CHAPTER 2

COMPARATIVE ADVERTISEMENT – AN OVERVIEW

The previous chapter has dealt with a brief introduction on comparative advertisement and objectives and methodology of this study. This chapter is designed to give a detailed account of the theoretical background of comparative advertisement. This chapter has two sections. The first section will discuss comparative advertisement in general and the second section will deal with legal background of comparative advertisement in USA, European Union and India.

I. COMPARATIVE ADVERTISEMENT IN GENERAL

Comparative advertising, as stated in the previous chapter, is advertising where a party (the advertiser) advertises his goods or services by comparing them with the goods or services of another party. Such other party is usually his competitor and is often the market leader in the particular trade. The comparison is made with a view towards increasing the sales of the advertiser. This is typically done by either suggesting that the advertiser’s product is of the same or a superior quality to that of the compared product or by denigrating the quality of the compared product.¹

DEFINITION OF COMPARATIVE ADVERTISEMENT

According to the Federal Trade Commission (FTC) in the US “Comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price and identifies the alternative brand by name, illustration or other distinctive information” (Statement of policy regarding comparative advertising, Federal Trade Commission., Washington, D.C. Aug. 13, 1979).
The European Union directive 97/55/EC on misleading and comparative advertising says that “comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by the competitor”.

Hungarian law defines comparative advertising as “advertising that directly or indirectly allows the recognition of another enterprise which engages in the same or a similar activity as the advertiser or of goods manufactured, sold or introduced by such other enterprise for the same or similar purpose as those featuring in the advertising.”

German law defines comparative advertising as “every advertisement, that directly or indirectly allows recognition of goods or services offered by a competitor”. These definitions show how consumer behaviour and market condition have influenced the law and understanding of comparative advertising on a global level.

FUNCTIONS OF COMPARATIVE ADVERTISEMENT

Comparative advertising should enable advertisers to objectively demonstrate the merits of their products. Comparative advertising improves the quality of information available to consumers enabling them to make well founded and more informed decisions relating to the choice between competing products/services by demonstrating the merits of various comparable products. Based on this information, consumers may make informed and therefore efficient choices. (These statements are true only if the comparative advertising is objective).

Comparative advertising, which aims to objectively and truthfully inform the consumer, promotes the transparency of the market. Market transparency is also deemed to benefit the public interest as the functioning of
competition is improved resulting in keeping down prices and improving products. Comparative advertising can stimulate competition between suppliers of goods and services to the consumer’s advantage.³

ADVANTAGES OF COMPARATIVE ADVERTISEMENT

There are several advantages to using a comparative advertising message. A comparative ad. may be a way of gaining attention, particularly when a new or lesser-known brand compares itself to a well known brand or market leader. Comparative ads also allow a company to directly communicate the features, attributes, benefits and advantages of its product or service relative to those of its competitor(s). For a new brand, comparative advertising provides a way of positioning the product in the evoked set of brands the consumer might consider. It also helps consumers to decide on which product is better and what is best suited for him.⁴

RISKS OF COMPARATIVE ADVERTISEMENT

Comparisons between goods and services of different undertakings carry with them some significant risks. There is a danger that once undertakings address the merits and inadequacies of competing goods or services, they may be tempted to denigrate them or derive unfair advantages from such inaccurate comparisons. Just like traditional forms of advertising, comparative advertising seeks to both assist the development of the undertaking concerned and to inform consumers. Although both forms of advertising seek to attract consumers, in case of comparative advertising, commercial relationship may be exposed to the constant threat of unfair practices.⁵

TYPES OF COMPARATIVE ADVERTISEMENT

Darrel. D. Muehling, Peter Raven (1989) had defined four types of comparative advertisements for the purpose of their study. The four types
defined were: (i) advertisement that make direct comparisons with a clearly identified and named competitor; (ii) advertisements that make reference to the competitor by implication only (i.e.) the competitor’s identity might be readily apparent to members of the audience. But the brand name is not actually mentioned); (iii) advertisements that make comparisons with a fictitious brand (brand X ); (iv) advertisements that make broad, general product comparisons with all competitors or simply tout product features without mentioning the competition what some might label as non – comparative advertisement.⁶

In their study, “Comparative Magazine Advertisements” (1979), Brown and Jackson and Harmon have defined the different types of comparative ads under categories such as comparative ad., strictly comparative ad and implied comparative ad for the purpose of their study. The definition given by them is more or less on similar lines as that given by Darrel D. Muchling and others.⁷

Comparisons made in the abovementioned comparative ads can be either positive or negative and may seek either to associate or differentiate two (or more) brands. Associative comparative ads largely emphasise brand similarities whereas differentiative ones focus on brand differences.⁸ In many cases, an advertisement will have both an associative and differentiating dimension. For example, an advertisement that refers to computer A in terms that it is as good as or equivalent to computer B, but half the price—seeks to associate the two products in terms of quality but to differentiate them in terms of price. These two functions (association and differentiation) need to be considered carefully if comparative ads. are to be used effectively since the impact that they have on consumers may be different.
II. LEGAL BACKGROUND

Comparative Advertisement in the USA

In the USA, federal advertising legislation is found in two major laws: The Federal Trade Commission Act and the Trademark (Lanham) Act (the federal trademark statute prohibiting false designations of origin and false or misleading description of facts). The Federal Trade Commission when it was founded in 1914, had as its mission to protect businesses against unfair practices. In 1992, the Supreme Court ruled that the FTC has the right to regulate advertising. Specifically, this ruling allowed the FTC to regulate all aspects of false labelling and unfair methods of competition in advertising. Comparative advertising became an important issue in the 1960’s and 1970’s. Early on, the FTC has emphasized that comparative advertising is a means to transmit information to consumers. In 1963, the FTC narrowed an order with respect to comparative advertising so as to allow firms to make “truthful and non-deceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess. Such a comparison may have the effect of disparaging the competing product, but we know of no rule of law which prevents a seller from honestly informing the public of the advantages of its products as opposed to those of competing products” (60 FTC at 796).

The relatively sudden increase during the 1970’s and 1980’s, in the use of explicit comparisons in advertising in the US was in part a result of a Federal Trade Commission appraisal of such a practice as a means of improving competition. The FTC statement reads:” The commission has supported the use of brand comparisons where the bases of comparison are clearly identified. Comparative advertising, when truthful and non – deceptive, is a source of important information to consumer and assists them in making rational purchase decisions. Comparative advertising encourages product

Both competitors and consumers can address to the FTC for controversies arising from comparative advertising. Nevertheless most complaints about comparative advertising actions have not come from consumers, but instead from the firms which were the target of comparison. Since 1974, plaintiffs, instead of addressing to the FTC, started ordinary Court actions applying to the 1946 Lanham Act. These firms have found that section 3(a) of the Lanham Act (although it does not mention advertising) holds in the words of Bixby and Lincoln (1989, page 145) “the key to getting more expedient and decisive action taken on their complaints. [...] Section 43(a) of Lanham Act was largely intended to clarify trademark, “palming off”, and other trade law issues. However, it has been used as a basis for private litigation against companies promulgating allegedly false comparative advertising.”

