



المعهد القومي للملكية الفكرية

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دورية نصف سنوية محكمة يصدرها

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Comparative Advertising as a Competitive Tool for Advertising Institutions

Ayatullah Osama Mohamed Abdelaziz

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ABSTRACT:

Advertising is as old as civilization and commerce, today, businesses attract potential customers with appealing business signs, pamphlets, brochures, billboards, radio, Internet and TV communications, and many other advertising tools.¹ Advertising is competitive by nature, if we take a closer look on the Advertising industry, it becomes very noticeable how increasingly comparative advertising is taking place on various types of media, whether on television, social media platforms or even on outdoor billboards and banners.

Since Comparative Advertising is seen in our everyday lives, and as it increases, many questions are asked, one important question is: Can you compare the relative qualities of your brand with those of competitors without the infringement of trademark laws or unfair competition laws? In this research paper, we will mention the different approaches of some countries to answer this question, we will also discuss the situation in Egypt and what is the most suitable law to be applied to comparative advertising in Egypt.

In this study, we aim to prove that by putting laws and regulations to govern Comparative Advertising in Egypt, there will be a more organized and well-practiced structure of Comparative Advertising leading to the enhancement of the advertising industry in Egypt as a whole. Also, advertising will be more realistic, and advertisers will learn to use comparative advertising to benefit their product and well position their brand without harming either their reputation or misleading the consumer.

¹ Lien Verbauwhede, (2005), *“Intellectual Property Issues in Advertising”*, SMEs Division, WIPO, Vancouver, Canada, P.1

Chapter 1 – Research hypothesis & methodology

1.1 Introduction:

Advertising has always had a competitive nature, if we take a close look on the Advertising industry, it becomes very noticeable how increasingly comparative advertising is taking place in various types of media, whether on television, social media platforms or even on outdoor billboards and banners. Comparative Advertising is seen in our everyday lives: Coca-Cola and Pepsi challenge each other for taste tests, detergent companies such as Persil and Ariel compare each other's effectiveness, and also car manufacturers challenge the strong capability of each other's products.¹

And the question here is: Can you compare the relative qualities of your brand with those of competitors without the infringement of trademark laws or unfair competition laws? Countries throughout the world have taken different, and sometimes even contradicting approaches.

Some legislations, for example, in the United States, widely support comparative advertising and consider that truthful comparisons are informational for consumers and beneficial to competition. Other countries, for example, in Europe, allow comparative advertising as a general principle, but establish specific requirements for it to be considered legitimate. Still other countries ban comparative advertising, either in general, or for certain products.²

Civil law countries take a highly restrictive approach to comparative advertising, sometimes prohibiting it altogether. For example, Germany took the view that all forms of comparative advertising, even if true, are unfair competition as they think that the newcomer should not 'piggyback' on the established reputation of another. In France, truthful comparative advertising is permitted only if it objectively compares "essential, pertinent, verifiable, and representative characteristics of the products; a claim of unfair

¹ Jason Reed Struble, June (2013), "*A Brief Guide to Comparative Advertising*", The Practical Lawyer, Miami, Florida, P.42

² Lien Verbauwheede, (2005): Op. Cit., P.9

competition will arise if the defendant's advertising, even if truthful, makes derogatory or personal attacks against the plaintiff. ¹

For all we know, comparative advertising is very common and is common in many countries whether by famous and well-known companies, or small companies who still want to enter the market and be recognized and that includes Egypt's advertising industry. With the undeniable increase of comparative advertising in Egypt, especially during the month of Ramadan, we can notice that in comparison to other countries, Egypt has no specific laws regulating this specific matter and this is an issue that needs to be regulated because of how harmful or misleading it maybe with having cases where for example a whole marketing campaign based on stating how a certain product is better than his competitor based on false information or in case of unfairly attacking the competitor's products or services.

1.2 Research Problem

This study aims to answer the following questions:

- How common is comparative advertising in Egypt?
- To what extent is the application of laws necessary in the success of Comparative Advertising?
- What is the legal frame that countries put to regulate Comparative Advertising?
- What legal rules can Egypt apply to its advertising laws to legally regulate Comparative Advertising?

