CHAPTER 6

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CHAPTER 6
INTELLECTUAL PROPERTY REGULATIONS UPON ELECTRONIC MEDIA

6.1.1 Introduction

Basically the activities related to the electronic media are an intellectual activity. So the laws relating to the intellectual property is applicable to the electronic media. The Holy Bible says that the Creatio ex nihilio - creation from nothing –is special ability given to mankind. Both the intellectual property as well as the electronic media is making properties from nothing. That is why in the initial stage the electronic media was considered a part of the intellectual property. Even now the Copyright is playing an important role in the intellectual media programmes. The patent is significant role in the inventions relating to the media and trademarks are playing a cardinal role in the commercial activities relating to it.

FIGURE 18
TYPES OF INTELLECTUAL PROPERTY RIGHTS AVAILABLE TO THE ELECTRONIC MEDIA

6.1.2 Intellectual property and electronic media

The law of Intellectual property and electronic media is now a global concern. In today's globalised scenario of expanding multilateral trade and commerce,

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it has become inevitable for any country to protect its intellectual property by providing statutory rights to the creators and inventors and thus help them fetch adequate commercial value for their efforts in the world market. This innovative and creative capacity is protected under the intellectual property system of WTO. Recognising this fact, India as a founder member of WTO has ratified the Agreement on Trade Related Intellectual Property Rights (TRIPS). As per the agreement, all member countries including India are to abide by the mutually negotiated norms and standards within the stipulated timeframe. Accordingly, India has set up an Intellectual Property Right (IPR) regime, which is WTO compatible and is well established at all levels whether statutory, administrative or judicial. The Government has taken a comprehensive set of initiatives to streamline the intellectual property administration in the country in view of its strategic significance. In the Ministry of Commerce and Industry, the office of the 'Controller General of Patents, Designs and Trade Marks (CGPDTM)' has been set up under the Department of Industrial Policy and Promotion. It administers all matters relating to patents, designs, trademarks and geographical indications and also directs and supervises the functioning of (1) The Patent Office (including Designs Wing), (2) The Patent Information System (PIS) (3) The Trade Marks Registry (TMR), and (4) The Geographical Indications Registry (GIR). Besides, a 'Copyright Office' has been set up in the Department of Education of the Ministry of Human Resource Development, to provide all facilities including registration of copyrights and its neighbouring rights.

6.1.3 Types of intellectual property related to electronic media

For complementing the administrative set up, several legislative initiatives have been taken. It includes, the Trade Marks Act, 1999; the Geographical Indications of Goods (Registration and Protection) Act 1999; the Designs Act, 2000; the Patents Act, 1970 and its subsequent amendments in 2002 and 2005; Indian Copyright Act, 1957 and its amendment Copyright (Amendment) Act, 1999; Semiconductor Integrated Circuit Layout Design Act, 2000; as well as the Protection of Plant varieties and Farmer's Rights Act, 2001. This chapter is to analyse the electronic media related matters of Intellectual Property Rights. It is with reference to the Paris Convention, Rome Convention, Berne Convention and the Treaty on Intellectual Property in

6.1.4 Copyright related to electronic media

Copyright protects literary and artistic works by offering a range of exclusive and non exclusive rights to their authors. To be protected, a work has to be more than a mere idea. The distinction between protected works and ideas lies at the very heart of copyright law. The protection of a given work applies to the expressions of ideas that are contained therein. Accordingly, in order for copyright in a work to be infringed or violated, one has to copy the form in which the ideas are expressed. The mere use of ideas found in a work does not represent a copyright violation. For example, the author who has written an article on how to build a boat will be protected against the making and selling of copies of the article (i.e. the expression) without his or her consent. However, copyright protection cannot prevent anyone from using the instructions (i.e. the idea) contained within the article in order to build a boat, neither to write another article on the same subject, without copying the first one.