The amended Section 43(a) of the Lanham Act says that “any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, of geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or he is or is likely to be damaged by such act.” Plaintiffs typically have used section 43(a) of the Lanham Act rather than the FTC Act “because (1) it may give them immediate relief from competitive advertising by means of an injunction, (2) it may oblige the competitor to run corrective advertising and
(3) it may allow the plaintiff to collect damages from the defendant.”  (Bixby and Lincoln, 1989, page 145).

**Legal practice: standards of substantiation**

An important issue is whether the standards of substantiation are to be higher using comparative advertising compared to other forms of advertising which makes claims about product characteristics. The position of the FTC, as stated in 1979, reads: “On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self–regulation entities. The Commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques. The ultimate question is whether or not the advertising has a tendency or capacity to be false or deceptive. This is a factual issue to be determined on a case–by–case basis. However, industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised.”  (Statement of Policy Regarding Comparative Advertising, Federal Trade Commission, Washington, D.C., August 13, 1979)

Two important caveats to be noted are: (i) Since competitors can take actions against comparative claims and much less so against claims that are not comparative, the FTC statement of non–discrimination may not correspond to legal practice.  (ii) The FTC statement becomes empty, if comparative advertising is the only means to communicate content about a product to consumers. This is the case if a competitor’s product serves as a reference point for consumers because consumers do not have an understanding for absolute content statements.

“To state a cause of action for misleading advertisement under the Lanham Act, a plaintiff must establish the following: 1) the defendant has
made false or misleading statements of fact concerning his own product or another's; 2) the statement actually or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; 4) the advertisements were introduced into interstate commerce, and 5) there is some causal link between the challenged statements and harm to the plaintiff.” (Leighton 2004, Page 588).

“When materiality has to be proven under the Lanham Act, it usually must be shown that the claim at issue likely would affect purchase decisions of a significant percentage of the intended audience.” (Leighton, 2004). The plaintiff must provide clear results from consumers' surveys about how consumers interpret the claim and subsequently exert purchasing choices. Notice that even if the claim is not literally false, it is actionable if it provides consumers with a wrong perception of reality. In other words the content of an ad is important (it must be true) but also the general impression given to consumers matters. In particular, what matters is the way consumers interpret the ad. To summarize, two situations are possible. An ad may have literally false statement but not be deceptive or misleading in its net impression. Or every claim in an ad may be literally true, but the net impression given by the ad can be misleading. As Wood (2003) reports: “most cases involve advertising that contains literally true statements when viewed out of context but, as presented, leaves a false or deceptive net impression.”

More specifically, courts place false or misleading advertising into three categories: implied falsity, literal falsity and mere puffery. Only the first two categories are actionable. “Most plaintiffs prefer the court to categorize the challenged advertising as literally false because the element of deception is presumed and no costly consumer survey is required” (McKenna and Manning 2002, p.2).
The third category is not actionable. Puffery can be used as a defense in Lanham Act false advertising cases. When such a defense succeeds, the court finding is that the claim in the ad is merely the seller's opinion and therefore non-actionable puffery. The courts and regulatory agencies find an advertising claim to be mere puffery when it obviously is not material to reasonable potential customers. In other words the claim clearly reports the seller's opinion and "no sensible man takes seriously". We can distinguish between "puffery by exaggeration, bluster, boast or humor" (the Mastercard advertising mentioned in the introduction falls in such a category). And "puffery by vagueness and/or seller's opinion" as the ad "the most beautiful car on the market" (Leighton 2004). However, the world of puffery is quite small for comparative ads, as Pizza Hut v. Papa John's exemplifies (although the federal court's decision was overturned). This case is discussed later on.

Also, comparative ads which may be defended as puffery may be ruled to violate trademark anti-dilution law. Section 43(c) of the Lanham Act contains the important norm concerning Trademark Dilution, i.e., disparagement, blurring or alteration of a competitor's "famous" trademark. It aims at preventing the reduction of a trademark's selling power. If a firm is the target of a comparison ad, it can base its lawsuit on Section 43(c) whenever the advertising campaign alters or distorts its trademark in any way that could be regarded as spoofing the mark. More than twenty States in the US have anti-dilution laws which sometimes are stricter than the corresponding federal law (as the New York's trademark anti-dilution statute). Recently, in the case *Deere & Company v. MTD Products, Inc.*, the court dismissed the allegation based on the Section 42(a) of the Lanham Act and found that the comparative statements were true. Anyway, the Court of Appeals for the Second Circuit of New York affirmed a lower court's injunction barring the comparative advertising because it violated New York's trademark anti-dilution statute. One law firm argues that other States would now look to New York' Court of
Appeals as persuasive authority and follow its interpretation of what constitutes "dilution" (Wood, 2004).

**Legal practice: damages**

Section 35 of the Lanham Act allows plaintiffs to claim a number of damages: lost profits, corrective advertising expenses to help regain loss business, attorneys’ fees, and punitive damages. Standards of proof for recovering damages for false advertising are high. In fact, to be entitled to damages, a plaintiff must show that consumers were actually deceived by the defendant’s false advertising and that there was a direct cause or connection between the alleged false advertising and the injury of the plaintiff. “However, in several cases, the courts have dispensed with the requirement that actual deception be proven where the defendant’s conduct was found to be wilful” (Raymond, 2004). Thus, when misrepresentations in the ad are wilful and egregious, actual deception is presumed and even punitive damages can be awarded. Anyway, damage awards have not been common in Lanham Act cases. On the contrary, only a dozen of court decisions provided for damages awards in false advertising cases and only some of them refer to comparative ad. The most important case, with a 40 million $ reward, is U-Haul International Inc. V. Jartran, Inc., 793 F.2d 1034 (9th Cir. 1986). This case is discussed later on.

The law firm Arnold and Porter – suggests that damages are so rare because of the perceived difficulty of proof. Other authors argue that the courts are sceptical towards comparative claims in litigations concerning trade mark infringement or malicious falsehood. In particular Swan (2000, page 4) reads: “judges take the view that the public is neither gullible nor particularly trustful of advertising. Even if a cause of action is established, judges take some convincing that a comparative advertisement has caused any damage".
COMPARATIVE ADVERTISING IN THE EU

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 (see e.g. J. Dickerson and P. Jordan from the DLA Group in the UK, www.dla.com). In particular “the explicit identification of a rival or its product constituted unauthorized use of the rival’s trademark or unfair denigration” (Petty and Spink, 1995). Recently, the UK had, compared with other Member States, a reputation of taking a rather relaxed approach (see below).

The European Union first addressed the issue of comparative advertising in the late 1970’s. 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 (almost 20 year after its first proposal). “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.” (Petty and Spink, 1995)

According to current European legislation, comparative advertising is allowed only if it is not misleading, compares like with like, does not create confusion, discredit or take unfair advantage of a rival’s trademark or present goods as imitations of those bearing a protected trade name. To be more
precise, it is stated in article 3a of the Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 that

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.
Several of the restrictions on comparative advertising can be defended by commonsense, although they are open for interpretation. However, a defense of condition (f) is less clear as it requires comparisons to products with the same designation. In particular, this effectively reduces the possibility of imports to establish themselves against certain home—grown products.

