2.1 PREFACE

The history of comparative advertising dates back to the beginning of commerce itself. It has always been normal for a trader to attempt to enjoy pecuniary benefits by drawing a comparison between the qualities of his products/services and a competitor’s. While comparative advertising was initially restricted to ‘puffery’—where a trader lists facts about the product, or makes vague claims which cannot be proved or disproved—some traders, in the name of comparative advertising, have started ‘disparaging’ competitors’ goods, forcing the law to intervene. Puffery and disparagement can therefore be considered as the two fundamental facets of comparative advertising.

In this chapter we will take a glance on the history and evolution of comparative advertising. We shall limit to its evolution particularly to United States (USA), European Union (EU) and India. We shall addresses the major episodes, individuals and the principles involved and the efforts taken up by the industry to make it widely acceptable.

2.2 HISTORY OF TRADEMARKS AND RELATED LEGISLATIONS

In trademark treatises, it is usually reported that blacksmiths who made swords in the Roman Empire are thought of as being the first users of trademarks.\(^1\) Other notable trademarks that have been used for a long time include Lowenbrau, which claims use of its lion mark since 1383.\(^2\)

The first trademark legislation was passed by the Parliament of England under the reign of King Henry III in 1266,

\(^1\) Gary Richardson, Brand Names Before the Industrial Revolution, National Bureau of Economic Research available at National Bureau of Economic Research

which required all bakers to use a distinctive mark for the bread they sold.\(^3\)

The first modern trademark laws emerged in the late 19th century. In France the first comprehensive trademark system in the world was passed into law in 1857 with the "Manufacture and Goods Mark Act". In Britain, the 1862 Merchandise Marks Act made it a criminal offense to imitate another's trade mark 'with intent to defraud or to enable another to defraud'. In 1875 the Trade Marks Registration Act was passed which allowed formal registration of trade marks at the UK Patent Office for the first time. Registration was considered to comprise prima facie evidence of ownership of a trade mark and registration of marks began on 1 January 1876. The 1875 Act defined a registrable trade mark as 'a device, or mark, or name of an individual or firm printed in some particular and distinctive manner; or a written signature or copy of a written signature of an individual or firm; or a distinctive label or ticket'.\(^4\)

In the United States, Congress first attempted to establish a federal trademark regime in 1870. This statute purported to be an exercise of Congress' Copyright Clause powers. However, the Supreme Court struck down the 1870 statute in the Trade-Mark Cases later on in the decade. In 1881, Congress passed a new trademark act, this time pursuant to its Commerce Clause powers. Congress revised the Trademark Act in 1905\(^5\)

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3 “History of trademarks”http://www.tmprotect.idknet.com/eng/history.html
5 The History and Development of Trademark Law http://www.tmprotect.idknet.com/eng/history.html
The Lanham Act of 1946 updated the law and has served, with several amendments, as the primary federal law on trademarks.\textsuperscript{6}

The Trademarks Act of 1938 in the United Kingdom set up the first registration system based on the “intent-to-use” principle. The Act also established an application publishing procedure and expanded the rights of the trademark holder to include the barring of trademark use even in cases where confusion remained unlikely. This Act served as a model for similar legislation elsewhere.\textsuperscript{7}

The oldest registered trademark has various different claimants, enumerated below:

- United Kingdom: 1876 – The Bass Brewery's Red Triangle for ale was the first trademark to be registered under the Trade Mark Registration Act 1875.\textsuperscript{8}
- United States: A design mark with an eagle and a ribbon and the words "Economical, Brilliant" was the first registered trademark, filed by the Averill Chemical Paint Company on August 30, 1870 under the Trademark Act of 1870.\textsuperscript{3,9} However, in the Trade-Mark Cases, 100 U.S. 82 (1879), the U.S. Supreme Court held the 1870 Act to be unconstitutional.\textsuperscript{9} The oldest U.S. registered trademark still in use is trademark reg. no 11210.\textsuperscript{10}

\[\text{References:}\]
\textsuperscript{6} Roger W. Dyer Jr., Monetary Damages under the Lanham Act: Eighth Circuit Holds Actual Confusion is Not a Prerequisite, 77 Mo. L. Rev. (2012).
\textsuperscript{8} Case details for trade mark UK00000000001, United Kingdom Intellectual Property Office.
a depiction of the Biblical figure Samson wrestling a lion, registered in the United States on May 27, 1884 by the J.P. Tolman Company \(^{11}\) (now Samson Rope Technologies, Inc.), a rope-making company.\(^{12}\)

