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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

COMPARATIVE ADVERTISEMENT

AUTHORED BY - SHASHANK VERMA

Comparative Advertisement 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. Based on this information the consumers may make informed and therefore efficient choices.

Comparative advertisements may not be considered trademark infringement if they do not harm any other brand's reputation or disparage their products to gain any form of unfair advantage in the market. In case there is an infringement, there are civil & criminal remedies.

Advertisements are all about representation of a product or services to the end customers. It is one of the primary steps to launch a product and create awareness in the market. It also helps to analyze the future of a product when it reaches the end customers. It is a proven fact that without advertisements, the product cannot survive in the market.

However, due to the wide range of options for each product, the customers get to opt for the option that suits them the best. To survive in this competitive world, the advertisers often come up with unique concepts to showcase their product as the best in the market.

To create awareness and to make the product best-selling in the market, the advertisers often resort to a practice of comparative advertisement. These comparative advertisements are done through media. However, it is unclear about its end effect on customers.

- Comparative advertisement is a unique practice where the manufacturing entity or advertisers compares its products and services with its competitors for the purpose of selling their product and to sustain in the market.
- The intention of this type of advertisement is to influence the customers by comparing the features, benefits, price, and other essential aspects of the competitors' products.

- In this type of advertisement, the manufacturers may name a competitor or refer to them.

They also emphasize the similarities or differences between the products.

It is very common nowadays that the manufacturing entity sometimes states that the advertised product is better than the competitor's products. It is to be noted that during such advertisements, the manufacturer or advertiser cannot disparage the goods/services of its competitors. In case such advertisements disparage the goods/services of competitors, it amounts to trademark infringement. Further, it also creates unfair competition in the market.

Every individual on this Earth has the basic requirements of food, clothing and shelter. During the early phases of human civilization, man depended on the natural surroundings for fulfilling his basic needs of food, clothing and shelter. With the passage of time and development of human societies the concept of selling and buying the things required also evolved. Further with the development of industrialization and globalization the market-system also developed and finished goods and various services were available in the markets for buying and selling. Thus every human being came to known as a consumer' and started depending on these markets for procuring his basic requirements.

The last half of the century has seen a remarkable change in the marketing strategy adopted by the companies and the value the society attaches with the advertisements. Advertising world is no longer confined to signing big celebrities to endorse the product or to bring out the emotions people attach with it. Today, the business market is centered on building one brand's superior claim over the other. Companies have started adopting a very cut- edge approach to leave their competitors far behind in the race to show their products as the best amongst the lot. They adopt different kinds of advertising techniques such as covert advertisement or celebrity advertisement to bring their products to catch the attention of its consumers. Some of them also make use of their rival's trademarks/ logos / trade dress and comparing their products. Such form of advertising is known as comparative advertising. In simple words; comparative advertising is a form of advertising in which two or more brands of same generic products are compared in terms of one or more products or attributes.

These advertisements are not only centered on the merits of the product as compared to others but also highlight the differences between the products. They may state that the advertised product is "better than" (superiority claims) or "as good as" the competitor's (equivalence or parity claims). Comparative advertisements can be classified into two types- advertisement that compare the

competing products directly and the one in which comparison is done indirectly.

One such form of competition stems from comparative advertising campaigns. In such advertisements goods or services of one trader are compared with the goods and services of another. Thus, it can be understood as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. Covering a wide range of advertisements, starting from promoting a product through the means of a social message or through a celebrity presence, comparative advertisement seems efficient and convenient, nevertheless, also a possible legal threat.

The struggle for acquiring the coveted supreme command has always existed. In the nineteenth century it was amongst the rulers to rule till eternity and in today's world the fight is to rule the market. Commodities given by the market have always been inevitable for our survival. Be it the rich class who want to agglomerate them and carry on with their flamboyance or be it the working class who need goods as bare minimum necessity. The consumer has always been craving for the best with least bit of expenditure following the Bentham's Philosophy of maximum pleasure with minimum loss. In earlier times the products were scarce and so not much was in competition. The only thing then which evaded manufacturers was identification of their products in the market. Gradually the concept of registered trademark evolved. As time passed competition between commodities became fierce, making product image, important for the item to survive in the market. All this not only led to the deliberate attempts for enhancement of one's own product image but an intentional attempt to abase the competitor's commodity so as to increase the former product's market value. In the initial stages of advertisements, the reference towards the rival commodity is not direct and explicit; instead the compared product is referred to as leading product. However when in the field of advertisements, the dark road to unfair use of registered trademark through brazen and petty remarks over the rival product so as to cause damage to its reputation and thrive on it.

