



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL**  
**ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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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

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# **COMPARATIVE ADVERTISEMENT & COMMERCIAL DISPARAGEMENT**

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## **INTRODUCTION**

In the ever-evolving landscape of commerce, businesses resort to various advertising strategies to gain a competitive edge in the market. One such tactic is commercial disparagement, wherein companies intentionally tarnish the reputation of their rivals to bolster their own standing. However, walking the fine line between fair competition and deceptive practices is crucial in the realm of advertising. Comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. Thus, all advertising in which a manufacturer states that his product is the strongest, most efficient, cheapest, best etc. than the others can be considered to include a certain element of indirect comparison with competitors' products.


The purpose of this concept is to enable fair and transparent comparisons between the products of different traders, ensuring that such comparisons are not misleading. Such evaluations naturally involve using the trademarks associated with the products being compared. Without regulations governing this practice, such use could potentially be considered as trade mark infringement.

The concept comparative advertising implies that there must be a competitive relation between the undertaking who compares and the one who is compared. Comparative advertising is advantageous for consumers as it helps them make informed choices by comparing prices, value, quality, and other aspects of various products, leading to increased consumer awareness. However, there is a crucial caveat to consider: The benefits of informed consumer knowledge can only be sustained if the advertising is free from misinformation. The risk lies in relying on entities with vested interests to educate consumers, as they may prioritize their own agenda over providing accurate and unbiased information.

In comparative advertising, it is essential to strike a delicate balance between promoting the strengths of your product and avoiding the use of false or misleading information that could damage the reputation of competitors. Presenting factual, verifiable data to support your claims is crucial to maintain transparency and credibility in the eyes of consumers.

When engaging in comparative advertising, businesses should focus on highlighting their unique selling points and the benefits their products offer without resorting to false or derogatory statements about competitors. Ethical advertising practices play a pivotal role in building consumer trust and fostering a positive brand image.

Look at this real time recent example of Commercial disparagement below

Screenshots	Comments
	<p>In the commercial, the lady tactfully highlights the unique features of the advertising product- “Zarf” comforter in comparison to “Sarita Handa” emphasizing that the “Zarf” comforter offers exceptional quality and comfort at a much more affordable price point than the comforter.</p>





The lady in the advertisement confidently assures customers that Zarf product surpasses the competitor's offering both in terms of size and price, providing a better value for their money.