6.1.5 Forms of expression related to electronic media

In order to illustrate what forms of expression may be protected; most copyright laws contain an elaborate, but usually not exhaustive, list of examples. The enumerated categories generally comprise articles, novels, poems, songs, plays, choreography, applied art and architecture, alongside more recent additions such as computer programs and, in certain countries, databases. Scientific theories, marketing concepts

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470 United Nations Convention (on 2005) the Use of Electronic Communications in International Contracts says that the Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.
and algorithms could be given as examples of unprotected ideas. Furthermore, to qualify for copyright protection an expression must have a sufficient degree of originality. Broadly speaking, a work is original when it reflects the personality of its creator. Yet, there are no universally agreed standards on how to assess originality. In any case, novelty, artistic merit or purpose of the work, are all irrelevant factors. Legal traditions vary as to whether copyright takes effect from the moment of a work’s creation or rather from its fixation in tangible form. In a country with a fixation requirement, i.e. a common law country, such as the USA or the UK, a speech or a work of choreography, for example, is not protected under copyright until it is either recorded or transcribed. In countries adhering to the civil law tradition, such as France or Germany, copyright protects any type of works regardless of whether they have ever been recorded or transcribed. 471

6.2.1 Broadcaster’s rights

World Intellectual Property Organisation (WIPO) Standing Committee on Copyright and Related Rights (or SCCR) established a Proposal in order to protect rights for all broadcast organizations. But the members at the meeting decided at the time to exclude webcasting from the treaty 472. The revised proposal would in fact consider creating protection rights for webcasting, netcasting, and simulcasting. As per the treaty, the media broadcasters would have the right to protect the content of their media transmissions as well as their right of reproduction, retransmission, and even from public communication. All copyright protections would endure for 50 years. On the other hand UNESCO decided to take an active role in stimulating discourse pertaining to the WIPO Broadcasting Treaty. Studies from UNESCO show that the treaty could limit the flow of information by weakening the balance between broadcasting or cablecasting interests and the values of freedom of expression. 473

471 The form of rights over the electronic media originates on the basis of the Constitution of India.
473 www.wipo.int last visited on 12-2-2012 .The World Intellectual Property Organization (WIPO) is one of the 17 specialized agencies of the United Nations. WIPO was created in 1967 “to encourage creative activity, to promote the protection of intellectual property throughout the world.”WIPO currently has 185 member states, administers 24 international treaties
Broadcaster’s rights are the first established rights under the electronic media.\footnote{http://www.mib.nic.in . Last visited on 10-10-2012.} Most important of them are the economic rights, moral rights, performer’s right and neighbouring right. The equitable rights, the property rights, the legal rights etc, are other types of rights. The intellectual property rights over the media are now universally discussed. To obtain the status of intellectual property upon a news item (which is covered by the history), the type of, angle of the camera, the name of the cameraman etc is to be found out. The former is supported by the UNESCO. The latter is supported by the WIPO.\footnote{WIPO and UNESCO are UN bodies. Both accessed through UN sites as well as the concerned sites. www.wipo.org, www.unesco.org and www.un.org. Last visited on 1-1-2013.}

6.2.2 Broadcaster’s economic rights over intellectual property

The copyright subsists in original literary, dramatic, musical and artistic works; cinematographs films and sound recordings. The authors of copyright in the aforesaid works enjoy economic rights under Sec 14 of the Act. The rights are mainly, in respect of literary, dramatic and musical, other than computer program, to reproduce the work in any material form including the storing of it in any medium by electronic means, to issue copies of the work to the public, to perform the work in public or communicating it to the public, to make any cinematograph film or sound recording in respect of the work, and to make any translation or adaptation of the work.

In the case of computer program, the author enjoys in addition to the aforesaid rights, the right to sell or give on hire, or offer for sale or hire any copy of the computer program regardless whether such copy has been sold or given on hire on earlier occasions. In the case of an artistic work, the rights available to an author include the right to reproduce the work in any material form, including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work, to communicate or issues copies of the work to the public, to include the work in any cinematograph work, and to make any adaptation of the work. In the case of cinematograph film, the author enjoys the right to make a copy of the film including a photograph of any image forming part thereof, to sell or give on hire or offer for sale or hire, any copy of the film, and to communicate the film to the public. These rights are
similarly available to the author of sound recording. In addition to the aforesaid rights, the author of a painting, sculpture, drawing or of a manuscript of a literary, dramatic or musical work, if he was the first owner of the copyright, shall be entitled to have a right to share in the resale price of such original copy provided that the resale price exceeds rupees ten thousand.\footnote{476}

