# COMPARATIVE ADVERTISING IN INDIA: EVOLVING A REGULATORY FRAMEWORK

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*The increasing role of advertising in the consumer goods market with multiple players has resulted in the phenomenon of comparative advertising, wherein a seller attempts to derive pecuniary benefit by drawing a comparison between his product or service and that of a competitor. Comparative advertising may be restricted to simple puffery, which involves the seller making superlative statements of opinion about the utility of his own product. In case such puffery crosses the limits of tolerance by depicting an identifiable competing product in a negative manner, the same amounts to denigration of the other product. With the courts having prohibited both active and implied denigration, it is important to arrive at a broadly uniform standard to regulate comparative advertising activities keeping in mind the interests of the associated parties. The increasing significance of consumer protection jurisprudence in recent years has meant that the consumer is as much a stakeholder in any scheme of regulation as the seller or competitor. The authors have examined the role of the existing forms of regulation in both domestic and international jurisdictions, in addition to drawing attention on significant case law on the subject. Such an analysis would help in evolving a more comprehensive scheme of regulation keeping in mind the diverse interests of the various stakeholders.*

## I. INTRODUCTION

The term 'comparative advertising' refers to any form of advertising in which a trademark owner attempts to enjoy pecuniary benefits from a comparison between his product, service, or brand and that of a competitor. Comparative claims may vary in nature. They may explicitly name a competitor or implicitly refer to him. They may either emphasize the similarities or the differences between the products. They may also state that the advertised

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product is 'better than' or 'as good as' the competitor's.[1] Comparative advertisinggenerally possesses two components, puffery and denigration. Puffery is where the advertiser seeks to draw the consumer's attention by making superlative claims about his product that are assertions of opinion, rather than verifiable statements of fact. Often puffery crosses the limits of tolerance and seeks to portray the competing product in a negative light. The same is then said to amount to denigration, which the courts have strictly prohibited. Thus, the material question that often arises is to what extent comparative advertising may be restricted. The answer lies in developing a clear understanding of the conflicting interests of the various stakeholders involved, including the advertiser, the competitor and the consumer. The advertiser's objective herein is to present his products in a manner such that the consumer is most likely to purchase it. On the other hand the competitor would always try to prevent any advertising that aims at denigrating his product or makes false claims, or uses his product as a standard which the advertiser claims to exceed. The hapless consumer finds himself in the midst of a cacophony of claims, and has the right to be accurately informed about the quality or utility of the products available in the market.

Any attempt at developing a mechanism to regulate advertising has to be made with reference to the constitutional guarantee provided to the same under Article 19(1)(*a*) of the Constitution of India.[2] Initially, advertising was excluded from the ambit of the provision, with the Supreme Court holding in *Hamdard Dawakhana* v. *Union of India*,[3] that while advertisements were a form of speech, they were not constitutive of the concept of 'free speech'. The reason for the same was that in seeking to promote trade and commerce they were guided by the object of commercial gain. The subsequent process of economic literalization, however, brought about certain substantive changes in the structure of the market for consumer goods. The advent of a wider range of products and services led to increased competition, with advertising acquiring a vital role in the determination of consumer demand and in influencing the dynamics of the market as a whole. The media too was increasingly reliant on advertising revenues, as were other forms of public entertainment such as sports and cultural events.[4] A shift in the constitutional position was evidenced in the case of *Tata Press* v. *Mahanagar Telephone Nigam Ltd*.,[5] wherein advertising was observed to be beneficial to consumers as it facilitated the free dissemination of information, leading to greater public awareness in a free market economy. Further, it was held to be the 'life blood' of the free media due to the

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1 Charlotte J. Romano, *Comparative Advertising in the United States and France,* 25 NW. J. INT'L L. & BUS. 371 (2004-05).

2 The Constitution of India, 1950, Art.19(1) (a), "Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right (*a*) to freedom of speech and expression".

