

# **COMPARATIVE ADVERTISEMENTS: BALANCING CONSUMER INTEREST VIS-À-VIS IPR INFRINGEMENT**

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## **I. INTRODUCTION**

On May 3, 2007 the Times of India published an advertisement<sup>1</sup> for the promotion of the website timesjobs.com. The campaign line was 'It took us 25 days to move 1,28,370 steps further ahead of our competitor' and this was followed by some comparative graphs and charts without mentioning specifically who their competitor was, although it was quite obvious to all who read it as to who their unnamed competitor was. This type of non-disclosure is commonly employed nowadays to avoid legal pitfalls regarding the veracity of the published information. This form of advertising, promoting one product / service or brand by comparing it to similar products is known as comparative advertising. As defined in EU Directive 97/55/EC, it is "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor."<sup>2</sup>

The opening up of the Indian economy has lead to a plethora of brands in the markets with each one out to capture a portion of the market. While comparative advertising may be one of the best ways of relaying relative information to the consumers, advertisers should tread carefully as it often leads to a clash of legal and ethical principles. Honest, non-misleading and fair comparative advertising is generally viewed positively by law as well as by the public. 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 processes like need, recognition and information search 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 advertising helps him to take a better decision. If it gives very compulsive reasons to a potential consumer to buy a product, it can't be faulted.<sup>3</sup> Thus it can be seen that comparative advertising affects three parties - the advertising company, the rival company or companies and the consumers.

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1. See TIMES OF INDIA, May 03, 2007, <http://timesofindia.indiatimes.com/>.

2. See EU Directive 97/55/EC, OJ L290 23/10/1997 at pg. 8.

3. See Sukanya Ashok Kumar, *Comparative Advertisement: Benefit to Consumers*, THE HINDU, Jun. 15, 2000, <http://www.hinduonnet.com/thehindu/2000/06/15/stories/0615000h.htm>.

In this paper the authors seek to lay out the law as it is today. Thereafter the authors seek to critically analyse the balancing of interests of the parties affected by comparative advertising and the extent to which this fine balance can be stretched under the law.

## **II. STATUTORY FRAMEWORK OF COMPARATIVE ADVERTISING IN INDIA**

In the legal framework governing comparative advertising, there has been a shift from curbing monopolies to encouraging competition. The basic legal structure has been laid down by the Monopolies of Restrictive Trade Practices Act, 1984 (M.R.T.P Act) and the Trade Marks Act, 1999 (T.M.A.)

It's interesting to note how the earlier law came into place. The Government of India, in 1964 appointed the Monopolies Inquiry Commission to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity.<sup>4</sup> Along with the report that the Commission submitted was a draft bill (The Monopolies and Restrictive Trade Practices Bill, 1965) which was passed as the M.R.T.P. Act, 1969. The initial purpose behind the Act was the control of monopolies and prohibition of restrictive trade practices;<sup>5</sup> however the Act was amended several times to suit the changing circumstances until it was finally rendered obsolete by the economic reforms of 1990s as stronger pro-competition laws were required.

The Trade Marks Act, 1999 came into place after The Trade and Merchandise Act Marks Act, 1958 was repealed. "India enacted its new Trademarks Act 1999 (the TM Act) and the Trademarks Rules 2002, with effect from 15th September 2003, to ensure adequate protection to domestic and international brand owners, in compliance with the TRIPS Agreement."<sup>6</sup> Certain rights of trademark owners were extended – such as the protection of trademarks was extended to cover not only goods but services as well. However another provision of the TMA imports a defence to an otherwise infringing use of a trademark. This can be seen as a delicate balancing of interests – the rights of the trademark owners on one hand and the consumers' interest in informative advertising on the other.

