



COMPARATIVE ADVERTISEMENT IN INDIA: A JUDICIAL ANALYSIS

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ABSTRACT

Advertising is key to success. Brands spend exorbitantly on the advertising and marketing of their products and services to attract consumers. The market is highly competitive and to survive in the hostile market economics, businesses often compare their products with others to showcase their credibility. Though to an extent, it is permissible and genuine to compare, when the comparative advertisement exceeds the limitations to disparage the products and services of other businesses, suits with regard to infringement are filed by the aggrieved. As in the modern world, almost all businesses register their trademarks under the respective legislations, they can file suit of infringement with regard to the comparative advertisement which disparages or damages the reputation of one's trademark. The research intends to deal with the concept of comparative

advertisement and its legality referring to various judicial decisions.

Keywords: Advertising, Comparative Advertisement, Competitive, Disparagement, Trademark.

INTRODUCTION

Comparison in the commercial world is to differentiate between two products or services about their unique qualities and characteristics. It is not an unusual practice in advertising resorting to comparative advertisements to highlight their products over others. As per De Jager and Smith, "*Comparative advertising is a technique of advertising which contains displayed pictorial, audio or printed material, which has the effect of making a direct or indirect comparison between product or services of identified competitors or non-competitors as to the price, qualities,*

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attributes or characteristics of these products or services.”³

In *Gillette Australia Pty Ltd. v Energizer Australia Pty Ltd.*, the Federal Trade Commission (USA), defined comparative advertising as “Advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.”⁴

EU defines comparative advertising as “Any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.”⁵

It refers to any form of advertising wherein a trademark owner vies for financial and perceptual advantages by comparing one’s good or service or brand with that of its competitor. Comparative claims in advertising can take on various forms, either explicitly mentioning a comparison or implying it through subtle language. The emphasis can be on the similarities or differences between the products being compared, with the goal of portraying the advertised product as equal to or superior to the competition.⁶

Comparative advertising primarily aims to promote one product at the cost of another. This generates competing views and controversies regarding the legality and boundaries of comparative advertising. The prime reason for this debate is that comparative advertisement intends to show information that would apparently show the benefits or abuse of the competitors’ products to the consuming or viewing public.⁷

Business conflicts between the advertising company and the competitor play an important role. On one side, the goodwill of the competitors

is at stake, and on the other side restrictions on such advertising will hinder the advertisers from completely showcasing their uniqueness and other factors over other competitors. Comparative advertising diminishes the commercial appeal of a competitor’s trademark.⁸

Generally, comparative advertising comprises two categories: puffery and denigration. Puffery is an advertising practice where the advertisement makes superlative claims to attract the consumer’s attention which are just unverified claims without any scientific or rational explanation. Puffery goes beyond the limits of other competitors’ tolerance and shows the competitors’ products in an adverse way. The same leads to the denigration of other products, which the courts on numerous occasions have absolutely forbidden. Consequently, the common question that arises is to what extent comparable advertising is prohibited. The solution is to gain a crystal-clear awareness of the opposing relationships and interests of several parties, particularly the advertiser, the competitor, and the customer. The advertiser’s goal is to present his items such that the consumer is persuaded to purchase them. Regarding this, the rival would attempt to avoid any advertisement that makes misleading claims and seeks to disparage the product or uses his product as a benchmark that the marketer promises to surpass. The consumer is currently surrounded by a cyclone of advertising and has the right to be informed about the accuracy of quality, efficacy, and utility of the products or services the market offers.⁹

Article 19(1)(a) of the Indian Constitution guarantees that any reference to advertising control must be viewed from a constitutional viewpoint. Advertising was formerly barred from the scope of Article 19(1)(a), but the Supreme Court ruled

3 De Jager and Smith, *Advertising and the Law* 67 (Butterworths 1995).

4 *Gillette Australia Pty Ltd. v Energizer Australia Pty Ltd.*, (2002) 193 ALR 629.

