his goods as being best even if the claim is untrue.
- (ii) Manufacturer has the right of comparing the advantages of its product over competitor's product.
- (iii) Manufacturer or Advertiser in the process of comparing cannot defame the competitor's product as it is unacceptable.

²³ 1999 PTC (19) 741 (Cal)

²⁴ Ms. Abha Shah, *supra* note 1, at 3.

- (iv) No action or suit can be filed if the advertisement does not amount to defamation of the goods but if it exists an action can be initiated for recovery of damages for defamation and an order of Injunction can also be granted by the court.

The principle that the advertiser while claiming his product to be best cannot denigrate other product was further clarified in **Pepsi Co. Inc & ors. v. Hindustan Coca Cola Ltd**²⁵ where the court held that generic disparagement of a competitor's product without specifically mentioning the competitor's product is still objectionable. Tests as to what amounts to disparagement in television commercials were laid down in the case which are:

- (i) Intention of the Advertisement
- (ii) Layout of the advertisement that is in which manner it is shot.
- (iii) What is conveyed by the storyline and commercial message of the advertisement?

The observations of the court in the above-mentioned case was criticizing products of the competitor would amount to denigration of product or goods and thus disparagement whereas if the advertisements does not clearly mention the competitor's products action cannot be initiated.

A good and clever advertisement is one in which there is no direct attack to the rival product. Further, the court observed Advertisement is not supposed to be misleading, unfair and glorification of one's product is allowed till the time it does not denigrate other product.

Puff statements have always been used while comparative advertising and courts had always given leeway to advertisers for making those exaggerated claims. In the case of **Dabur India Limited v. Emami Limited**²⁶ in 2004 when Emami had made claims in its advertisements that other brands were selling substandard Chawanprash and its product was the best even without making direct reference to any brand, the Delhi High Court held that advertisers and manufacturers are not allowed to puff its product by denigrating competitor's good.

Denigration and puffery are two sides of Comparative Advertising and to develop any mechanism of regulation there lies a need to differentiate both the concepts. Some judicial opinions could help in understanding the uniform difference between puffery and denigration. In the case of **Dabur India Ltd.v. M/S Colortek Meghalaya Pvt Ltd.**²⁷ the court held that the seller can always represent his goods in a manner which will lead to additional sales and consumer attraction but this in no way implies acceptability of misrepresentation and allowed

²⁵ 2003 (27) PTC 305 Del.

²⁶ 2004)112 DLT 73.

²⁷ (OS) no. 625/2019.

only to the extent it is permissible. With this the court further stated that seller holds the right to affirm that the goods he is selling is good enough to buy and of better quality.

In another case of **Colgate Palmolive (India) Ltd v. Anchor Health and Beauty Care Private Ltd**²⁸, the defendant in the advertisement had stated that the product “Anchor” was the only product available in the market that comprised of all the three ingredients namely fluoride, calcium and triclosan and went on to claim that it was the only toothpaste and the first one to provide all round protection. Objections raised by the plaintiff was that the first claim made by the defendant was false and the product that plaintiff owned also had all the three ingredients. The Court in this case, held that the advertisement released by the defendant put out a misleading message to the customers and a consumer could believe “Anchor “to be the only product containing all three ingredients. The Court further stated that though there has been no disparagement of the plaintiff’s product but the use of the two terms ‘only’ and ‘first’ was misleading and untruthful. Thereafter, the court restrained the defendant to use the words ‘first’ and ‘only’ in the advertisement of the product. Though, there are a number of significant cases of comparative advertising being decided in India and other countries this case is based on unfair trade practices.

Similarly, in the case of **Procter & Gamble Home Products v. Hindustan Unilever Limited**²⁹ the High Court of Calcutta pointed out the difference between puffery and denigration. In this case, the petitioner manufactured a product named “Tide” and the defendants who were the competitors had a similar product manufactured named “Rin”. The respondents had released a commercial claiming that their product Rin was more effective than Tide and would wash clothes better and make clothes white and thereafter the plaintiffs had alleged that their product was portrayed negatively. The High Court of Calcutta held that there existed denigration of the product of the petitioner and the results of the advertisement was such that it showed the petitioner’s product in a bad light.

In another case of 2017 between **HUL v. Gujarat Co-operative Milk Marketing Federation**³⁰ the plaintiff put forth that the defendant was disparaging an entire class of frozen dessert in the advertisement it has released because it included the word “Vanaspati” in the advertisement which has bad influence on health and people who are lactose intolerant use it. Further it stated that frozen desserts do not use “Vanaspati” The Defendant in its favour argued that neither the advertisement nor the statement was misleading. The court

²⁸ 2009 (40) PTC 653.