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

4 Madhavi Divan, Facets of Media Law 187-190 (2006).

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

substantial contributions it gave to print and electronic media organizations. In light of the same, the Court reversed the position as adopted in *Hamdard Dawakhana*,[6] and held advertising to be constitutive of 'commercial speech', and therefore brought it within the ambit of constitutional protection conferred by Art. 19(1)(*a*).

Through the course of the article, the authors have examined the multiple mechanisms developed to regulate comparative advertising, being both voluntary and statutorily enforceable in nature. A comparison has been drawn with mechanisms that have been adoptedin other jurisdictions, with reference to the efforts as have been made in seeking to balance the diverse interests involved. In evaluating the competing interests of different stakeholders, the evolution of the law with regard to rights of the competitor and consumer has been observed. An analysis has also been made of certain recent judicial pronouncements on the issue, which may help in determining the standard of tolerance in comparative advertising.

## II. EXISTING FORMS OF REGULATION

The onus of regulating advertising in India has been assumed by a wide array of governmental authorities and tribunals, but presently there exists no dedicated statutory mechanism to regulate the dissemination of untruthful or disparaging material through such medium. Primarily, matters related to untrue and misleading advertising were adjudicated upon by the Monopolies and Restrictive Trade Practices ('MRTP') Commission, constituted under the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act'). The Act defined an 'unfair trade practice' under §36A to include any false representation of goods with regard to their quality, quantity or utility. The provision also incorporated the clause that a warranty or guarantee of performance or durability of the product, if not adequately substantiated, would amount to an unfair trade practice.[7] Further, to advertise a 'false or misleading fact disparaging the goods, services or trade of another person' too was brought within the ambit of the same.[8] However, the MRTP Act was subsequently repealed by virtue of §66 of the Competition Act, 2002.

Fortunately, the power to enquire into complaints of unfair trade practices was vested with the consumer grievance forums established under the Consumer Protection Act, 1986 ('CP Act').[9]For such purpose, the definition of 'unfair trade practice' as under §36A has been incorporated *parimateria* in §2(1)(*r*) of the CP Act. While the said provision has put in place

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6 *Supra* note 3.
7 The Monopolies and Restrictive Trade Practices Act, 1969, §36A (vii).
8 *Id*., §36A(x).
9 The Consumer Protection Act, 1986, §9.

an effective mechanism to address the grievances of the consumer, it fails to provide relief to a competing seller as the CP Act excludes manufacturers, sellers and service providers from its ambit.[10] Such parties are often compelled to take recourse to common law remedies in the form of injunctive action or monetary damages,for the securing of their interests, with a significant proportion of complaints by competing manufacturers and sellers involving alleged violations of their intellectual property rights through the said advertisements.[11]

In the absence of an established statutory mechanism dedicated to the regulation of advertising, the industry itself has sought to develop a model for voluntary self-regulation in the form of the Advertising Standards Council of India ('ASCI'). The same is a non-statutory tribunal comprising an association of advertisers established in 1985. The ASCI position on the form and manner of comparative advertising has been laid out in Chapter IV of the body's Code for Self Regulation in Advertising.[12] It is stated herein that advertisements containing comparisons with competing manufacturers and sellers are permissible in the interests of vigorous competition and free dissemination of information, subject to the following requirements being satisfied:

(*a*) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.

(*b*) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

(*c*) The comparisons are factual, accurate and capable of substantiation.

(*d*) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.

(*e*) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements, directly or by implication.[13]

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[10] As observed in Colgate Palmolive (India) Ltd. v. Anchor Health and Beauty Care Private Ltd., 2009 (40) PTC 653.

[11] An instance of the same was seen in the case of Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd. & Anr., 2003 (27) PTC 305. (The matter herein involved the defendant having disparaged the product of the plaintiff by way of comparing his own product with one that was referred to as 'sweet' and 'suitable for children'. The said product was given a name deceptively similar to that of the plaintiff's product, with the registered trademark of the plaintiff being imposed on the same. A similar situation arose in Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd., 1996 (16) PTC 393, wherein an unnamed product was disparaged as being ineffective and uneconomical. The same was held to be an allusion to the plaintiff's product as a distinctive 'red blob' that was associated with the plaintiff's brand was imposed thereon.)