1.3 Importance of the study:

- 1- By putting laws and regulations to govern Comparative Advertising in Egypt, there will be a more organized and well-practiced structure of Comparative Advertising leading to the enhancement of the advertising industry in Egypt as a whole.
- 2- Advertising will be more realistic, and advertisers will learn to use comparative advertising to benefit their product and well position their brand without harming either their reputation or misleading the consumer. Also the competitor

¹ Mary LaFrance, (2011), "*Passing Off and Unfair Competition: Conflict and Convergence in Competition Law*", Paper 784, University of Nevada, William S. Boyd School of Law, Las Vegas, P.1425

will not be harmed by misleading or false information about his product or service because the comparison will be based on true facts.

1.4 Hypothesis of this Study:

The main hypothesis of this study is stated in the following points;

The application of legal rules and regulations in the Egyptian Law guarding comparative advertising may lead to:

- The prevention of promoting false or misleading information about the competitor that may harm the reputation of his product or service.
- The protection of the consumer from shifting his choice to choose a certain product or service based on false information represented by the advertiser.
- Avoiding creating brand name confusion on the consumer.
- Avoiding the misidentifying of the actual sponsor & decrease rather than enhance believability and credibility for the sponsor brand.

1.5 The Aims of the Study

This study aims to discuss the following scenarios and reach the appropriate set of laws that need to be implemented to regulate and fix the following issues:

The Consumer Protection law of Egypt states in article 6 that "Every advertiser shall provide the consumer with correct information concerning the nature and characteristics of the product and avoid anything that would create an incorrect or misleading impression to the Consumer or lead to the Consumer falling into confusions or mistake"¹, The article misses some scenarios such as where an advertiser markets for his product or service by comparing it to a competitor product or service, also it misses other scenarios such as where: ²

¹ The Consumer Protection Law, Enacted by Law Number 67 OF 2006, Egypt.

² Kaylene C. Williams, Robert A. Page, Jr, (2013), "*Comparative Advertising as a Competitive Tool*", Journal of Marketing Development and Competitiveness, North American Business Press, Vol. 7(4), United States, P.4

- The intent of the advertisement is to discredit or unfairly attack competitors, competing products, or services.
- The competition isn't fairly and properly identified and, in a manner, or tone of voice that degrades the competitive product or service.
- The advertising doesn't compare related or similar properties or ingredients of the product, dimension, feature to feature.
- The identification isn't for honest comparison purposes.
- A competitive test is conducted, but not done by using an objective testing source.
- The advertising uses partial results or stresses insignificant differences to cause the consumer to draw an improper conclusion.
- The property being compared isn't significant in terms of value or usefulness of the product to the consumer.

1.6 Methodology

To answer the proposed research questions, the following approaches are used:

- **The Qualitative Approach** to define Comparative Advertising, in addition to mentioning Comparative advertising's effects on the sponsoring brand (advertiser), the competitor and the consumer. The legal aspects will be discussed as well in relation to how different laws govern or regulate comparative advertising in various countries such as Trademark laws, Unfair Competition, Consumer Protection and other treaties, laws or regulations that may be beneficial to this study.
- **The Comparative Approach** will also be used to compare the different directions of laws and regulations guarding comparative advertising as some of the countries tend to put laws limiting or even denying such act and others encourage it.

Chapter 2 – Comparative Advertising

2.1 Definition of Comparative Advertising

Comparative advertising is an advertising marketing strategy and an argumentation technique where the advertising message is about making comparisons about features of a company's products as compared to the products of the same type belonging to one/several competitors. Therefore, companies pursue in getting immediate advantages, at least by deflecting attention of some of the buyers towards their brands.¹ Comparative advertising identifies the competition for the purpose of claiming superiority or enhancing perceptions of the sponsoring and usually lesser-known brand².

As such, comparative advertising is a persuasive advertising strategy meant to communicate verbally and visually the competitive advantage of superior brands in the marketplace. Comparative ads also have been termed contrast ads, negative ads, attack ads, or knocking copy.³ As to the statement of policy regarding the comparative advertising of the Federal Trade Commission, "Comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information".

In the European Union, the directive 97/55/EC concerning misleading and comparative advertising says: "comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a

¹ Mihaela, Marcu, (2008), "*Comparative advertising*", Annals of the University of Oradea, Journal of Economic Science Series, Vol. 17 (4), Romania, P. 955.

² James, K. E., & Hensel, P. J., (1991), "*Negative advertising: The malicious strain of comparative advertising*", Journal of Advertising, Vol. 20(2), United States. P. 57.