5 Directive 2006/114/EC, OJ L 376 at 22, Art. 2(c).

6 Charlotte J. Romano, *Comparative Advertising in the United States and France*, 25 NJILB 371 (2004-05).

7 Stewart E S, *The Law of Comparative Advertising: How much worse is ‘better’ than ‘great’*, CLR, 76-80 (1976).

8 Charlotte J R, *Comparative Advertising in the United States and France*, 25 NJILB 371-409 (2005).

9 Parth Gokhale and Shriyani Datta, *Comparative Advertising in India: Evolving a Regulatory Framework* 4 NUJS L.REV. 131 (2011).

in *Hamdard Dawakhana v. Union of India*,¹⁰ that while advertisements are a type of speech, they do not constitute the idea of ‘free speech’. In an effort to encourage trade and commerce, the decision was motivated by a desire for financial advantage. However, economic liberalization brought about significant modifications to the composition of the consumer products sector. The emergence of a vast array of products and services accelerated competitiveness. Advertising played a very important role in this aspect, thereby affecting the dynamics of the market. Moreover, it also determined consumer demand. Similar to the available types of public entertainment, for instance, sports, shows, social events, etc., the amount of income generated by advertisements rendered the media excessively dependent.

In *Tata Press v. Mahanagar Telephone Nigam Ltd.*,¹¹ a constitutional paradigm shift occurred when it was determined that advertising was beneficial to consumers since it permitted the free diffusion of information, hence increasing the awareness of the consumers in a free market economy. In addition, advertisements were regarded as the “lifeblood” of the free media since they made significant contributions to print and electronic media companies. Based on the aforementioned remarks, the Court rejected the stance of the Supreme Court of India in *Hamdard Dawakhana* and found that advertising constitutes “commercial communication” within the meaning of Art. 19(1)(a).

PRODUCT DISPARAGEMENT

Black’s Law Dictionary defines “disparagement as to connect unequally; or to dishonour (something or someone) by comparison; or to unjustly discredit or detract from the reputation of (another’s property, product, or business); or a false and injurious statement that discredits or detracts from the reputation of another’s property, product, or business.”¹² Succinctly,

‘disparagement’ is nothing but a fake and injurious (sometimes legal injury) expression that discredits or defames the reputation of another’s character, property, product, or business as a whole.

Product denigration is not confined solely to comparative advertising. Even a single action directed towards a third party may amount to product disparagement. An online article, for instance, evaluates a specific product and disparages it in the process. Disparagement by a third party is neither new nor unusual. Numerous examples of product-specific disparagements, such as service provider disparagement and food product disparagement, have become so prevalent that, in the United States, about thirteen states have implemented laws intended to ban food-related disparagement. As per these laws, if anyone disparages your product, a food manufacturer can sue them without providing credible scientific evidence. However, such scenarios, it does not directly involve comparative advertising since the goods or services are not used for comparison and, in certain instances, are not even used in advertising.¹³

INDIAN POSITION ON COMPARATIVE ADVERTISEMENT

In recent years, explicit legal reference to competitive advertising has emerged in India. In accordance with the TRIPS Agreement, India adopted the Trademarks Act, 1999, and the Trademarks Rules, 2002 to provide reasonable protection to domestic and international trademark owners. The Trademarks Act defines a well-known mark as a mark that is well-known to a significant percentage of the population using such goods or utilizing such services, to protect international proprietors.

Section 29(8) of the Act talks about comparative advertising. In accordance with its terms, comparative advertising is permissible but

10 *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

11 *Tata Press v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

12 Garner Bryan, *A Black’s Law Dictionary*, (West Group, Minnesota, 7th Edn. 1999).

13 Uphar Shukla, *Comparative Advertising and Product Disparagement vis-à-vis Trademark Law*, 11 JIPR 409-414 (2006).

subject to specific prohibitions regarding unfair business practices. Section 36A of the Monopolies and Restrictive Trade Practices Act of 1969, which has been repealed and replaced by the Competition Act of 2002, defines “unfair trade practices”. Section 30(1) of the Trademarks Act, 1999 states, “Nothing in Section 29 shall be construed as prohibiting the use of a registered trademark for the purposes of identifying goods or services as those of the proprietor, provided that 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 trademark.” Section 29(8) provides the following limitations: “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 detrimental to the reputation of the trademark.” When it comes to comparative advertising, the litigants are firms/brands (whose products are recommended by the adverts), which do not fit within the umbrella of ‘consumers’ to approach consumer forums.