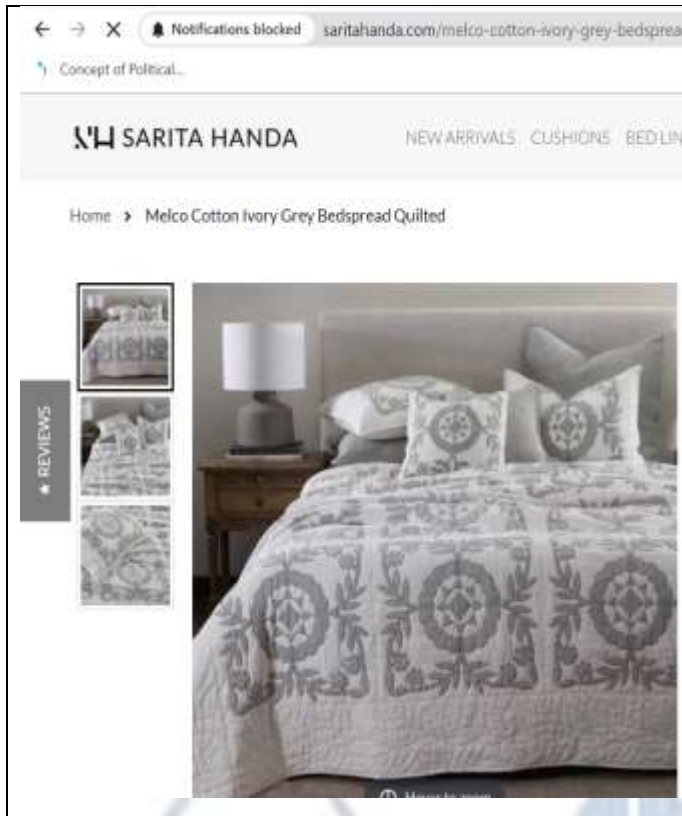


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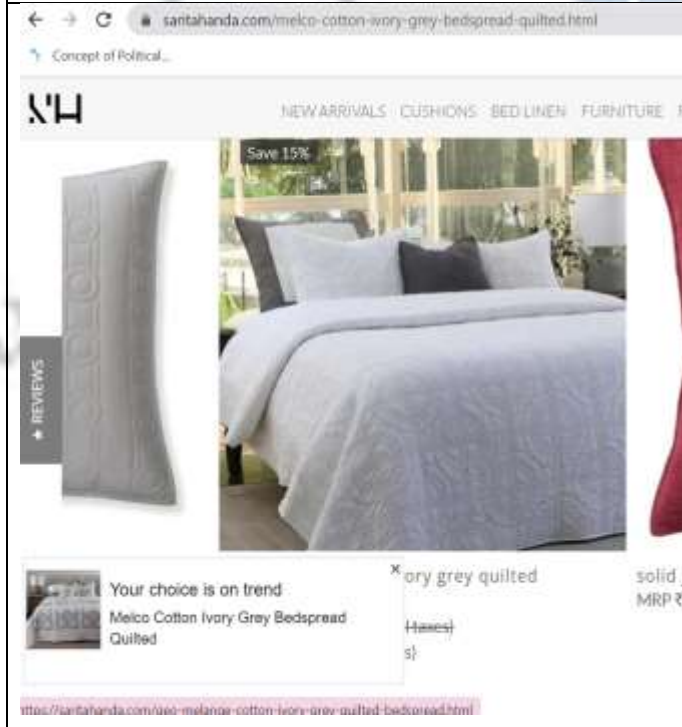


The lady in the commercial critiques the competitor's product, describing it as lacking comfort and not providing a pleasant experience.

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That's the screenshot of the competitor's product—"Sarita Handa" comforter which is being portrayed in an unfavourable light, emphasizing its perceived drawbacks or negative aspects.



In the given example, it becomes evident that the advertising company is resorting to severe disparagement of the competitor's product to promote its own. In an attempt to boost the sales of their

advertising product, they are engaging in negative tactics that undermine the reputation of the rival offering. This approach reflects a concerning willingness to compromise ethical standards and target the competition at any cost.

## CONCEPT OF DISPARAGEMENT

Disparagement, as a concept, entails making unjust comparisons or unjustly discrediting and dishonouring someone or something. It involves making false and harmful statements that undermine the reputation of another's property, product, or business. While it is acceptable to assert that your product is superior to a competitor, when stating that their product is inferior to yours, there might be an implied message of your product's superiority, which is unavoidable in the context of comparison.

## WHAT IS PUFFING IN THE ADVERTISEMENT AND WHY IS IT ALLOWED?

Law in the cases of ads tolerates advertisers to make false statements to the extent that it doesn't mislead the consumers. Right term used for this kind of advertisement is puffing.

Over time, the acceptance of "puffing" has grown alongside the caveat emptor principle. For example, when advertisements contain exaggerated claims or extravagant boasting that a reasonable consumer would not take seriously, such statements do not provide grounds for legal action.

In the case of **White v. Mellin**<sup>1</sup> the House of Lords ruled that a statement claiming a baby food to be "far more nutritious and healthful than any other preparation yet offered" was not considered legally problematic. The reason was that there was no intention to deceive customers deliberately. Instead, it was merely a claim that the defendant's baby food was better than the plaintiffs.