\textbf{6.2.3 Broadcaster’s Moral rights over intellectual property}

Section 57 of Copyright Act defines the two basic “moral rights” of an author. These are: (i) Right of paternity, and (ii) Right of integrity. The right of paternity refers to a right of an author to claim authorship of work and a right to prevent all others from claiming authorship of his work. Right of integrity empowers the author to prevent distortion, mutilation or other alterations of his work, or any other action in relation to said work, which would be prejudicial to his honour or reputation. The proviso to section 57(1) provides that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer program to which section 52 (1)(as) applies (i.e. reverse engineering of the same). It must be noted that failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section. The legal representatives of the author may exercise the rights conferred upon an author of a work by section 57(1), other than the right to claim authorship of the work.\footnote{477}

\textbf{6.2.4 Performers Rights}

Performer's rights are mentioned in the Copyright Act.\footnote{478} Performance include the news, sports, skits, gymnastics, live shows or any kind of performance etc. Whether in the presence of reading news and information, performing sporting activities, participation by members of an audience and certain performances by teachers and students in the course of educational instruction an audience or otherwise, performers’

\footnote{476} The Copyright Act, 1957 came into effect from January 1958. This Act has been amended five times since then, i.e., in 1983, 1984, 1992, 1994 and 1999, with the amendment of 1994 being the most substantial. Prior to the Act of 1957, the Law of Copyrights in the country was governed by the Copyright Act of 1914. This Act was essentially the extension of the British Copyright Act, 1911 to India.

\footnote{477} The Copyrights Act

\footnote{478} Performer’s rights are considered as a part of the copyright in India. In fact the case called Hero cup case came as a part of the performance of the cricket.
rights apply to the following live performances: a dramatic work, or part of such a work, including a performance given with the use of puppets; a musical work or part of a musical work; a dance; a circus act or a variety act or any similar presentation or show; and an expression of folklore.; or a reading, recitation or delivery of a literary work or part of a literary work, or the recitation or delivery of an improvised literary work. If you are staging a live performance within the above categories, or recording or filming such a live performance, performers’ rights should be considered. If the performance in question does not fall into any of these categories, the performer has no performers' rights in that performance. It should be noted that certain performances do not attract performers’ rights, such as performances by teachers and students in class.479

6.2.5 Neighbouring Rights

The term neighbouring rights (also often referred to as related rights) is usually understood to mean rights that protect the interests of certain groups of right holders, whose activities in most cases relate to the reproduction and dissemination of works, such as: Performers; Producers of sound recordings. Broadcasting organizations Protection under neighbouring rights is similar to that of copyrights.480

6.3.1 International conflicts on the basis of Intellectual Property in Electronic Media

It is not possible to segregate copyright and neighbouring rights so as to provide a separate legal regime for protection of neighbouring rights. International developments in this area of intellectual property have created so much trade interest that World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) stand together on the issues of protection and compel the member countries to bring their domestic laws in conformity with international commitment that facilitates trade. This shows that neighbouring rights have acquired a status, from which no relegation is possible now, what is left is to move further and devise stringent legal regime to strengthen these intermediary rights. Both the treaties, WCT and WPPT,

479 http://copyright.gov.in/. Last visited on 10-10-2012
480 http://www.unesco.org/fileadmin/multimedia/hq/clt/creativity/pdf/copyright/basic_notions_en.pdf last visited on 10-10-2012. The difference of opinion on telecasting between UNESCO and WIPO is going on and is being debated in UN as well as in the broadcasting countries.
particularly deal with the use of copyright protected works, performances and sound recordings in digital networks, such as the Internet.

