

## COMPARATIVE ADVERTISING IN THE EUROPEAN UNION, UNITED STATES AND INDIA

\*KIRANDEEP KAUR<sup>1</sup>

Advertising generally refers to communication in paid forms that is distributed at the initiative of economic operators, by means of television, radio, newspapers, banners, mail, internet, etc.<sup>2</sup> Advertisements may be comparative in nature also. Such advertisements are sale promotion mechanisms wherein the products or services of one undertaking are compared with those of another.<sup>3</sup> They are aimed at highlighting the advantages of the goods or services offered by the advertiser in comparison to those of the competitor.<sup>4</sup>

Comparative advertising aims at enabling the consumers to make an objective choice of products by giving them proper information of the other product/products in the market. However, the tendency is generally to highlight the merits of the goods endorsed and display only the negative points of the goods compared.

Comparative advertising can be theoretically divided into two types on which also relies its legality and tolerance, namely: puffery<sup>5</sup> and denigration. Puffery is where the advertiser intends to draw the attention of the consumer by making superlative and flamboyant claims and praises of his product which can be considered as mere positive assertions of opinion, rather than statements which can be precisely verified, measured or quantified.<sup>6</sup> Statements of puffery are generally subjective in nature. When puffery tends to get aggressive and ends up portraying the competitor's product in a bad light, it takes the form of denigration. Comparative advertisement up to the stage of puffery is generally considered lawful and very much tolerable in all jurisdictions however almost all laws of the world heavily scrutinize denigration of any form.<sup>7</sup>

---

<sup>1</sup> Assistant Professor of Law at the Army Institute of Law, Mohali & Pursuing Ph.D. in Law from National Law School of India University, Bangalore

<sup>2</sup> Available at <http://www.agcm.it/en/consumer-scope-of-activities/legal-definition-of-advertising.html> (Last visited on November 3, 2017).

<sup>3</sup> Peter Miskocz-Bodnar, *Definition of Advertising*, 3 European Integration Studies 25 (2004) available at [www.uni-miskolc.hu/uni/res/kozlemanyek/2004/DEFINITION.doc](http://www.uni-miskolc.hu/uni/res/kozlemanyek/2004/DEFINITION.doc) (Last visited on November 3, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> See also *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 QB 484; *De Beers Abrasive v. International General Electric Co.*, 1975 (2) All ER 599; *Reckitt & Coleman of India Ltd. v. M.P. Ramachandra & Anr.* 1999 PTC (19) 741.

<sup>6</sup> Parth Gokhale and Shriyani Datta, *Comparative Advertising in India: Evolving a Regulatory Framework*, 4 NUJS L. Rev. 131 (2011).

<sup>7</sup> *Id.*

Along with the interests of the consumers, comparative advertisements also potentially influence the competitors and the proprietary right holders of the trademark, if the case is one of comparison with goods/services bearing a reputed trademark in the market. There is many a chance of the trademark being economically exploited by a comparative advertisement wherein consumers start associating the goods/services of the advertiser with that of the trademark owner.<sup>8</sup>

This paper herein narrates the laws relating to comparative advertising, as they exist in the European Union, the United States and India respectively. By traversing this path, the project attempts to compare these laws. An attempt is also made therein to find out the aptness of these laws and whether they are in parity with the situation in their respective territory and whether they are in need of any change.

### **THE EUROPEAN UNION:**

Regulation 2A of the Control of Misleading Advertisements Regulations 1988 defines “*comparative advertising*” in the following words:

*“For the purposes of these Regulations an advertisement is comparative if in any way, either explicitly or by implication, it identifies a competitor or goods or services offered by a competitor.”*

Directive 84/450/EC concerning Misleading Advertisement was amended by Directive 97/55/EC in 1997 to include within its ambit, “*comparative advertising.*” It is *inter alia* stated that any advertisement which either explicitly or impliedly referred to another’s product, such an advertisement must abide by certain rules, enumerated in Article 3a, namely: the advertisement must not contain any misleading messages; it should not create confusion between the advertiser and the concerned competitor. The advertisement should also not take unfair advantage of the competitor’s trademark or other distinguishing material and should not present its goods or services as replicas of the other product and it does not discredit or degenerate it. Comparative advertisement should compare the products objectively, that is, the material should be relevant and must relate to verifiable features of the two products compared.