The economy of India is dynamic, free-market, and competitive. The market competition is intensifying due to the aggressive marketing of items and services through branding exercises. These dynamics require new legislation or judicial interpretation. The Trademark Act is not adequate to the evolving trademark law conflicts since it covers only the circumstances under which comparative advertising is permitted and is unlikely to deal with several issues of the legal outlook, such as what actually leads to comparative advertising, product disparagement, or what legal remedy can be provided to the injured parties in cases of product disparagement. Judicial precedents play a crucial part in the decision of comparative advertising, as described in the following section.¹⁴

COMPARATIVE ADVERTISEMENT: JUDICIAL ANALYSIS

Reckitt & Colman of India Ltd v. Kiwi TTK Ltd.,¹⁵ is among the earliest instances wherein the Delhi High Court investigated the extent of comparable advertising. The case was about advertisement depicting two shoe polish bottles, one with the Kiwi brand name that did not leak and the other with the X brand name that was dripping. A product of Reckitt & Colman India, the second bottle featured a crimson glob in the shape of a cherry. In addition, the advertisement presented through electronic media, the defendant also circulated ‘point-of-sale’ poster materials in stores and retail outlets offering similar products. In the aforementioned post material distributed by the defendant, it is alleged that the bottle displayed ‘OTHERS’ with a malfunctioning applicator that resembled the plaintiff’s applicator. The court ordered the defendants to remove the red item from the advertisement and withdraw the posters. The Court established guidelines for competitive advertising of products:

- a) A businessperson is permitted to claim that his products are the best in the world, even if the claim is false.
- b) He may also falsely assert that “my items are superior to those of his competitors.”
- c) He can emphasize the benefits of his goods above those of competitors in order to assert that they are the best on the market or superior to those of his rivals.
- d) However, while asserting that his goods are superior to those of his competitors, he cannot also assert that his competitors’ goods are inferior. If he says so, he is accountable for defaming his competitor’s products. In other words, he violates the law by defaming his competitors and their products.

The primary and the secondary principle with respect to comparative advertising held by the Court is known as the ‘puffery rule’ which was

14 Mittal & Singh, *Comparative Advertising: An Eye for an Eye Making the Consumers Blind*, 13 JIPR 19-27 (2008).

15 *Reckitt & Colman of India Ltd v. Kiwi TTK Ltd.*, 63 (1996) DLT 29.

reiterated in *Pepsi Co Inc and Anr. v. Hindustan Coca-Cola and Ors.*,¹⁶ This rule of puffery does not ban imprecise and general comparison advertising; a rival may say his product to be the finest in the world so long as he does not disparage his competitor's goods.

In *Hindustan Lever v. Colgate Palmolive (I) Ltd.*,¹⁷ the Supreme Court investigated the extent of comparable advertising. In this case, Hindustan Lever unveiled "New Pepsodent", a brand-new toothpaste that claimed of being 102% superior to the leading toothpaste in the market. The lip movement suggested Colgate was the other top brand even if the speaker's voice was muted. Additionally, the leading brand's jingle implied the same. The court ruled that, despite a direct reference, such references to inferiority constituted denigration. Although the courts in the aforementioned case decided the issue in conformity with the laws of developed countries, there was no set standard to determine what constituted product disparagement.

In *Dabur India Ltd v. Wipro Ltd.*,¹⁸ The following criteria were established to determine if a certain assertion constitutes product disparagement:

- (1) The purpose of the ad,
- (2) the style of the commercial, and
- (3) the plot and intended message of the commercial.