6.3.2 The rights applicable to internet users in India

Authors, performers and phonogram (i.e. record) producers are granted a broadly worded exclusive right of communication to the public, covering interactive services and delivery on demand. Still a lot needs to be done to cope up with the developing aspects of neighbouring rights. The world looks ahead to WIPO webcasting treaty in order to see a bright dawn of the neighbouring rights protection regime. An attempt has been made to highlight and identify protection regime for the neighbouring rights under the Copyright Act, 1957, in India.\footnote{http://nopr.niscair.res.in/ last visited on 10-10-2012

6.4.1 Judicial pronouncements and intellectual property

Though mark is not substantially used, but if the reference made points towards the product of another person and results in its disparagement, the user can be held liable. In Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.,\footnote{Reckitt & Colman Of India Ltd. vs Kiwi T.T.K. Ltd., 63 (1996) DLT 29, 1996 (37) DRJ 649, (1996) 114 PLR 45.per: S Mahajan. J.} the plaintiff company is engaged in manufacture and sale of consumer products and one of the products of the plaintiff is liquid shoe polish being manufactured and marketed by them under the name and style of Cherry Blossom Premium Liquid Wax Polish. Defendant is also engaged in the manufacture of polish and one of the brands being manufactured and marketed by the defendant is "Kiwi" brand of liquid polish.

It is alleged that the liquid polish being marketed by the defendant and some other manufacturers have much less wax contents and more acrylic contents as compared to the liquid polish of the plaintiff. The acrylic base allegedly tends to form a film on the footwear which over a period of time is liable to crack and thus damage the footwear. It is, therefore, stated that the liquid polish of the plaintiff having wax rich formula is better than the other polishes. The liquid polish of the plaintiff is sold and marketed in angle neck bottles which are alleged to have easy application of the polish to the footwear. An imported applicator is alleged fitted on to the bottle which is
strengthened by chemical flocking on the surface as also by riveting the sponge on to the plastic applicator base. The plaintiff has claimed its product to be superior to the similar product of the other competitors in every respect and it is stated that the plaintiff has 68% market share of the liquid shoe polish whereas the defendant has only 20% of such share.\footnote{In a broadcasters view this finding is applicable to them also. The intellectual property laws as well as the advertisement laws are different for the electronic media.}

The defendant with a view to promote its product is displaying an advertisement through the electronic media. The advertisement of the defendant shows a bottle of "Kiwi". From which the word "Kiwi" is written on white surface which does not drip as against another bottle described as "others" which drips. The product shown to have been flowing from the bottle of "Others" is from a bottle marked "Brand X" and allegedly looks like the bottle of the liquid shoe polish of the plaintiff for which the plaintiff allegedly has a designed registration granted in 1993 under design No. 165756. The bottle of "Others" marked "Brand X" also has a red blob on its surface, which allegedly represents "Cherry" which appear on the bottle of the plaintiff’s product. Besides the advertisement in the electronic media, defendant had also been circulating a "point of sale" poster material at shops and marketing outlets selling similar products. It is alleged that in the said poster material circulated by the defendant, the bottle shown, as "Others" with a faulty applicator allegedly resembles the applicator of the plaintiff.

The advertisement was regarded as comparative advertisement and five principles laid down by the Court to decide as to whether a party is entitled to an injunction are as under the law: (1) A tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue. (2) He can also say that my goods are better than his competitors', even though such statement is 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 goods is better than his competitors', say that his competitors' goods are bad. If he says so, he really 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 to the goods or to the
manufacturer of such goods no action lies, but if there is such defamation an 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. If it was held that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad so as to puff and promote his goods.

In Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr, the facts were that the plaintiff was the manufacturer of blue whitener under the name and style of "Robin Blue". The defendant had also started manufacturing blue whitener and with a view to promote their products they issued an advertisement allegedly making disparaging representations to the plaintiff's Robin Liquid Blue. The defendants had depicted the product of the petitioner showing the container in which the product of the petitioner was sold and in regard to which the petitioner had a registered design. It was further shown in the advertisement that the product contained in the said container was priced at Rs.10.00. By giving the price, the respondent had in no uncertain terms identified the product of the petitioner since the only blue whitener sold in the market at the relevant time priced at around Rs.10.00 was the product of the petitioner. It was contended in the advertisement that the said blue was uneconomical and it was then contended that at Rs.10.00 the average blue is the most expensive to white your clothes. Thereafter it was added "What is more, you have to use lots of blue per wash". By making this comment the container of the petitioner had been shown upside down and had been further shown that the liquid was gushing out. The object was obviously to show that the product of the petitioner priced at Rs.10.00 gushed out as a squirt and not in drips while being used and, therefore, it was expensive way to whiten the clothes. It was in these circumstances that the Court held that the assertion made in the

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484 Defamation is not a separate law for the electronic media. For example the innuendo and fair comment in law of torts, per se defamation in criminal law and economic loss theory in advertisement laws are applicable to the electronic media.

