

COMPARATIVE ADVERTISEMENT: A COMPREHENSIVE OVERVIEW

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ABSTRACT

“Frivolity has become a serious business these days. Television commercials which are meant to portray a stylization of the good life are crafted with great care, using all the skills that the arts and psychology have produced.”¹ It is explicable that considering the various market forces and the fierce competition coupled with the ability of the common man to purchase a product, which he deems to be good for himself, comparative advertising has become inevitable. The concept of comparative advertisement has created quite an amount of uproar lately. Since, the liberalizing reforms were introduced in the 1990s every product category has seen a boom in the number of brands. This has led to extensive use of comparative advertising by the companies to promote their product over the others. In India comparative advertisement has taken off in a big way. There has been a paradigm shift from hesitant indirect comparisons to bold and direct

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¹Pepsi Co. Inc and Anr. v. Hindustan Coco Cola and Ors., [2003] 27 PTC 305 Del.

comparisons. At present comparative advertisement is not dealt by any specific law in India. Section 29 of Trademarks Act and section 36A of the repealed MRTP Act have been applied in cases where the companies were alleged to have overstepped their liberties in advertising their products. The authors of this article have scrutinized regulations governing comparative advertisement in India and analyzed case laws laying down the protocol to be followed while simultaneously assessing the common law and statute governing comparative advertisement in the US.”

I. INTRODUCTION

In a liberalised economy, there are thousands of entrepreneurs or businessmen who manufacture the same or similar products for the consumers. Their main aim is to maximise the profits and advertising has proved to be a medium of inestimable value for the entrepreneurs to achieve this goal. Commercial advertisers strive to attract the attention of consumers to their products by branding. Incidentally, branding involves a repetition of an image which is generally associated with the product. Advertising, in general, may be a tool to make consumers aware of a certain product, in addition to establishing a product in certain segment of a market.² In common parlance, comparative advertisement means advertisement of a particular product, or service, which specifically mentions a competitor by name for the express purpose of showing why the

²Francesca Barigozzi & Martin Peitz, *Comparative Advertising and Competition Policy* (Sept. 5, 2012), <http://amsacta.unibo.it/1563/1/524.pdf>.

competitor is inferior to the product naming it.³ It is a practice primarily used as a promotion technique by naming, directly or indirectly, the product of the competitor to compare one or more attributes or characteristics.

Here, the question arises as to whether comparative advertisement is something which is legal, and whether such comparison is equivalent to trademark infringement. The answer to such questions is obvious, yet complex. Advertisement of one's product is in no way barred. In fact, the Constitution does recognise the right of "commercial speech" under Article 19(1) (a) which deals with freedom of speech and expression. But the underlining point being that such a right is not to be misused. There is a thin line of distinction between puffery and disparagement, the two elements of comparative advertisement. Puffing, in general, is a superlative claim made about one's product; and is typically understood as being so superlative that an average consumer would not believe the claim.⁴ Disparagement, on the other hand, is 'to dishonour by comparison with what is inferior.'⁵ Traditionally, puffing of one's products is allowed. Whereas when such puffing up denigrates the product of another, resulting in disparagement, it has leverage to attract an immediate injunction. Another factor, which needs to be kept in mind to determine whether in a case injunction should be granted or not, is the interest of the consumers. Careful consideration needs to be given to the fact as to whether an average man would be confused, deceived or lured by the advertisement in question. This is where there is an interface between consumer interest and the interest of the competitor.

³Karan Gandhi & Anurag, *Competition and Comparative Advertising*, 4 INDIAN LEGAL IMPETUS, 10 (2011).

⁴Sharad Vadehra et al., *Puffing-Commercial Disparagement* (Sept. 9, 2012), http://www.galamarketlaw.com/joomla4/index.php?option=com_content&view=article&id=250&Itemid=123.

⁵THE CHAMBERS ENGLISH DICTIONARY 409 (1992).

Therefore, in conclusion, comparative advertisement can be allowed only to the extent that it does not in any way disparage the product of the rival, and at the same time it should not have the element of confusing the average man, which would lead to luring or deceiving him into buying the particular brand product. This is very subjective and depends on the facts of different cases. However, over a period of time the courts have tried to lay down the guidelines for comparative advertisement which will be discussed in the article.