The authority responding to controversies arising from comparative advertising is the competition authority in every member state. However, the directive provides for the possibility of ordinary Court actions when comparative advertising consists in acts amounting to unfair competition, or infringes the laws on copyright, trademarks or other distinguishing signs. In particular, not only the competitor but also consumers and their organizations and associations can directly apply to a court.

In Section 7 (administrative and judicial remedies) of the Directive 97/55/EC, it is written that (i) the ad deemed to be unlawful can be provisionally suspended by the Authority; (ii) the advertiser can be asked to furnish evidence as to the accuracy of factual claims in the ad, if evidence is not given or is deemed inadequate, the factual data shall be considered false; (iii) when the Court rules in favour of the plaintiff, the misleading ad must be stopped and eventually the Court’s judgment published, moreover, the advertiser can be asked to publish a corrective ad.

As Petty and Spink (1995, page 317) observe, “the tenor and language of the European (proposal) directive contrast sharply with the permissiveness of U.S. policy toward comparative advertising. Although legal violations, such as trademark infringement, disparagement, and passing off, are recognized in both the United States and Europe, they are more broadly construed in Europe.” Moreover, they claim that “in many cases, comparisons allowed in the United States will be prohibited in Europe.”
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.

PARTICULAR COUNTRY STUDY: UK

Before 1994 comparative advertising were prohibited in the UK because it amounted to trade mark infringement. Then, section 10(6) of the Trade Mark Act (TMA) permitted the use of another trademark for purpose of making a comparison within certain guidelines. As Berns Wright and Morgan (2002, page 14) put it: “the TMA provides that trademarks must not be used other than in accordance with honest practice. The courts’ test for honesty is an objective one. They ask: would a reasonable reader, accustomed to advertisings’ use of hyperbole and even “knocking copy”, find the advertisement so biased or misleading to be dishonest? The comparison must be between products intended to meet the same needs or intended for the same purpose. The comparison must be material, relevant, representative, and verifiable.” Moreover, comparative advertising must not create confusion, nor create the impression of a link between different trademarks. In the cases of alleged trademark infringement, the plaintiff, who is the trademark owner, has to prove that the use of the trademark is not honest.

Some years after the TMA approval, the European Directive on comparative advertising was implemented in the UK with the Control of Misleading Advertising (Amendment) Regulations 2000. As Dickerson and Jordan (2003) observe, the harmonization initiative did not mean for the UK a
relaxation of the law on comparative advertising, contrary to what happened in the other Member States.

Given that the use of comparative advertising has been introduced so recently, UK courts are still determining the way comparative advertising laws are being put in practice. Several cases in the recent past suggest a general encouragement to the use of comparative advertising, as discussed in the later pages.

Berns Wright and Morgan (2002) compare the European Directive and the UK Trademark Law on the side with the FTC’s statements and the Lanham Trademark Law on the other side. Some interesting points arise. In the FTC’s law, the focus of protection is only on consumers and competitors, while in the Directive it includes the general public as well. The comparative claim must compare “like with like” in UK, while the comparison of dissimilar product is permitted in the US. Moreover, objective claims are required in the UK while subjective claims are permitted in the US. Testing in a lawsuit must be run by independent third party in UK, whereas standards are not set in the US. The burden of the proof as to the accuracy of factual claims in the ad is given to the advertisers in the UK, while it is given to the competitor challenging the claim in the US. Malicious intent must be proved in the UK for an ad to be actionable, this is in line with the “Honest Practice” the Court asks for, according to the TMA.

As a consequence, the comparison between the UK’s and the US’s attitude on comparison ad suggests for advertisers that since “the American approach of aggressive, vague, opinionated comparisons is not likely to meet the standards under the European Directive, US advertisers should begin to utilize a more benign approach to comparative communications if they desire to present the same campaigns in EU Member States.” (Berns Wright and Morgan, 2002, p.22).
PARTICULAR INDUSTRY STUDY: PROFESSIONAL SERVICES IN EU

It is interesting to note that the use of advertising in the market for professional services has traditionally been illegal in all industrialized countries. Today, where it is allowed, usually advertising is legal as long as it is not comparative (see, for example, advertising regulation for lawyers in Sweden and in the US or for the accountants in Italy). However, it can be argued that such an advertising regulation for professional services seriously affects competition and is detrimental for consumers. The preamble of the Commission Communication of 9 February 2004 entitled "Report on competition in professional services" explicitly asks to regulatory authorities in the member states and professional bodies to review the rules governing professional services because these rules are not necessary for the public interest and, thus, are unjustified. Moreover, the Commission suggests to put in place pro-competitive and transparency-enhancing mechanisms to strengthen consumer empowerment.

Analyzing the markets in which lawyers, notaries, accountants, architects, engineers and pharmacists operate in the European Union, the Commission has identified five main categories of national legislation or self-regulation that restrict competition: fixed prices, recommended prices, advertising restrictions, entry restrictions and reserved tasks and regulations governing business structure and multidisciplinary practices. The Commission believes that advertising, and in particular comparative advertising, can be a crucial competitive tool for new firms entering the market and for existing firms to launch new products.

It is interesting to notice that advertising restrictions are justified by professional bodies on the ground of the asymmetry of information between practitioners and consumers of professional services. According to this
argument, consumers find it difficult to assess information about professional services and therefore need particular protection from misleading or manipulative claims. Against such a rationale for advertising bans, the Commission mentions the increasing body of empirical evidence which highlights the potentially negative effects of some advertising restrictions (Stephen and Love 2000). The research suggests that advertising restrictions may under certain circumstances increase the fees for professional services without having a positive effect on the quality of those services. As the Commission argues, the implication of these findings is that advertising restrictions do not necessarily provide an appropriate response to asymmetry of information in professional services. Conversely, truthful and objective advertising may actually help consumers to overcome the asymmetry and to make more informed purchasing decisions.

The Commission reports that during the last two decades, a number of member states have started to relax advertising restrictions in the professions. This general practice together with the market outcomes it has led to, suggests that sector specific advertising restrictions in these professions may not be essential for protecting consumers from misleading claims. As a result, today the legal, notary and pharmacy professions are able to conduct most forms of advertising in a number of Member States. Obviously all professions remain subject to general legislation that prevents untruthful or deceptive advertising.

ANALYSIS OF SELECTED ANTITRUST CASES

Allegedly misleading comparative advertising

Several European and US cases have as a critical issue whether the comparison ad is indeed misleading. In the UK as well as in the US case law has evolved which provide interpretations of the law and thus additional guidance. As mentioned earlier, in the UK section 10(6) of the 1994
Trademark Act is relevant for the case analysis of comparative advertising. According to section 10(6) the use of a registered mark does not constitute copyright infringement if it is in accordance with honest practices in industrial and commercial matters" The term “honest practices in industrial and commercial matters” can be criticized as vague. It may be interpreted by bodies that regulate advertising. However, in Barclays Bank Plc v RBS Advanta [1996] RPC 307 the court did not consider the suggestion to follow statutory or agreed codes of conduct.

Barclays Bank Plc v RBS Advanta concerned advertising by RBS advanta. It compared the terms of the advertiser’s own credit cards with those of competing credit cards including the Barclaycard Standard Visa. A leaflet listed 15 dimensions summarized by the statement that the RBS Advanta card was said to be ‘a better credit card all round’. In addition, a brochure included a comparative table showing the main financial terms of competitive credit cards.