485 Calcutta High Court, Reckitt & Colman Of India Ltd vs M.P.Ramchandran and another on 22 June, 2010, CS No.31 of 1996, per Maharaj Sinha J.
advertisement was clearly related to the product of the petitioner in that case and was
made with a view to disparage and defame the petitioner's product. The Court had
based its decision mainly on the fact that the price of the container shown in the
advertisement was Rs.10.00 and no other blue whitener except that of the petitioner
was at the relevant time priced at Rs.10.00 and it, therefore, held that the advertisement
was directly related to the product of the petitioner. The Court, therefore, in that case
restrained the respondent from issuing the advertisement in question.486

Once it is made out that trademark has been used, the next issue to make out
infringement has to be determined as to whether it has been used in disparaging the
goods of the owner of the trademark. And when the latter is established it gives rise to
the action against trademark infringement. Use of the trademark to disparage the goods
of another has been dealt in Pepsi Co. Inc. and Others. v Hindustan Coca Cola Ltd and
Another, in which Court has referred to Kerly's law of trademarks and trade names by
David Kitchin and another.487

Article 3(a) deals with Comparative advertising which shall, as far as the
comparison is concerned, be permitted if the following conditions are met (a) "it is not
misleading according to Articles2(2), 3and7. Art. 2(2) reads as: ‘misleading advertising’
means any advertising which in any way including its presentation, deceives or is likely
to deceive the persons to whom it reaches and which, by reason of its deceptive nature,
is likely to affect their economic behaviour or which, for those reasons, injures or is
likely to injure a competitor. Art 3 in determining whether advertising is misleading,
account shall be taken of all its featured, and in particular of any information it contains
concerning: (a) the characteristics of goods or services, such as their availability,
nature, execution, composition, method and date of manufacture or provision, fitness
for purpose, uses, quantity, specification, geographical or commercial origin or the
results to be expected from their use, or the results and material features of tests of
checks carried out on the goods or services. (b) The price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services

486 Calcutta High Court, Reckitt & Colman Of India Ltd v M.P.Ramchandran and another, 2010, CS
487 2003 (27) PTC 325
provided; (c) The nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

Art.7 the Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public. (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 trademarks, trade names, other distinguishing marks, goods or services and those of a competitor; (e) It does not discredit or denigrate the trademarks, 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 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 trademark or trade name.

This shows that comparative advertising cannot be permitted which discredits or denigrates the trade mark or trade name of the competitor. The Pepsi Company Incorporation along with Pepsi co (India) Holdings Limited and Pepsi Foods Limited, the appellants (plaintiffs before the trial court) filed suit against Hindustan Coca Cola and others. Hindustan Coca Cola and others are endorsing their product with the help of a commercial which shows that the lead actor asks a kid which is his favourite drink. He mutters the word "Pepsi", which can be seen from his lip movement though the same is muted. The lead actor thereafter asks the boy to taste two drinks in two different bottles covered with lid and the question asked by the lead actor is that "Bacchon KO Konsi pasand aayegi". After taste the boy points out to one drink and says that that drink would be liked by the children because it is sweet. In his words he

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488 Pepsi Co., Inc. and other v Hindustan Coca Cola Ltd. and another, Delhi High Court 2003 (27) PTC 305 Del.
says. "Who meethi hain, bacchon ko meethi cheese pasand hai". He preferred the other drink which according to him tastes strong and that grown up people would prefer the same. Later the stronger one came out be "Thums Up", and one which is sweet, word "Pappi" is written on the bottle with a globe ‘device’ and the colour that of the "Pepsi". The model had at the initial stage given his preference for "Pepsi". Subsequently finding it to be a drink for kids, the boy felt embarrassed. There are other commercials by the respondents where the lead actor said "Wrong choice baby", and that the "Thums Up" is a right choice, and "Kyo Dil Maange No More" for the appellant’s products. Here the issue was whether the commercial by depicting that the boy preferred Thums Up as against "Pepsi" because Thums Up is strong drink while "Pepsi" is for children as children like sweet, amounts to disparagement or it is only a healthy competition and puffing the product of the respondents.