³ Moore, M.T., (1999), "*Campaigns enter phase 1 of ad war*", USA Today, October 27, 16A, United States, P. 15.

competitor". The intensity of comparison advertising changes among countries and industries. ¹

2.2 The History

In comparative advertising or advertising war, a particular product, or service, specifically mentions a competitor by name for the purpose of showing why the competitor is inferior to it. In the United States, In the U.S., more than a decade ago, the courts recognized the legality of honest comparative advertising; still they were often limited by industry self-regulatory codes until 1960. In the advertising zone, it was considered that comparing or naming one's rival could only give free publicity and nothing more. Therefore in a comparison, the rival was simply referred as "brand X" or the "leading brand". Two major decisions in 1960 brought a significant change in this thought.

- (i) The first decision was the ruling in the case of *Smith vs. Chanel*. The manufacturer of perfume Ta'Ron's, the defendant in this case, copied an unpatented product sold under a trademark and launched a low priced perfume —2nd Chance and attracted the buyers through an advertisement in which he asked them to detect the difference between his and Plaintiff's perfume —Channel No.5. The Court of Appeals for the Ninth Circuit permitted the defendant to use the copied trademark in advertising for identifying the copied product. It considered that the advertisement was truthful and did not amount to any confusion regarding its source or did not contain any misrepresentations.
- (ii) The second and quite significant decision was the statement of 1969 Federal Trade Commission (FTC) Policy on Comparative Advertising. It encouraged the use of comparisons that name the competitor or the competitive product. The FTC's statement considered that honest and fair comparative advertising is a

¹ Bagwell, K., (2003), "*The Economic Analysis of Advertising, forthcoming in: M. Armstrong and R. Porter (eds.)*", The Handbook of Industrial Organization, Vol. 3, Amsterdam: North Holland. P. 67.

valuable source of information to consumers that could assist them in making rational purchase decisions. It further supported it by stating that it is an efficient marketing tool to persuade improvement and innovation in a product and can lower the prices of a commodity in the market.¹

Subsequently, the use of comparative advertising and acceptability of this format of advertising grew dramatically high in the United States and has remained unchanged ever since. There is no dearth of literature on comparative advertising and its regulation in US but the account prior to 1960s is too little to appreciate. Subsequently, the use of comparative advertising and acceptability of this format of advertising grew dramatically high in the United States and has remained unchanged ever since. There is no dearth of literature on comparative advertising and its regulation in US but the account prior to 1960s is too little to appreciate.

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The use of comparative advertising started perhaps from US where in the mid 1960s certain advertisers marketed their product naming their competitors. The industry lore suggests that prior to this period the use of comparative advertising was quite infrequent. It can be said that although the use was less, but it was not completely absent from the main stream advertising. In due course it became significant rather prolific enough to attract early industry reforms and self regulation agencies.

Prior to the 1970s, Comparative advertising was deemed unfeasible due to the related risks, such as misidentification of products, potential legal issue, Puffery or Disparagement. In 1972,

¹ Barry, T.E and Tremblay, L.T., (1975), "*Comparative advertising: Prospectives and issues*", Journal of advertising, Vol.4 (2), United States, P. 16

however, the Federal Trade Commission (FTC) of America began to encourage advertisers to make comparison with named competitors, with the broad, public welfare objective of creating more informative advertising. stimulate comparison shopping, Encourage product improvement and innovation, Foster a positive competitive environment. The FTC has also provided guidelines which say that the ads must be “truthful and non-deceptive”.¹

The law of comparative advertising has evolved from providing virtually no legal remedy for misleading claims to enjoying most advertising challenged by competitors under the Section 43(a) of the Lanham Act. Explicit Comparative Advertising was rarely used in the US until the FTC actively lobbied in favor of it in early 1979. Comparative Advertising has enjoyed a similar evolution from being virtually non-existent to its current status of relatively common place challenges under the Lanham Act and industry self-regulation.

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. In Europe, there was a significant difference between different countries, in the Seventies. Still for a long time the majority of European countries were hostile to the comparative advertising that was considered unfair towards competitors. This method of advertising was prohibited by the specific laws against unfair competition.

¹ Corvi, Elisabetta & Bonera, Michelle, (2008), “*The effectiveness of comparative advertising: a literature review*”, 2nd International Scientific Conference Marketing theory challenges in transitional societies, Zagabria, Croazia, P.2.