II. STATUTORY PROVISIONS

The Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the MRTP Act) which is now repealed, was the first step towards regulation of competition in the market. Section 36A of the act defined ‘unfair trade practice’ (hereinafter to be referred as UTP). The same has also been elucidated under Section 2(1)(r) of Consumer Protection Act, 1986. If any firm/company/person for the purpose of promoting its sale, supply of goods and services, adopts any unfair method so as to mislead people on quantity, quality, standard, need, usefulness, performance, efficacy, or gives false guarantee of goods or services, or falsely mislead people on goods, services or trade of another person, it amounts to ‘unfair trade practice’. Comparative advertising has UTP as a component. When an advertisement provides misleading facts in order to disparage the goods of the competitor, it falls under section 36A of the MRTP Act. This provision of UTP limited comparative advertising by recognising that the publishing of any misleading or disparaging facts about a competitor’s goods or services amounted to ‘unfair trade practice’.⁶

⁶Ameet Datta, *Comparative Advertising in India – Puff under scrutiny* (Dec. 2, 2009), <http://www.iam-magazine.com/reports/Detail.aspx?g=5509d118-a8d7-4d57-84b5-4a917bf824d2>.

The angle of trademarks was introduced in the Indian scenario when the Trademarks Act, 1999 was implemented. Section 29(8) of the act lays down the conditions under which a trademark is infringed in advertising. They are:

1. When the advertisement takes unfair advantage of and is contrary to honest practices in industrial or commercial matters.
2. Is detrimental to its distinctive character.
3. Is against the reputation of the trademark.

The MRTP Act and the Trademark Act together provided a base for the regulation of comparative advertising in India. The UTP provisions under the MRTP Act have not been included in the Competition Act of 2002 which was enacted in place of MRTP. Therefore, comparative advertising has now become a subject of only the Trademarks Act and the Consumer Protection Act. Also, the law laid down by courts and tribunals in various cases now plays an imperative part in the regulation of comparative advertisements.

In *Reckitt Benckiser v. Hindustan Lever*⁷, the court noted that sections 29(8) and 30(1) of the Trademarks act dealt with disparagement and comparative advertisement with regard to trademarks. Disparagement occurs when an advertisement denigrates or disseminates the products of others so that the product it represents gains more popularity than the other products, amongst the masses. A trader is entitled to boast about his product for the purpose of its promotion only, however untrue the boast may be, and for that purpose can even compare the advantages of his goods over the goods of another. However, the competitor's goods cannot be mentioned in a disparaging manner.⁸ Disparagement in India has been identified mostly through judgments. One of the earliest examples of disparagement that can be

⁷Reckitt Benckiser v. Hindustan Lever, [2008] 38 PTC 139.

⁸Safir Anand & Shivli Katyayan, *Legal Issues in Advertising: Major Implications for IP Rights*, 28 INTELLECTUAL ASSET MANAGEMENT, 176,179 (2008).

mentioned is the case *Chloride Industries Ltd. v. The Standard Batteries Ltd.*⁹ The Calcutta HC held that if the goods are disparaged maliciously or with some other such intent to injure and not by way of fair trade rivalry, the same would be actionable.

Under the Competition Act, 2002 provisions have been made for the transfer of cases on dissolution of MRTPC. As per sub-section (3) and sub-section (5) of section 66 of the Competition Act, 2002, the following cases shall be referred to the Competition Appellate tribunal:

1. All cases pertaining to Monopolies and Trade Practices or Restricted Trade Practices including such cases in which Unfair Trade Practice has also been alleged. These cases would have arisen under sections 31 and 37 of the MRTP Act.
2. All cases pertaining to Unfair Trade Practices referred to in clause (X) of sub section (1) of section 36A of MRTP Act. These cases relate to giving false or misleading facts disparaging the goods, services or trade of another person.

However, there is no provision for Unfair Trade practices under the new Act. In order to move away from the rigid structure of the MRTP Act, the UTP definition has not been incorporated anywhere in the new legislation. Therefore it can be concluded that it is not possible for an aggrieved party to approach the CCI for effective legal remedy for any grievances arising out of comparative advertising. Nevertheless, it does find mention in the Consumer Protection Act, 1986. Since it was included in the consumer protection act, it can be construed that the legislators were of the view that the appropriate forums to deal with misleading facts relating to goods and services were the consumer protection forums. The UTP provision under the Consumer Protection Act has limited application. The Consumer Protection Act allows a consumer or a consumer association, the central government or a state government to take up the case of unfair

⁹Decided on September 13, 1994.

trade practice before a consumer forum. This, however, does not provide effective relief to the aggrieved parties, since they cannot approach the consumer protection forum for addressing the issue in question as the act excludes the manufacturers, sellers and service providers from its ambit.¹⁰ This way the parties are forced to seek alternate remedies such as injunctive measures to stop the alleged infringement of their intellectual property rights.