6.4.2 Disparagement and electronic media

Disparagement as per The New International Webster’s' Comprehensive Dictionary means, to speak of slightly, undervalue, to bring discredit or dishonour upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation. The Concise Oxford Dictionary defines disparage as under, to bring discredit on, slightly off and depreciate." In the electronic media the disparaging message is conveyed to the viewer by repeatedly showing the commercial everyday thereby ensuring that the viewers get clear message as the said commercial leaves an indelible impression in their mind. To decide the question of disparagement we have to keep the following factors in mind namely; (1) Intent of commercial (2) Manner of the commercial (3) Story line of the commercial and the message sought to be conveyed by the commercial. Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable. 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.490

Hindustan Lever introduced new toothpaste called New Pepsodent, claiming to be 102% better than the leading toothpaste. Advertisement showed New Pepsodent superior in killing germs than any other toothpaste. Lip movement in the ad indicated Colgate as the other toothpaste referred, although voice muted. Also, same jingle as used in the Colgate ad is played. Court held that direct reference about inferiority need not be shown and such reference amounted to disparagement. Advertisement likely to leave doubt in minds of viewers that Pepsodent was being compared with Colgate. Injunction was granted.

6.4.3 TV commercial in a derogatory and mocking manner

By calling the Cola drink of the 'appellants this is for children and the children ill like it to which the opponents said that this a "Wrong Choice Baby". The respondents depicted the commercial in a derogatory and mocking manner. It can't be called puffing up. Repeatedly telecasting this commercial will leave an impression on the mind of the viewers that product of the appellant i.e. "Pepsi" neither is simply a sweet thing nor meant for grown up or growing children. If they choose Pepsi, it would be a wrong choice. The message is that kids who want to grow should not drink "Pepsi". They should grow up with "Thums UP". The manner in which this message is conveyed does show disparagement of the appellant's product. Both the products used the electronic media to market their product.

6.4.4 Electronic media comments made in generic sense

When the reference has been made in generic sense, but it still results in disparagement of the product of another, cause of action lies. In Dabur India Limited v. Emami Limited, It was held that 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

490 Supreme Court of India in Colgate Palmolive (India) Ltd vs Hindustan Lever Ltd 1999, 1998 (1) SCC 720.
advertisement in question, for Dabur Chayawanprash is also a Chayawanprash as against which disparagement is made. To the same effect is the judgment of Calcutta High Court in Reckitt & Colman of India Limited v. M.P. Ramachandran and Anr. 491

When the Defendant is propagating in the advertisement that there should be no consumption of Chayawanprash during the summer months, it is also propagating that the Plaintiff's Chayawanprash should not also be taken during the summer months as it is not good for health and instead Amritprash, which is the Defendant's product, should be taken. Such an advertisement is clearly disparaging to the product of the Plaintiff as there is an element of insinuation present in the said advertisement.

In Dabur India Limited Vs. Colgate Palmolive India Ltd. 492, Trade rivalries which lead to advertisements in which the product of an advertiser is extolled and the rival product deprecated have led to this suit by the plaintiff Dabur India Ltd. who makes Dabur Lal Dant Manjan Powder, against the defendant Colgate Palmolive India Ltd. who manufacture Colgate tooth powder. This suit and this application for interim injunction are occasioned by an advertisement aired on the visual media by the defendant.

The sum and substance of the TV advertisement complained of is that a Cinestar Sunil Shetty is seen stopping the purchasers of Lal Dant Manjan powders. He further inform them of the ill effects of such Lal Dant Manjan by rubbing it on the purchaser's spectacles which leave marks which are termed by Sunil Shetty as being akin to sandpapering. He also endorses the defendant Colgate's tooth powder as being 16 times less abrasive and none damaging to the spectacles. He is heard telling the purchaser that it is easy to change spectacles but not the teeth.