The Court stipulated further requirements under which comparison advertising could be permitted:

- (1) It must not be deceptive.
- (2) It compares products or services that fulfill the same needs or serve the same function.
- (3) It compares one or more items fairly together with pertinent, verifiable, and representative

characteristics of those products and services, including price;

(4) It doesn't lead to confusion between the advertiser and his rival, or between the advertiser's goods, services, trade names, or other distinctive marks and those of a rival.;

(5) It does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods or services of the advertiser or a competitor;

(6) When it comes to products having an origin designation, it always refers to products with the same designation;

(7) It doesn't unfairly exploit the goodwill associated with a rival's trademark, trade name, or other distinctive marks, or the claim of origin of rival items;

(8) It does not advertise products or services as copies of products or services with registered trademarks or trade names.

Another landmark judgment on the subject matter is *Dabur India Limited, Delhi v. Colortek Meghalaya Private Limited & Anr.*¹⁹ The Appellant manufactures and markets a mosquito repellent cream under the brand names Odomos and Odomos Naturals, among other products. Under the brand name Good Knight Naturals, the Respondents also make a mosquito repellent cream. The Respondents televised their advertisement/commercial for Good Knight Naturals mosquito repellent cream, and according to the Appellant, the advertisement/commercial disparages its product. The issue before the court was whether the commercial televised by the Respondents disparages the Appellant's product and whether the Appellant is entitled to an injunction against the telecast. Before reaching its findings, the Delhi High Court analyzed a number of prior rulings on the subject.

16 *Pepsi Co Inc and Anr. v. Hindustan Coca Cola and Ors.*, 94 2001 DLT 30.

17 *Hindustan Lever v. Colgate Palmolive (I) Ltd.*, 1998 (1) SCC 720.

18 *Dabur India Ltd v. Wipro Ltd.*, 2006 32 PTC 677 Del.

19 *Dabur India Limited, Delhi v. Colortek Meghalaya Private Limited & Anr.*, 2010 (44) PTC 254

In the first instance, the Court observed that in *Tata Press Ltd. v. MTNL & Ors.*,²⁰ The Supreme Court ruled that “commercial speech” is protected by Article 19(1)(a) of the Constitution. However, the definition or explanation of “commercial speech” was not provided. In fact, it does not appear conceivable to define or explain “commercial speech” accurately, and it is unnecessary for the purposes of this case for us to do so. The rationale for this is that the Supreme Court stated that advertising as “commercial speech” includes two facets, hence hypothesizing that advertising is a form of commercial speech. The Supreme Court consequently held in Para 23 that “Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited from the information made available through the advertisement. In a democratic economy, the free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of commercial speech.”

In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*,²¹ In paragraph 36 of the Report, the Supreme Court remarked that a distinction must always be made, and allowances made for an advertisement to attract one or two buyers. This flexibility cannot and does not constitute a license to misrepresent, but rather a description of admissible assertions. The Supreme Court relied in this case on Anson’s Law of Contract (27th Edition), which states that commendatory phrases are not treated as significant assertions of reality. The same perspective is presented in the 28th Edition. “A similar degree of latitude is accorded to a person who seeks to acquire a customer, but it must be conceded that the boundary between permitted and impermissible assertions is not always clear.” The Supreme Court acknowledged

and enforced the rule of civil law known as “*simplex commendatio non obligat*” which states that a simple recommendation can be seen as an invitation to a customer without any responsibility pertaining to the quality of the products. It was noted that every vendor would attempt to assert that his merchandise is worthy of purchasing. As per the principles laid down by the Supreme Court, the following should be our guiding principles: -

(i) A commercial advertisement is protected by Article 19(1)(a) of the Constitution as commercial expression.

(ii) Advertisements are prohibited from being inaccurate, unfair, misleading, or deceptive.

The grey areas must not be construed as factual representations but rather as a means of promoting one’s goods.

Article 19(1)(a) of the Constitution offers protection to this extent. However, an advertisement would not be protected if it crossed the line and proved to be false, unfair, misleading, or deceptive.