In addition to the abovementioned provisions, there are the guidelines¹¹ laid down by the Advertising Standards Council of India, a voluntary, non-profit, self-regulatory company having its members as advertisers of considerable repute from the Indian advertising industry. In conclusion, it is clear that currently there is neither specific law nor any specific provision in any law which directly lays down the guidelines for comparative advertisement.

III. THE SCENARIO IN UK AND US

Comparative advertisement has been a point of debate not only in India but around the world. In the UK it was prohibited till the 90s, whereas in the US it has been encouraged since the 70s.

Initially, common law was unreceptive towards comparative advertising with regard to the legal parameters to which an entity can indulge in comparative advertisement. It was something which was abhorred by the society. It was considered to be an unfair trade practice under which even honest practices did not fall as an exception. However, things changed when the Trademarks Act of 1994 was introduced, which provided certain degree of flexibility to the regime of comparative advertisement. The UK courts operate in a

¹⁰Colgate Pamolive (India) Ltd. v. Anchor Health and Beauty Care Pvt. Ltd., [2009] 40 PTC 653.

¹¹*The Code For Self-regulation In Advertsing*, 1985,
<http://www.ascionline.org/index.php/asci-codes>.

manner whereby the regulation of comparative advertisement is such that the interest of the consumers is not completely eclipsed.¹² The Comparative Advertising Directorate has put down the following conditions to be observed in such advertising:

1. Must not be misleading.
2. Must compare goods or services meeting the same needs or intended for the same purpose.
3. Must objectively compare one or more material, relevant, verifiable and representative features.
4. Must not create confusion, discredit or denigrate the competitor or its trademark.
5. Must not take unfair advantage of the reputation of the competitor's mark.
6. Must not present goods and services as imitations or replicas of goods or services of the competitor trademark owner.¹³

There is also the Advertising Standards Authority which was established with the object of ensuring that the advertisements were "legal, decent, honest and truthful".¹⁴ The basis is an agreement between newspapers and journals not to carry any advertisement that seems to have breached the code set out by it. Also, it can refer disputes to the Director General of Fair Trading. The European Union Directive has played an important part in developing the mechanism by permitting comparative advertisement in the interests of competition and public awareness. The only condition imposed is that

¹²Swaraj Paul Barooah & Shivaji Bhattacharya, *Comparative Advertisements: Balancing Consumer Interest Vis-à-vis IPR Infringement*, 2 IJIPL 116 (2009).

¹³Council Directive 84/450/EEC of 10 September 1984(OJ 1984 L 250 at 17).

¹⁴TOM CRONE, *LAW AND THE MEDIA* 204-207 (3rd ed., 1996).

the promotion should not be misleading and should genuinely compare like with like.¹⁵

The USA first addressed Comparative Advertisement as a tort of unfair trade practices and so no specific legislation regarding it was considered.¹⁶ However, by the 1970s, comparative advertisement in US became widespread as the Federal Trade Commission sanctioned the use of it. The FTC had issued its “Statement of Policy Regarding Comparative Advertising”, noting that, although some industry codes and trade association standards may be interpreted as discouraging comparative advertising, it is the “Commission’s position that industry self-regulation should not restrain the use of truthful Comparative Advertisement”.¹⁷ In addition to providing a green light for comparative advertising, the FTC has further stated that disparaging advertisements, that is, advertisements attacking, discrediting, or otherwise criticizing another product, are permissible so long as they are truthful and non-deceptive.¹⁸ Comparative advertisement is subject to regulation through a combination of federal, state and local laws, as well as self-regulatory codes of conduct in US.¹⁹ These include:

1. The Federal Trade Commission Act (FTC Act)
2. Section 43(a) of the Lanham Act

¹⁵Directive 97/55/EC on Comparative Advertising Control of Misleading Advertisements (Amendment) Regulations, 2000 (SI 2000/94).