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4. See Anurag K. Agarwal, *Competition Law in India: Need to Go Slow and Steady*, IIM Ahmedabad, W.P. No. 2005-10-05, Oct. 5, 2005, <http://www.iimahd.ernet.in/publications/data/2005-10-05anurag.pdf>.
  5. Monopolies and Restrictive Trade Practices (Act No. 54 of 1969), Statement of Object and Reason.
  6. See Priya Bansal, *Use of Trademark in Comparative Advertising: Situation in India*, <http://>

The various legislative developments and amendments in the law governing competitive advertising in India have gone hand in hand with India's economy. Comparative advertisement is permitted by section 30 of the Trade Marks Act, 1999 which allows the use of registered trademarks provided that it is honest use, that it does not take unfair advantage of the trademark and that it does not damage the goodwill associated with the trademark.<sup>7</sup> To infringe the use of a registered mark, the conditions stated in the relevant provisions of the Paris Convention<sup>8</sup> and the Trademark Approximation Directive<sup>9</sup> must be fulfilled. In other words, it must (a) be otherwise than in accordance with honest practices in industrial or commercial matters and (b) without due cause take unfair advantage of, or be detrimental to, the distinctive character or repute of the mark.<sup>10</sup>

Section 36A of MRTP Act lists several actions to be 'unfair trade practices'.<sup>11</sup> Unfair trade practices in comparative representation include any promotion of goods or services that deceives or gives false information regarding the goods or services of another person. Other instances of unfair trade practices include the adoption of any unfair or misleading methods or practices in the representation of goods and services. The entire concept of 'disparagement of goods of another person' thus flows from the MRTP Act.

The Trade Marks Act, 1999 provides protection against 'passing off' for registered trademarks as well as well known unregistered marks. The essence of an action of passing-off is confusion. The proprietor thereby has a statutory alternative to the common law action of passing off.

[www.legalserviceindia.com/articles/tadv.htm](http://www.legalserviceindia.com/articles/tadv.htm).

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7. Section 30 of the Trade Marks Act, 1999 states: "Nothing in section 29 shall be preventing the use of registered trademark by any person with the purposes of identifying goods or services as those of the proprietor provided the use:-  
 a) is in accordance with the 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." But with *certain limitations* which are provided under § 29(8) of the Trade Marks Act, 1999 which reads as:  
 A registered trademark is infringed by any advertising of that trademark if such advertising:-  
 a) takes unfair advantage 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 trademark."
  8. See Paris Convention for the Protection of Industrial Property, art. 10bis (2), Mar. 20, 1883, 6 I.L.M. 806.
  9. See First Council Dir.89/104/EEC of Dec. 21, 1988.
  10. See Navpreet Panjratn and Kanwardeep Singh, *Comparative Advertising- A Brief Overview*, 1 MANUPATRA INTELLECTUAL PROPERTY REPORT A-200, A-203 (2007).
  11. The provision which pertains to comparative representation is contained in § 36A(1)(x) o f the Monopolies and Restrictive Trade Practices Act, 1969 which reads as follows: "Definition of

### **III. JUDICIAL PRECEDENTS IN INDIA**

As can be noted from above, comparative advertising in India was initially covered by the MRTP Act, 1984 as being a potentially unfair trade practice. It was only after the recent enactment of the Trade Marks Act, 1999 that some headway was made in the direction of comparative advertising vis-à-vis intellectual property jurisprudence. However, as the said Act was only made enforceable in 2003, comparative advertising case law in India is yet to truly develop.

There are a significant number of comparative advertising cases decided by the courts under the MRTP regime. While the focus of these cases was largely on the protection of the consumer rather than the use of infringed trademarks, they provided the groundwork for the present legal stance towards comparative advertising in India.

The leading judgments in this respect were the two *Reckitt & Colman cases*<sup>12</sup>. In the case of *Reckitt & Colman of India Ltd. v Kiwi TTK*<sup>13</sup> the Delhi High Court held that statements made by manufacturers claiming their product to be the best or puffing up their goods will not give a cause of action for disparagement. However, any statements that portrays competitors' similar goods in bad light while simultaneously promoting the manufacturers own goods is not permitted and will be tantamount to disparagement.<sup>14</sup> In the given case, both parties were in the business of manufacturing shoe polish. The defendants, whose brand name was 'Kiwi' marketed an advertisement comparing a bottle of their shoe polish with another bottle, marked as 'Product X' whereby the virtues of the defendant's product were extolled while disparaging the other unnamed product. The plaintiff claimed that 'Product X' bore a striking resemblance in design to their own product namely, 'Cherry Blossom' and that the advertisement disparaged its product. Based on the stated reasoning, the Delhi High Court granted an injunction against the defendants for the disparaging contents of the advertisement.

