

**Comparative Advertising Case
(Case of Demand for Injunction against Comparative Advertising)
Intellectual Property High Court Decision (October 18, 2006)
Case No. H 17(ne) 10059**

FACTS

The Appellant (Plaintiff in original trial), Lotte Co., Ltd., sells chewing gum using the trademark "Xylitol+2". The Appellee (Defendant in original trial) sells chewing gum using the trademark "POsCAM". The Appellee claims in advertisements of its own chewing gum that "POsCAM realizes a recalcification effect about five times that of general xylitol chewing gums" and displays a certain graph indicating this along with the claims.

It states that "the recalcification phenomenon is a phenomenon in which enamel dissolved from the teeth is restored." The fact is clear that the expression "general xylitol chewing gums" indicates the gum of the Appellant in the market. This advertisement is comparative advertising which claims that the gum of the Appellee has a higher recalcification capability than that of the Appellant.

The Appellant claims that this comparative advertising is based on falsehoods not in line with the objective facts and thus constitutes an act of misleading the quality and damaging the reputation of another party in a competitive relationship, and thus falls under the Unfair Competition Prevention Act, Article 2, Paragraph 1, Subparagraphs 13 and 14, and the Appellant seeks injunction of the same.

In the appeal trial, the Court, in response to a petition from the Appellant, which bears responsibility for providing evidence in the present case, judged that an expert opinion was necessary, and asked the parties to discuss and to determine concrete ways for an expert opinion to be effectuated. At that time, the Appellant proposed a specific method, but the Appellee stated that the expert opinion was meaningless unless the expert was one whom the Appellee designated himself and refused to concede on this point, so no expert opinion could be obtained.

ISSUE

Whether advertising which includes the present comparative indication constitutes dissemination of a falsehood under the Unfair Competition Prevention Act, Article 2, Paragraph 1, Subparagraph 14 or is a misleading indication of quality of Subparagraph 13.

HOLDING

The experiment serving as the only basis for the Appellee's assertion is unreasonable. Further, the Appellee fails to show any grounds for its claim that "POsCAM realizes a recalcification effect about five times that of general xylitol chewing gums."

Accordingly, the content of the advertisement of the Appellee should be said to be a falsehood not conforming to the objective facts. The present comparative advertisement including a graph and other items is an act damaging the business reputation of another party in a competitive relationship. Accordingly, this falls under the Unfair Competition Prevention Act, Article 2, Paragraph 1, Subparagraphs 13 and 14.