---

<sup>8</sup> *Id.*

In 2006 Directive 2006/114/EC also known as the Advertising Directive, was adopted which consolidated the 1984<sup>9</sup> and 1997<sup>10</sup> Directives. Among the few amendments was that the condition that the comparison should not be misleading.<sup>11</sup> The most important amendment herein is that, Article 1, the 2006 Directive only aims to protect traders against misleading advertising.<sup>12</sup> Whereas consumers are *inter alia* protected against, misleading advertising in the Unfair Commercial Practices Directive.<sup>13</sup>

Although member states have the freedom to have their own law on comparative advertisements, yet national courts can and also refer matters to the European Court of Justice for clarification whenever necessary.<sup>14</sup> The European Court of Justice (ECJ) has always had a pro-advertising approach. Discussed below are some of the leading ECJ judgements on comparative advertisement.

### ***Toshiba Europe GmbH v. Katun Germany GmbH***<sup>15</sup>

The question herein was whether it is comparative advertising for a supplier of spare parts suitable for the products of an equipment manufacturer to indicate the manufacturer's product numbers in its catalogues<sup>16</sup>. The ECJ held that it was permitted for a representation to be made in any form which referred, by implication or otherwise, to a competitor or to the goods or services which he offered.<sup>17</sup> No actual comparison was necessary for an advertisement to be described as comparative but what was required was a reference to a competitor or his products. The ECJ further observed that an advertiser is not said to take unfair advantage of the reputation attached to distinguishing marks of his competitor if effective competition on the relevant market is something that is conditional upon a reference to those marks.<sup>18</sup>

---

<sup>9</sup> 84/450/EC.

<sup>10</sup> 97/55/EC.

<sup>11</sup> Paul Reeskamp, *Is comparative advertisement a trade mark issue?*, EIPR 130 (2008).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Patty Kamvounias, *Comparative Advertising and The Law: Recent Developments In The European Union*, EABR & ETLC Conference Proceedings (2010) available at [http://www.cluteinstitute.com/proceedings/2010\\_Dublin\\_EABR\\_Articles/Article%20479.pdf](http://www.cluteinstitute.com/proceedings/2010_Dublin_EABR_Articles/Article%20479.pdf) (Last visited on November 3, 2017).

<sup>15</sup> European Court of Justice decided this case on 25<sup>th</sup> October, 2001, Case No. C-112/99.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

***Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH.*<sup>19</sup>**

This was another landmark decision of the ECJ on comparative advertising. Pippig operated three specialist opticians' shops in Austria, and obtained its supplies from around 60 different manufacturers. Hartlauer was a commercial company that had optical shelves where the spectacles sold were mostly of less known brands and were sold at low prices. Hartlauer circulated throughout Austria an advertising leaflet stating 52 price comparisons for spectacles carried out over six years which also showed a total price differential of ATS 3 900 on average per pair of spectacles, between the prices charged by Hartlauer and those of traditional opticians.

The advertising leaflet contained a comparison between the price and the same was also announced in Austrian radio and television channels as advertisements, in which, in contrast to the advertising leaflet, it was not stated that the spectacles compared had lenses of different brands. The Oberster Gerichtshof referred this case to the ECJ. The ECJ held in this case *inter alia* that the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form and content of the comparison was concerned is precluded and that a price comparison did not entail the discrediting of a competitor. The application to comparative advertising of stricter national provisions as compared to the EU Directives as far as the form and content of the comparison was concerned were precluded.

***O2 Holdings Limited and O2 UK Limited v Hutchison 3G UK Limited, 12 June 2008, Case C-533/06***

The ECJ held that use by an advertiser of a sign identical with or similar to a competitor's mark was to be regarded as of a trade mark and could be prevented where necessary. However, the rights conferred by the trade mark were to be limited to a certain extent in order to promote comparative advertising and the associated benefits to consumers. The court further held that the proprietor of a registered trade mark is not entitled to prevent the use by a third party of a sign identical with, or similar to, his mark, in a comparative advertisement which satisfies all the conditions, laid down in Article 3a(1) of Directive 84/450 except when it is likely that the use of the trade mark was likely to cause confusion on the part of the

---

<sup>19</sup> European Court of Justice decided this case on 8 April 2003, Case C-44/01.

public between the advertiser and a competitor, the advertisement would not satisfy the condition, laid down in Article 3a(1)(d) and would not be permitted.