The plaintiff Barklay’s Bank argued that the leaflet was not honest as it did not compare like with like. In particular, it was selective because it did not mention other ancillary benefits which Barklay’s Bank offered to its cardholders and which RBS Advanta did not. Examples are a 24 hour emergency service and an overseas emergency service. Furthermore, 6 or 7 out of the 15 points listed in the RBS Advanta leaflet were common to Barclaycard as well.

Judge Laddie J was not convinced and concluded that the defendant really believed to offer customers a better deal, summarized by the advertisements with the list of 15 items. He argued that honesty had to be judged by what can be reasonably expected by the relevant public exposed to the advertisements.
Subsequent decisions have made it clear that the use of a competitive trade mark is acceptable if it is honest. In the words of Laddie J, an advertisement may be dishonest if it is “significantly misleading”.

The general principles have been summarized by judge Jacob J in *Cable & Wireless PLC v. British Telecommunications PLC* [1998] FSR 383. The primary objective of s. 10(6) of the 1994 Act is to permit comparative advertising.⁹

1. As long as the use of a competitor’s mark is honest, there is nothing wrong in telling the public of the relative merits of competing goods or services and using registered trade marks to identify them.

2. The onus is on the registered proprietor to show that the factors indicated in the proviso to s10(6) exist.

3. There will be no trade mark infringement unless the use of the registered mark is not in accordance with honest practices.

4. The test is objective: would a reasonable reader be likely to say, upon being given the full facts, that the advertisement is not honest?

5. Statutory or industry agreed codes of conduct are not a helpful guide as to whether an advertisement is honest for the purposes of s.10(6). Honesty has to be gauged against what is reasonably to be expected by the relevant public of advertisements for the goods or services in issue.

6. It should be borne in mind that the general public are used to the ways of advertisers and expects hyperbole.
7. The 1994 Act does not impose on the courts an obligation to try and enforce through the back door of trade mark legislation a more puritanical standard than the general public would expect from advertising copy.

8. An advertisement which is significantly misleading is not honest for the purposes of s.10 (6).

9. The advertisement must be considered as a whole.

10. As a purpose of the 1994 Act is positively to permit comparative advertising, the court should not hold words used in the advertisement to be seriously misleading for interlocutory purposes unless on a fair reading of them in their context and against the background of the advertisement as a whole they can really be said to justify that description.

11. A minute textual examination is not something upon which the reasonable reader of an advertisement would embark.

12. The court should therefore not encourage a microscopic approach to the construction of a comparative advertisement on a motion for interlocutory relief.”

This view has been restated in *British Airways plc v Ryanair Limited* [2000] which contrasts nicely with a court’s view of an advertising campaign by Ryanair in Belgium. Let us first consider the case in Britain before turning to the case in Belgium.

In 1999 Ryanair ran a comparative advertising campaign in various newspapers in the UK. First, it placed the so – called “Bastard” advertisement (with the headline “EXPENSIVE BA...DS!”), later the so – called “Expensive”
advertisement (with the headline “EXPENSIVE BA”). The Bastard advertisement appeared in February and March in several national newspapers. The Expensive advertisement appeared just once in November, in the Evening Standard. Before the latter the Advertising Standards Authority had upheld a complaint by members of the public (not made by BA) against the Bastard advertisement. It considered that the headline “was likely to cause serious or widespread offence.” Ryanair responded that it would not use the headline again. The court then only had to decide how costs of the two sides were to be allocated; both sides made the case on a matter of high principle.

In British Airways plc v. Ryanair Limited, 8 December 2000, the judge gave a general evaluation about what constitutes misleading advertising. He comments on the testimonies as follows. “For Ryanair the principal witness was Mr. Jeans, its Sales and Marketing Director...he wanted dramatically to convey the message that Ryanair was a lot cheaper than BA for what was broadly the same journey. In part the effect of that would be to take sales from BA, in part it would generate new sales from those who could not afford BA prices. In relation to the Bastards advertisement Mr Hobbs [for the plaintiff] sought to demonstrate that Ryanair selected the headline first and put in the price comparison later as some sort of spurious justification for the headline. Actually the facts were that the advertising agency had been asked to produce a number of headlines (which they did somewhat sequentially). All of these were intended to go with a price comparison table of the same sort as Ryanair had used previously. The fact that the detailed BA prices were only obtained at the last minute has no sinister significance—that would have happened whatever the headline chose. The point of the last minute obtaining of detailed prices was to avoid the risk of any change happening before publication. It was done to ensure accuracy.” (British Airways plc v. Ryanair Limited, 8 December 2000). The judge continues: “Before passing from the witnesses, it is particularly pertinent to observe that no witness testified to anyone actually
being misled by either advertisement. There have been no complaints about
leceptiveness in respect of any of the matters alleged made by members of the
public (to whom the advertisements were directed) or even by anyone
ndependent in the trade. Complaints might have been made to either party, to
he ASA or to any Trading Standards Officer in any Local Authority."

BA had three complaints: (1) it found the Bastard headline offensive; (2)
it said that the individual price comparisons were unfair; (3) and it said that in
the case of Frankfurt and Dinard, the destination comparisons were unfair.
With respect to the heading, Ryanair promised not to repeat it. Ryanair
considered both the price comparison and the destination comparison to be fair.
In the two latter points, the judge agreed with Ryanair.

In the advertisements Ryanair mentions only one price for BA and one
for Ryanair for certain city-pairs. At that point BA operated like other “flag” or
“conventional” airlines under the so-called “Saturday night rule”, according to
which to fly out on a weekday and fly back before the weekend, costs a lot
more then taking a return-trip which includes a Saturday night. For example, in
the BA’s return same week fare from London to Frankfurt was, as quoted in the
Bastard advertisement, £ 374; including Saturday night, the return fare would
be £ 192. In its price comparison Ryanair noted that prices refer to “Midweek
return fees”, where Ryanair required a minimum of two nights stay on its
flights. Although this term is to some extent ambiguous, the judge argued that
“what matters is the phrase read in the context of the advertisement – by people
familiar with the Saturday night rule. My conclusion is that most people would
have appreciated that what was being got at was the resented rule.”
Furthermore, the judge reasoned as follows: “I think people would take the
advertisement to be making the most favourable comparison Ryanair could
reasonably make – that is what advertisers are most apt to do. The average
consumer would know BA was cheaper if one stayed over Saturday. So, he
would realize that it was same week returns that were being compared.” This is in line with earlier cases according to which the consumers have an understanding of the way advertisers make their messages. In the words of Jacob J, “I do not think that the average consumer would find the price comparison misleading. He would expect there to be some sort of conditions (and indeed the small print makes that clear). In substance the advertisements were true.”

With respect to destinations, there were two points. The first relates to Frankfurt. Ryanair fly to the “secondary” airport Frankfurt – Hahn which is designated by IATA as a city airport of Frankfurt but is about 68 miles from the city centre whereas Frankfurt International is only around 6 miles from the city centre. BA correctly said that the advertisement did not make this clear which was true. However Judge Jacob J did not consider this to be an unfair comparison. The second point relates to Dinard and was rather bizarre since a flight with BA would require to change planes. Hence, the ad compares the fares but does not point out that the BA fare is for a journey which suffers the additional disadvantage of having to change planes. This clearly does not make the advertisement by Ryanair dishonest, as argued by Jacob J.