[12] ASCI Code for Self Regulation in Advertising (2007).

[13] *Id.*, Chapter IV (1).

The abovementioned principles ensure that advertising activities are conducted in a fair manner, with the interests of all associated groups being secured. While the ASCI has been able to ensure a reasonable degree of adherence to its norms from members, a difficulty arises when complaints are filed with regard to the activities of non-members. Furthermore, the absence of an effective enforcement mechanism to implement the said principles has resulted in them being limited to a purely recommendatory role.[14] A comparison may be drawn between this non-implementable model of self-regulation and similar mechanisms that have been instituted in other jurisdictions.

The initiation of the self-regulatory approach in Britain was made in pursuance of a scathing indictment of the advertising industry by the Monoley Committee on Consumer Protection, 1962, which recommended the establishment of an independent regulator for the industry. Under the threat of external regulation, the industry considered the establishment of a self-regulatory mechanism much alike the Press Council, which might satisfy the concerns of policymakers and consumers alike.[15] The Advertising Standards Authority (ASA) was established, with the objective of ensuring that advertisements were 'legal, decent, honest and truthful.'[16] A fundamental difference between the ASA and the ASCI is in the former's ability in ensuring the enforceability of its directives. The basis of the same is an agreement that the ASA has entered into with newspapers and journals to not carry any advertisement that it deems to have breached the Advertising Code set out by it. Further, it may refer persistent cases of infringement to the Director General of Fair Trading, who has a statutory duty to obtain injunctive action against false advertising.[17] With regard to comparative advertising, the Code provides that 'Advertisers should not unfairly attack or discredit other businesses or their products.'[18] An instrumental role in developing the above mechanism has been that of a European Union directive permitting comparative advertising in the interests of competition and public awareness. The only condition imposed therein is that the promotion should not be misleading and should genuinely compare like with like.[19]

In the United States, false and deceptive advertising has been excluded from the constitutional protection of the First Amendment. Hence, advertisements of such nature may be banned, or advertisers may be asked to alter the same so as to include warnings, disclosures and corrections.[20] The leading regulatory body in the states is the Federal Trade Commission ('FTC'),

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14 *Supra* note 5.

15 Geoffery Robertson & Andrew Nicol, Media Law 797 (2002).

16 Tom Crone, Law and the Media 204-207 (1996).

17 Geoffery Robertson & Andrew Nicol, *supra* note 15, 797.

18 *Id.*, 804.

19 Directive 97/55/EC on Comparative Advertising, implemented by the Control of Misleading Advertisements (Amendment) Regulations, 2000 (SI 2000/94).

20 Kent Middleton, Bill Chamberlin & Matthew Bunker, Public Communication 314-315 (1997).

a five member body which defines not only the scope of federal regulation but also determines the standards for state and industry specific bodies. The primary object of the FTC is to protect consumers from unfair or deceptive market practices and promote healthy competition. The source of the Commission's regulatory authority is in its ability to require that advertisers substantiate the accuracy of their assertions.[21]It recognizes that the law of advertising allows for subjective statements of opinion, with the assumption being that ordinary consumers do not take such statements seriously. However, such claims become deceptive when they falsely imply assertions of superiority. In the case of *Jay Norris Inc*.,[22] an advertisement amounted to deception when it claimed that a television antenna was an 'electronic miracle'. The FTC held it to be an exaggerated claim that could lead consumers to believe that the antenna was generally superior.