Finally, in 1997, was ready the directive number 55 amending directive number 450 (September 10, 1984) that concerned misleading advertising and in particular referred to comparative advertising. The European position is that comparison advertising is legal if it provides verifiable details and is neither misleading nor unfair. Among European states the laws on comparative advertising were harmonized only in April 2000.

According to current European legislation “comparative advertising is allowed only if it is not misleading, compares like with like, does not create confusion, discredit or take unfair advantage of a rival’s trademark or present goods as imitations of those bearing a protected trade name”. In most countries where comparative advertising is legal, it is closely monitored and regulated by government agencies.¹

2.3 Types of Comparative Advertising

Comparative advertising can involve the direct or indirect comparison of a sponsored brand in an advertisement or commercial. Comparative advertising may compare products or services directly or indirectly, and may take either a positive or negative tone, though negativity tends to be far more common. Comparisons may entail a single attribute or multiple attribute.

Direct Comparative Advertising (DCA)



Figure no. (1)

¹ Corvi, Elisabetta & Bonera, Michelle: (2008), Op. Cit., P.3

Comparative advertising puts together face to face the advertised product and one or several of the competitors' products, Direct comparative advertising (DCA) is an advertising strategy in which the advertiser specifically names its competitors in the advertisement to compare itself to the named competitors.¹ As a direct comparison advertisement explicitly names the competing brand and compares on two or more attributes, benefits, or market positions.²

Indirect Comparative Advertising (ICA)



Figure no. (2)

In contrast, in an Indirect comparative ad (ICA), the advertiser does not identify any particular competing brands, but instead refers to unnamed competitors, such as the leading brand, other brands, or

¹ Pechmann, Cornelia and S. Ratneshwar: (1991), Op. Cit., P.153

² Barry, T. E., (1993), "Comparative advertising: What have we learned in two decades?", Journal of Advertising Research, Vol. 33(2), United States, P. 25

all other brands. As Indirect Comparative advertising puts together face to face the advertised product and a general product whose brand has not been revealed, an indirect comparison advertisement is comprised of an overall subtler comparison such as the "leading brand" or "Brand X" approach that does not name the competing brand.¹

While both DCA and ICA encourage the creation of comparative evaluations in viewers' minds, the effectiveness of these two types of comparative advertising should differ based upon viewers' reference points ². Researchers have found evidence for good advertising effectiveness for both DCA and ICA³.

Examples of Comparative Advertising

2.3.3.1 The Cola Wars



Figure no. (3)

The cola wars are a series of mutually-targeted television advertisements and marketing campaigns since the 1980s between two long-time rival soft drink producers, The Coca-Cola

¹ Barry, T. E.: (1993), Op. Cit., P. 27

² Miniard, Paul W., Michael J. Barone, Randall L. Rose, and Kenneth C. Manning, (2006), "*A Future Assessment of Indirect Comparative Advertising Claims of Superiority Over All Competitors*", Journal of Advertising, Vol. 35(4), United States, P. 56

³ Miniard, Paul W., Michael J. Barone, Randall L. Rose, and Kenneth C. Manning: (2006), Op. Cit., P.61

Company and PepsiCo. The battle between the two dominant brands in the United States intensified to such an extent that the term “Cola wars” was used to describe the feud. Each employed numerous advertising and marketing campaigns to outdo the other.

Short periods of intense competition between the two firms contrast with how the two firms avoid competition most of the time by focusing on different consumers, sponsoring different sports, differentiating their logos, choosing different colors for their packaging, and building different images for their brand.¹ In periods of intense competition, one firm challenges the other by asserting superiority on one specific aspect of their products.

This leads to direct competition and changes in market shares or in prices. For example, Pepsi marketed bigger bottles for the same price as Coca-Cola during the Great Depression in the 1930s.² The memory of such periods of frontal competition may help both firms maintain the more profitable status quo. Both firms generally prefer not to compete on real product differences, such as price or taste, because this offers only short-term opportunities for additional profit.

2.3.3.2 Burger Wars



Figure no. (4)

¹ Crosetto, Paolo; Gaudeul, Alexia, (2017), "Choosing not to compete: Can firms maintain high prices by confusing consumers?", Journal of Economics & Management Strategy, Vol. 26, United Kingdom, P.899

² Crosetto, Paolo; Gaudeul, Alexia: (2017), Op. Cit., P. 901

The Burger wars is a series of off-and-on comparative advertising campaigns consisting of mutually-targeted advertisements that highlight the intense competition between hamburger fast food chains McDonald's, Burger King and others in the United States. The term first came into use during the late 1970s due to an attempt by Burger King to generate increased market and mind-share by attacking the size of bigger rival McDonald's hamburgers.