unfair trade practice: .... "unfair trade practice" means a trade practice which, for the

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purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely :-

- (I) the practice of making any statement, whether orally or in writing or by visible representation which,- xxx
  - (x) gives false or misleading facts disparaging the goods, services or trade of another person."
12. See *Reckitt & Colman of India Ltd. v. Kiwi T.T.K.*, 1996 P.T.C. 193 T 399 (hereinafter referred to as Reckitt Colman-1); *Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Anr.*, 1999 P.T.C. (19) 741 (hereinafter referred to as Reckitt Colman-2).
13. See generally *Reckitt Colman* 1, 1996 P.T.C. 193 T 399.

The Calcutta High Court took it a step further in the case of *Reckitt & Colman of India Ltd. v. MP Ramachandran & Anr.*<sup>15</sup> As per the facts of this case the plaintiffs were engaged in the manufacturing of blue whitener under the name of 'Robin Blue' for which they had a design registration over the bottle. The defendants, who were in the same business, issued an advertisement comparing their product to others stating that not only was their product cheaper, but also more effective. In this depiction they compared their product to a bottle having the same shape and pricing as that of the plaintiff's product. While holding that the advertisement was made with the intent to disparage and derogate the plaintiff's product, the Calcutta High Court laid down five principles in aiding the grant of injunctions in such matters, stating that:<sup>16</sup>

1. A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue;
2. He can also say that my goods are better than his competitors', even though such statement is untrue;
3. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others;
4. He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible;
5. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

These principles were used in the much publicized case of *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.*<sup>17</sup> However, this case differed from the cases aforementioned in respect of the fact that herein the Delhi High Court also dealt with copyrights and trademark related issues.

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14. *Id.*, at ¶ 12.

15. See Reckitt Colman 2, 1999 P.T.C. (19) 741.

16. *Id.*, at 476.

The plaintiff in the instant case claimed disparagement of trademark and copyright in two advertisements of the defendants. Both advertisements allegedly desecrated the plaintiff's products with derogatory remarks. One of the advertisements depicted a thinly veiled substitute of Pepsi as a "bachhon wali drink" while mocking Pepsi's advertising slogan by saying "Yeh Dil Mange No More".<sup>18</sup> The entire commercial conveyed to the viewers that kids should prefer 'Thums Up' over 'Pepsi' if they want to grow up.<sup>19</sup> The court while using the principles laid down in the two aforementioned cases also went onto state that in order to decide questions of disparagement, the following factors have to be kept in mind, namely:<sup>20</sup>

1. Intent of the commercial;
2. Manner of the commercial;
3. Story line of the commercial and the message sought to be conveyed by the commercial.

Although it is unclear whether these factors are to be read conjunctively or disjunctively, the Delhi High Court used the second factor as the determining one. It ruled that if the manner in showing the commercial is only to show that the product is better without derogating somebody else's product, then no actionable claim lies. But if the manner of the commercial is ridiculing or condemning the product of the consumer then it amounts to disparagement. In essence, this is reflective of the ratio of the *Reckitt & Colman* cases. Therefore, the Court while concluding that there was no disparagement also went onto hold, without precedent, that Pepsi's advertising slogan was copyrightable. The Court however also mentioned that mere use of the trademark protected Pepsi logo and parody of the slogan does not give rise to *ipso facto* infringement.

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17. 2001 (21) P.T.C. 699.

18. Hindustan Coca Cola and others endorse their product with the help of a commercial wherein the lead actor asks a child which is his favourite drink. He mutters the word "Pepsi", which can be seen from his lip movement though the same is muted. The lead actor thereafter asks the boy to taste two drinks in two different bottles covered with lids and the question asked by the lead actor is that "Bacchon Ko Konsi pasand aayegi?" After taste the boy points out to one drink and says that that drink would be liked by the children because it is sweet. In his words he says. "Who meethi hain, Bacchon ko meethi cheese pasand hai". He preferred the other drink which according to him tastes strong and that grown up people would prefer the same. And later the stronger one came out be "Thums Up", and one which is sweet, word "Pappi" is written on the bottle with a globe device and the colour that of the "Pepsi". The boy feels embarrassed about the fact that he chose "Pepsi", which he himself felt was a childrens' drink.: *See generally* Bansal, *supra* note 6.