While setting in place an effective mechanism for protecting consumer interests, the FTC offers little immediate relief to a competitor who may be hurt by false and misleading comparative advertising.[23] Hence, aggrieved parties have to take direct recourse to the courts in order to obtain injunctive relief against deceptive advertisements. The competitor may seek an injunction under §43(*a*) of the Lanham Trademark Act, 1946. The legislation prohibits any person's "false or misleading representation of fact" in "commercial advertising or promotion" that "represents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." The courts have generally restricted action under the Act to those who have suffered 'competitive injury', ruling that consumers may not sue under the same for false advertising. Competitors may proceed with an action for both injunctive relief and monetary damages.[24]

## III. FROM COMPETITOR'S INTEREST TO CONSUMER'S INTEREST

In seeking to evolve any uniform standards to determine the permissibility and tolerance of comparative advertising, there exists a need to effectively balance the interests of both the competitor and the consumer. The law on the point has undergone a significant shift, with an initial disregard of the rights of the consumer being replaced by an attitude that seeks to develop a more inclusive position on the subject.

The initial common law position on the point was determined by a decision of the Chancery Division in *De Beers Abrasive* v. *International*

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21 *Id*.

22 *Re* Jay Norris, Inc., 91 F.T.C. 751 (1978).

23 Kent Middleton, Bill Chamberlin & Matthew Bunker, *supra* note 20, 335-337.

24 *Id*., 336.

*General Electric Co.*[25] Herein, a manufacturer of natural diamond abrasive sued a manufacturer of a competing abrasive made from synthetic diamonds, on the ground that that latter had distributed a pamphlet carrying a laboratory experiment report comparing the performance and qualities of the two products. The product of the plaintiff had allegedly been cast in an unfavorable light in the same. The offending statements contained in the report conveyed the impression that the defendant's goods were better than those of the plaintiff. The Court observed the same to be a more dramatic representation of the defendant's claim regarding the superiority of its goods. Statements of this nature were held to be instances of simple puffery, with an attempt being made on part of the manufacturer to exaggerate the benefits or utility of its products, either in absolute terms, or by way of a comparison with rival products.[26] Such instances of puffery were seen as constitutive of the professional liberties that might be allowed to advertisers operating in a free commercial environment. There was little emphasis placed on the motive of the advertiser, with the Court opining that it was immaterial as to whether the advertisement intended to injure the plaintiff's interests, and that it was perfectly legitimate for a market competitor to want to draw away the plaintiff's customers. The only substantive limitation imposed on such use of puffery was that the advertiser was prevented from actively denigrating the product of a competitor, with any representations seen as deprecating or rubbishing the rival product being actionable.

The role of puffery as a facet of comparative advertising was substantively dealt with by an Indian court for the first time in *Reckitt & Colman of India Ltd.* v. *M.P. Ramchandran&Anr.*[27]In the concerned matter, the plaintiff and defendant were manufacturers of clothing detergent brands 'Robin Blue' and 'Ujala', respectively. It was contended by the plaintiff that the defendant, in its advertisement, had intentionally displayed a container that was similar to the one in which the plaintiff's product was sold, and in regard to which the plaintiff had a registered design. A further insinuation to the product of the plaintiff was in the fictitious product being priced at Rs. 10, which was known to be the price at which 'Robin Blue' was sold. The advertisement went on to state that the said product 'Blue' was uneconomical, and depicted that the same was a product of obsolete technology and hence ineffective. There was also an implication that the product failed to dissolve effectively in water, and hence damaged clothes by leaving blue patches on them. It was argued by the defendant that the bottle depicted in the advertisement did not bear any resemblance to 'Robin Blue', and that the object of the portrayal had been merely to assert the technological superiority of 'Ujala' over other competing products. Hence, it was denied that there was any specific disparagement of 'Robin Blue' in the concerned advertisement. The Court herein relied upon the common law

[25] De Beers Abrasive v. International General Electric Co, 1975 (2) All ER 599.
[26] *See also* White v. Mellin, 1895 AC 154.
[27] Reckitt & Colman of India Ltd. v. M.P. Ramchandran&Anr, 1999 PTC (19) 741.

position as held in *De Beers*[28] and enunciated the following principles to state the law on the subject:

1. A tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue.

2. He can also say that his 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 the repetition of such defamation.[29]

Therefore, the question to be determined by the Court was whether the advertisement merely puffed the product of the advertiser, or in the garb of doing so, was denigrating the product of the plaintiff. It was observed herein that the assertions in the advertisement were aimed at denigratingthe product of the plaintiff by indicating to existing and future customers that the product was both uneconomical and ineffective. Hence, the Court passed an order of injunction against the defendant, restraining him from broadcasting the said advertisement. A significant aspect of the manner in which puffery has been interpreted in this case is the broadly liberal attitude adopted towards untrue and imprecise statements. The law as had evolved in England and found resonance in *Ramchandran*,[30] considered it permissible to allow the advertiser to enhance the perceived utility of his product, even at the expense of factual accuracy. The emphasis of the Court in this regard was to prevent any loss or injury to the interests of the competing manufacturer or seller, with any active disparagement of a competing product being impermissible. The said approach, while protecting the rights of the competing parties, was woefully inadequate in addressing the concerns of the other significant market group, the consumers.

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[28] *Supra* note 25.
[29] *Supra* note 27, 746.
[30] *Id.*

The *Ramchandran*[31] position on puffery was reconsidered to a limited extent in the matter of *Glaxo Smith Kline Consumer Health Care Limited* v. *Heinz India Private Limited and Ors.*[32] Herein, the parties were manufacturers of the reputed nutritional drinks 'Horlicks' and 'Complan'respectively. In addition to allegations of implied disparagement, it was contended by the plaintiff that the advertisement had attributed certain qualities to the defendant's product in an imprecise and untruthful manner. The first half of the advertisement had shown a young boy hanging on the central bar of a school bus, apparently in a desperate bid to gain some height. Thereafter, another boy approaches and advises him to start consuming the brand 'Complan', which he says is necessary for growing tall. The advertisement proceeded in its second half to show the same boy who had previously been hanging on the bar having had a considerable increase in his height, with him declaring that he was now a consumer of the defendant's brand. The broadcast ended on a visual note declaring that the defendant's brand 'Complan' had 'extra growing power'.

The plaintiff argued that the said portrayal was enhancing the utility of the defendant's product in an untruthful manner, with there being no substantive basis to the defendant's assertion that its brand ensured an increase in height. It was contended that the consumption of nutritional drinks was not the only factor contributing to the growth of children, with genetic potential, physical activity and various environmental circumstances being equally determinant. Such incorrect portrayal was argued to be an attempt to misguide consumers with regard to the utility of the defendant's product, resulting in the plaintiff suffering extensive economic losses. The defendant contended that the assertions made were understood by consumers to be an attempt at puffery, with there being no requirement of warranty or accountability with regard to the same.[33] The Court herein adhered to the principles as had been stated in *Ramchandran*,[34] holding that an advertiser was at liberty to engage in puffery so long as the product of a competitor was not slandered in any manner. On the other hand, it also sought to regulate such representations of opinion by introducing a broad requirement to substantiate their tenability. However, with no mechanism or standard of regulation being prescribed, the position on the point remained unclear.

A significant evolution of the law on false and imprecise puffery was seen in the case of *Colgate Palmolive (India) Limited* v. *Anchor Health and Beauty Care Private Ltd.*[35] The parties herein were manufacturers of dental

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

32 Glaxo Smith Kline Consumer Health Care Limited v. Heinz India Private Limited and Ors., 2007 (2) CHN 44.

33 The court herein placed significant reliance on the decision in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., 1999 (7) SCC 1.

34 *Supra* note 27.