- United States: In 1923, the businessman and author Edgar Rice Burroughs registered his fictitious character Tarzan as a trademark; even after the copyright to the Tarzan story expired, his company used ownership of the trademarks relating to the character (which unlike copyrights, do not have a limited length) to control the production of media using its imagery and license the character for use in other works (such as adaptations). This practice is a precursor to the modern concept of a media franchise.\(^{13}\)

### 2.3 EVOLUTION OF COMPARATIVE ADVERTISING & ITS REGULATIONS AND LEGAL FRAMEWORK

#### 2.3.1 Evolution in US

From centuries, United States have been the harbinger of free and competitive economy and "the keystone of governmental attitude towards the business scene" has been promotion of maximum consumer welfare. Comparative advertising has therefore been a highly popular and acceptable form of advertising in the United States. The US, being a herald of free-market and competitive economy supports liberal regulation in the context of comparative advertising. Their system of law supports and encourages the comparison of products or services of competing brands provided the bases for comparison are clearly identified.

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Under their statutory framework, the disparagement or denigration of competitor’s brand in a competitive advertisement shall face no legal action if such comparison is truthful and is not explicitly or implicitly misleading. The judicial and legislative authorities, as well as administrative agencies, in the area of advertising law do not restrict comparison between dissimilar products or goods.

In the U.S., more than a decade ago, the courts recognized the legality of honest comparative advertising; still they were often limited by industry self-regulatory codes until 1960. In the advertising zone, it was considered that comparing or naming one’s rival could only give free publicity and nothing more. Therefore in a comparison, the rival was simply referred as "brand X' or the "leading brand". Two major decisions in 1960 brought a significant change in this thought.

(i) The first decision was the ruling in the case of Smith vs. Chanel. The manufacturer of perfume Ta’Ron’s, the defendant in this case, copied an unpatented product sold under a trademark and launched a low priced perfume “2nd Chance” and attracted the buyers through an advertisement in which he asked them to detect the difference between his and Plaintiff's perfume “Channel No.5”. The Court of Appeals for the Ninth Circuit permitted the defendant to use the copied trademark in advertising for identifying the copied product. It considered that the advertisement was truthful and did not amount to any confusion regarding its source or did not contain any misrepresentations.

(ii) The second and quite significant decision was the statement of 1969 Federal Trade Commission (FTC) Policy on Comparative Advertising. It encouraged the use of comparisons that name the competitor or the competitive product. The FTC's statement considered that honest and fair comparative advertising is a valuable
source of information to consumers that could assist them in making rational purchase decisions. It further supported it by stating that it is an efficient marketing tool to persuade improvement and innovation in a product, and can lower the prices of a commodity in the market.

Subsequently, the use of comparative advertising and acceptability of this format of advertising grew dramatically high in the United States and has remained unchanged ever since. Courts often mention the beneficial effects of comparative advertising. For example, the Seventh Circuit held that comparative advertising naming a competitor is beneficial to consumers because “they learn at a glance what kind of product is for sale and how it differs from a known benchmark.” In this case, the defendant's packaging of Life Savers Delites candies stated: "25% Lower In Calories than Werther's Original Candy.” Similarly, the Eighth Circuit, recognizing the existence of the "strong public interest in lowest possible prices," refused to issue a preliminary injunction against use of the trademark "Obsession" in a claim for a perfume advertised as "our version of Obsession”.

The use of comparative advertising started perhaps from US where in the mid 1960s certain advertisers marketed their product naming their competitors. The industry lore suggests that prior to this period the use of comparative advertising was quite infrequent. It can be said that although the use was less but it was not completely absent from the main stream advertising. In due course it became significant rather prolific enough to attract early industry reforms and self regulation agencies.

Prior to the 1970s, Comparative Advertising was deemed unfeasible due to related risks such as misidentification of products, potential legal issue, Puffery or Disparagement. In 1972, however, the Federal Trade Commission (FTC) of America began to encourage advertisers to make comparison with
named competitors, with the broad, public welfare objective of creating more informative advertising.

The law of comparative advertising has evolved from providing virtually no legal remedy for misleading claims to enjoying most advertising challenged by competitors under the Section 43(a) of the Lanham Act.