By the mid-1980s, the constant spending on advertising began to affect the major players. In 1987, Burger King laid off more than a hundred people from its corporate headquarters in Miami, Florida, while Dublin, Ohio-based Wendy's reported its first quarterly operating loss since its founding in 1969. Conversely, McDonald's operating revenue and profit increase while its market share also grew. Smaller chains, such as Hardee's, worked to keep from getting caught up in the extensive financial brinkmanship by avoiding the expensive ad campaigns and by staying in smaller, more geographically limited locations.¹

2.3.3.3 Careem vs Uber



Figure no. (5)

¹ Shriver Jr., Jube, (1987), "*Burger Wars Taking a Bite Out of Profit*", Los Angeles Times, Los Angeles.

The nationwide burger wars, waged mostly in multimillion-dollar television commercials, are hitting some hamburger chains on the bottom line--forcing layoffs and losses.

This image illustrates a “fill in the missing letters” game where they keep adding letters that make the viewer think that the word UBER will be filled in. This campaign took place in the streets and social media of Egypt.

2.4 Function of Comparative Advertising

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

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

Comparative advertising is not used solely for the promotion of a product or service. It has become a common technique used in political advertisements, with one candidate listing how he or she would not have made the same specific decisions as the incumbent if elected. This type of advertising is popular with companies releasing new products, as the focus of the ad will be how the new product is better than products already on the market.

2.5 The Effectiveness of Comparative Advertising

The effectiveness of Comparative Advertising has been widely investigated in the marketing literature. Research has shown

that comparative advertising enhances the costumer's persuasion by both association and differentiation.

2.5.1 Direct versus indirect comparative advertisements' effectiveness

Operationally, several comparison formats are used for communicating the claim such as direct comparisons, indirect comparisons or general superiority comparisons. Comparative advertisements can be further classified on the basis of whether or not specific competitors are identified explicitly as a reference point for interpreting claims about the advertised brand's merits. Direct comparative advertisements are those that name (by photos, images or trademarks) specific competitors as a point of comparison.

The underlying principle is to differentiate the advertised brand from competition by demonstrating that it has better performance characteristics. For example, in the direct comparison strategy, the advertised brand may be explicitly compared with the comparison brand by stating that the latter is inferior on an important attribute. Comparative advertising, in which the advertised brand is explicitly compared with one or more competing brands, has become popular in recent years.

Relevant sectors are food, retail, and motoring, which all rely heavily on aggressive marketing strategies. The more explicit form of comparative advertising refers to the product by name and this is generally known as comparative brand advertising. Comparative advertising can, however, also occur without any use of the trademark at all.

On the contrary, indirect comparative advertisements do not refer to specific competitive brands, instead they refer to unnamed competitors. In the indirect comparison, the competing brand will be referred to as the leading brand or other brands. A general

comparison would be a statement such as the advertised brand has the best performance.

Many studies have shown that direct comparative advertising is superior to non-comparative advertising in positioning the advertised product against the specific competitor used¹. Far less attention has received in the literature the indirect comparative advertising². While legislators express their concern for its information content, economic theorists support the view that advertising can be informative also in an indirect way, irrespective of content.

2.5.2 Comparative advertisements of the leaders or the followers brands

It is interesting to note that research a direct comparative ad from a small follower is least likely to lead to higher awareness for the market leader and that because the market leader already has high awareness. On the other side a leader brand has the most to lose from a direct comparative ad, as the smaller brand will obtain some awareness easily anyway. Nevertheless, it is commonly confirmed that an unfamiliar brand can enlarge the relevance of an ad by naming a leading brand that consumers regularly purchase.³

In other words, comparison ads should be more effective in generating initial attention towards small firms wishing to take on established brands⁴. It is the so called “underdog hypothesis”. Thus,

¹ Jain, S.P., Buchanan B., Maheswaran D., (1998), “*Comparative Versus Noncomparative Messages: The Moderating Impact of Pre-purchase Attribute Verifiability*”, Marketing Science Working Paper Series, William E. Simon School of Business, University of Rochester, New York, P. 98

² Jain, S.P.: (1998), Op. Cit., P.121

³ Jung O. J., and Beatty, S. E., November (2002), “*Comparative advertising effectiveness in different national cultures*”, Journal of Business Research, Vol. 55 (11), Amsterdam, P. 912

⁴ Kamins, M. A., and Marks, L. J., (2007), “*An examination into the effectiveness of two-sided comparative price appeals*”, Journal of the Academy of Marketing Science, Louisiana, United States. P.43

it is possible to affirm that while low-share brands ought to use direct comparative advertisements; market leaders perhaps ought to use non-comparative or indirectly comparative ads, without naming the competitors.