35 Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd, 2009 (40) PTC 653.

care products including toothpastes, with the plaintiff seeking an injunction restraining the defendant from broadcasting the contentious advertisement. It was contended by the plaintiff that in the advertisement the defendant had stated that its product 'Anchor' was the 'only' one that contained three ingredients, namely calcium, fluoride and triclosan. Further, it was also claimed by the defendant that 'Anchor' was the 'first' toothpaste that could provide 'all round protection'. The plaintiff objected to the first assertion as being false on the basis that even its products contained all of the three named ingredients. Having established itself as a pioneer in the market for dental care products, it argued that an assertion on part of the defendant that 'Anchor' was the 'first' product to provide 'all round protection' was an act of denigrating the competing product in an implied manner. Hence, it was argued that the defendant's assertions were both false and disparaging, with the same exceeding the tolerable limits of puffery. The defendant replied to the same arguing that its use of the word 'only' was intended to mean that its product was the only one containing the three ingredients within the specific range of white toothpastes. Further, with regard to the usage of the word 'first', it argued that it related to the adoption of the slogan 'all round protection', and not the utility of the brand.

The Court rejected the defendant's argument and held that the advertisement sent a message to a consumer of average intelligence that 'Anchor' was in fact the 'only' product containing the said ingredients, and that it was the 'first' to provide optimal protection. A significant development seen in the reasoning of the Court was the introduction of the element of consumer protection in the law regulating puffery, with the Court observing that the consumer was as significant a stakeholder in the market as the competing manufacturers. With consumers being the often gullible targets of advertising campaigns, the protection of their interests was required while establishing a substantive mechanism to regulate comparative advertising. In an analysis of the judicial trend on the subject since *Ramchandran*[36], it observed that the law in India had failed to take account of the demands of consumer justice, despite the introduction of the Consumer Protection Act, 1986, and the subsequent broadening of the jurisprudence and policy relating to consumer protection.

Finding fault with the traditional position in *Ramchandran,*[37] the Court noted that while the same had been arrived at on the basis of the English decision in *De Beers*[38], the law on the subject in England itself had undergone a significant change since then. The introduction of the Consumer Protection Act, 1987, and numerous other regulations such as the OFCOM (Office of Communications)[39] had resulted in the statutory repudiation of the

[36] S*upra* note 27.
[37] *Id*.
[38] *Supra* note 25.
[39] Introduced by The Communications Act, 2003.

principles enunciated in *De Beers*[40]. Hence, the Court considered the continued validation of the *De Beers* opinion by Indian courts to be contrary to the stated objectives of legislations such as the Consumer Protection Act, 1986. It observed that with the present regulatory norms in India, it may not be possible for manufacturers to make 'false, misleading and harmful' claims in their advertisements.The Court herein referred to the concept of 'unfair trade practice' as has been defined under §2(i)(r) of the Consumer Protection Act, 1986. Clause (x) of the same brought any statement giving false or misleading facts, or disparaging the goods of the competitor, within the ambit of the provision.[41]

Hence, the right that had been conferred on advertisers to make untrue statements regarding the utility of the product was extinguished. With reference to the present matter, the Court accepted the defendant's argument that there had been no active disparagement of the plaintiff's product. However, the use of the terms 'only' and 'first' in an untruthful and misleading manner was considered to be constitutive of an unfair trade practice. Hence, the Court admitted the prayer of the plaintiff to a limited extent and restrained the defendant from the usage of the words 'first' and 'only' in the said manner.

## IV. RECENT JUDICIAL TRENDS: DIFFERENTIATING SIMPLE PUFFERY FROM DENIGRATION

The two fundamental facets of comparative advertising are puffery and denigration, with there being a need to comprehensively differentiate the nature of the two in order to develop any broad mechanism of regulation. An attempt may be made towards the same by way of an analysis of certain recent case law on the subject. An understanding of the judicial opinion herein might help in determining a uniform standard of tolerance to differentiate cases of simple puffery from those of actionable denigration.

The case of *Dabur India Ltd.* v. *M/S Colortek Meghalaya Pvt. Ltd.*[42]laid down certain principles to help ascertain the import of implied disparagement in comparative advertising. Herein, the appellant was a manufacturer of mosquito repellent creams, namely 'Odomos' and 'Odomos Naturals.' The respondent also manufactured a mosquito repellent cream under the brand name 'Good Knight Naturals.' The respondent telecast the advertisement of 'Good Knight Naturals', with the appellant contending that the same disparaged its product. The question that arose before the Court was whether the

40 *Supra* note 27.
41 Consumer Protection Act, 1986, §2(*i*)(*r*)(*x*).
42 Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd, 2010 (42) PTC 88.

telecast disparaged the product of the appellant in an implied manner, and if so, whether the appellant was entitled to an injunction against the telecast.