Delhi High Court observed that in *Pepsi Co. Inc. & Ors. v. Hindustan Coca-Cola Ltd. & Another*,²² The Delhi High Court ruled that while it is permitted to boast about one’s goods, it is not acceptable to disparage a competitor’s product. An advertisement may not trash a competitor’s goods while extolling its own. It was also determined that certain considerations must be taken into account when assessing the issue of disparagement. These aspects include (i) the purpose of the commercial, (ii) the style of the commercial, and (iii) the storyline and intended message of the ad. While we agree with these points in general, we would want to elaborate or rephrase them as follows:

(1) The purpose of the advertisement, which can be deduced from its narrative and the intended message.

(2) The overall impact of the commercial; does it promote the advertiser’s product or degrade

20 *Tata Press Ltd. v. MTNL & Ors.*, (1995) 5 SCC 139.

21 *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*, (1999) 7 SCC 1 1999.

22 *Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd. & Another*, 2003 (27) PTC 305.

a competitor's? In this context, it must be kept in mind that, while marketing its product, the advertiser may make an unfavourable comparison between it and a rival or competing product; yet this may not necessarily impact the storyline and message of the marketed product or have this effect overall.

(3) The way of advertising - is the comparison generally accurate or does it falsely criticize a competitor's product? While truthful disparagement is acceptable, untruthful disparagement is not permissible.

Similarly, in Halsbury's Laws of England, states, "It is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product." This view was observed, in *Dabur India Ltd. v. Wipro Limited, Bangalore*,²³ Delhi High Court held that "it is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to the defendant's."

The Delhi High Court stated that the medium of the advertisement must also be considered. Electronic media advertisements would have a much greater impact than print media advertisements. To this regard, in *D.N. Prasad v. Principal Secretary*,²⁴ the Andhra Pradesh High Court determined that a broadcast reaches people of all ages, levels of education, and capacities to comprehend or withstand. The court observed that the influence of a television broadcast on society is phenomenal. Similarly, Pepsi Co. observed that the vast majority of viewers of commercial advertisements on electronic media are influenced by visual advertisements "as these have a profound effect on the psyche of the people" Consequently, an advertiser must walk a tightrope while broadcasting a commercial and repeatedly ask himself the aforementioned questions:

(1) Can the commercial be interpreted as disparaging the competing product?

(2) What effect will the commercial have on the viewer's mind?

This Court has taken the position that each case must be decided based on its own facts because there is no definitive response to these questions.

Due to the fact that commercial speech is protected, and an advertisement is commercial speech, the Delhi High Court concluded that regardless of the impact that a telecast may have, an advertiser must be given ample room to manoeuvre (in the grey areas) in the advertisement that it produces. As highlighted in *Dabur India*, a plaintiff (such as the appellant before the court) should not be hypersensitive. This is because market drivers, economic conditions, and the nature and quality of a product would eventually influence a consumer's decision. It is possible that aggressive or enticing advertising may cause the plaintiff partial or temporary harm, but eventually, it is on the consumer to adopt what is better for him or her.

The Delhi High Court, having not only read the commercial's text but also having viewed it on DVD, had concluded that there is no indication that the Appellant's product is either overtly or surreptitiously targeted. Neither the overt nor the hidden nature of the commercial's alleged disparagement of the appellant's product is supported. Furthermore, there is no indication of malice in the commercial for the Appellant's goods, and there is no obligation to demonstrate malice.

The court dismissed the contention of the appellant's learned counsel, who said that because the appellant's product has a market share of over 80% in the country and 100% in some States, it is the obvious objective of the commercial. The subtext of this argument is a purpose to create a market monopoly or to solidify a monopoly the appellant believes it already has. The court opined that if this argument were to be accepted, no other manufacturer of mosquito repellent cream would be able to advertise its product because doing so would inevitably mean that the Appellant's product is being targeted. We are only

23 *Dabur India Ltd. v. Wipro Limited, Bangalore*, 2006 (32) PTC 677.