19. *See* Navpreet Panjwani and Kanwardeep Singh, *Comparative Advertising: Things You Can Do and Things You Can't*, <http://news.indlaw.com/guest/columns/default.asp?navpreet>.

The other advertisement was alleged to have copied substantial portions of the plaintiff's commercial thereby amounting to copyright infringement by the defendants.<sup>21</sup> The plaintiff also went on to claim that the portrayal did not constitute fair use or claim to be a parody. The court concluded that the commercial was nothing but a literal imitation of the plaintiff's work subject to minor and insufficient changes. As the commercial squarely violated the meaning of copyright under the statute,<sup>22</sup> the court granted an injunction to the effect that the defendant should be refrained from showing the advertisement in its present form.

#### **IV. JUDGMENTS UNDER THE TRADEMARK ACT ERA**

With the enforcement of the Trademarks Act in 2003, there have been only a handful of judgments in the new era of comparative advertising governance. The first of these was the triumvirate of *Dabur cases*.<sup>23</sup> In *Dabur India Ltd v. Colgate Palmolive India Ltd*,<sup>24</sup> the standards used by the Delhi High Court were not unlike those previously used. The facts delineated an open-shut case of clear disparagement. The sum and substance of the commercial showed a film actor rubbing the plaintiff's dental powder on the surface of a purchaser's spectacles, leaving marks and depicting it to be akin to sandpapering. The advertisement went onto to show how the defendant's product was sixteen times less abrasive than the plaintiff's product and thereby less damaging to the teeth.<sup>25</sup> Using the principles laid down through judicial precedent in the pre-Trademarks Act era, the court stated that this was a straightforward case of disparagement, which could not be allowed under any circumstances.

However, the decision in the case of *Dabur India Ltd. v. Emami Limited*<sup>26</sup> has possibly set the law governing comparative advertising down a potentially dangerous path. In the judgement the court ruled that even if there is no direct reference to the product of a competitor and only a reference is made

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20. See *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.*, 2001 (21) P.T.C. 722.

21. The advertisement was concerning a roller coaster, of which portions were identically copied by the defendant in the advertisement for their product 'Sprite'. The copied commercial went to the extent of copying whereby even the characters wore the identical clothes as compared to those in the 'Pepsi' commercial: *The Famous Cola War (Copyright of Advertisement Phrases and Themes)*, TIFAC BULLETIN, May 2004, [www.pfc.org.in/fac/may04.pdf](http://www.pfc.org.in/fac/may04.pdf).

22. Section 14, Indian Copyright Act, 1957.

23. See *Dabur India Ltd v. Colgate Palmolive India Ltd.*, 2004 (29) P.T.C. 401 (hereinafter referred to as Dabur-Colgate); *Dabur India Ltd v. Emami Limited*, 2004 (29) P.T.C. 1 (hereinafter referred to as Dabur-Emami); *Dabur India Ltd.v. Wipro Ltd.*, Bangalore, 2006 (32) P.T.C. 677 (hereinafter referred to as Dabur-Wipro).

24. See *Dabur-Colgate*, 2004 (29) P.T.C. 401.

25. See Panjratn and Singh, *supra* note 10, at A-208.

to the entire class in a generic sense, a case of disparagement in such circumstances is still possible. As per the given facts, an advertisement issued by the defendant stating that consumers should not use "Chayawanprash" in the summers but use the defendant's product, which was more effective in the summer months. Although no insinuation was specifically made against the plaintiff's product, the court went onto issue an injunction stating that the commercial denigrated Dabur's product.

In *Dabur India Ltd. v. Wipro Limited, Bangalore*<sup>27</sup> the judiciary added a new dimension to the existing tests for determining disparagement. The court stated that in comparative advertising, the degree of disparagement should be such that it would be tantamount to, or almost tantamount to defamation.<sup>28</sup> Only at such levels of disparagement would the court interfere with the marketing strategies employed.