Smaller follower brands will get more benefits from direct comparative ads in another way: consumers will normally put both the advertised and the comparison brand in the same consideration set, increasing the degree to which they are perceived as similar to each other. Comparative advertising seems much more effective than non-comparative advertising in increasing the perceived similarity of the challenger and leader brands, particularly when the leading brand is explicitly named in the ads.

While a comparative advertisement can reduce the perceived distance between the leader and the follower brand, it will not significantly raise the attitude toward the advertised brand. Many other studies have also failed to find such effects. These failures could be due, in part, to the fact that these authors often did not measure (and could not therefore find) possible decreases in consumers' attitudes toward the comparison brand.

It has also been shown, however, that comparative ads often fail to positively influence attitudes and preferences because, while consumers may indeed notice them more, they nonetheless may consider a comparative ad offensive, less informative and less credible, especially if they like the brand being shown in a negative light. The consumers' liking for a brand does go up due to comparative advertising but only up to a certain point.

Chapter 3 – Legal Aspects of Comparative Advertising

3.1 United States Law on Comparative Advertising

In the United States, maximizing consumer welfare and promoting a free and competitive economy have been the guiding objective and "the keystone of governmental attitude towards the business scene" for more than 100 years. Thus, the use of comparative advertising has rapidly become a primary goal of judicial and legislative authorities, as well as administrative agencies, in the area of advertising law. U.S. courts recognized the legality of truthful comparative advertising more than thirty years ago.

Ideally, comparative advertising should be honest, should not mislead, and should not exaggerate. When a company crosses the honesty/exaggeration line, it may find itself in court answering to various causes of action. Even in the United States, Companies may not engage in comparative advertising without being able to back up the claims that they make. They must be able to prove their assertions of better quality, greater popularity, better value, etc. with facts, and may not engage in false statements or imagery that disparage a competitor.¹

The Federal Trade Commission

In 1971 the Federal Trade Commission (FTC) endorsed comparative advertising in order to promote a greater disclosure of product differences. Until then, comparative advertising had rarely been used in the United States. The FTC's policy on comparative advertising states that it benefits consumers.

¹ Ross D. Petty, (1991), "The Evolution of Comparative Advertising Law: Has the Lanham Act Gone Too Far?", J. Pub. Pol'y & Marketing, United States, P. 161

¹ Jenna D. Beller, (1995), Op. Cit., P. 922

The FTC encourages the naming of, or reference to competitors, but requires clarity, and, if necessary, disclosure to avoid deception of the consumer and believes that Comparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions, it encourages product improvement and innovation, and can lead to lower prices.

The FTC considers an advertisement deceptive if it contains a representation, practice, or omission likely to mislead reasonable consumers and if the representation, practice, or omission is material to consumer choice. Therefore, in order to be successful on a deceptive advertising claim, the FTC merely has to prove that a reasonable consumer is likely to be misled and that the advertisement played a material role in the consumer's purchasing choice. The FTC also requires the advertisers to substantiate the truthfulness of their implied or express advertising claims. ¹

The United States International Trade Commission

A way to remedy a harmful comparative advertisement of imported goods is to file a complaint with the International Trade Commission (ITC). The complaint must define and describe the domestic injury caused by the practices and include facts that constitute an unfair method of competition or unfair act. However, filing a complaint does not guarantee that the ITC will take any action toward the competitor. The ITC decides, based on the complaint, whether it will pursue a formal investigation. If the ITC decides that the complaint is worth pursuing, it will complete its investigation within a year and recommend a remedy.