Explicit Comparative Advertising was rarely used in the US until the FTC actively lobbied in favor of it in early 1979. Comparative Advertising has enjoyed a similar evolution from being virtually non-existent to its current status of relatively common place challenges under the Lanham Act and industry self regulation.

There is no dearth of literature on comparative advertising and its regulation in US but the account prior to 1960s’ is too little to appreciate. The evolution of advertising to comparative advertising and its twist from serving proprietors’ interest to serving consumers’ interest is a fascinating journey and the data can be collected from the available books, journals and magazines of and on that time. So the literature on it was extensively referred to. The source of information for the period between 1900 and 1913 are the published 60 volumes of the industry’s most influential trade journal “Printers Ink”. The text for the latter periods can be found in three indexes: the Industrial Arts Index (1913-1957), the Business Periodicals Index (1958-1973) and the ABI/Inform Complete search engine. Going through these sources reference to other significant sources could also be drawn. Certain other published work like Smith 1989; Fox, 1984; Mc Govern, 2006; Pope, 1983; Presbrey, 1929 give a good account of information on this matter and help the reader regarding topic familiarization and theme development.

A careful research in this direction reveals that the progressive movement or “finding truth in advertising” begun as early in 1911 at the convention of the Associated Advertising Club of America (AACA). In this
convention, as reported by historian Daniel Pope\textsuperscript{14} (1983) the President of AACA retail advertisers and the manager for John Wanamaker’s’ Departmental Stores delivered the “Ten Commandments of Advertising” in his speech and also included all those admonitions which should be taken care of while performing an comparative advertising act. Those comments are of immense significance and have been therefore quoted below:-

“Thou shall not covet,

nor imitate,

nor run down thy neighbors’ business;

Thou shall not covet,

nor imitate,

nor run down thy neighbors’ name, nor his wares,

nor his trademark ....

Nor anything that is thy neighbors’.”

The government regulations had an impact on these progressive self regulation movements. Reciprocally these movements also influenced the government’s future policies regarding regulation of comparative advertising and its use. In 1911, a wide circulating trade Journal “Printer’s ink” asked an corporate attorney Mr. Harry D Nims to draft a model statue which could prevent effectively dishonest advertising. This was later adopted as law by all twenty three states of US at that time without any alteration. Frank Presbrey published “History of Advertising” in 1929.

Meticulous studies suggest that the early advertisers favoured national regulatory policies. The businesspersons obeyed the legislations and administrative regulations and it was common practice to find them seeking the government’s intervention whenever required to fit their needs.

Literature survey reveals that there was a lot of discontent growing in the public regarding advertising during the depression period. The study of books like “Your Money’s Worth” and “100,000,000 Guinea Pigs” magazine Ballyhoo and a research survey conducted by non-profit consumers Research Organization (MC Govern, 2006) reveals this fact. The new regulatory bill, the Copeland Bill put pressures on the advertisers as it threatened to move the regulation on advertising from Federal Trade Commission to Food and Drug Administration. Historian Stephen Fox also notes that the business fell back on its old dream of self regulation to save the federal intrusion. Another writer Arndorfer et. al. 2005 explains this discontent in his treatise on this matter where he refers the industries regulation process as “system of codes & volunteerism”.

Attempts to pass federal trademark laws were made starting in 1870, but all were considered inadequate prior to the adoption of the Federal Trademark Act of 1946, known as the Lanham Act. Named for Representative Fritz G. Lanham of Texas, the Act was passed on July 5, 1946, and signed into law by President Harry Truman, taking effect "one year from its enactment", on July 6, 1947.

For the first time, Congress passed a law creating substantive, as well as procedural, rights in trademarks and unfair competition. The law was not without its opponents. The Department of Justice expressed a number of strong concerns, including the assertion that trademarks are monopolistic and the law would favor ‘big business ’ and encourage violation of antitrust laws. However, in support of the new law, the Senate Committee on Patents implied that these fears were overstated, noting that ‘the protection of trademarks is merely protection to good will, to prevent diversion of trade through misrepresentation, and the protection of the public against deception.’

15 www.njcl.utu.fi/1_2012/cynthia_sharp.pdf
The committee also pointed out that the new law was necessary to align US law with its international obligations. US failure to carry these out meant that industrialists had been ‘seriously handicapped in securing protection in foreign countries.’