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6.5.1 Electronic media coerced for marketing

When the Electronic media came into picture regarding advertisements the court relied upon, Reckitt and Coleman v. Kiwi T.T.K. Ltd\textsuperscript{493} and Dabur India Ltd. v. Emami Ltd.\textsuperscript{494}. The following paragraph can be quoted from Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr.\textsuperscript{495}. "Therefore, in a suit of this nature one has to look at whether the advertisement merely puffed the product of the advertisement advertiser or in the garb of doing the same directly or indirectly contended that the product of the other trader is inferior. There cannot be any dispute that in the concerned advertisements blue was stated to be of inferior quality. Although, for having depicted the container and the price in the advertisement together it is difficult to proceed on the basis that the defendant No. 1 was not referring to Robin Blue, but assuming in the advertisement insinuations are not made against Robin Blue and the same were directed to all blues as has been stated is no uncertain terms in the affidavits, can it be said that it was not made against Robin Blue. The answer is a definite 'no', because Robin Blue is also blue.

6.5.2 Unfair trade practises in the electronic media

Unfair trade practises in the electronic media is actionable under the laws on trade as well as the intellectual property. Court also relied upon Pepsi Co. Inc. and Others. v. Hindustan Coca Cola Ltd. and Another\textsuperscript{496} and Wander Ltd. and Another v Antox India P. Ltd\textsuperscript{497}, particularly in which it was said that “An infringement action is available where there is violation of specific product right acquired under and recognised by the statute. In a passing off action, however, the plaintiff's right is independent of such a statutory right to a trademark and is against the conduct of the defendant, which leads to or is intended or calculated to lead to deception. Passing off is said to be a species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the

\textsuperscript{493} Reckitt & Coleman v. Kiwi T.T.K. Ltd., 1996 PTC (16) 393;
\textsuperscript{494} Dabur India Ltd. v. Emami Ltd., IA No. 2124/2004 in CS (OS) 453 of 2004
\textsuperscript{495} Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr., 1999 PTC (19) 741
\textsuperscript{496} Delhi High Court, Pepsi Co, Inc. and others v Hindustan Coca Cola Ltd. and another. 2003 (27) PTC 305 Del.
\textsuperscript{497} 1990, Supp. SCC 727
reputation, which another has established, for him in a particular trade or business. The action is regarded as an action for deceit. The tort of passing off involves in misrepresentation made by a trader to his prospective customs calculated to injure, as a reasonably foreseeable consequence, the business or goodwill of another which actually or probably, causes damages to the business or good of the other trader." It was held that as the mark could not be established as registered trademark, S. 29(8) could not be stressed. But relying upon the above authorities, the court held that the generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or genre of a product within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified.

6.5.3 Unregistered electronic media commercials

When the statement disparaging the plaintiff’s product is true in comparative advertising, no relief can be given to the plaintiff. In Reckit Benekiser (India) Limited v Naga Limited and Others, the plaintiff has filed this Suit for permanent and mandatory injunction, being aggrieved by the defendant's television commercial which depicts a woman in an advanced stage of pregnancy needing urgent medical assistance during a train journey. The doctor calls for hot water and is handed a cake of soap which she rejects, stating that an antiseptic soap is needed. It is not in dispute that the soap which was handed over to the doctor is identifiable by viewers as the plaintiff's product, namely, Dettol Soap. The doctor further states in the commercial that "at a time like this, you do not need just antiseptic, you need a protector". The defendant's Ayurvedic soap is then shown and it is concurrently stated that it is body 'rakshak' soap, the first Ayurvedic soap that completely removes all seven kinds of terms and protects from infection. The plaintiff's grievance is that this commercial disparages its Dettol Soap. It is averred that the intention behind the commercial is malicious, especially in view of the trade literature which shows that Dettol Brand sales are about 30.35 crores

498 Passing off is a tort applicable to products similar to that of the unregistered copyright.
499 Delhi High Court, Reckit Benckiser (India) Limited vs Naga Limited and others. 104 (2003) DLT 490, 2003 (68) DRJ 441.
out of a total sales of Rs. 230 crores. The plaintiff has vehemently stressed that Dettol is the leader in brand equity.