²⁹ C.S.No .43 of 2010.

³⁰ (2017) 71 PTC 396 BOM.

observed that the use of the term Vanaspati now when edible vegetable oil was used earlier shows the intention of the defendants that was to disparage the entire class of frozen desserts by conveying the customers that Vanaspati is not good to be used so to buy ice-creams over frozen desserts. The Court also held that if the storyline and intention of the advertisement is to be taken into consideration, the advertisement of the defendant disparaged and denigrated not only the plaintiff but the whole class of frozen desserts thus the court granted an injunction to the defendant to take down its advertisement.

The global outbreak of the novel corona virus has led to brands releasing catchy advertisements to attract customers. The situation has inadvertently given a chance to brands to advertise their goods and therefore, brands are being seen using it in the most effective way. One of the most recent cases of Comparative advertising during the pandemic is of **Hindustan Unilever Limited v. Reckitt Benckiser (I) Private Limited**³¹ In this, the plaintiff's advertisement showed the importance of washing hands and sanitization using its soap 'Lifebuoy'. Further, the defendant released an advertisement depicting that its hand wash is better than regular soap displaying a red soap in the advertisement. The plaintiff in this case, initiated an infringement suit that the defendant's advertisement disparaged his product as the soap shown in the advertisement was of the same colour and shape. The advertisement also portrayed that the plaintiff's soap is not effective against germs and is therefore misleading customers. However, the defendant pulled off the advertisement and the Court further held that the commercial of the defendant purports to disparage and denigrate plaintiff's soap in its distinctive shape. It becomes evident that defendant wanted to show plaintiff's product as ineffective and unreliable. This very case constitutes product disparagement and though Comparative Advertisement plays an upper hand in increasing customer attraction and public awareness, it does not mean that law and regulation permit a competitor or advertiser in the market to maliciously inflict harm on the rival's product.

V. INTERNATIONAL PERSPECTIVE

Countries have different take on Comparative Advertising. Some consider brands making claims of their product, the best and unique way to mislead customers unless proved by facts while some others consider it as harmless exaggeration. The status of Comparative Advertising in U.K and USA has been progressive if compared to our country.

USA

In India there is no specific legislation that deals with Comparative Advertising. Similar is

³¹ COMIPL /2020.

the case of United States where they have a combination of state, federal and local laws along with self-regulatory codes of conduct that regulate comparative advertising. Section 43(a) of the Lanham Act and the Federal Trade Commission Act that is the FTC deals with comparative advertising. All public advertisements are regulated by the Federal Trade Commission. The Lanham Act keeps a check on the misrepresentation of another person's goods and services.³² Even in the presence of FTC regulating public advertisements, there have been several cases initiated against product disparagement. Comparative Advertising is permitted in United States, provided it is backed by facts and is reasonable and does not step into the realm of Product Disparagement. It is believed that this advertising is highly beneficial for consumers as they provide the required information and make consumers aware about the right kind of choices. In a case of **Coca-Cola vs. Tropicana Products, Inc**³³ court set requirements of granting Injunction in the case of Comparative Advertising. The claim made in the advertisement was that "Tropicana is the one and only leading brand that did not have in its content concentrate and water." Further the Coca-Cola Company which owned orange juice named minute-maid claimed the commercial put up by Tropicana as misleading and not true. The Court in this case established a test in two parts, wherein the plaintiff is supposed to prove that it will suffer irreparable damages if:

- (i) Injunction is not granted and
- (ii) The abusive message is allowed to persist.

UK & European Union

Unlike India and US, in European Union (EU), the trend of Comparative Advertising is permitted only if it fulfils the following requirements-

- (i) Firstly, it is not misleading under Misleading and Comparative Advertising Directive
- (ii) Secondly, it compares the relevant material of the goods or services.

In the case of **Carrefour Hyper marches SAS v. ITM Alimentaire International SASU**³⁴ it was stated by the court that if an advertiser chooses to compare his product with the competitor's product then the said advertiser is supposed to be clear with which aspect of the products is being compared so that the consumer gets the required clarity on the same. Here, Carrefour SAS started a campaign where it compared the prices of the products sold in the

³² Ms.Abha Shah, *supra* note 1, at 3.

³³ 690 F.2d 312 (1982).