There existed many a difference in national laws on comparative advertising. The October 1997 of Directive 97/55/EC which amended Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising signified a major shift in approach.<sup>20</sup> Over the years, in the course of its deliberations, the European Court of Justice has clarified the scope of the Directive and in doing so has interpreted it in favour of the advertiser who engages in comparative advertising.<sup>21</sup>

### **THE UNITED STATES:**

The Federal Trade Commission (FTC) in 1979 issued a *Statement of Policy Regarding Comparative Advertising*.<sup>22</sup> It defines comparative advertising in the following words:

*“For purposes of this Policy Statement, comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.”*<sup>23</sup>

The policy encourages the naming of or referencing to the particular competitor but warrants clarity and if need be, disclosure to avert confusion. Truthful comparative advertisements should not be restrained. Brand comparisons are permitted, provided the bases of comparison are identified clearly. Upholding the importance of comparative advertising, it observes thus:

*“Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. For these reasons, the Commission will continue to scrutinize carefully restraints upon its use.”*<sup>24</sup>

---

<sup>20</sup> *Supra* note 13.

<sup>21</sup> *Supra* note 13.

<sup>22</sup> Available at <http://www.ftc.gov/bcp/policystmt/ad-compare.htm> (Last visited on November 3, 2017).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

FTC permits disparaging advertising, as long as they are truthful and not deceptive. The FTC evaluates comparative advertising in the same manner as it evaluates all other advertisements and does not require a higher standard of substantiation by the advertisers for comparative claims.<sup>25</sup> The National Advertising Division (NAD) of the Council of Better Business Bureaus, Inc., a self-regulatory body which commands the respect of national advertisers, advertising attorneys, federal and state regulators, and the judiciary; comparative advertising issues brought to its attention receive thorough review by highly competent attorneys who apply relevant precedent in reaching a determination of whether the advertising claims at issue are truthful, non-misleading, and substantiated.<sup>26</sup> The decisions of NAD are appealable to the National Advertising Review Board (NARB). One of the vital benefits of using the NAD process is the ability to obtain a thorough review on the merits in only a fraction of the time required for litigation.<sup>27</sup> The comparative nature of an advertising claim can affect important issues of proof and burden shifting in a false advertising proceeding brought under the Lanham Act, in particular in cases brought under Section 43(a) of the Lanham Act, the plaintiff's burden of proof varies depending on the type of relief sought. Under Section 43(a) cases involving comparative advertising that specifically mention the competitor, plaintiffs benefit from a presumption of irreparable injury. To recover monetary damages for a Section 43(a) violation, a plaintiff has to prove the elements of a false advertising claim, demonstrate that actual consumer deception or confusion occurred and that the false advertising claim was material to customers, causing actual injury to the plaintiff. When the challenged advertising makes a misleading comparison or reference to a competitor's product, causation and injury may be presumed.<sup>28</sup> The FTC on the other hand evaluates comparative advertising the same way it evaluates all other advertising and therefore does not require a higher standard of proof for substantiating comparative claims. Thus, advertisements that attack, discredit or otherwise criticize another product are permissible if they are truthful and not expressly or impliedly deceptive.<sup>29</sup> The FTC considers an advertisement to be deceptive if it includes a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances; the representation, omission or practice is likely to affect the consumer's conduct or decision regarding a product or service.<sup>30</sup>

---

<sup>25</sup> John E. Villafranco, *The Law of Comparative Advertising in the United States*, 16 IP Litigator (2010)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

**THE LAW IN INDIA:**

The question has arisen before the Supreme Court of India whether the right to advertise was a fundamental right to freedom of speech guaranteed under Article 19(1)(a). The Supreme Court held in *Hamdard Dawakhana v. Union of India*,<sup>31</sup> that though advertisement was a form of speech, it was not constitutive of the concept of free speech. A different stand was taken by the Supreme Court later in the case of *Tata Press v. Mahanagar Telephone Nigam Ltd.*,<sup>32</sup> wherein it was observed that advertising is beneficial to consumers because it facilitates the dissemination of information and resultantly public awareness in a free market economy. It was held that advertising is a form of commercial speech, and therefore should be protected under Art. 19(1)(a).