¹⁶Shyam Kapoor, *Comparative advertisement – an eye for eye*, 13 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 19.

¹⁷FTC statement of policy regarding comparative advertising, (Aug. 13, 1979) <http://www.ftc.gov/bcp/policystmt/ad-compare.htm>.

¹⁸FTC Comparative Advertising Statement § (c)(1) (citing Carter Prods., 60 F.T.C. 782, modified [1963 Trade Cas. (CCH) 70,902], 323 F.2d 523 (5th Cir. 1963) (narrowing the order of a hearing examiner to allow respondents to make “truthful and non-deceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess”).

¹⁹John. E. Villafranco et al., *Comparative Advertising Law in the US*, (Sept. 05, 2012), <http://us.practicallaw.com/3-503-3503>.

Hence it is apparent that the US laws encourage comparative advertising, including naming the competitors blatantly for the benefit of consumers, provided that the information is absolutely correct and legitimate and not misleading or denigrating. Petty and Spink²⁰ observed:

The tenor and language of the European (proposal) Directive contrast sharply with the permissiveness of US policy towards comparative advertisement. Although legal violations of such a trademark infringement, disparagement and passing off are recognised in both the United States and Europe, they are more broadly construed in Europe.

In the contemporary sense, comparative advertising is now a commonly accepted marketing technique worldwide. It is highly controversial in nature and to reduce the number of cases the countries have allowed it to be used only to a certain extent. Comparative advertisement, if used in a healthy way, is a source for consumer awareness and helps the producer stay vigilant.

IV. ASPECTS OF COMPARATIVE ADVERTISEMENT

A. Puffing Up

To puff up is to praise extravagantly. It is primarily a flattering commendation. Puffing is an exaggerated advertising, blustering and boasting upon which no reasonable buyer will rely on.²¹ The courts have held that ‘publicity and advertisement of one’s product with a view to boost sales is a legitimate market strategy’.²² Puffing may also consist of a general claim of superiority over a comparative

²⁰Paul Spink is Lecturer in Law, University of Stirling and Ross Petty is Professor in Marketing Law, Babson College, Boston.

²¹J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, (4th ed. 2010).

²²M. Balasundram v. Jyothi Laboratories and Anr., [1995] 82 CC 830.

product that is supposed to be vague, it will be understood as a mere expression of opinion.²³ Puffing up has definitely been accepted in India but only up to a certain extent as has been established in various case laws in the past ten years. In the case of *Reckitt & Colman of India Ltd. v. Kiwi TTK Ltd.*,²⁴ the court laid down five principles to determine whether a party is entitled to an injunction or not. They are:

1. A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue.
2. He can also say his goods are better than his competitors', even though such statements are untrue.
3. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
4. He, however, cannot while saying his product is better than his competitors', say that his competitors' goods are bad. If he says so, he slanders the goods of his competitors'. In other words, he defames his competitors' and their goods which is not permissible.
5. If there is no defamation of the goods or the manufacturer of such goods, no action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

The same has been reiterated and confirmed by the court in *Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Anr.*²⁵ The first and the second rule regarding comparative advertising of a product constitute the rule of puffery which was also later endorsed in *Pepsi Co. Inc and Anr. v. Hindustan Coco Cola and Ors.*²⁶ The court had

²³*Id.*

²⁴*Reckitt & Colman of India Ltd. v. Kiwi TTK Ltd.*, [1996] 63DLT 29.

²⁵*Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Anr.*, [1999] PTC (19) 741.

²⁶*Pepsi Co. Inc and Anr. v. Hindustan Coco Cola and Ors.*, [2003] 27 PTC 305 Del.

further stated in Para 8 that the respondents were puffing to promote their goods, which is healthy competition. Moreover, advertisements are nothing but probity and are aimed at poking fun at the advertisements of others, which is permissible by law. Para 16 of the same judgment says,

After analysing the submissions made by the counsel for the parties, the picture which emerges can be summed up thus; it is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior....