The decision in *Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd.*<sup>29</sup> was reflective of what the courts thought honest comparative advertising to mean. In the case, the defendants advertised their product 'Mortein' which was meant to kill both cockroaches and mosquitoes and the commercial highlighted this aspect. The plaintiff claimed that this disparaged their product 'Hit', which had two separate versions for killing cockroaches and mosquitoes. The court in its judgment stated that the advertiser has a right to boast of its technological superiority in comparison with product of the competitor. Telling the consumer that he could use one single product to kill two different species of insects without undermining the plaintiff's products, by no stretch of imagination amounted to disparaging the product of the plaintiff.<sup>30</sup>

## **V. WHERE DID IT ALL GO WRONG?**

As a direct consequence of the liberalization and globalization of the Indian economy, the Indian consumer is now faced with an onslaught of products and services. Foreign brands are pouring in and their Indian counterparts, both new and old are bidding to gain a foothold in the market leaving the consumer drowning in a sea of choice. In such a scenario comparative advertising gives scope to the consumer to resolve some of the ambiguity and facilitates in the making of more informed choices.

In comparative advertising the underlying assumption is that the consumer is made aware of differences in features/prices/utility etc. between

26. See Dabur-Emami, 2004 (29) P.T.C. 1.

27. See Dabur-Wipro, 2006 (32) P.T.C. 677.

28. See Panjrath and Singh, *supra* note 10, at A-208-209.

29. 2006 (32) P.T.C. 307.

30. See Manisha Singh Nair, *India: Roads Ahead- Comparative Advertisement*, <http://www.mondaq.com/>

the compared products. However, while aggressively and vigorously promoting their products and services, firms have often disregarded truthfulness and fairness of representation. The United States Federal Trade Commission legalized comparative advertising in 1971 with the intention that increasing the awareness of consumers would allow them to make more well informed choices.<sup>31</sup> Comparative advertising was legalized in India for the same reasons. What needs to be examined is whether the law has succeeded in fulfilling what it set out to do.

Amongst numerous instances, the most illustrative example of contemporary comparative advertisement in India would be the recent Cola War campaigns. These advertisements are subverting the very essence of comparative advertisement and are degenerating it into mere mockery. In their game of one-upmanship the cola companies have reduced themselves to merely puffing up their products and not providing the consumer with any useful information about the product itself. Unfortunately this form of comparative advertising seems to be a growing trend in advertising today.

In the landmark decisions of *Reckitt-Colman of India Ltd. v. Kiwi TTK*<sup>32</sup> and *Reckitt Coleman of India Ltd. v. M.P. Ramachandran*<sup>33</sup> the courts have encouraged this disturbing development by allowing mere puffing up without any basis whatsoever. The focus has only been on the prohibition of disparagement. The attitude of the courts has been such that the promotion of hot air is allowed just so long as a competitor is not denigrated. While focusing on unfair trade practices and the protection of intellectual property rights, the courts seem to have disregarded the consumers' interest. This can be seen in a recent Madras High Court case, wherein Justice Banumathi opined that comparative advertisement at present involved a balancing of interests of advertisers in promoting their products on one hand and the interest of those who might be damaged by competitor's attacks on their products on the other.<sup>34</sup>

## VI. THE POSITION OF LAW IN THE UNITED KINGDOM

Considering that a significant portion of intellectual property jurisprudence in India is derived from English law, perhaps the Indian judiciary should take a leaf out of the UK courts. They have applied the law in a article.asp?article\_id=39572.

31. See Kumar, *supra* note 3.

32. 1996 P.T.C. 193 T 399.

33. 1999 P.T.C. (19) 741.

34. See *Comparative ads Need to be Curtailed: HC*, THE HINDU BUSINESS LINE, Dec. 15, 2005, <http://www.hindubusinessline.com/2005/12/15/comparative-ads-need-to-be-curtailed-hc/>

manner whereby the regulation of comparative advertising is such that the interest of the consumer is not completely eclipsed.