Initially all matters concerning untrue and misleading advertisements were governed by Monopolies and Restrictive Trade Practices Act, 1969 and disputes therein were decided by Monopolies and Restrictive Trade Practices Commission. The Act was subsequently repealed by Section 66 of the Competition Act, 2002.<sup>33</sup>

The consumer grievance forums under the Consumer Protection Act, 1986 enquire into complaints of unfair trade practices. Though this Act provides for an effective mechanism for grievance redressal of the consumer, it does not address the interests of manufacturers, sellers and service providers.<sup>34</sup>

With the aim of regulating advertisement, the Advertising Standards Council of India (ASCI), a non-statutory body was established by an association of advertisers in 1985.<sup>35</sup> Chapter IV of the ASCI's Code for Self Regulation in Advertising provides for comparative advertising. Advertisements herein which contain comparisons with competing manufacturers and sellers are allowed in the interests of vigorous competition and free dissemination of information. subject to the following requirements being fulfilled:

---

<sup>31</sup> AIR 1960 SC 554.

<sup>32</sup> (1995) 5 SCC 139.

<sup>33</sup> *Supra* note 5.

<sup>34</sup> *Supra* note 5.

<sup>35</sup> *Id.*

- It should be clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.
- The subject matter of comparison should not be chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
- The comparisons should be factual, accurate and capable of substantiation.
- There should not be any possibility of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.
- The advertisement should not unfairly denigrate, attack or discredit other products, advertisers or advertisements, directly or by implication.

There has been many a case in India dealing in comparative advertisement. Some of the important cases are discussed herein below.

***Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.***<sup>36</sup>

It was contended by the plaintiff, manufacturer of the detergent clothing brand 'Robin Blue' that the defendant, manufacturer of the detergent clothing brand 'Ujala' in its advertisement, had intentionally displayed a container that was similar to the one in the plaintiff's product and the price shown was also that of the plaintiff's product.

The advertisement alleged that the said product 'Blue' was uneconomical, and that the product failed to dissolve effectively in water, and hence damaged clothes by leaving blue patches on them. It was observed by the court that this advertisement aimed at denigrating the product of the plaintiff by indicating to existing and future customers that the product was both uneconomical and ineffective.<sup>37</sup> Hence an order of injunction was passed against the defendant, restraining the defendant from broadcasting the advertisement henceforth.<sup>38</sup>

---

<sup>36</sup> 1999 PTC (19) 741.

<sup>37</sup> *Supra* note 5.

<sup>38</sup> *Id.*

***Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd.***<sup>39</sup>

The contention of the plaintiff in this case was that in the advertisement the defendant had stated that its product ‘Anchor’ was the only one that contained calcium, fluoride and triclosan and that the defendant had also claimed that ‘Anchor’ was the first toothpaste that could provide “*all round protection.*” The plaintiff argued that, the plaintiff being a pioneer company in dental care, the assertion made by the defendant, that it was the first and the only company which contained the aforementioned ingredients and which gave all round protection was an act which amounted to denigrating the competing product. The argument placed on behalf of the defendant was that the term ‘only’ referred to the fact that theirs was the only toothpaste comprising the aforementioned ingredients within the range of white toothpastes and the term ‘first’ was used with reference to the phrase “*all round protection.*” The Court came to the conclusion that the concerned advertisement was sending a message to an average consumer that ‘Anchor’ was actually the only product containing the said ingredients, and also that it was the first one to ultimate protection to the teeth. This case herein reflects the trend of the court thus enunciated to protect the interests of the consumers from getting misled by any advertisement in particular a comparative advertisement intending to so mislead.<sup>40</sup>

***Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd.***<sup>41</sup>

In this case the appellant was a manufacturer of mosquito repellent creams: ‘Odomos’ and “*Odomos Naturals.*” The respondent manufactured a mosquito repellent cream and advertised the same under the name “*Good Knight Naturals.*” The court held herein that each has the right to try to affirm that his wares are good enough to be purchased, or of superlative quality.

Three guiding principles were laid down by the court, namely:

“(i) *An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.*

“(ii) *An advertisement must not be false, misleading, unfair or deceptive.*

---

<sup>39</sup> 2009 (40) PTC 653.

<sup>40</sup> *Supra* note 5.