It appears that, at least initially, the ‘protection to good will’ cited by the Senate Committee translated into protection of the rights holder’s investment. US trademark law as codified in the Lanham Act was (according to some) intended to serve the dual goals of protecting both consumer and rights holder. In a Report accompanying the Lanhams Act in 1946, the Senate said,

“The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner.”

Perhaps in response to the DOJ’s initial fears, however, US case law interpreting the Lanham Act has since emphasized the consumer protection aspect.

In 1960 the discontent raised again which brought to shore the problems engulfing the industry’s self regulation process. To prevent deceptive TV advertising the FTC launched a campaign through which it served penalty of corrective advertising by replacing cease and desist orders.16 Due to such action the industry came up again with promises of self regulations. A National Advertising Division (NAD) was formed by merging

certain major associations like the –Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF) with the Council of Better Business Bureaus (CBBB). The National Advertising Review Board (NARB) was also established to assist NAD in regulating advertisements comprising competitive advertisements. The research on the practical aspects that aroused due to comparative advertising and the regulatory problems created for those involved in the industry’s self regulation i.e. AAAA, ANA, NAD, CBBB & NARB are quite few.

The Act has been amended several times since its enactment. Its impact was significantly enhanced by the Trademark Counterfeiting Act of 1984, which made the intentional use of a counterfeit trademark or the unauthorized use of a counterfeit trademark an offense under Title 18 of the United States Code, and enhanced enforcement remedies through the use of ex parte seizures and the award of treble profits or damages (whichever is greater). In 1999, the Anti cyber squatting Consumer Protection Act inserted 15 U.S.C. § 1125(d), and amended 15 U.S.C. § 1114(2)(D).

The study’s findings regarding who should be responsible for the regulation of comparative advertising show that interest in working with government regulators declined during and after the 1930s. Perhaps, as long-time Printers’ Ink editor C.B. Larrabee (1934, 8)\(^\text{17}\) noted at the time, advertisers were tired of the “mass of detail that has been dumped upon them by the NRA.” They may also have been motivated by the threat of the Copeland Bill, which passed the US Senate in May 1935. Ironically, as the findings also reveal, despite the industry’s desire to regulate itself,

comparative advertising would set the stage for a battle with federal regulators—a battle the industry would lose.

The specific features of comparative advertising that advertisers thought should be regulated reveal some new and interesting insights into the history of advertising self-regulation. Once advertisers appeared to accept the inevitability of comparative advertising during the 1930s—and some began to openly endorse it as an expression of competition in the marketplace—their concern quickly turned to the problem that occupied their attention until their successors lost their battle with the FTC in the 1970s—the disparagement of competitors. This preoccupation with disparagement as a principal problem with comparative advertising is consistent with the findings of other histories of advertising regulation (e.g., Beard and Nye, Forthcoming). An explanation for it can be found in professional thought regarding some of the recognized risks linked to aggressively combative and “knocking” advertising as a competitive tool that date to the beginning of the 20th century. Beard (2010),\(^{18}\) for instance, found that advertisers who engaged in comparative advertising “wars” often regretted it, mainly because hostilities tended to escalate, causing damage to both sides and, in some cases, to entire product markets and industries. Empirical research by James and Hensel, (1991) also confirms the longstanding and widely held professional belief that negative comparative advertising by market leaders regularly produces backlash. A study by Sorescu and Gelb (2000)\(^{19}\) likewise supports the professional belief that consumers often respond negatively to especially aggressive comparative advertising.


They found that a high-negativity comparative ad, compared to a low-negativity ad and a positive one, scored significantly lower on believability, fairness of content, approval of content, informativeness, and overall evaluation. They also found that attacks on a competitor’s image were rated far worse than attacks on a competitive product’s features.

Professional concerns about the appropriation of a competitor’s trademark or brand name can also be traced to a problem that emerged early in the 20th century. Dubbed “The Substitution Menace” by Printers’ Ink, advertisers often found that after building primary demand with national advertising, often-inferior brands would be substituted for theirs—sometimes inadvertently, but often purposely—by retailers and jobbers. The desire to avoid this type of problematic competitive rivalry in advertising is also likely explained by the historical and contemporary beliefs that among the biggest problems with comparative advertising are that it provides free exposure for competitors and often leads to brand confusion (Barry and Tremblay, 1975).[20]

The study’s findings also reveal what is arguably the single most contentious episode in the history of advertising self-regulation—a dispute over the industry’s right to self-regulate truthful disparagement of competitors and its failure to secure that right from the FTC. Inspired by the deregulation ideology gaining momentum in the 1970s, the FTC ultimately crushed industry resistance to the agency’s campaign of litigation in support of comparative advertising, including disparagement.