The rule of puffery is a popular defence taken up by a party when accused of denigration. As long as it is not disparaging the other competitors, it is allowed. This gives a manufacturer great leverage to endorse his product using clever advertising techniques thereby leaving a mark on consumers and still not be actionable for disparagement. The puffing rule amounts to a seller's privilege to lie, as long as he says nothing specific, on the theory that no reasonable man will believe him, or that no reasonable man will be influenced by such talk.²⁷

Another aspect which needs to be touched upon is that of commercial speech. The Supreme Court, in the *Tata Press Ltd. v. MTNL*,²⁸ had held that advertisement does fall under the expression of a 'commercial speech' as given under article 19(1) (a) of the Indian Constitution. The apex court in the case *Colgate Palmolive India ltd. v. Hindustan Lever Ltd.*²⁹ had said that,

²⁷P T Hayden, *A Goodly Apple Rotten At The Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition*, 76 IOWA L. REV. 67 (1990).

²⁸*Tata Press Ltd. v. MTNL*, [1995] 5 SCC 139.

²⁹*Colgate Palmolive India ltd. v. Hindustan Lever Ltd.*, [1999] 7 SCC 1.

In any event, a distinction shall always have to be made and latitude is allowed in the event of there being an advertisement to gain a purchaser or two. The latitude spoken of, however, cannot and does not mean any misrepresentation but by a description of permissible assertion.

Discussing a paragraph from Anson's Law of Contract (27th Edition), the court was of the opinion that 'commendatory expressions' in advertisements such as certain brand of beer refreshes the parts that other beers cannot are not dealt with as serious representations of fact. Applying a rule of civil law, 'simplex commendatio non-obligat'-simple commendation can only be regarded as a mere invitation to the customer without any obligation as regards the quality of goods: Every seller will naturally try and affirm that his wares are otherwise good to be purchased unless of course the same appears to be on evidence that the commendation was intended to be a warranty.

In all of the above cases, it can be seen that the court does not come down hard on the practice of puffing up. The court has even pointed out that it is but natural for a seller to persuade the consumers to choose his goods over that of a competitor. The court is of the view that puffing up is allowed as long as

1. It is overt.
2. It can be easily understood as being spurious by the consumers.
3. It does not cause any real harm to the products of the other competitors.

However, the court has to consider the fact that the perception of consumers in their living rooms is different from that of a Judge's in his dissection of an advertisement

In conclusion, the law permits a seller to puff up his goods for the purpose of selling his products. But he is allowed to do so only to a limited extent, so long as the puffing does not in any way denigrate the goods of the other. But what constitutes denigration, i.e., what is the limit after which the puffing will be considered to be

disparagement of the other's product is a matter to be looked into, which is dealt with in the next segment of the article.

B. Disparagement

Comparative advertisement when accompanied by disparagement causes infringement of trademark. Commercial advertisement should not be misleading or disparaging as visual media has immense impact on the mind of the viewers and that of possible purchasers.³⁰ According to Black's Law Dictionary 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 product, property or business.³¹ The basic foundation of disparagement in comparative advertisement is that it is one thing to say that your product is superior and another thing to say that the other product is inferior, even though while asserting the latter the hidden message is the former, but that is inevitable in case of comparison.³²

Lord Watson, a member of the House of Lords, stated the pre-requisites required for maintaining an action for disparagement, in the following words,

Every extravagant phrase used by a tradesman in commendation of his own goods may be implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance. 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;

³⁰Priya Bansal, *Use of Trademark in Comparative Advertising- Situation in India* (Sept. 8, 2012), <http://www.legalserviceindia.com/articles/tadv.htm>.

³¹BLACK'S LAW DICTIONARY, (7th ed. 1999).

³²Dabur India Ltd v. Wipro Limited, Bangalore, [2006] 36PTC 677 (Del).

*that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff.*³³

The court in *Pepsi Co. Inc. and Anr v. Hindustan Coco Cola Ltd and Ors.*³⁴ laid down the factors to be kept in mind to decide the question of disparagement:

1. Intent of Commercial: what the advertisers seek to establish in order to promote their product.
2. Manner of Commercial, which is the most important factor. If the manner is ridiculing and condemning, then it amounts to disparagement but if the manner is just to show that one's product is better or best without degrading other's product then it is not actionable.
3. Storyline of commercial and the message sought to be conveyed.

One of the other questions which usually arises with regard to disparagement is whether the product should be specifically pointed out or a general assertion can amount to denigrating the product of the competitor. In *Reckitt Colman v. M.P. Ramachandran*³⁵ it was held that,

It was sought to be contended that insinuations against all are permissible, though the same may not be permissible against one particular individual. I do not accept the same for the simple reason that while saying all are bad, it was being said all and everyone is bad and anyone fitting the description of "everyone" is affected thereby.