Ryanair also ran advertising campaigns in continental Europe comparing its flights with those of flag carriers. Perhaps the most illuminating case is the one in Belgium, a country which traditionally has been hostile to comparative advertising. On 24 April 2001 advertisements with the text “Welcome Ryanair and its lowest fares. Goodbye Sabena and its outrageously expensive flights” appeared in 6 national Belgian newspapers and on publicity vehicles in Brussels. On the same day Sabena asked Ryanair to withdraw the ads. Ryanair ignored this request and on the following day released an ad with a picture of the Brussels landmark the “Mannequin Pis”, a statue of a boy urinating, with the line "pissed off with Sabena’s high fares. Low fares have arrived in
Belgium”. Ryanair also published price comparisons indicating the vast difference between the two airlines’ one-way fares. Sabena’s president and CEO reacted by calling the ads “clearly defamatory”. Ryanair’s CEO O’Leary faxed back that the ads were “valid criticisms of Sabena’s outrageously high air fares” and, hoping for free publicity, distributed it to every major Belgian newspaper.

Sabena then took the case to court and claimed that the ads violated Belgian comparative advertising legislation and were unlawful because (1) the ads were misleading; (2) the text was denigrating and damaging to Sabena’s reputation (3) Ryanair obtained unfair advantage through the use of Sabena’s logo and trademark. The claim that the ads were misleading were based on the act that Sabena offered services to many destinations whereas Ryanair offered flights to only four countries in Europe, at the time the ads were placed. Also, no comparisons of “relevant characteristics” were made. In particular, Sabena claimed that consumers could not objectively judge the services of Sabena and Ryanair based on the terms “lowest” or “outrageously expensive”.

Ryanair defended its campaign as in the case against British Airways. It argued that the ads were not misleading. By launching its service to Brussels – Charleroi, Ryanair claimed that it had shown that lower air fares were possible. It also claimed that consumers had benefited overall as Sabena reduced its fares on routes where it was in competition with Ryanair.

Judge J. M Lahaye (in a judgment of the Brussels Commercial Court published on 10 July 2001) upheld Sabena’s complaint. He found that Ryanair’s advertising campaign was misleading and offensive and damaged Sabena’s reputation. He ruled that any future comparative ads by Ryanair could include details of prices and comparisons of the quality of service. Ryanair was ordered to discontinue the ads immediately and to run corrective ads. He ordered Ryanair to publish an extract of the decision in Belgian
newspapers and post it on its website for a period of three weeks. The court further imposed a penalty of 99,000 Euros for every future breach of the order.

Both of these campaigns tried to establish Ryanair as a low – cost alternative to national “flag” carriers, BA in the UK and Sabena in Belgium. They show different attitudes of the courts within Europe. As mentioned earlier, Belgium has in the past (before the EU Directive became effective) taken a hostile stand towards comparative advertising, whereas comparative advertising has been seen more relaxed in the UK since the TMA of 1994. Even after the EU Directive was passed, the Belgium and UK court rulings suggest a difference in approaches.

The fact that Belgium did not allow comparative advertising until recently and that its court appeared to be tougher on Ryan Air allows for a number of alternative interpretations. Belgian courts may still be more hostile to comparative advertising because of legal history. Alternatively, in Belgium law makers and judges like to have a more paternalistic vision according to which there are consumers who suffer from severe misperceptions and therefore have to be protected. In such a world, comparative advertising would need to adhere to the strictest standards. Perhaps the most favorable view is that at least initially the Belgian court feels it has to protect consumers from ads like the one by Ryanair because consumers lack the experience to see the ad in the same context as e.g. British consumers would do.

While the Belgian case highlights the high hurdle for comparative ads in parts of continental Europe, standards for “honest” comparative advertising appear to be lower in other places.

This can be illustrated by a recent US Lanham Act case. In Avon Products v. S.C. Johnson & Son (1994)\textsuperscript{10} the court refused to prohibit the comparative advertising for the insect repellent Off by Johnson. The ad stated
that off was better than Avon’s Skin – So – Soft, a bath oil frequently used as insect repellent. Avon called Johnson’s ads “illegal efforts to confuse consumers, tarnish Avon’s reputation, and gain sales at Avon’s expense.” In particular, Avon claimed that the ad would confuse consumers because Avon had a new insect repellant. With the suit Avon tried to make Johnson stop the advertisements, issue corrective advertising, and provide monetary damages. The court was not troubled by Johnson’s advertising campaign.

In this case (as in several others) the comparison is rather ambiguous. Under the Lanham Act the Plaintiff faces a high burden of proof. He has to show that consumers were likely to be misled by the ad. To do so, the plaintiff has to prove the actual messages that the ad communicates to consumers.

The courts in the US distinguish between establishment (or test prove) claims and non establishment claims. In cases with non – establishment claims the plaintiff has to prove that the advertising is false. This is clearly a higher burden of proof than for case with establishment claims where plaintiff must only prove that the supporting tests are inadequate.

**SUPERIORITY OR PUFFERY**

Our next two cases go one step further. In those cases it is not obvious whether the ad merely contains puffery or whether the claim can transmit some information to consumers.

In 2000 a federal judge ruled that Papa John’s must pay over $468,000 in damages to Pizza Hut and cease and desist from using its tag line “Better ingredients. Better Pizza.” The judge ruled in favour of Pizza Hut, as the ingredient comparison was misleading. In fact the claim cannot be scientifically substantiated nor taste tests exist that prove a statistically significant preference for Papa John’s product. Notice that a claim would be a
generalized statement of opinion, hence puffery, notwithstanding the clear implication that the advertiser’s pizzas were better than others because of the better ingredients. However, in the context of two commercials that focused on the advertiser’s ingredients, the court agreed that the slogan was an implied, unsubstantiated superiority claim with the characteristics of a statement of fact. However, the 5th US Circuit Court of Appeals overturned the verdict. The court argued that Pizza Hut failed to present evidence that a reasonable consumer was influenced in her purchasing decision, that is, the plaintiff failed to show implied falsity. (In 2001, the US Supreme Court refused to review the decision).

A recent case in a Dutch court suggests that comparative advertising with questionable superiority claims may survive European courts. In April 2004 a civil court in Utrecht, Netherlands, has ruled on a case concerning razor manufacturers Gillette and Wilkinson. The court decided that both can claim that their most recent bladed razors are the best. Gillette launched a complaint before the court because Wilkinson had advertised its new 4 bladed razor saying that it produces the smoothest result and that it had carried out comparative tests, showing that it was even better than Gillette’s 3 – bladed one. Gillette sued Wilkinson claiming that this was misleading advertising. Wilkinson filed a counter suit, saying that also Gillette made superiority claims in its advertising, without being able to substantiate these claims. The court rejected Gillette’s case arguing that the advertising was not misleading. It also rejected Wilkinson’s case because Gillette simply used classic advertising exaggerations, which could not be seen as misleading. The court argued that consumers would not believe the ads anyway. Hence both firms can continue to claim that they are better than their competitor.