However, comparative advertisements can be found in early twentieth-century advertising, and they typically portrayed competitors' products as unhealthy or harmful. Throughout the twentieth century, many U.S. advertisers fought comparative advertising wars which grew increasingly hostile over time, created problems for the media delivering the advertisements, and raised concerns about potentially misleading advertising. Eventually, disparagement and the validity of comparative claims seem to have driven media advertising self-regulation policies. One of the first U.S. comparative ads

dates to the 1930s wherein prospective automobile buyers were encouraged to "Look at all three" major automobiles before making a decision. Industry-wide self-regulation was mentioned rarely beginning in the 1930s. In the 1960s, comparative ads started to identify competitors by name and comparisons to "Brand X" almost disappeared.

In Europe the cases of comparative advertising were beginning only around the mid-seventies, in the same period in America the phenomenon was already significant. Direct comparison ads would enable consumers to make more informed purchasing decisions.

The European Community issued regulations in 1984 concerning advertising, with one of the directives called Misleading Advertising Directive. The directive was issued in order to protect consumers from misleading advertising; an amendment was passed in 1996 that lays down criteria for comparative advertising. The regulation defines misleading advertising as any presentation that in any way deceives or can deceive the people whom it is intended to reach or that is likely to cause economic injury to the competitor. The European Community has imposed strict fines upon those engaged in misleading advertising and misleading comparative advertising. Advertisers must be able to prove every claim they make about the comparison brand. Comparative Advertisement benefits the consumer as it usually compares the price, value, quality or other merits of different products, thereby enhancing the awareness of a consumer. However the improvement of consumer's knowledge can only be achieved for as long as the advertising doesn't contain misinformation; which is always a risk if the education of consumers is entrusted to entities with vested interests.

Comparative Advertising can play the role of a salesman who helps to remove and clarify doubts about a brand. A person who has already gone through the various buying processes like need, recognition and information may be stuck because he is not able to make a comparative evaluation between the brands on which he has zeroed in. It is at this stage that comparative advertisement helps him to make a better decision. It gives very compulsive reasons to be a potential consumer to buy a product. Whether "fair use" can also be brought in trademark related matters is a big debated question.

As in copyright doctrine of fair use is involved which protects the authors right over the copyrighted material, whereas in the trademark if we bring it will protect the interest of the owner of trademark to the goodwill attached to the mark.

The two fundamental facets of comparative advertising are puffery and denigration, with there being a need to comprehensively differentiate the nature of the two in order to develop any broad mechanism of regulation. An attempt may be made towards the same by way of an analysis of certain recent case law on the subject. An understanding of the judicial opinion herein might help in determining a uniform standard of tolerance to differentiate cases of simple puffery from those of actionable denigration. Therefore, the question to be determined by the Court was whether the advertisement merely puffed the product of the advertiser, or in the garb of doing so, was denigrating the product of the plaintiff. It was observed herein that the assertions in the advertisement were aimed at denigrating the product of the plaintiff by indicating to existing and future customers that the product was both uneconomical and ineffective. Hence, the Court passed an order of injunction against the defendant, restraining him from broadcasting the said advertisement. In cases of trademark disparagement, one who disparages another person's product does not seek to make his own product similar to the disparaged product; but rather, on the other hand, seeks to distinguish his product from the disparaged product. The object of disparagement is to make the 'disparaged product' appear to be as near / similar to the product of the competitor. The comparisons, therefore, in cases of 'passing off' and 'disparagement' are different. The law as on date is that, all traders are entitled to puff their goods, even though such puff as a matter of pure logic involve denigration of rival's goods. Passing off is a wrongful invasion of property vested in the plaintiff; but the property which is protected by an action for passing off is not the plaintiff's proprietary right in the name or get up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misrepresentation. One of the most important concepts of marketing is 'Consumer Pull' or the ability of the brand to have consumers demand the product at the retail outlet. Comparative advertising is a widely used marketing strategy in which a marketer claims product superiority for its brand over one or more explicitly named or implicitly identified competitors, either on an overall basis or on selected product attributes. The wide use of comparative advertising indicates that marketers are confident that comparative ads exert positive effects on brand attitudes, purchase intentions and actual purchases. The two main purposes fulfilled by comparative advertising is firstly, of highlighting of special features of a product or service, aiming at increasing the enticement for the product or service in the minds of potential consumers, and secondly, the comparative statement directly position the product or service as not just potential but as the only best substitute to an already established product or service. The FTC argued that this form of advertising

could also stimulate comparison shopping, encourage product improvement and innovation, and foster a positive competitive environment. Comparative advertising is the natural phenomenon of a highly competitive environment. Human mind is like a slate, the darkest will be visible and hence positioning is the key to success. The only way a newcomer or competitor can make an impression in the human mind is to erase the earlier impression and this may entail comparison. Comparative advertising can play the role of a salesman who helps remove and clarify doubts about a brand. A person who has already gone through the various buying process like need, recognition and information search may be stuck because he is not able to make comparative evaluation between the brands on which he zeroes in. It is at this stage that comparative advertising helps him to take a better decision.