In the case of **De Beers Abrasive Products Ltd. v. International General Electric Co.**<sup>2</sup> a pamphlet was circulated in the International Trade Market comparing the effectiveness of the defendant's abrasives with those of the plaintiff. The pamphlet concluded that the defendant's abrasive was

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<sup>1</sup> [1895] AC 154.

<sup>2</sup> [1975] 1 WLR 972 ;[1975] 2 All ER 599

superior. The court ruled that this was not just a harmless exaggeration, but it could be considered as slander of goods.

The court clarified that simple "advertising puffs" that praise a product over a competitor's in exaggerated terms to attract customers are generally not legally actionable. However, the distinction between acceptable puffing and crossing the line depends on various factors, including the nature of the statements and the type of product being advertised. Sometimes, certain claims about a product may become legally problematic if they are found to be untrue or misleading.

## **HOW IP IS RELATED TO COMMERCIAL DISPARAGEMENT AND COMPARATIVE ADVERTISEMENT IN INDIA?**

The primary purpose of a trademark is to 'distinguish the goods of one person from another. Therefore, a trademark enables a consumer to identify the goods and their origin. Hence in case, if an advertiser uses a competitor's trademark to make a comparison between his goods and those of his competitor, and in the process disparages them, then such an act on the part of the advertiser would not only invoke issues related to comparative advertising and product disparagement, but would also invoke issues related to trademark infringement.

Trademark Law acknowledges the legitimacy of comparative advertising, allowing businesses to showcase the advantages of their products or services over competitors' offerings. However, it also sets a clear boundary, prohibiting advertisers from disparaging the goods or services of another in the process.

As a matter of fact, in cases of 'trademark disparagement,' for the purpose of adjudication of disputes, the Courts in India have looked into the following criteria:

- Intent of the Commercial;
- Meaning of the Commercial;
- Storyline of the Commercial; and
- Ordinary Meaning' the Advertisement renders to a 'Man of Average Intelligence'

In the case of, **Imperial Tobacco Company v. Albert Bonnan**<sup>3</sup>, the Calcutta High Court in Division Bench held as follows: “To succeed in an action of slander of goods, the plaintiff has to allege and prove that the statement complained of was made concerning his goods and that it must be with the direct object of injuring his business.” Inspiration for long has been taken by the Indian Courts from the Courts of U.K. and U.S.

The Trademarks Act, 1999, provides guidelines to ensure fair practices in comparative advertising, allowing businesses to promote their products or services while respecting the rights of competitors. This article explores the settled law on trademark infringement and comparative advertising, shedding light on the principles that govern honest and ethical practices in this competitive landscape.

## STATUTORY PROVISIONS

**Section 29(8)** of the Trademarks Act, 1999 talks about trademark infringement in connection with Disparagement.

Section 29(8) states that “*A registered trade mark is infringed by any advertising of that trade mark if such advertising--*

*(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters;*

*or*

*(b) is detrimental to its distinctive character; or*

*(c) is against the reputation of the trade mark.”*

Further, **Section 30 (1)** of the Trademarks Act 1999, creates a limitation on Section 29 for using comparative advertising. It states as follows-

“**Section 30(1)** Of Trademarks Act 1999- Limits on the effect of a registered trade mark-

*(1) Nothing in section 29 shall be construed as preventing the use of a registered trade mark 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) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.”*

Consequently, combining both sections implies that comparative advertising is permissible in India,

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<sup>3</sup> AIR 1924 Cal 216

but it must be executed with caution, respecting a delicate boundary. The key is to use the competitor's mark in an honest manner, ensuring that the advertisement remains free from any misleading or harmful aspects to the competitor's product.