24 *D.N. Prasad v. Principal Secretary*, 2005 Cri LJ 1901 2005.

required to determine whether or whether the advertisement disparages the Appellant's product. There is nothing in the commercial that suggests a negative message or that the Appellant's goods are disparaged. The commercial simply touts the benefits of the Respondents' product, specifically that it contains substances such as tulsi, lavender, and milk protein that may not be found in any other mosquito repellent cream. Any advertising comparing its product to another product would naturally emphasize its positive attributes, but this should not be seen as a criticism of the competing product. Therefore, it is irrelevant whether the appellant's product is targeted or not.

The court also rejected the Learned Counsel's argument that the use of phrases such as "fear of obtaining rashes and allergies" and "other creams create stickiness" constitutes disparagement of the appellant's product. There is no evidence that any other insect-repellent lotion causes rashes, allergies, or is sticky. If a mosquito repellent cream (which might be any mosquito repellent cream) is applied to the skin, there may be an increased risk of rashes and allergic reactions. In general, this may be feasible depending on the quality of the cream, the sensitivity of the consumer's skin, and the frequency of usage, etc.; nevertheless, we cannot say for certain. The advertisement does not imply that any mosquito-repellent cream or all mosquito-repellent creams cause rashes and allergic reactions. In fact, the Respondents are also attempting to market a mosquito repellent cream, and it is implausible that all mosquito repellent creams (which would include their product) produce rashes or allergies. Since their product contains tulsi, lavender, and milk protein, the Respondents' only argument is that such fears are considerably diminished or should not exist at all. Regarding stickiness, this is a purely subjective affair. What one person perceives as stickiness may not be perceived by another as such. In this circumstance, no injunction can be given based on a perception-based allegation. As stated above, a plaintiff should not be overly sensitive. The respondent is very sensitive. It appears that the

introduction of another product to the market could pose a threat to the appellant's monopoly or near-monopoly, and the court is using the injunction process to repel this threat.

By reference to *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.*,²⁵ the court established the following premises on comparative advertising:

a) A businessperson may falsely claim that his products are the best in the world.

b) He may also claim that his products are superior to those of his competitors, despite the fact that such a claim is false.

c) In order to claim that his goods are the greatest in the world or superior to those of his competitors, he can compare the benefits of his items to those of others.

d) While asserting that his goods are superior to those of his competitors, he cannot also claim that his competitors' goods are inferior. If he says so, he actually disparages his competitors' products. In other words, he is prohibited from defaming his competitors and their products.

e) If there is no defamation of the goods or of the maker of the goods, no action lies; if there is such defamation, an action lies; and if an action lies for recovery of damages for defamation, the court has the authority to issue an injunction against the repeat of such defamation.

The Court completed its decision by stating that, while hyperbolic advertising may be legal, it cannot cross the grey areas of permissible assertion, and if it does, the marketer must have a plausible factual foundation for the assertion. It is therefore impossible for anyone to make an unsupported claim that his products are the greatest in the world or fraudulently assert that his products are superior to those of a competitor. The Court determined the case to be without merit and dismissed the appeal.

25 *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.*, 1999 (19) PTC 741.

CONCLUSION AND SUGGESTIONS

Advertising is at the heart of businesses. It goes without saying that comparison advertising is usually advantageous for the consumer because it increases awareness of the products/services that will be utilized. It also helps the brand owner to establish his supremacy over others in the concerned market. But it should be recognized that every activity is bound by the law and advertisements involving comparisons should be within the permissible limitations as provided by 29(8) and Section 30(1) of the Trademarks Act, 1999, and the judicial pronouncements as mentioned earlier. The advertisers should always have regard to these provisions and judgments so

as to not disparage the other products or services whichever case may be. In addition to it, there is a need to frame vibrant advertising regulations in India. For example, India has the Advertising Standards Council of India (ASCI) which provides for a self-regulatory regime. The Code for Self-Regulation of Advertising in India provides various guidelines on advertisements. Such codes and guidelines should be implemented sincerely to protect the consumers' interest which is also covered by Consumer Protection Act, of 2019. The ultimate interests and benefits should be borne in the minds of the advertisers so that the consumers are not misled or misinformed.