Advertising is an instrument for elaborating brand benefits. A persuasive advertising message has a greater association compared to a brand name as it has association with lives of people facilitating higher recalls. Comparative advertising helps consumers to make informed choice because advertiser provides relevant and objective information to compare attributes to arrive at a brand choice. It works in a situation where a non leading brand has a benefit on which it has a potential to dominate the category leader. Thus, comparative advertising puts the brand in the category of leading brands through demonstrable superiority.

The last half of the century has seen a remarkable change in the marketing strategy adopted by the companies and the value the society attaches with the advertisements. Advertising world is no longer confined to signing big celebrities to endorse the product or to bring out the emotions people attach with it. Today, the business market is centered on building one brand's superior claim over the other. Companies have started adopting a very cut- edge approach to leave their competitors far behind in the race to show their products as the best amongst the lot. They adopt different kinds of advertising techniques such as covert advertisement or celebrity advertisement to bring their products to catch the attention of its consumers. Some of them also make use of their rival's trademarks/ logos / trade dress and comparing their products. Such form of advertising is known as comparative advertising. In simple words; comparative advertising is a form of advertising in which two or more brands of same generic products are compared in terms of one or more products or attributes. It compares the product or services of one company with that of other or with those of competitors. These advertisements are designed to highlight the advantages of the goods and services offered by the

advertiser as compared to those of a competitor. Although, comparative advertisement has not been defined in the Indian statute, the UK Regulations define it as an advertisement which “explicitly or by implication, identifies a competitor or goods or services offered by a competitor”. These advertisements are not only centered on the merits of the product as compared to others but also highlight the differences between the products. They may state that the advertised product is “better than” (superiority claims) or “as good as” the competitor’s (equivalence or parity claims). Comparative advertisements can be classified into two types- advertisement that compare the competing products directly and the one in which comparison is done indirectly. While in some countries, like UK, both form of comparative advertisement are allowed, there are other countries where comparative advertisement is not allowed at all.

However, it must be noted that the countries in which comparative advertisement is legal, it is allowed as long as while comparing the goods, a trader does not project or say that the goods of his competitor are inferior or undesirable. All he can do is puff up his products but he cannot belittle the products of his competitor. In India puffery is allowed as long as it is subjective i.e. an average customer is likely to comprehend it as a puff. Thus, a company is allowed to puff his products even if such a statement is untrue, however, it should be kept in mind that such a statement is not objective i.e. which is likely to be believed by the consumers coz’ in such a case it is actionable.

In this dissertation, I will briefly outline the aspects of comparative advertising and its relation with the Consumer Welfare then a description of the Indian legal regime will be followed by an introduction to US and EU legislation in the field of comparative advertising, with special regards to the domestic laws in the Civil Law and Common Law Countries. I will also provide an analysis of similarities and distinctions between the two distinct regimes. And then finally, based on the method of comparison, remarks will suggest some improvements related to comparative advertising in Indian law. The agenda of producers being aimed at enhancing consumerism in the post globalisation era, advertisement of their products plays a key role in realising their sales expectation(s). In fact, the importance of advertisements, product placements, popularity and awareness in a competitive market for the sale of retailed goods can hardly be disputed. Resultantly, there is increased competition among producers and thus begins the race to shoot up the rate of sales. This is, however, expected, to illustrate, A Company ‘A’, involved in the manufacturing of aerated drinks, would always try to show its product to be better than that of its direct competitor, Company ‘B’. In the context of

advertisements, this is done by including double-meaning statements to target blurred out images of the competitor's product. These advertisements, which on the face of it seem to be protected under the clause of freedom of speech, are often challenged on the grounds of disparagement of the competitor. Said this, there emerges a point where judicial system is torn between (i) the interests of the competitors, (ii) freedom of speech of the producers and, (iii) protection of the interest of consumers and thus struggles to maintain an equilibrium with an object of fair and just treatment. Covering a wide range of advertisements, starting from promoting a product through the means of a social message or that through a celebrity presence or Comparing one's own products or services with those of a competitor in the market place can indeed be an effective tool in persuading the public of the alleged advantages. This comparative advertisement has emerged as the most efficient and convenient but also a possible legal threat. In such advertisements goods or services of one trader are compared with the goods and services of another trader. It must be noted that the countries in which comparative advertisement is legal, it is allowed as long as while comparing the goods, a trader does not project or say that the goods of his competitor are inferior or undesirable. All he can do is puff up his products but he cannot belittle the products of his competitor. In India puffery is allowed as long as it is subjective i.e. an average customer is likely to comprehend it as a puff. With the passage of time and development of human societies the concept of selling and buying the things required also evolved. Further with the development of industrialization and globalization the market- system also developed and finished goods and various services were available in the markets for buying and selling. Thus every human being came to known as a consumer' and started depending on these markets for procuring his basic requirements.

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