The Court observed that a seller always has the scope to represent his product in a manner that gains him additional purchasers than what he would have normally had. This latitude, however, in no way implies any permission for misrepresentation, but only a description of permissible assertion.[43] To substantiate this argument, the Court also placed reliance on the principle of civil law, "simplex commendatio non obligat", which means that simple commendation can only be regarded as a mere invitation to a customer, without any obligation as regards the quality of goods. Thus, each seller has the right to naturally try and affirm that his wares are good enough to be purchased, or of superlative quality.

Although the Court held that commendatory expressions should not to be treated as serious representations of fact, it further stated that such principle was by no means conclusive as the limits of permissible assertion are not always discernible. The Court thus laid down certain guiding principles wherein it observed that an advertisement is constitutive of commercial speech and is protected by Art. 19(1)(*a*) of the Constitution. While there would be some grey areas in the process of representation, any commendatory statements need not necessarily be taken as serious representations of fact, but only as glorifying the product, provided that the advertisement is not false, misleading, unfair or deceptive. Also while glorifying the product, an advertiser may not denigrate or disparage a rival product. A cause of action would arise when the subject of the advertisement goes beyond mere commendatory statements to constitute untrue statements of fact about a rival's product.[44]

However, the possibility always remains that whenever an advertiser promotes his product through puffed statements, there may be an assumption that he is implying at the inferiority of another product. Referring to the case of *Pepsi Co. Inc. & Ors.* v. *Hindustan Coca Cola Ltd,*[45]the Court formulated certain tests to determine any cause of action for disparagement:

1. What is the intention behind the advertisement, as deciphered from the storyline and the message ostensibly sought to be conveyed?

2. Is the manner of advertisement or comparison by and large truthful or does it falsely denigrates or disparage the rival's product?

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[43] *Supra* note 32.

[44] Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd, 2003 (27) PTC 305 (Del.). See also Dabur India Ltd. v. Wipro Limited, Bangalore, 2006 (32) PTC 677, "[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 that of the defendant."

[45] *Id.*

3. Finally, does the ad have the overall effect of promoting the seller's product or showing the rival in poor light?

The judgment delivered in *Dabur India*[46] assumes significance in the regulation of comparative advertising as it points out stark differences between tolerable amounts of puffery and what might amount to denigration. The Court rejected the argument of the appellant that it was the implied target of denigration since it had a dominant market share. The underlying rationale behind this argument would be that the appellant sought to create a monopoly in the market, or had wanted to entrench the monopoly it had already established. If such a thing were to happen, then no company in the market could advertise its product as doing so would necessarily mean that the appellant's product was being targeted. The commercial in dispute merely enlisted the virtues of the advertised product rather than denigrating that of the competitor. The Court found no content in the commercial to suggest overt or even implied denigration. It was held to be natural to assume that "while comparing its product with any other product, any advertiser would naturally highlight its positive points but this cannot be negatively construed to mean that there is a disparagement of a rival product."

A further submission by the appellant was that the use of expressions such as 'an apprehension of getting rashes and allergy with the use of mosquito repellent creams', or an allegation that other creams caused stickiness, amounted to disparagement of its product. The same was also rejected by the Court as there was no suggestion that any specific product caused rashes or allergies or was sticky. A general proposition had been advanced which suggested that if a mosquito repellent cream was applied on the skin, there may be an apprehension of rashes and allergy. Since the respondents were also promoting a mosquito repellent cream, there was no reasonable apprehension that they would denigrate all mosquito creams or of the fact that such creams caused rashes or allergies. The respondents were only suggesting that since their product contained certain exclusive ingredients, there is a lesser chance of the consumer suffering from any side effects. With regard to the point on stickiness, the Court observed that it was entirely dependent on the subjective opinion of the consumer, and thus ended all apprehension of denigration of the appellant's product.[47]

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[46] *Supra* note 42.