<sup>41</sup> 2010 (42) PTC 88.

(iii) *Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.*"

The court however, went on to add that if an advertisement extended its scope beyond the grey areas so much so that it became false, misleading, unfair or deceptive, it would not entail the protection of Article 19 (1) (a). The court further added that in the process of glorifying one's own product, the advertiser must not disparage or denigrate the rival product.

***Procter & Gamble Home Products v. Hindustan Unilever Limited.*<sup>42</sup> (The 'Rin' and 'Tide' dispute)**

The petitioners were manufacturers of a detergent powder brand 'Tide', while the respondents were the manufacturers of the detergent powder 'Rin' and also the market rivals of 'Tide'. The respondents aired a commercial which compared both the products and allegedly portrayed the petitioner's product in a negative manner, claiming that 'Rin' was better than 'Tide' in providing whiteness to clothes. The petitioner herein applied before the court for an injunction to restrain the respondent from telecasting the advertisement, contending that the same had not stopped at merely puffing the advertised product, but had disparaged the competing product.<sup>43</sup> The Court held that there was an express denigration of the petitioner's product because it was evident from the very format of the advertisement and the manner in which it was depicted that it had the overall effect of portraying the competing product in a poor light rather than promoting the seller's own product. Court therefore, passed an interim injunction, restraining the petitioner from broadcasting the denigrating advertisement. In a recent decision of the Calcutta High Court in *Hindustan Unilever Limited v. Procter & Gamble Home Products*<sup>44</sup> where it was alleged that the present advertisement of 'Rin' was a continuation of the previous advertisement against which an interim injunction was passed therein. Keeping in mind the facts of this case, the court held that considering the same as a continuation of the previous advertisement would be exaggeration and would be far-fetched and unsubstantial as there was no similarity between the two advertisements.

The law relating to comparative advertisement has thus, over the years emerged through case laws. The problem with respect to Advertising Standards Council of India has been that it has not been able to effectuate proper compliance because of lack of an enforcement mechanism and there also lies a problem of non-compliance if the complaint is filed against a non-

<sup>42</sup> High Court of Calcutta, G.A. No. 614 of 2010, C.S. No. 43 of 2010.

<sup>43</sup> *Supra* note 5.

<sup>44</sup> G.A. No. 1309 of 2011, A.P.O.T No. 200 OF 2011.

member.<sup>45</sup> Therefore, the plausible future discrepancies can be obviated only by a proper piece of legislation exhaustively enumerating the law therein leaving no scope of confusion and vagueness.

#### **LEARNING FROM OTHER TERRITORIES, WHETHER THE NEED OF THE DAY FOR INDIA:**

Comparative advertising holds significance in the market as it encourages product improvement and innovation; it also helps in lowering prices and thus, acts as a price leveller. However, the misuse of this form of advertising may mislead the consumer or may adversely affect the interests of the competitor whose goods are so compared. The European Union, United States and India, all three have recognized the importance and magnanimity of comparative advertising in the society. The laws of these countries aim to protect the consumer from getting confused by deceptively similar products and also protect the competitor by preventing his product from getting adversely affected by disparaging comparative advertisements. Mere puffery is tolerated to a substantial extent in the three laws, however, the degree and mechanism of protection afforded to various forms of comparative advertising varies keeping in mind the scenario and requirement of the particular land. The laws relating to comparative advertising in the European Union and the United States seem apt for the respective situations, however, the developing competition in the market and the fast emergence of new products makes one think that with this fast pace, the laws of these lands will develop further and mould to cater to the needs of its people. The legal framework in India, however, needs to develop substantially. The law relating to comparative advertising must take care of the interests of all the concerned stakeholders, including manufacturers, advertisers, competing parties and consumers.<sup>46</sup> The Consumer Protection Act, 1986, for instance, has proved insufficient as it excludes from its ambit competing manufacturers and sellers.<sup>47</sup> A regulation scheme within the market should also be encouraged.<sup>48</sup> Courts should be cautious to intervene, keeping in mind the fragility of the situation. Nevertheless, it can be concluded that the legal framework of India, though not ideal, has been successful to a great extent, in addressing the adverse effects of comparative advertising in India.

---

<sup>45</sup> *Supra* note 5.

<sup>46</sup> *Supra* note 5.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*