6.1 CONCLUSIONS DRAWN FROM STUDY

In our study we have found that initially Comparative advertising was forbidden and looked after as unfair competition but gradually with most of the countries opting for liberalization and globalization started accepting it in sake of consumer welfare. The international trend is in the direction of removing restrictions against comparative advertising and promoting it. The modern norm is to welcome proper representation of facts even if compared against a competitor. The proponents of Comparative Advertising look upon it positively as a means of providing consumers information and an assessment of the competing brands resulting in a detailed study reference which would in turn help consumers in knowing the true facts of the various products and be careful in their purchases. This way transparency of data can be achieved which shall aid in lowering consumer information search costs and conduct a valid & rational purchase. Disparagement of product has also been leveraged by the courts in some countries so as to restrict ban of all statements in comparisons thus allowing truthful Comparative Advertising.

The use of comparative advertising is encouraged because, if fair and not misleading, it conveys useful information to consumers and can increase competition in the market place. But comparative ads can increase competition among firms and retailers only if claims are credible and claims are credible only if the legal system is efficient in processing false claims. If firms diffusing misleading ads are not punished, all claims become empty: comparative claims which are defined non actionable “mere puffery” becomes equivalent to generic ad and are not informative. The way consumers interpret advertising is important for the court, as “implying falsity” claims prove. But, at the same time, consumers’ perception is influenced by the legal practice that is consumers learn
Conclusions

Chapter 6

6.2
to interpret comparative claim observing the outcome of existing litigations. In this sense legal practice deeply affects the way comparative advertising is used by firms and understood by consumers.

The electronic media plays a major role, as the ad is shown or is made audible several times leaving an impression created by the commercial. So, if consumers are sensible and sophisticated enough such that they distinguish between comparative advertising containing puffery, which cannot be sanctioned, and other comparative advertising claims, which can be sanctioned, then there is no issue with the flow of information from firms to consumers. But if the masses are not well educated and well versed with minute difference and are not updated to the technological advances (as is the case most of the time in most countries) then such flow of information can prove to be disastrous for dissemination of deceptive and misleading information.

Thus, the other side of the study reveals views in contrast. We know that the very aim of advertising is to seek to persuade consumers to purchase the particular goods in question. But regarding comparative advertising it is expressed very candidly that the main focus of advertiser’s interest in phenomenon is its potential for augmenting profits through market share gain. Several Authors too have observed that virtuously there is no intent here in terms of educating the consumer or enabling the consumer to make a more informed purchasing decision.

The underlying theme is thus to look for whether it serves to protect the manufacturing firm’s goodwill or does it benefits the consumer in providing greater information? We find Comparative advertising can be a powerful yet dangerous tool. Operators need to be careful when using it and must strictly
examine the authenticity of the comparison to avoid being sued by competitors for trademark infringement or for unfair competition. On the other hand, companies that have been affected by unfair comparative advertisements have the right to file suit in and, if successful, receive compensation.

Here we shall initially draw all our references regarding position in India and in subsequent article shall underline the inferences drawn for position of comparative advertising in other countries.

### 6.1.1 Conclusions on Position in India

The conclusions drawn regarding statutory framework and judicial pronouncements’ on Comparative Advertising involving use of a competitor’s trademark and product disparagement are summarized as below:

1) Section 29 (8) and Section 30 (1) of The Trademarks Act, 1999, primarily permits comparative advertising with limitations to the concept of unfair trade practice. Unfair trade Practices were covered under MRTP Act 1969 which stands repealed now. Under the Consumer Protection Act, 1986 the consumers can apply but here the sufferers are the firms which do not fall into the ambit of consumers to get an advantage to approach the consumer forum. The Trade-Mark law permits Comparative Advertising but doesn’t allow product disparagement.

2) Expressing the merits of competing products/services & using registered trademarks to identify them do not invoke legal action against it.

3) Infringement is considered only when the use of the mark is not in accordance with honest practices.

4) Statutory or other self regulatory codes of conduct do not provide
sufficient and clear guideline to as to determine whether a practice is honest for the purposes of Section 29 (8) and Section 30 (1). The test of Honesty is objective and has to be gauged against as what is reasonable for the relevant public of advertisements for the goods or services in use.

5) The onus lies on the registered proprietor to prove that the factors indicated in the proviso to the section are applicable.

6) The Act does not impose on the courts an obligation to try and enforce through the legislation a more puritanical standard than the general public would expect from an advertisement.

7) The facts pertaining to “Correctness of Representation”, “Scientific and Technical Details”, “Assessing Loss of Business and Profits”, “Interim Injunction: Make or Break” are looked into to declare if the advertisement was infringing or not and to decide on the claims.

8) Any advertisement which is misleading does not qualify to be honest as per proviso of Section 29(8) and Section 30(1).

9) The courts have not encouraged a microscopic approach to the construction of an advertisement on a motion of interlocutory relief. The advertisement has been and ought to be considered as whole. A sensible viewer of the advertisement shall not embark upon the minute textual or frame per frame examination.