The causes and consequences of this episode are especially important to understand given the fact that it was the FTC of the 1920s to 1940s that encouraged the emerging trade associations to include disparagement in their

codes of industry conduct and that the FTC itself was discouraging disparagement as late as the 1950s.

Laws and government regulations exert the greatest and most direct influence on all the other elements responsible for the relationship among advertising, society and public policy.

Sectors most affected by rules on comparative advertising include food, retail, motoring and airlines. Famous examples of direct comparative ads involve Coke and Pepsi, Burger King and McDonald's, Unilever and Procter and Gamble. Different studies suggest varying figures on the relative use of comparative advertising in the US. Muehling et al. (1990)\textsuperscript{21} found that around 40 percent of all advertising is comparative.

Until recently the primary form of brand comparisons used in the consumer advertising field were Brand X euphemisms. Although comparisons with named competitors have been a long-established personal selling technique for consumer products, it was not until 1968 when American Motors compared the Javelin to the Mustang that direct brand comparisons began frequenting the print media. The use of named competitors has been slow to evolve in electronic media presentations of consumer products. However, due to the relaxation of traditional advertising taboos, the frequency of direct brand comparisons in consumer advertising has increased dramatically in the last two decades.

This increase may be largely attributed to endorsements of comparative advertisements by the Federal Trade Commission and special interest groups. In 1972, the FTC issued a statement calling for advertisers to name competing brands in their advertisements as an alternative to the Brand X euphemism. In conjunction with their request to

\textsuperscript{21}time.dufe.edu.cn/jingjiwencong/waiwenziliao/compad10.pdf
advertisers, the FTC asked major television networks to change their policies prohibiting explicit mention of competitors in advertisements and to accept these otherwise suitable commercials on a trial basis as a means of informing the consumer about who competes against whom and how.

Other groups, including consumerism advocates, have also cited benefits of comparative advertising in their endorsements. Joan Bernstein, Assistant Director of the Bureau of Consumer Protection, has stressed the potential of comparative advertising for delivering information not previously available to consumers. And although the American Association of Advertising Agencies has previously publicly discouraged the use of comparative advertising, a recent policy statement recognizes that comparative advertising provides the consumer with needed and useful information when used truthfully and fairly.

In spite of the benefits acclaimed to comparative advertising and the endorsements, some groups have begun to evaluate comparative advertising for negative side-effects. Jack Roberts, of Ogilvy and Mather, expressed concern that with comparative advertising the environment could become one of claims, counterclaims and contradictions resulting in increased opportunities for misleading or deceptive claims. Both the Television Code and the Radio Code imply recognition of the potential of comparative advertising to be deceptive and misleading. The Television Code states that, "Advertising should offer a product or service on its positive merits and refrain by identification or other means from discrediting, disparaging or unfairly attacking competitors, competing products, other industries, professions or institutions". And the Radio Code states that "any identification or comparison of a competitive product or service, by name, or other means, should be confined to specific facts rather than generalized statements or conclusions unless such statements or conclusions are not derogatory in nature".
The American Broadcasting Company and the National Broadcasting Company have now developed formal guidelines for comparative commercials to help avoid the possibility of deceptive and misleading information. Although the guidelines of both networks are very similar, ABC places stress on the test procedures for comparative claims. Thus, the controversy over the deceptive nature of comparative advertising has led to more concern over an already scrutinized advertising technique, claim substantiations.

2.3 Evolution in European Union

In most European Union countries comparative advertising is a quite young phenomenon. Probably the lack of harmonization of comparative advertising rules among the European Countries, despite the Directive 97/55/EC, and the subsequent legal risks faced by the advertising firms still represents an obstacle for its diffusion. Also, since consumers have been less exposed to comparative advertising, advertisers may be more critical of its effectiveness in Europe.

Until very recently, comparative advertising was essentially not allowed in European countries. The explicit identification of competitors had been banned in Belgium, Italy and Luxemburg. It was generally prohibited as unfair competition in Germany and France, unless advance notification was given to the competitor. Limited comparative advertising was permitted in Spain and the Netherlands. The use was restricted by the criteria of strict truthfulness and relevance in Scandinavia. The UK had, compared with other Member States, a reputation of taking a rather relaxed approach.