The landmark case of *O2 Holdings Ltd. and Others v. Hutchison 3G Ltd.*<sup>35</sup> introduced a new defence to trade mark infringement under the Comparative Advertising Directive. The petitioners, a leading provider of mobile telecommunication services in the United Kingdom, had been using imagery including bubbles in its advertisements since 2002 and had spent £320 million on advertising and promotion. The bubble formed a part of the petitioner's identity. The respondents, a rival company that had launched a new service under the name "ThreePay", advertised with a stream of bubbles in black and white and information about O2's prices and services. Even though the Judge accepted the claim by them that the bubbles in the respondent's advertisement was similar to O2's bubble and that it could have caused confusion, the respondents took the defence under the Comparative Advertising Directive; which lays down conditions for acceptable comparative advertising:

1. Must not be misleading;
2. Must compare goods or services meeting the same needs or intended for the same purpose;
3. Must objectively compare one or more material, relevant, verifiable and representative features;
4. Must not create confusion, discredit or denigrate the competitor or its trademarks;
5. Must not take unfair advantage of the reputation of the competitor's trade mark; and
6. Must not present goods or services as imitations or replicas of goods or services of the competitor trade mark owner.

The Judge held that an advertisement must comply with the Directive in order to avoid trademark infringement. Hence the suit for trademark infringement failed.

As can be seen, unlike the principles adopted by the Indian courts, as per the standards applied in UK, a statement made by an advertisement needs to be verifiable and true thereby not allowing the same amount of puffing up that occurs in the Indian scenario.

An extension to this line of thought brings up a more fundamental question of whether the truth, in any form, disparaging or otherwise, ought or ought not to be suppressed. Stripping it down to the basics, advertising is for the consumers' benefit. Take the instance of the landmark English case of *Cable & Wireless PLC v. British Telecommunications*.<sup>36</sup> The defendants issued an advertisement brochure comparing the prices of its telephone services with those of the plaintiff. The court refused the injunction because the information which the defendant advertised was not false. Similar rulings have been given in numerous English cases<sup>37</sup>, all indicating that as long as the comparison is honest then it should be allowed irrespective of it being disparaging or not. While there have not been too many cases of honest comparative advertising coming before the courts in India, a similar stance such as that of the UK ought to be taken. An early indication of a step in this direction can be found in *Godrej Sara Lee Ltd. v. Reckitt Benckiser*<sup>38</sup> where the court upheld honest comparative advertising despite certain overtones of disparagement.

## VII. TREADING A DANGEROUS PATH?

On a different note, precedents like the one laid down in *Dabur India Ltd. v. Emami Ltd.*<sup>39</sup> could severely curtail the scope of comparative advertising. Jurisprudentially speaking, the concept of defamation has to be specific or individualized in nature.<sup>40</sup> In the present case, the courts seem to have overlooked this premise, as the court's ruling in the case laid down that even a reference to a generic class of products could be potentially disparaging. This could be viewed as dangerous precedent as it would disallow a competitor to even make comparisons on a general basis. Hypothetically if the newly launched Tata Nano were to put out an advertisement giving out the impression that bike owners could 'progress' in life by graduating to a car, then based on the ratio of this case, any bike company would be able to successfully sue Tata for disparagement.

Perhaps the position of the courts has been relaxed with the decision in the case of *Dabur India Ltd. v. Wipro Ltd., Bangalore*.<sup>41</sup> In this case, the court added a new dimension to the existing test for disparagement by laying down that the degree of disparagement must be tantamount to, or almost tantamount to defamation. The judgment further went on to say that a manufacturer of a product ought not to be hyper-sensitive in such matters. It

35. [2006] E.W.H.C. 534 (Ch). 12.

36. 1998 F.S.R. 383.

37. See *British Airways PLC v Ryanair Ltd.*, 2001 F.S.R. 32; *O2 Holdings Ltd. & Ors. v. Hutchison 3G Ltd.*, [2006] E.W.H.C. 534 (Ch). 12. [2006] E.W.H.C. 534 (Ch).

38. 2006 (32) P.T.C. 307.