In *Dabur India Ltd. v. Colgate Pamolive India Ltd.*³⁶ the learned single judge stated, in Para 19, that generic disparagement of a rival product without specifically pinpointing the product is equally

³³Timothy White v. Gustav Mellin, [1895] AC 154.

³⁴P T Hayden, *supra* note 27.

³⁵Reckitt Colman v. M.P. Ramachandran., [1999] PTC (19) 741.

³⁶Dabur India Ltd. v. Colgate Pamolive India Ltd., [2004] 115 DLT 667.

objectionable. In *Dabur India Ltd. v. Emami Ltd.*³⁷ the honourable Delhi HC said that what is sought to be done by the defendant is to forbid and exclude user of Chayawanprash during the summer months so that it can exclusively capture the Indian market during the summer months, which is sought to be done by sending a message that consumption of Chayawanprash during the summer season serves no purpose and Amritprash is more effective substitute thereof, and thereby attempting to induce an unwary consumer into believing that Chayawanprash should not be taken in summer months at all and Amritprash is the substitute for it. The aforesaid effort on the part of the defendant would be definitely a disparagement of the product Chayawanprash and even in generic term the same would adversely affect the product of the plaintiff. According to the judge,

In my considered opinion, even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of Chayawanprash in its generic sense, even in those circumstances disparagement is possible. There is insinuation against user of Chayawanprash during the summer months, in the advertisement in question, for Dabur Chayawanprash is also a Chayawanprash as against which disparagement is made.

However, it is the view of some that precedents like the one laid down by the Dabur case are like treading a dangerous path as it would disallow a competitor to even make comparisons on a general basis.³⁸

A very intriguing point to be noted is the position defamation occupies in disparagement. In *Dabur India Ltd. v. Wipro Ltd.*³⁹ the court had come to a conclusion that the degree of disparagement must be such that it is tantamount to, or almost tantamount to defamation. It emphasised the fact that there was no need for a manufacturer of a product to be hyper-sensitive in such matters as market forces are

³⁷*Dabur India Ltd. v. Emami Ltd.*, [2004] 29 PTC 1.

³⁸*Supra* note 13.

³⁹*Supra* note 33.

much stronger than the best advertisement. If the product is good, it stands no matter whatsoever.

Any advertisement which is in conformity with 'honest practices' as provided under section 29(8) of the Trademarks Act will not be actionable disparagement. This has been upheld in the case of *Godrej Sara Lee Ltd. v. Reckitt Benckiser India Ltd.*⁴⁰ where the defendants advertised their product 'Mortein' which was meant to kill both cockroaches and mosquitoes and the commercial highlighted this aspect. The plaintiff claimed that this disparaged their product 'Hit', which had two separate versions for killing cockroaches and mosquitoes. The court in its judgment stated that the advertiser has a right to boast of its technological superiority in comparison with product of the competitor. Telling the consumer that he could use one single product to kill two different species of insects without undermining the plaintiff's products, by no stretch of imagination amounted to disparaging the product of the plaintiff.

Therefore, a complete analysis of the above mentioned case laws will lead to the conclusion of the following:

1. The term disparagement has neither been defined by the courts nor does it find mention under any Act. This not only fails to deter the manufacturers from adopting unlawful means such as giving false information but also makes it difficult for an aggrieved party to prove disparagement.
2. The concept of generic disparagement has decreased the scope of comparative advertising. Now the advertisers are not allowed to make disparaging claims against any faction of products which a consumer might associate with any specific brand.
3. The plaintiff should prove that the said advertisement is fallacious or misleading and has caused him damage.

⁴⁰Dabur India Ltd. v. Wipro Ltd., [2006] 32 PTC 307 Del.

4. The disparagement should amount to or almost amount to defamation. However the courts have failed to identify the degree of disparagement that would amount to defamation.
5. Disparagement if it is true and is backed by substantial proof is allowed.

The courts have attempted to differentiate puffing up from disparagement. However there is only a thin line of difference and it depends on the facts and circumstances of each case.