The European Union first addressed the issue of comparative advertising in the late 1970s. The position was that comparative advertising should be legal if it provides verifiable details and is neither misleading nor unfair. However, laws on comparative advertising were harmonized only in
April 2000. The preamble of the directive indicates that for goods to flow freely throughout the EC, the rules governing the form and content of advertising must be uniform and notes that this currently is not the case with comparative advertising. The preamble emphasizes comparative advertising's importance as a consumer decision making tool and a stimulus of competition.

Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

(a) it is not misleading;

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products
(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

As we mentioned before, within the EU the UK has today a rather relaxed attitude towards comparative advertising. Nevertheless, to compare the legal approaches to comparative advertising characterizing European countries and the US it is useful to consider the UK as an example for an EU country. In both countries the interpretation by the courts is of particular importance because both, the UK and the US, have a common law legal system, where court cases provide precedent, i.e. these cases are used by other courts within the same jurisdiction when making decisions in comparable cases.

The current British Trade Marks Act was adopted from October 1994. Prior to then, the Trade Marks Act, 1938, regulated trademark law in the United Kingdom. This Act contained a provision which was similar in its effect to Section 44(1)(b) of the South African Trade Marks Act, 1963 and also prevented the use of a registered trade mark in comparative advertising. Section 10(6) of the British Act of 1994 has, however, changed the position materially. This section no longer regards use of a registered trade mark by a third party for the purposes of identifying the goods or services of the proprietor of the trade mark as an infringement of a registered trade mark. In effect, therefore, the provision removes the prohibition against the use of a registered trade mark in comparative advertising. However, the section lays down qualifications applicable to the removal of the prohibition. It says that "such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark."

In France, Comparative Advertising was authorized in 1992 and applied to some similar products and services using the same sales conditions.
such as before it is broadcast, the comparative message must be made known to the opposite party in due time to be eventually cancelled or the comparison must be loyal, truthful, undeceiving and objective.

2.4 Evolution in India

The advertising companies and manufacturers were not very much interested on comparative advertising before 1970. According to them, there might have a risk of negative impact of advertising. Such type of advertising may invite unwanted legal challenges from the competitors and the competitors may gather public sympathy as victims by counter advertising. However, from the beginning of the 1971, many countries began to encourage the comparative advertising mentioning that comparative advertising is an important tool for providing the distinctive information about various attributes of same product of different brands. The government of many countries began to formulate and enact the legislation to protect the manufacturers from disparagement that came from the competitors. The new laws encouraged the companies to publish comparative advertising. However, still now, the amount of comparative advertising is small.

Like all other countries, Government of India also took some measures to encourage the comparative advertising. The most important step was the amendment of “The Monopolies and Restrictive Trade Practices” (MRTP) Act, 1969”. In 1984, the Union Government introduced a new chapter on unfair trade practices. In the original act of 1969, there was no specific provision for restricting many categories of unfair trade practices, like misleading and unscrupulous advertising. The 1984 amendment clearly mentioned that any representation which ‘gives false or misleading facts disparaging the goods, services or trade of another person’ to be an unfair trade practice. In some advertisements, competitive products are mentioned as ordinary products without mentioning the names of any specific product. The amendment mentioned that “other ordinary products” term in advertisements
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will be treated as all the rival products excluding the advertised one in the court of law.

The amendment also clarified another complex issue. When the disparaging occurred on the basis of false technical facts, a detailed scientific and technical analysis is required to establish the fact. In 1984, our legal system was not so equipped to dispose the technical and scientific matters within a short period. The process was lengthy and it took a long time to settle the dispute. In that case, the plaintiff could appeal for an injunction on publishing the advertising. The court generally granted the interim injunction. However, the advertising already did the damage of the competitive product. In that case, the amendment made a provision of compensation for the loss or damage. The law also set the guidelines of computing the amount of loss or damage.

After the amendment, many cases were filed in the various courts of India. Some of important cases are Regaul vs Ujala, Colgate vs Vicco, Saffola vs Fortune rice band oil and Rin vs Tide. The historic judgments in these cases attracted the legal professionals across the world.