³⁴ C-562/15

market with competitor's stores and also offered some kind of reimbursement to the customers at some condition. The European Union Court held that as there was a failure from the side of advertiser to disclose that prices which were being compared for products of different sizes, which was misleading for the consumers.

In UK Comparative Advertising Directive, Business Protection from Misleading Marketing Regulations 2008, and the Trademarks Act of 1994 regulate comparative advertising. One of the significant cases of comparative advertising in UK is the **O2 Holdings Ltd and O2 (UK) Ltd vs. Hutchison 3G Ltd.**³⁵ case wherein it was held that a person cannot use the trademark of another as it was prohibited but a trademark owner cannot prevent its competitor from using sign similar or identical to in a comparative advertising. Most US courts have taken consumer interest into consideration, while deciding cases related to this kind of advertising. Even though UK and European Union have a balanced approach towards comparative advertising they have given similar and equal importance to violation of trademarks rights. Thus, trademarks or intellectual property rights cannot be side-lined while comparing products and goods with competitor's good.

VI. COMPARATIVE ADVERTISING AND CONSUMERS

The whole idea of Comparative Advertising is providing required details of the product that includes analysis and comparison of the features with the competitor's product. If this advertisement is done properly and according to the regulations it can be a boon to the consumers. However, if the information given is false or inadequate it could result in deceiving consumers. Post liberalization, the expansion of economy has left plethora of choices for consumers. Comparative Advertising gives rise to healthy competition in the market. Brands being run down by competitor brand and if same is backed by facts and evidence which proves the brand as inferior to the competitor brand it helps in gaining customer attraction and is also a wake-up call to the brand to improve its quality. However, there are cons attached to such advertisement. Comparative advertising, if done by the advertiser to make exaggerated claims about its product, the very primary purpose of it fails. Merely puffing up of product without any essential information being passed on to the consumer about the product defeats its objective. Therefore, it becomes very essential for advertisers to compare products for the sake of creating awareness about it and passing on the required essential information rather than making unnecessary exaggerated and inflated claims which would not be of any help to customers.

³⁵ C-533/06 [2008] E.C.R. I-4231 (ECJ (1st Chamber)).

VII. CONCLUSION AND SUGGESTIONS

A good and effective advertisement can enhance the product or services. Strategic Comparative Advertising is the best option available to achieve the goal of product being reached to a larger number of audiences. Post globalization, majority of the firms are located in multiple jurisdictions. The use of competitor's trademarks in these circumstances must be fair, honest and according to the established trade practices. It is the primary duty of the advertisers to ensure non indulgence in puffing up of products without it being capable of substantiated and presence of enough evidence for the same. It is imperative to realize that product advertising not only creates customer attraction but also plays a major role in educating the customers and creating the required awareness in the long run. Though comparative advertising is beneficial as it increases competition among the people handling trades, brings consumer awareness and product identity, but at the same time, it must be ensured advertisers are not indulging into misleading consumers in the name of advertisement nor there exists unfair trade practices or advertisement that would amount to disparagement of competitor's product. Apart from this, the authorities that look into the cases of Comparative Advertising need to concentrate on aspects of comparative Advertising that include content of advertisement, mode of advertisement and views of customers. In India, a series of judicial pronouncement over the years has provided some needed clarity to this field of advertising. However, the need of the hour is to introduce new provisions in the existing act or a comprehensive legislative mechanism that would issue guidelines for comparative advertising that can be enforced and is not merely recommendatory in nature like the ASCI guidelines which creates a problem in case of non-members. With the existing cutthroat competition in the market, there needs to be a fine line drawn between interest of advertisers and the consumers. Some of the recommendations are as follows:

- (i) As abiding by the Advertising Standards Council of India, advertising code is voluntary because of it being recommendatory in nature there needs to be guidelines either under the existing provisions related to comparative advertising, so it is enforceable or inclusion of these recommendatory guidelines under the legal regime.
- (ii) A stricter Advertising code is the need of the hour as it will hold the advertising agencies, manufacturers, service providers and also the brand endorsers accountable for making any exaggerated or misleading claim. Introduction of new

provision in the current Acts would keep a check on commercial disparaging in comparative advertising.

- (iii) The Recent draft of Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsements of Advertisements) Guidelines, 2020 needs to be notified as it would be one step closer to better Advertising law.

With news brands emerging daily in the market and challenges being faced by the branding teams of these new products and services there needs to be a fine balance between the competing interests of the advertisers and the consumers.