*C. Consumer Interest to be kept in Mind to Determine
Disparagement*

Advertising is the most appropriate way or an inevitable medium for a manufacturer to reach out to the consumers, and through the true or false perception lures them into purchasing his product. Comparison lies at the root of advertising.⁴¹ Comparative advertising primarily affects 3 parties- the advertising company, the rival company and then the consumers. It is important not to forget the interest of the consumers as at the end of the day advertising is for them. In 1997, the EU released a directive which allowed comparative advertising provided it is not misleading. The rationale for such a favourable attitude towards ‘comparative advertising’ on part of the competition authorities is that it improves the consumers’ information about available products and prices.⁴² Comparative advertising may be a useful strategy to transit information to consumers.⁴³ If the consumers are left confused and technically speaking there is no disparagement by the advertising company of the rival product, the purpose of law will be defeated. There needs to be a balance between the interests of a consumer and competitor.

⁴¹W.R. CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY* 656 (4th ed., Sweet & Maxwell 1999).

⁴²Simon P Anderson & Regis Renault, *Comparative Advertising: Disclosing Horizontal Match Information*, 40 *RAND Journal of Economics* 558 (2009).

⁴³Francesca Barigozzi & Martin Peitz, *supra* note 3.

The Consumer Protection Act 1986 defines ‘unfair trade practices’. This act protects the two most important rights of a consumer:

1. The right of the consumer to be informed about the quantity, potency, purity, standards and price of goods to guard against unfair trade practices;
2. The right to consumer education.⁴⁴

In *Peoples Union for Civil Liberties (PUCL) v. Union of India*,⁴⁵ the apex court observed that disinformation, misinformation and non-information, all equally create a uniformed citizenry which would finally make democracy a monocracy and a farce. Hence, it is very important that the consumers should not be misinformed or misled. The whole point of comparative advertisement should be for the benefit of the consumers. Therefore, in a suit for disparagement, the advertisement should be viewed from the standpoint of such consumers.⁴⁶

The rule of puffery in advertisement has been substantially dealt with. It had been asserted in case after case that all that is required to be determined is whether the advertisement has just been puffed up or it actually denigrates the rival product. However, this position was reconsidered to a limited extent in the case of *Glaxo Smith Kline Consumer Health Care Ltd. v. Heinz India Private Limited and Ors.*⁴⁷ where the court sought to regulate the representations of opinion by introducing a broad element of tenability. Adding to this, the court in the case *Colgate v. Anchor* introduced the principle of ‘consumer of average intelligence’. It introduced the element of consumer protection. However, the law in India has mostly ignored the consumer’s rights up until recently where the Madras HC held the

⁴⁴Consumer Protection Act, 1986, Section 6.

⁴⁵*Peoples Union for Civil Liberties (PUCL) v. Union of India.*, [2003] 4 SCC 399.

⁴⁶*Reckitt Benckiser (India) & Anr. v. Hindustan Lever Ltd.*, [2008] 38 PTC 139 (Del).

⁴⁷*Glaxo Smith Kline Consumer Health Care Ltd. v. Heinz India Private Limited and Ors.*, [2007] 2 CHN 44.

even puffery was not allowed and would amount to disparagement.⁴⁸ The Court was called upon to decide whether certain claims by Anchor (that its toothpaste was the “only” and “first” toothpaste to offer all-round dental protection) amounted to disparagement. Colgate, obviously, did not take this claim too kindly; and asked for an injunction. On these facts, it may well be possible to hold that the advertisement was not a puff, but was in fact a misleading objective claim. The decision would not have been as significant had it rested solely on this aspect. Nonetheless, the Court went further to observe that all puffing was illegal. The reasoning of the court being that the question of the legality of puffing needed to be decided by balancing the right to freedom under Article 19 along with reasonable restrictions on that right in the form of consumer laws. The Court noted that the contrary decisions of other Courts were based on old English cases decided before consumer protection laws were put in place. Therefore, any proper determination of the legality of puffing must necessarily take into account consumer protection laws in India. The Court went on to hold that *any puff* must amount to an “unfair trade practice” under the Consumer Protection Act. It was held that allowing competitors to puff their products was not in the public interest, and could not be permitted.

Ending with what was stated in *Colgate v. Anchor*,⁴⁹ in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for trade rivals in the advertising arena, so that each exposes the other and the consumers thereby derives a fringe benefit. It is with the touchstone of public interest that such advertisements are to be tested.

⁴⁸Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd., [2009] 40 PTC 653.