In India, the law on Comparative Advertising has developed through judicial precedent. During the late 1990s, courts took the view that while ‘puffing’ is permissible, any statement or image which demeans or disparages a competitor’s product is not. This view was consistently upheld by courts in many cases. However, in recent times the courts have held that companies should not be too sensitive when it comes to Comparative Advertising. The refusal of an injunction to Colgate appears to be a sign that courts recognize the maturing of economies and consumers. This may just be the beginning of a new jurisprudence requiring companies to show greater tolerance to Comparative Advertising and a signal that market fights ought to be fought in
the markets and not in a court of law.

In all these cases the guiding principle for the courts has been that “The law is that any trader is entitled to puff his own goods even though such puff as a matter of pure logic involves the denigration of his rival’s goods. Notices reading ‘the best tailor in the world’, ‘the best tailor in this town’ and the ‘best tailor in this street’ do not commit an actionable offence. When, however, the trader is not puffing his own goods but turns to denigrate the goods of his rival then the situation is not so clear-cut.

“The statement ‘my goods are better than X’s’ is only a more dramatic presentation of what is implicit in the statement ‘my goods are the best in the world’ and would not be actionable. However, the statement ‘my goods are better than X’s because X’s are absolute rubbish’ would be actionable.” The above cases relate to instances wherein the rival’s product was clearly identifiable. However, competitors have found an innovative way to indulge in comparative advertising, by condemning a whole class of products instead of a specific competing product, thereby creating an entirely new species of comparative advertising: ‘generic disparagement’.

In this form of comparative advertising the competitor does not merely disparage a specific product but indulges in disparagement of a complete class of products. One of the earliest cases of generic disparagement was Dabur India Ltd v Emami Ltd. In this case the court was concerned with a commercial wherein an entire class of products, ‘chyawanprash’ (a herb and spice mix), was denigrated. One of the market leaders manufacturing chyawanprash objected to the commercial by filing a civil suit for injunction. The court held that the plaintiff enjoyed a market share of more than 63 percent for this class of products and thus had a vital interest in ensuring that
its product or the class as a whole was not condemned in any manner. The Learned Single Judge therefore recognized the concept of generic disparagement and granted an injunction.

Thereafter, a series of cases have maintained that if a complete class of products is being disparaged, then it would be permissible for one manufacturer or more who constitute that particular class or are market leaders, to take action.

A review of case law clearly shows that courts in India have gone beyond the days of White v Mellin (House of Lords) and expanded the scope of comparative advertising to include a class of products and not restricted it to disputes between two competitors.

In conclusion, the four-pronged test for disparagement can be summarized as:

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;

iii. Grey areas need not necessarily be taken as serious representation of facts but only as glorifying one’s product; and

iv. While glorifying its product, an advertiser may not denigrate or disparage a rival product.

Thus, with regard to comparative advertising, several things seem apparent. First, public policy makers, media representatives, and other special interest groups have taken an increased interest in the use and impact of comparative advertising. The result is that many groups have endorsed comparative advertising on the assumption that it will provide the consumer
with more and better information than will traditional advertising. Other
groups, however, have expressed concern over the ability of comparative
advertising to convey deceptive and misleading information to the consumer.
Second, consumers have experienced and will probably continue to experience
an increase in the use of comparative advertising strategies. And finally, since
the use of comparative advertising has only recently been accepted, advertisers
and public policy makers have virtually no information concerning its impact
on the consumer.

As advertisers are increasingly taking advantage of the fact that they
can now employ comparative advertising, it is important that the relative
impact of comparative and non-comparative advertising upon the consumer be
empirically investigated. Since the ultimate objective of a firm's advertising is
to elicit a purchase response from the consumer, the general purpose of this
research is to investigate the relative effects of comparative and non-
comparative advertising upon purchase intentions. Further, this investigation
studies the effects of the communications with respect to other variables which
may affect consumer reactions to comparative advertisements. Specifically,
the effects of the consumer's degree of brand loyalty toward the advertised
brand, degree of brand loyalty toward the competing brand in a comparative
advertisement, the competitive position of the advertised brand and claim
substantiation are considered in this investigation. The influence of three
different but parallel copy themes is also investigated in order to eliminate
copy testing of one theme.

With the opening up of the economy, while it can be argued that
comparative advertising is essential since it assists the consumers in making
an informed decision, it is important to establish a comprehensive scheme of
regulation to safeguard the interests of the consumer as well as the
competitors.