For the advertising not to be misleading, consumers must be either other sophisticated or, since advertisers can exaggerate and use hyperbole,
nearly ignore content. In the latter case there is hardly any possibility of a
more efficient information transmission with comparative claims than with
generic advertising. If consumers are not able to separate advertising which
exaggerate to those which do not, firms have an incentive to exaggerate
whenever they can get away with it. Although consumers can be expected to
earn about the courts’ stand on comparative advertising, by allowing
exaggerations and hyperbole the courts may have made it more difficult to
convey information for those advertisers who otherwise would have provided
truthful content statements. This may lead to socially wasteful advertising and
ultimately less information in the market. Therefore, the courts must
distinguish very carefully between those cases in which the ad contains puffery,
which is easily recognized as such by the average consumer and other cases, in
which claims are potentially informative but the content is exaggerated. In the
atter case, it was argued that courts apply strict test so as to make truthful non-
exaggerated claims possible.

A case in point is *S.C. Johnson v. The Corox Co.*, 241 F. 3d 232 (2nd
Cir. 2001). In this case, Clorox, the maker of Glad – Lock storage bags, ran
elevision programme that featured a comparative ad of Glad storage bags
versus Ziploc storage bags. Both of them were filled with water and turned
upside down. In the advertisement the Glad – Lock bags stayed watertight
while the Ziploc bags leaked profusely. An animated goldfish in the Ziploc bag
was shown in a state of distress. To prove that the ads were misleading, S.C.
Johnson simply proved that their bags leaked at a slower speed than the rate
represented by the advertisement. The court concluded that the content of the
ads was literally false and the ads were found in violation of section 43(a) of
the Lanham Act.
DAMAGES

The most famous case of punitive damages in the US is the U – *Haul International Inc.v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir.1986). The court found Jartran of willful and malicious false advertising after running a comparative advertising campaign run for more than a year. As the basis of the $40 millions judgment served $6.4 million to cover the cost of the false advertising campaign and $13.6 million to air corrective advertising. Under Section 35 of the Lanham Act, the court doubled the award to a total of $40 million. (e.g. Bixby and Lincoln, 1989, or Steinberg and Naidech, 2003). In this case awarding the defendant’s profit was justified to avoid the defendant’s unjust enrichment, as first established by the 2d Circuit in 1984 for a case of false advertising (Raymond, 2004).  

Damages in the form of corrective advertising may be needed to re-establish the lost or damaged reputation of a firm. Furthermore, damages in the form of attorney’s fees are appropriate to give the plaintiff a sufficiently strong incentive to sue against comparative advertising which the plaintiff thinks to be misleading. Often, incentives to sue are sufficiently strong even in absence of such awarded damaged (Barigozzi, Garella, and Peitz, 2003). Also, for a campaign that has already generated revenues, lost profits may have to be rewarded to the competitor in case of false or misleading advertising. The corresponding incentives are amplified under punitive damages. In all cases of damages, it seems important to distinguish between erroneous and malicious false claims. This allows firms that believe in their product to go ahead with their campaign even if to their surprise the claims prove to be erroneous.
COMPARATIVE ADVERTISEMENT IN INDIA

The Law in India – The early years

Comparative advertising is not new in India, although from a trade mark perspective it was until recently not legislated. The Monopolies and Restrictive Trades Practices Act 1984 (MRTP) dealt with comparative advertising under the unfair trade practices. The MRTP Act was repealed following the introduction of the Competition Act 2002, but a study of cases decided under the old act shows the first guidelines regulating comparative advertising. The focus was primarily on the protection of the consumer rather than the use of the infringed trademark.

The following questions usually arose under the MRTP Act:

i) Whether the compared product in the disputed advertisement is identifiable? In many cases, the MRTP commission took the view that as long as the product was not recognizable to the consumers (for example, where only the shape of the products or general words were used), the advertisement could not be misleading or cause disparagement.

ii) What is the effect on the common, reasonable man and what leads him to a wrong conclusion? In one case the supreme court ruled that showing affiliation to a trade mark in an advertisement rather than its owner company, with which the advertiser has a collaboration, does not lead to misrepresentation amounting to misleading of the consumers (Lakhanpal National Ltd. V. MRTP commission 1989 AIR 1962, May 2 1989).

iii) Whether the disputed advertisement contained a false statement and was misleading to the consumer, leading to disparagement?
iv) Whether the knowledge of the consumers is sufficient to make an association with the compared product by implication?

The above shows that the MRTP Act was fractured and provided limited protection and guidelines to companies. The trade mark issues were left out and fair competition was not the focus.

**THE 1999 TRADEMARK ACT – A NEW ERA**

The new Trademark Act heralds the law of comparative advertising and trade mark infringement in India in a timely fashion. India’s economy is getting more liberalized and competitive by the day. The thrust of competition has shifted to aggressive promotions of products and services through branding. Changing business practices have brought about new laws, which support the globalization trends. But because the Trademark Act only came into force on Sep.15, 2003, comparative advertising case law and jurisprudence is yet to develop.

Section 29(5) of the Act provides that the use of a registered mark in an advertisement is infringing if it takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; if it is detrimental to the distinctive character of the trade mark; and if it affects the reputation of the trade mark.

Section 30(1) of the Act continues:

“Nothing in Sec.29 shall be construed as preventing the use of a registered trademark by any person for the purposes of identifying goods or services as those of the proprietor provided the use:

a) is in accordance with honest practices in industrial or commercial matters, and
b) it is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark”.

It is clear that Sec 30(1) on the one hand creates a further category of trademark infringement through comparative ad., but, on the other, creates an exception to the owner’s right to use the trade mark by permitting third party use in comparative ad, provided it is in accordance with the honest practices in industrial or commercial matters. Sec.30(1) provides that comparative ads. which are fair and accurate do not harm the consumers and accordingly should not be prohibited by the use of registered trade marks by third parties.

The 1999 Act provides for additional forms of permitted trade mark uses in the form of sec.30(2), which says:

“A registered trade mark is not infringed where - the use in relation to goods or services indicates the kind, quality, quantity, intended purposes, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services:…"

It must be noted that the essence of sections 30(1) and 30(2) lies in section 10(6) and section 11(2) of the 1994 UK Trade Marks Act respectively.

CASE STUDIES

Prior to the enactment of the Trademark Act 1999, there were few Indian cases where comparative ads. were challenged on the grounds of disparagement, defamation, copyright, trademark infringement and other principles of injunction. For such cases, judgments were given by the MRTPC and the Supreme Court. Such cases are summarized as given below:
REGAUL V/S UJALA CASE

A television advertisement promoting Ujala liquid blue showed that 2-3 drops were adequate to bring striking whiteness of clothes while several spoons of other bands were required. A lady holding a bottle of Ujala was looking down on another bottle and exclaiming ‘chhi, chhi chhi!’ in disgust. The manufacturers of Regaul, a competing brand, approached the Commission that the advertisement was disparaging its goods. The bottle did not have any label. The Commission elaborated the meaning of the provision:

In order to bring home a charge under clause (x) of section 364(1) it must be established that the disparagement is of the goods, services or trade of another, ...the words “goods of another person” have a definite connotation. It implies disparagement of the product of an identifiable manufacturer.\textsuperscript{12}

The Commission was of the view that ‘a mere claim to superiority in the quality of one’s product\textsuperscript{13} by itself is not sufficient to attract clause (x). In the advertisement, the bottle did not carry any label. Further, the bottle did not have similarity with bottle of any brand. The Commission, thus, was of the opinion that it could not be a case of disparagement of goods.