On the contrary, advertising is encompassed by the **Right to Freedom of Speech**, safeguarded under **Article 19(1)(a)** of the Constitution of India. However, this right is not absolute and can be restricted as laid out in **Article 19(2)** of the Constitution. This article outlines certain situations in which limitations on such speech are permitted. It states that *“Nothing in subclause (a) of clause ( 1 ) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”*

## JUDICIAL PRONOUNCEMENTS

In the case of **Colgate Palmolive Company & Anr. v. Hindustan Unilever Ltd<sup>4</sup>**, it was ruled that comparative advertising allows for a certain level of disparagement, as long as it remains within the bounds of puffery. In other words, an advertisement can positively compare products or services, showcasing their superiority over competitors, which is permitted to a certain extent. However, negative comparisons that belittle or denigrate competitors' products or services are considered disparagement and are not allowed. Such negative comparisons violate the goodwill of the competitor and contradict trademark regulations and the rights of trademark holders.

In the case of **Pepsi Co. Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr.<sup>5</sup>** it was held that in order to decide a case of disparagement the following factors are to be kept in mind:

1. The intent of the commercial
2. The manner of the commercial
3. The storyline of the commercial and the message sought to be conveyed by the commercial.

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<sup>4</sup> 1998 (1) SCC 720

<sup>5</sup> 2003 (27) PTC 305 Del

Therefore, the advertisement has to be seen as a whole. The true intention of the advertisement can be seen only when it is seen as a whole.

Recently, Dhruv Rathee, a popular Youtuber found himself in a court battle against Dabur India (**Dabur India Limited v. Dhruv Rathee**) for criticizing its “Real” packaged fruit juice in his (now removed) video ‘**Is Fruit Juice Healthy? | The Harsh Truth**’.

Dabur, who is no stranger to product disparagement litigations, approached the Calcutta High Court, alleging disparagement. Consequently, the court on March 15, 2023 directed Rathee to remove some allegedly disparaging parts of the video. The rationale for this order was that the video contravenes section 29(8) of the Trademarks Act and is targeted towards ‘Real’. However, in a subsequent order dated March 24, 2023 the Calcutta HC has ordered YouTube to take down the video entirely.

In the case of **Horlicks v. Complan**,<sup>6</sup> Heinz India Pvt. Ltd. compared its product "Complan" to "Horlicks" in an advertisement, claiming that Complan provided twice the amount of protein in one cup compared to two cups of Horlicks. Horlicks filed a suit, alleging that the advertisement disparaged its product based on untrue and misleading facts, and the comparison lacked a standard parameter like protein per 100 grams of each product. The advertisement also included the tagline "From now on only Complan," implying a rejection of Horlicks.

Horlicks contended that Complan's use of its registered trademark in the comparison violated Sections 29(8) and 30(1) of the Trademarks Act, 1999. Complan defended the advertisement, stating it was ASCI code compliant and that using Horlicks' trademark in the comparison was permissible under Section 30(1) as long as it was honest.

Horlicks cited the right to privacy as a fundamental right under Article 21 of the Constitution, arguing that Complan violated it by using its trademark without consent for commercial purposes. However, the Delhi High Court ruled in favor of Complan, holding that the comparison did not cause detriment to Horlicks' distinctive mark and that using a competitor's advantages in advertising is not necessarily dishonest. The court emphasized that the Trade Marks Act permits comparative advertising as long

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<sup>6</sup> LSI-546-HC-2018(DEL)



as it is honest.

The court also ruled that the right to privacy, as established in the Puttaswamy case, does not apply in this scenario, as it cannot be asserted against information available in the public domain, such as the product packaging freely providing the information used in Complian's advertisement.

## **REMEDIES QUA TRADEMARK DISPARAGEMENT**

Two remedies are available to the party alleging trademark disparagement: injunction and a claim for damages. If the contending party can prove trademark disparagement and demonstrate pecuniary losses, they may be eligible for a claim for damages. In the case of **Niche Products Limited v. Mac Dermid Offshore Solutions LLC**<sup>7</sup>, it was held that if the defendant's advertisement is likely to cause financial harm to the plaintiff, a connection between the alleged falsehood and the claimant's economic interest can be presumed.