6.5.4 Electronic media and passing off

Passing off is a part of tort. Electronic media may be used for passing off. The issue in passing off was whether the defendant could be held to have disparaged the plaintiff's product even though no false statements have been made by the defendant. It was held that if a competitor makes the consumer aware of his mistaken impression, the plaintiff cannot be heard to complain of such action. Truth is always a complete defence against any assault or challenge regardless of whether any damage is sustained as a result of it. The public belief is that Dettol soap shares the same medicinal and curative qualities as the Dettol liquid. It matters little whether this misunderstanding has been contrived by the manufacturer or has developed in the consumers mind independently. If any party, such as the defendant, helps in correcting the error, it commits no illegality. The tortuous injunction, which is the backbone of the present action, is predicated on falsehood, and in the present circumstances, the falsehood can be laid at the door of the Plaintiff and not of the defendant. The vast majority of the viewer of the commercial advertisement on electronic media are influenced by the visual advertisements as these have a far reaching influence on the psyche of the people, therefore, discrediting the product of a competitor through commercial would amount to disparagement as has been held by the High Courts and the Supreme Court of India as well as the Law laid down by Courts in U.K. and U.S.A.

In the authority of Pepsi Co Inc and another v Hindustan Coca Cola and Ors which was decided in 2001, court dealt with the issue whether use of trademark in comparative advertising amounts to trademark infringement or not and decided it in negative as infringement occurs when two essentials are fulfilled that is, if the defendant has used the substantially similar mark and that too for passing off his own goods as that of the plaintiff's. In comparative advertising one or both may be absent.

500 Mahendra & Mahendra Paper Mills v Mahindra & Mahindra Ltd. AIR 2002 SC 117
501 N.R. Dongre and Ors. v Whirlpool Corporation And Anr. AIR 1995 Delhi 300
502 Delhi High Court, Pepsi Co, Inc. and others v Hindustan Coca Cola Ltd. and another. 2003 (27) PTC 305 Del.
sometimes. As it may be possible that only a reference is made to the mark and not the substantially similar mark is used. And the mark is not used to pass off the goods but to compare both the goods. 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, such use generally/specifically of a proprietor's product for a comparison with the rival product of another proprietor 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.

6.6.1 Statutes on broadcaster’s rights

Numerous statutes are there either directly or indirectly are a part of the electronic media regulation. Since they are scattered not even the media personnel are not able to find out the appropriate one. The broadcaster’s rights were mentioned in the following notifications:

(1) Notification GSR.459 (E) dated 02.08.2006 regarding amendment in Cable Television Networks Rules, 1994,

(2) Notification GSR.469 (E) dated 09.08.2006 amendment in Cable Television Networks Rules, 1994,

(3) Notification G.S.R. 104(E) dated 25th February, 2008 amending Rule 7(2) (viii) (A) of the Cable Television regarding Networks Rules

(4) Notification GSR 138(e) dated 27.02.2009 Amending rule 7(2) VIII (A) of the Cable Television Networks Rules

(5) The Cable Television Networks (Regulation) Amendment Ordinance, 2011

(6) Notification regarding introduction of Digital Addressable System (DAS)

(7) Cable Television Networks (Regulation) Amendment Act, 2011 No 21 of 2011,

(8) Cable Television Networks Amendment Rules, 2012 Digital Addressable System,
(9) Notification regarding extension of date of DAS in the first phase for the cities of Delhi, Mumbai, Chennai & Kolkata

6.6.2 Conclusion

Since the law relating to the electronic media in India is so scattered the aggrieved persons, the State or the private media is able to find out the necessary ones. Sometimes the shrewd lawyers who are appointed by rich class especially by the media may be able to find out a loophole in the law. A code consolidating all the powers and rights relating to the electronic media is needed in the matter of the intellectual property also. The electronic media Code shall have a section for the intellectual property also.

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