NOVINO BATTERIES CASE

The judgement of the Supreme Court in the Novino Batteries case has had an important influence on all cases raising questions about advertisements. Lakhanpal industries Ltd. had a collaboration with Mitsubishi Corporation of Japan for manufacturing Novino Batteries. Mitsubishi Corporation were the owners of the well known trade name, National Panasonic. Lakhanpal Industries, in its advertisements, was claiming that Novino batteries were made in collaboration with National Panasonic. This was technically incorrect as
National Panasonic was only a trade name. Lakhanpal Industries could not have collaborated with a trade name. The Supreme Court ruled:

When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such a representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly, a statement, which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively too than a literally correct statement. It is, therefore, necessary to examine whether the representation complained of contains the element of misleading the buyer. Does a reasonable man, on reading the advertisement, form a belief different from what the truth is? The position will have to be viewed objectively and in an impersonal manner.\textsuperscript{14}

The court, following this, held that even though, literally, the representation made by Lakhanpal Industries was inaccurate, it could not be held to be an unfair trade practice. In the next case, we would see how the judgement in the Novino Batteries case found an application.

**COLGATE V/S VICCO CASE**

In a television advertisement promoting Vicco tooth powder, another tin, of oval shape and without any label is shown. White powder coming out from
the can was described as useless. Colgate claimed before the Commission that this was disparaging its product Colgate toothpowder. The Commission found that the shape and colour combination of the can shown in the television commercial resembled Colgate’s tooth powder can. Following the Novino Batteries case, the MRTPC noted that the advertisement did not explicitly mention Colgate. In fact, there may even have been no intention of depicting the can to be of Colgate. But since the advertisement created an impression in the viewers that the can was of Colgate, it would be a case of disparagement. The Commission took into account the nature of the Indian audience:

...disparaging remarks about the uselessness of such toothpowder come through a mysterious invisible voice. It cannot be disputed that a TV set has become more or less a household kit and more than 90% of the country is covered by the TV Network. It cannot be gainsaid that illiteracy in India is all pervasive to the extent of 70% of the population. To the ignorant and illiterate people mysterious invisible voice would be likened to the voice of God. Such people might be inclined to believe that the white toothpowder contained in a red – and – white coloured oval – shaped can would be an absolutely useless substance.15

The issues involved in the case came to be emphatically emphasized in the context of inter – corporate competition in the Colgate v/s Pepsodent case.

NEW PEPSODENT V/S COLGATE CASE

Hindustan Lever Limited advertised its toothpaste, ‘New Pepsodent’ in print, visual and hoarding media, claiming that its toothpaste ‘New Pepsodent’ was ‘102% better than the leading toothpaste’. In the television advertisement, samples of saliva are taken for testing from two boys, hours after brushing. One boy has brushed with the New Pepsodent while another has brushed, according
to the commentary, ‘with a leading toothpaste’. The test of the two samples are visually depicted side by side. The saliva of ‘the leading toothpaste’ shows large number of germs. While the slide of the New Pepsodent shows negligible quantity of germs. While the sample was being taken from the boys, they were asked the name of the toothpaste with which they had brushed in the morning. One boy had said Pepsodent. The response of the second boy was muted. However, lip movement of the boy would indicate that he was saying ‘Colgate’. Also, when the muting was done, there was a sound of the jingle used in the Colgate advertisement.

The market share for toothpaste for Colgate and Hindustan Lever was 59% and 27% respectively. The Commission, thus, was of the view that a reference to ‘leading brand’ and ‘famous brand’ was to Colgate. A doubt, however, arises that the statistics on market share are produced by market research agencies. The consumers do not know these. Thus, a viewer need not necessarily interpret ‘leading brand’ to mean Colgate. The Commission, however, was of the view that Colgate has been in the business of manufacturing and selling toothpaste in India for more than 50 years. According to the Commission, the word toothpaste has become synonymous with Colgate over the years. The Commission in addition noted that the jingle in the background was a familiar one of Colgate. The comparative product in the television commercials could, thus, be identified as Colgate dental cream.

Thus, it became a case of comparative advertisement and a claim could be made of disparagement of Colgate’s products.

**CHERRY BLOSSOM CASE**

The principle, thus, emerged that a case of disparagement arises only if the product in question in identifiable. Identification could be explicit or from the facts and circumstances. Thus, in the advertisement of ‘Kiwi Liquid Wax
Polish’, a bottle is described as X from which liquid is dripping while from a bottle marked Kiwi liquid does not drip. From the shape of the bottle marked X, it could be identified as that of Cherry Blossom. Also, Cherry Blossom had a design registration for the shape of the bottle. Thus, the bottle could be identified with Cherry Blossom and the advertisement became a case of disparagement.\footnote{16}

**COLGATE DENTAL CREAM – DOUBLE PROTECTION CASE**

In June, 1998, Colgate introduced its toothpaste as Colgate Dental Cream – Double Protection. (CDC – DP). It gave wide publicity through print and television that the toothpaste was 2.5 times superior to any ordinary toothpaste in fighting germs. Hindustan Lever Ltd. moved the Commission alleging that the advertisements disparaged toothpastes manufactured by it under various brand names. It contended that a reference to ‘ordinary’ toothpaste was to all other brands than Colgate.

The word ‘disparagement is not defined in the Act, thus, the Commission explored its dictionary meaning. It noted that dictionaries define it as ‘to dishonour by comparison with what is inferior\footnote{17} bring discrediting or reproach upon; dishonour; lower in esteem; speak on or treat slightly or vilify; undervalue; and depreciate’.\footnote{18} The Commission concluded:

...for the purpose of disparaging something or some produce, some comparison with what is inferior is necessary,... disparagement or an act of disparaging would occur only by comparison with some identifiable product.\footnote{19}

The Commission was only reiterating the principle, which was established in the Ujala case. The Commission with approval quoted from the judgement:
... the words "goods of another person" have a definite connotation. It implies disparagement of the product of an identifiable manufacturer.\textsuperscript{20}

The commission was of the view that a reference to 'ordinary' toothpaste does not identify any specific product. It noted:

The word 'ordinary' has to be understood in contradistinction with the word special, uncommon, unusual, extraordinary and the like synonyms. The word 'ordinary' is defined to mean customary, usual or normal, of the usual kind, not distinguished in any important way from others\textsuperscript{21}... not characterized by peculiar or unusual circumstances.\textsuperscript{22} The word 'ordinary' as an adjective would not refer to any particular or special item, product or thing.

Thus, the Commission took the position that the claim of 2.5 times superiority of CDC-DP over any ordinary toothpaste did not refer to any identifiable product or any identifiable manufacturer. As a result, it could not be a case of disparagement of goods.