To grant pecuniary damages, the court considers whether the words used in the advertisement are capable of causing trademark disparagement and if the claimant's trademark has been affected negatively. The gravity of the libel and the extent of publication are vital factors in assessing the appropriate damages for reputation injury.

It is crucial to remember that when damages are claimed, it includes both harm to the complainant's reputation and the mental distress caused by the defendant's insistence that their assertions are true and no apology is owed. The quantum of damages for trademark denigration varies depending on the circumstances of each case.

## **INTERNATIONAL PERSPECTIVES AND DECISIONS ON DISPARAGEMENT**

In the **United States**, the focus is on consumer welfare and fostering a competitive economy. Consequently, comparative advertising is widely accepted and protected under freedom of speech laws. The Federal Trade Commission (FTC) Policy Statement of 1969 highlights that comparing

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<sup>7</sup> (2013) EWHC 3540 (IPEC)

advertisements of different competitors and their products is considered beneficial. The FTC sought clarity to address unfair practices, and in its statement, expressed support for advertisers dealing with issues related to comparative advertising.

The Lanham Act of 1946 was amended in 1988, but it provided limited guidance on handling false advertising and product disparagement within comparative advertising under Section 43(a).

In the **United Kingdom**, the Trademark Act of 1994 takes a lenient approach towards comparative advertising, endorsed by the UK Parliament as a legitimate and valuable marketing tool. It fosters healthy competition, consumer awareness, and aims to promote fair competition.

Under Section 11(2) of **the UK Trade Marks Act, 1994**, comparative advertising is allowed only when it involves a fair and honest comparison of goods between the advertiser and their competitor. If the conditions of fair and honest comparison are met, then the advertisement is admissible under this provision. However, if these conditions are not met, the advertisement will not be considered admissible under any provision.

In the case of *British Airways vs. Ryanair*, British Airways accused Ryanair of trademark infringement due to a comparative advertisement displayed through a banner ad. The ad read "EXPENSIVE BA...DS," and a pricing comparison stated that British Airways' airfare was five times more expensive than Ryanair's, although it was only three times costlier in reality. The High Court ruled that Ryanair's statement, though inaccurate, did not infringe British Airways' trademark as it conveyed the same message that British Airways was expensive. However, the Advertising Standards Authority (ASA) disagreed, stating that the statement contained false claims against British Airways.

**The European Commission Directive on Comparative Advertising, known as the Misleading and Comparative Advertising Directive (MCAD)**, sets specific criteria for advertisements:

- Advertisements must not be misleading.
- Comparisons should involve products meant for the same purpose.
- Price must be objectively included as a comparable item.
- Advertisements should not create confusion.

- Competitors' trademarks or trade names should not be discredited or disregarded.
- If the products have an origin, it should be identified in the advertisement.
- Advertisements must not take unfair advantage of the reputation of a trademark, trade name, or designation of origin.
- Goods should not be presented as imitated or replica goods.

The European Union's MCAD encourages comparative advertising that promotes healthy competition among traders.

## CONCLUSION

Comparative advertising is permissible and, in certain cases, even encouraged in India. It serves as a valuable tool for consumers to understand the distinctions between competing products, enabling them to make well-informed decisions based on their preferences and needs. However, it is essential to abide by the law, which prohibits the disparagement of competitors' products in a dishonest manner to gain undue advantages.

The primary objective of comparative advertising is to furnish consumers with accurate information about similar products, aiding them in making informed choices. This is precisely why comparative advertising is allowed, but it is restricted to showcasing the superiority of one's product or service over that of the competitor's, without resorting to belittling the competitor.

Notably, there is no specific statutory law governing advertisements on internet portals, and the ASCI code mainly deals with cases concerning the telecom industry. Considering the potential impact of disparagement and comparative advertising on the goodwill and reputation of trademark holders, there is a need for reform. Expanding the power of ASCI to include online advertisements or establishing a new body dedicated to handling such cases would ensure that the law remains up-to-date and relevant to the evolving advertising landscape.