¹ Ross D. Petty: (1991), Op. Cit., P. 167

The ITC's and the FTC's rules are similar, although the ITC does not have an affirmative policy encouraging comparative advertising. The ITC permits a company to refer to the product of another for purposes of honest comparison between the products, as long as the public remains aware of who produces which product. ¹

Section 43(a) of the Lanham Act

In response to the difficulty of getting the FTC or ITC to intervene and the consequent need for a new federal remedy for a variety of unfair competition problems, Congress passed section (a) of the Lanham Trademark Act. The Lanham Act is presently the predominant law for false advertising in the United States. Under this act, companies can bring private suits directly without having to rely on a government entity to do so for them. The act makes a company civilly liable to another who is or is likely to be damaged by the false description or representation of goods or services" in a comparative ad. ²

Evaluating the Legality of a Claim Under the Lanham Act A prima facie case of false advertising under section (a) of the Lanham Act requires the plaintiff to establish:

- A false or misleading statement of fact about a product;
- Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers;
- The deception is material, in that it is likely to influence the consumer's purchasing decision;
- The product is in interstate commerce; and
- The plaintiff has been or is likely to be injured as a result of the statement at issue.

¹ Jenna D. Beller, (1995), Op. Cit., P. 922

² Jenna D. Beller, (1995), Op. Cit., P.924

In summary, a company has three ways to seek redress in the United States when it thinks the comparative advertising of a competitor has harmed it. The FTC, which actually encourages comparative advertising, can bring an action against the advertiser. The injured company can file a complaint with the ITC, which may investigate the case. Or the company can bring a private suit directly against the competitor under section 43(a) of the Lanham Act.

Recently, more cases have been tried and won under the Lanham Act than by the FTC or ITC. The future of comparative advertising in the United States is likely be as it is now.¹

3.2 France

Unlike in the United States, in France, Comparative advertising is largely unknown. When comparative advertisements were used, they ran into trouble under trademark protection legislation. In addition, the French Civil Code prohibited acts that unnecessarily harmed others, which confusing or discrediting comparative ads were thought to do.

On January 18, 1992, the French Constitutional Council amended article 10 of the French Legal Code to allow comparative advertising only if it is fair, true, objective and not misleading to consumers.

Comparative advertisements must be based on "substantial, significant and verifiable qualities. In addition, any price comparison must consider identical products sold under the same conditions, and explicitly state the amount of time the price is applicable. Therefore, although comparative advertising in France is technically allowed, the restrictions still make creating an ad difficult.

¹ Jenna D. Beller, (1995), Op. Cit., P.924

3.3 The United Kingdom

Comparative advertising has been practiced in the United Kingdom for about as long as in the United States. Yet, the British approach to competition is much more courteous than the American approach, and the British feel strongly that advertising should center around images rather than facts. The British find direct comparative advertising distasteful because it appears to them to be very negative, and they believe that negative advertising is impolite. They prefer a pleasant, self-praising, soft sell to a more American, comparative, hard sell.¹

While the United Kingdom has no absolute ban on comparative advertising, the use of a competitor's trademark in an advertisement, which is hard not to do in a comparative advertisement, may create a cause of action under trademark infringement law. Nevertheless, Britain's laws are gradually changing. The United Kingdom recently passed the Trademarks Act of 1994, which will relax some of the older, more restrictive trademark infringement laws and effectively allow more comparative advertising.

The Trade Marks Act went into effect at the end of October 1994. Designed to ensure that consumers have "sufficient information to compare sensibly the prices and qualities of competing goods and services," the Act "will permit references to a competitor's registered trademark, provided that the advertiser operates within certain guidelines.

An advertisement will be a trademark infringement under the new Act "if it is not in accordance with 'honest practices in industrial and commercial matters' or if ... it takes 'unfair advantage

¹ Diane Summers, (1994), "Light Touch in Battle for Brands: A Free Speech Issue, a Clever Marketing Play or an Unfair Promotional Device?", Financial Times, London, United Kingdom, P. 17

of or is detrimental to the distinctive character or repute of the trademark¹. Outside of trademark law, a company can bring another common law cause of action in the United Kingdom if it believes that it has been injured by a comparative advertisement. This cause of action is called "passing off".

In summary, the United Kingdom tolerates but, unlike the United States, does not encourage comparative advertising. Most of Britain's comparative advertising law comes under trademark infringement. The new trademark law that went into effect in 1994 will make it easier to run a comparative advertising campaign, but distinct rules do exist.