10) The Indian law doesn’t encourages firms to make exaggeration of facts beyond simple puffery thereby discouraging rivals from securing lasting benefits.

11) Based on the decision taken up by Calcutta High Court in relation to the case Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr.(1999), it was clear that mere puffing of goods is not actionable unless it results in slandering or defaming the goods of the competitor. To allow two traders to puff the products in their advertisement without harming
each other will finally leave the consumers helpless even if the producers have benefited. Only if one trader gets affected by the CA then only the falsity of the facts produced in the advert relating to the quality, price and the value of the product will get disclosed and the consumers would benefit.

12) The position of law in India in respect of disparaging advertisements of rival products is well settled. Although a tradesman is entitled to make an untrue declaration that his goods are the best, better than his competitors, and for that purpose can even compare the advantages of his goods over the goods of the others; he cannot say that his competitors’ goods are bad. Further, regarding law on trademark infringement, the use of a proprietor's trademark in comparative advertising violates the first proprietor's intellectual property rights. But if a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action.

6.1.2 Conclusion on Position in Other Countries

Some countries feel that indicating the goods are superior or are unique or are best than the other amounts to misleading until they are proved to be justified while others consider such exaggerations and misrepresentation to be permitted. With regards to misappropriation and discrediting some countries which believe in providing a liberal climate on laws until found to be untrue or disparaging allows Comparative Advertising. While in some other countries Comparative Advertising is severely banned and the businessmen who don’t follow honest practices, are strictly punished by taking legal action. In a few countries using the trade name or the TM without the consent of its holder is considered as
discrediting. Even if the comparisons are true they are not encouraged to use them in certain jurisdictions.

For instance in EU, after the ECJ’s decision in *L’Oréal v. Bellure*, it can be concluded that a favorable comparison with a reputed mark is likely to be considered as ‘riding the coat-tails’ of that mark, and if the product advertised is essentially the same as the well-known product to which it is being compared, it risks being deemed a replica, in contravention to Article 4(f) and Article 4(g) respectively of the Comparative Advertising Directive. The Study acknowledges that, ‘in addition to indicating origin, marks may acquire intrinsic value as business assets’ with the economic rationale being that ‘reputation enjoyed by a mark is regularly the fruit of intensive investments, for which further incentives are provided by the additional protection granted.’ The related issue of allowing manufacturers to copy a product, but not allowing them to describe their products as such, is addressed in the section on comparative advertising. The Study declares ‘it appears appropriate to make provision for a broader clause exempting ‘honest referential use’ from infringement, i.e. cases where the protected trade mark is used as a reference to the proprietor’s goods or services.’ This recalls the US courts’ statement that ‘if a seller has the right to copy public domain features of his competitor’s goods, then, as a corollary, he must have the right to inform the public of this fact.’

Looking at the U.S. comparative advertising legal regime, it is overall less restrictive and does a better job in preserving the policy objectives of consumer welfare and free competition.

Further it has been seen that although many countries authorize truthful and non-confusing comparative advertising, yet many countries place additional
heavy restrictions on the use of this marketing tool. Yet, the prohibition of false and confusing claims seems sufficient to prevent abuses.

6.2 SUGGESTIONS

1) The existing laws in India are strong and the only need is to balance the interest of consumer while protecting the interest of firms.

2) For a businessperson who invests a huge amount to advertise his product revealing the truth of the other competitor then he is and should be allowed to proceed with the advertisement.

3) Finally, enactment of law should be done under the “Consumer Protection Act” to consider the grievances of the advertisers facing problems due to Comparative advertising which is presently lacking.

4) The contrast in interpretation of law in different countries results from different consumer standards and trademark values in each country.

5) The great weight accorded to trademark values other than the source identification function and the use of the credulous consumer standard under others law undoubtedly favor the interest of the individual competitor advertised against to the detriment of competition in the marketplace. Given the fact that competitors facing comparative advertisements are the ones with the strongest market positions and practically have the incentives and necessary resources to retaliate with their own advertising campaigns and answer their rival's comparative claim. This is ”over-protection” of competitors and impairs consumer welfare and free competition.

6) The courts have given a verdict that no firm can disparage a class or genre of a product and in its defense claim that any particular firm has not been specifically mentioned to. However in a broader view, this notion of
generic disparagement shall even not permit any firm to make comparison on general basis. That is a manufacturer of car can be sued for disparagement by Scooter Company if he shows through an advertisement that by owing a car a scooter owner will be better off. This should be reconsidered.

7) In the fast changing scenario of liberalization and globalization throughout the world, better regulation in form of appropriate laws, adequate enforcement, infrastructure and quick dispute settlement mechanism is required to create and sustain competition. In the absence of it, we would only be ‘jungle rule of the market place’.

8) To conclude, an efficient comparative advertising legal regime could play a small, yet positive, role in spurring consumer consumption in order to drive the economic recovery of many countries.