⁴⁹*Id.*

V. DRAWBACKS

In this rapidly evolving economy, the need for product advertisement is only going to increase. This, in turn, would lead to increase in comparisons between brands. Consequently, there will be need for more vigilant laws to deal with the challenges posed by comparative advertising. Known as ‘Knocking Copy’,⁵⁰ it is a tool which is used by a manufacturer to establish the superiority of his product. Law in India on comparative advertisement has not been codified. It is in fact not been dealt with specifically in any statute. The only provisions under which a grievance, in case of comparative advertising, can be entertained are the sections 29 and 30 of Trademarks Act, 1999 and the Consumer Protection Act, 1986 under which the term ‘unfair trade practices’ has been dealt with. In fact, the law regarding comparative advertising was further liquidated when the MRTP Act was repealed and nothing was provided for in the Competition Act, 2002. Now this field is regulated mainly through precedents laid down by the courts which are handful in number. This makes the entire set-up of this field of advertising vague and uncertain. This is because the guidelines set in various cases are of inconsistent standards as the court is always allowed to dissent from previously expressed opinions. For example, the recent judgment of the Madras HC in the case *Colgate v. Anchor* has taken a different stand with regards to the rule of puffery i.e., till now all the judgments had upheld that puffery not amounting to disparagement was allowed, however, going by the reasoning of the court in the case in question even puffery is not permitted as it confuses the customers. This point is highly debatable, as it a view taken by many that when advertising, comparisons are inevitable and puffery is usually a superlative claim which a customer is unlikely to believe. It is this blurred situation of the law that necessitates the immediate implementation of a statute which would

⁵⁰Petty R and Spink P, *Comparative advertising in the EU*, 47 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 855 (1998).

lay down in clear cut ways as to what is allowed and what are the consequences, in case the set rules are not followed. The law is insufficient as far as the subject of damages is concerned. In fact, the only remedy available to a competitor is injunction on the advertisement in question. It in no way provides for any pecuniary compensation in case of disparagement, even though there is loss to the business of the innocent manufacturer. Another one of the loopholes that needs to be covered is the issue of tenability. The court in Glaxo Smith Kline case did recognise the fact that the claims of advertisers need to be substantiated by tenable sources however, it didn't deal with the matter further and hence there is no mechanism or standard of regulation regarding this. The law is also unsettled with regard to honest practices. There is wide ambiguity in the law regarding a competitor's right to injunction when the offending advertisement involves not only disparagement but is also pursuant to honest practices.

The above mentioned issues form the crux of comparative advertisements. It is important to straighten out the disconcerted law regarding the issues. And the first and the most important step in this direction would be introduction of a statute, without which the law is bound to remain ambiguous.

VI. CONCLUSION

The Courts or the legislators should formulate comprehensive and unambiguous regulation which would curb false and misleading advertisements and conversely promote healthy completion which would benefit the consumers, keeping in mind the following:

1. Comparison should be made on verifiable facts and should have credible source which can be substantiated.
2. Comparison should be made only with products that are adequate alternates for the product in question.

3. Direct comparisons with other like products should be encouraged if it is backed by significant evidence.
4. Principal intent of the commercial should be informing the consumers about the virtues of the product in question and not to unfairly attack, condemn, or disrepute the mark of another.
5. No exploitation of goodwill of any trademark.
6. Honest practices pursuant to consumers' welfare should be allowed even though they might border on disparagement as relaying information should be the foremost goal.
7. Consumer interest needs to be kept in mind while granting injunction. Therefore, technically speaking even if there is no disparagement, but there is a good chance of the consumer getting confused there needs to be some action. However, while doing so the rights of the competitor on the other hand should not be ignored.
8. The advertising industry should be allowed to suggest a broad structure for a comprehensive scheme of regulation as their point of view would be invaluable.
9. Provisions have to be made under the Competition Act, 2002 to enable various competitors to approach the CCI for effective remedy against misleading advertisements

It is of utmost importance that both corporate bodies and judiciary work in tandem with each other to maintain a particular market order which would encourage a better corporate environment for increased investment. Comparative advertisement is a worldwide trend and cannot be done away with, even though it comes with its own disadvantages. It is up to the legislators and competitors to use it to their benefit. Also, the courts should not be used as instruments for settlement of market disputes; its intervention should be required only in the case of express violation of law. To conclude, regulation of comparative advertisement is of utmost importance, keeping in mind the interests of both the consumers and the traders.