39. See *Dabur-Emami*, 2004 (29) P.T.C. 1.

40. See RATANLAL & DHIRAJLAL, THE LAW OF TORTS 259-261 (G.P. Singh ed., Wadhwa & Co. 2004).

is necessary to remember that market forces are far stronger than the best advertisements. If a product is good and can stand up to be counted, adverse advertising may temporarily damage its market acceptability, but certainly not in the long run.<sup>42</sup>

### **VIII. CONCLUSION**

While there is no doubt that the law in India with regard to comparative advertising is well settled, the question that still remains unanswered is whether it has been settled in the right manner? By liberally allowing puffing up in marketing strategies, so long as a competitor is not adversely affected, the courts have turned a blind eye towards the equally important consumer and his interests. The manner in which competitive advertising is panning out in the Indian sphere, the focus only seems directed towards the grabbing of eyeballs, without providing any productive information for the consumer to utilize. The objective behind comparative advertising was not only being informative and an important tool to promote competition but for comparisons to serve as benchmarks to help consumers focus on the product's main qualities.<sup>43</sup> In India, the courts have been oblivious to these aspects.

Even on the stand of honest comparative advertising, the Indian position remains ambiguous and unsteady. While there is international consensus on the fact that any form of comparative advertising, whether disparaging or not, is permissible so long as it is based on facts and is verifiable, it is unclear whether the position is the same in India. It is true that most cases that have come before the courts depict instances of disparagement in an unequivocal manner but decisions like the one given in *Dabur India Ltd. v. Emami Limited*<sup>44</sup> sow seeds of doubt with regard to the Indian position.

Having said that, the latest set of judgments to emerge from the Indian courts seem to be taking comparative advertising in the direction of restoring some parity with the international position. Decisions like those made in the cases of *Dabur India Ltd.v. Wipro Limited, Bangalore*<sup>45</sup> and *Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd.*<sup>46</sup> are in conformity with the position of law in the UK and USA.

41. See *Dabur-Wipro*, 2006 (32) P.T.C. 677.

42. See Panjratn and Singh, *supra* note 10, at A-209.

43. See Keshav S. Dhadak and Vaishali Mittal, *India: How to Gain From Comparative Advertising*, <http://www.managingip.com/Article.aspx?ArticleID=1321496>.

44. See *Dabur-Emami*, 2004 (29) P.T.C. 1.

45. See *Dabur-Wipro*, 2006 (32) P.T.C. 677.

The onus of ensuring healthy competition however does not merely lie with the courts. It is of equal importance that the marketers of products engage in comparative advertising engage in the activity within the permissible parameters of the law. Establishing a brand marketing policy within a company ought to be as important as watching for use and misuse of a brand by other competitors. It is important to keep the following guidelines in mind while engaging in the activity:<sup>47</sup>

1. A comparison should be made based on verifiable facts about the advertisers' and the competitors' products/services, which can be substantiated.
2. If a comparison is based on clinical tests results there should be sufficient proof that they were conducted by an independent/objective body. Partial results or differences should not be shown in the advertisements because consumers may draw improper conclusions from them.
3. Always accurately depict the competitor's mark with appropriate trade mark symbols/notices and add a footnote identifying the correct owner and disclaiming any affiliation. A competitor's mark should not be altered in any form.
4. Avoid using a rival mark in a highlighted or prominent fashion that implies an affiliation with or sponsorship by the competitor of your advertisement.
5. Keep the primary goal of your advertisement limited to inform the consumer and not to unfairly attack, criticize, or discredit other products, advertisers or advertisements directly or by implication.
6. The product or services being compared should reflect their value and usefulness to the consumer. The comparative advertisement should be informative and convey positive merits of the product/service.
7. The advertisement should not make unjustifiable use of any firm, company or institution and should not take unfair advantage of the goodwill of any trade name or symbol of another firm.

If guidelines along these lines are followed by the product marketers, it allows for the fostering of a better corporate environment to invest in. It is of utmost importance for both companies and the judiciary to work in tandem to restore the parity in comparative advertising whereby fair trade practices; intellectual property protection and consumer interest can go hand in hand.

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46. See Godrej Sara Lee Ltd. v. Reckitt Benckiser, 2006 (32) P.T.C. 307.

47. See Dhadak and Mittal, *supra* note 43.