3.4 Germany

Germany has some of the strictest rules on comparative advertising. Comparative advertising is prohibited under unfair competition law. German antitrust laws allow competitors to bring suit if the advertising violates "good manners," which includes advertising that "usurps the efforts, reputation or advertising of a competitor." These unfair competition rules are not easy to circumvent.

For example, in 1994 a Carlsberg beer commercial that proclaimed the beer as "probably the best lager in the world" was not allowed to air on German television. An even more extreme example is the Avis car rental slogan, "We try harder", which was also prohibited on the theory that consumers could presume that Avis was referring to its main competitor in Germany.

Hertz, even though Hertz's name was not directly mentioned or shown, An advertisement that asserted "we offer more" was not allowed in a magazine because readers would most likely know the identity of the advertiser's two competitors. To say that one's

¹ Whybrow & Shanker Singham, (1994). *"Tricks of the Trade: Trade Marks Act of 1994"*, Money Marketing, London, United Kingdom, P. 40

product or service is “better” or “cheaper” is lawful if the public is deemed not to recognize competitors.

Since only rarely would the buying public not know the competitors of a certain advertiser, comparative advertising is essentially banned in Germany. One reason for the prohibition of comparative advertising is that Germany has strict standards regarding what is misleading information. The German Government has imposed these standards because of its concern for consumer protection. In the government's view, all companies should be on the same competitive level, with no one getting an unfair advantage.

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3.5 The Situation in Egypt

The Consumer Protection law of Egypt states in article 6 that “Every advertiser shall provide the consumer with correct information concerning the nature and characteristics of the product and avoid anything that would create an incorrect or misleading impression to the Consumer or lead to the Consumer falling into confusions or mistake”², The article misses some scenarios such as where an advertiser markets for his product or service by comparing it to a competitor product or service, also it misses other scenarios such as where:³

- The intent of the advertisement is to discredit or unfairly attack competitors, competing products, or services.
- The competition isn't fairly and properly identified and, in a manner, or tone of voice that degrades the competitive product or service.
- The advertising doesn't compare related or similar properties or ingredients of the product, dimension, feature to feature.
- The identification isn't for honest comparison purposes.

¹ Jenna D. Beller, (1995), Op. Cit., P.934

² The Consumer Protection Law, Enacted by Law Number 67 OF 2006, Egypt.

³ Kaylene C. Williams, Robert A. Page, Jr, (2013), Op. Cit, P.4

- A competitive test is conducted, but not done by using an objective testing source.
- The advertising uses partial results or stresses insignificant differences to cause the consumer to draw an improper conclusion.
- The property being compared isn't significant in terms of value or usefulness of the product to the consumer.

And these are issues that needs to be addressed especially with the increasing focus on the advertising industry and on the usage of comparative advertising whether in a single ad, or a whole campaign. As there is now a great necessity for a law to guide and regulate the practice of such kind of advertising in Egypt. For it can be really beneficial and informative or either destructive, causing the communication of false and misleading information and also causing consumer confusion.

Recommendations:

- The encouraging of the use of healthy, beneficial and informative Comparative Advertising in our advertising campaigns in Egypt.
- Bringing awareness and education to such kind of Advertising and ensuring that its application doesn't conflict with the Egyptian Laws.
- Giving more interest on a legal level to comparative advertising and putting the right legal rules to prevent any harm that could derive from such practice.
- Taking the United States law, Section 43(a) of the Lanham Act as an example in its legal rules when making legal rules to guard comparative advertising in Egypt, as this is the most suitable law that governs, regulates and also encourages the use of such advertising method, ensuring a healthy practice of competitive and creative advertising while maintaining

protection to all the sides of the equation from being harmed or misled by such practice.

Conclusion:

Advertising will always have a competitive nature, after discussing the use of comparative advertising and its importance, it appears like this kind of advertising is here to stay, and its usage is increasing day after another. In Egypt, as we can witness the growth of its advertising industry every day, the use of comparative advertising will also increase which may lead to serious damage whether to the consumer's side or the advertiser's side if it's not well regulated and governed by the right set of laws. And the key to have a healthy and safe practice of such form of comparative advertising is to have the right set of laws governing and regulating it, This will ensure that the advertisers practice all forms of innovation, enjoy a healthy competitive environment, as well as benefiting the consumer by giving him exposure to enough information about the product or service that makes his decision of purchase or usage based on a solid ground without being dragged into the confusion of false and misleading information.

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