It should be noted that 'disparagement' is not the only ground for an advertisement to be an unfair trade practice. The same advertisement could still be contested as an unfair trade practice under Section 36A(1)(a) on the grounds of misrepresenting quality. But this would be a different issue as to who could approach a court and the remedies, which could be availed. As a matter of fact, the Commission took the view that there was nothing called an 'ordinary' toothpaste. Thus, a claim of 2.5 times superiority was misleading and ordered the advertisement to be stopped.
UJALA V/S ROBIN BLUE CASE

Ujala whitener was advertised as insta violet concentrate, a post wash for white clothes. The advertisement disparaged ‘neel’. The makers of Robin Blue contended that this was a case of disparagement under section 364(1)(x), as their product was also ‘neel’. The makers of Robin Blue claimed that they were the market leaders in India, with a market share of 56.4% in the blue powder category. Thus, disparagement of ‘neel’ would definitely mean disparagement of their product. The Commission was not in agreement. It noted:

Simply because Robin Blue is stated to be commanding the market share to the tune of 56.4 per cent is no ground prima facie to come to the conclusion that in common parlance it is known as neel.23

GODREJ V/S VASMO CASE

The television commercial of Vasmo Hair dye opened with a lady dyeing her hair with instant hair dye, made by mixing hair dye and developer contained in two cylindrical bottles. The bottles were labeled as ‘Sadharan’ (ordinary). The picture then widened to show the anguish of the lady with falling hair. The commentary stated this to be the result of use of inferior dye containing harmful chemicals. The advertisement ended with the picture of “Vasmol 33 Hair Dye” which is stated to contain Ayurprash, a natural way of blackening the hair and strengthening the roots of the hair.

Godrej Ltd. was aggrieved with the advertisement. It has products like ‘Godrej Hair Dye’ and ‘Godrej Kesh Kala’ used for dyeing hair. Godrej’s contention was that the pictorial depiction of two cylindrical bottles would identify it as its product. Godrej claimed its products were disparaged not only
by insinuating that these contained harmful chemicals but also by calling these as ‘Sadharan’ (ordinary). The Commission stated the principles:

... disparagement could be by way of comparison through words, gesture, gimmicks pointing out indirectly to the inferiority of the informant’s product.

The Commission, however, in relation to the case noted:

Under the provisions of section 36A(1)(x) of the Act, the product of another manufacturer has to be identified before it can be said that the same has been disparaged by way of making false and misleading statements. The advertisement in question no doubt refers to instant hair dye and Goderj hair dye is one amongst many instant dyes available in the market. So are the two cylindrical bottles like that of Godrej in which are contained other various instant hair dyes. These in themselves are not sufficient to identify the informant’s product which is one amongst many in the market contained in the similar cylindrical bottles like Vellatone, ROCCO, Royal, etc. 24

To summaries the interpretation of the Commission, an advertisement could disparage other products and yet, it would not be a case of ‘disparagement’ so long as the disparaged product is not identifiable.

After enactment of Trademark Act 1999, only a handful of cases relating to comparative ads have been filed and decided in India. In Dabur India Ltd V Colgate Palmolive India Ltd. (2004 (29) PTC 401 (Del)), trade rivalries between two consumer durables companies led to a TV advertisement which praised the defendant’s product while criticizing that of the rival, Dabur, with the help of a famous actor. The actor was showing consumers the abrasive
characteristics of the plaintiff’s tooth powder, describing the defendant’s product as 16 times less abrasive. The court granted an injunction and held that visual media has an immediate effect on the viewers’ minds, particularly when a well-known actor is endorsing a product.

Similarly in *Dabur India Ltd. v Emami Limited* (2004 (29) PTCI (Del)), the court granted an injunction in favour of the plaintiff ruling that the defendant cannot negate the plaintiff’s product in an insinuating manner.

*In Reckitt & Colman of India Ltd. v Kiwi TTK:* the Delhi High court 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 the other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer in so doing. However, a manufacturer is not entitled to say that his competitor’s goods are bad as to puff and promote his goods”.

*In Reckitt & Colman of India Ltd. v MP Ramachandran & Anr* (1999 PTC (19) 741), the Calcutta high court laid down five principles as a guiding factor for granting an injunction:

i) A tradesman is entitled to declare his goods to be the best in the world even though the declaration is untrue.

ii) He can also say that his goods are better than his competitors, even though such a statement is untrue.

iii) 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 the others.
iv) He, however, cannot, while saying his goods are better than his competitors’, say that his competitors’ goods are bad. If he says so, he slanders the goods of his competitors. In other words, he defames his competitors and their goods which is not permissible.

v) 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 injunction restraining repetition of such defamation.

As compared to the above, the case of Pepsi Co. Inc v Hindustan Coca Cola Ltd [2003 (27) PTC 305 (Del) (DB)] was primarily based on copyright and trade mark infringement. The court granted an injunction on the copyright claim holding that the advertisement of the defendant had copied that of the plaintiff. On the trademark claim, the court held that comparative advertising is permissible as long as it does not degrade the other product. It said that if a trader compares his goods with the goods of a rival without giving the impression that the trade mark is used in relation to his goods, there is prime facie no infringement.

BRAND MANAGEMENT – MARKETING POLICIES

Brand management includes a set of marketing principles, which help company managers identify, create, promote and implement the brands for their products by keeping in mind the consumer behaviour and the market trends. Brand management can happen around a house mark or corporate brand (HP or Colgate) or can be decentralized with a strong force on sub brands where the corporate brand remains in the background (P & G or Unilever)

One of the main challenges for brand managers is to market the brands competitively and to protect them from being misused by competitors. With
the ever-expanding internet environment, multiplying international transactions and increasing numbers of global travellers, the opportunities available to businesses to position their brands, as per the jurisdiction, climate conditions, customs, consumers and political environment, are immense and almost limitless.

As consumers, we all agree that comparative advertising is in vogue and is here to stay. It allows the market to stay competitive and helps consumers to decide between two products or services. In today’s global village, comparative advertising acts as a medium through which consumers receive useful and critical information about respective products and services. Additionally, because the law requires the comparative ads to be verifiable and based on true facts, consumers get the right information to make their choices in an easy manner. Companies become more responsible to the public in general, which creates a better corporate environment to invest in.

Thus, it is for the businesses to understand the permissible parameters of the comparative advertising laws and regulations of different jurisdictions. Those in charge of marketing strategies within a company are under a duty of caution when deciding to confront their competitors. Having a brand management within a company can be the first step towards safe advertising, followed by diligently watching the use and misuse of the company’s trade marks in the markets.
FOOT NOTES


9. These were established in **Barclays Bank v. RBS Adanta** and the subsequent case of **Vodafone Group plc v Orange Communications Services Ltd [1997] FSR 34. Jacob J built on M.Crystal QC in British Telecommunications Plc v AT & T Communications (UK) Ltd (unreported) 18 December 1996.


19. **Hindustan Lever Limited and Another v Colgate Palmolive (India) Limited**, Judgement of the MRTP Commission, 18/11/1998. Citation: 1999 (2) CPJ7


24. **Godrej Soaps Ltd. V. Hygienic Research Institute**, Judgement of the MRTP Commission, 30/5/01, citation 2001 (43) CLA 300.