[47] See also, S.C. Johnson & Son, Inc & Anr. v. Buchanan Group Pty Ltd., High Court of Delhi at New Delhi CS(OS) No. 2173/2009. "The respondent allegedly disparaged the goods of the petitioner by claiming that their product is of superior quality and while drawing this comparison depicted a container which had striking resemblance with the petitioner's product. The respondent's argument that the comparison was of a generic nature was turned down and the Court held that it was comparison by innuendo and since such comparison showed the petitioner's product in poor light, it was disparagement. It also seemed to recognize the impact of advertisement on sales figures."

Furthermore, it referred to the appellant as being 'hypersensitive' and suggested that the parties were settling a commercial rivalry by using the courts as a medium to ward off challenges to their monopolistic position in the market. In conclusion, however, the Court also mentioned that while puffed-up advertising may be permissible, it cannot transgress the grey areas of permissible assertion. In case it does so, the advertiser must have some reasonable factual basis for the assertion made. The medium of advertisement was also one of the factors that became a determinant of denigration. The far-reaching consequences of the electronic media were looked into. Since "a telecast reaches persons of all categories, irrespective of age, literacy and their capacity to understand or withstand",[48] the impact of a telecast on society was held to be phenomenal. The Court, however, seemed to recognize the consumer as one who was capable of comprehending market realities, and choosing a product accordingly. It did not consider the general public as being blindly influenced by a commercial advertisement that indulged in puffing its products in order to promote sales.

This case was shortly followed by that of *Procter & Gamble Home Products* v. *Hindustan Unilever Limited,*[49] wherein the Calcutta High Court highlighted the difference between express denigration and puffery. The petitioners were manufacturers of a detergent powder brand 'Tide', while the respondents were the market rivals of 'Tide' and the manufacturers of the detergent powder 'Rin'. The respondents aired a commercial that compared both the products and allegedly portrayed the petitioner's product in a negative manner, claiming that 'Rin' was more effective than 'Tide' in providing 'whiteness' to clothes. The petitioner thus prayed for an injunction to restrain the respondent from telecasting the advertisement, contending that the same had not stopped at merely puffing the advertised product, but had disparaged the competing product. The respondents herein submitted that the assertions in the advertisement were a comparison of the quality of the two products, in particular the 'whiteness' quotient, that the respondent's product was imparted due to the use of certain chemical fluoresces. They argued that the fact that the whiteness provided by Rin was better could be inferred from laboratory tests conducted by both the respondent and independent agencies, thus resulting in an absolute defense of truth.[50] Since the comparison was strictly restricted to the whiteness as provided by the respondent's product due to the chemical fluoresces, it was argued that the commercial fell within the ambit of permitted comparative advertising.

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

49 Procter & Gamble Home Products v. Hindustan Unilever Limited, High Court of Calcutta, G.A. No. 614 of 2010, C.S. No. 43 of 2010.

50 *See generally* 2001 FSR 32; AIR 1928 Cal 1; 26 PTC 535; 1998 FSR 9 and 1989 (3) SCC 251 as cited in Procter & Gamble Home Products v. Hindustan Unilever Limited, High Court of Calcutta, *supra* note 47.

The Court, however, differed from the respondent's view and held that there was an express denigration of the petitioner's product. According to the Court, on application of the principles laid down in *Dabur India*,[51] it was discernable from the format of the advertisement and the manner of its depiction that it had the overall effect of portraying the competing product in a poor light rather than promoting the seller's own product. The mention of the tickler mentioning independent laboratory tests had not been the focus of the advertisement, with there being sufficient scope for ambiguity surrounding the degree of accuracy of such tests. Further, a dull shirt and a clear white shirt were depicted with the respective products, and a connection between the dull shirt and the petitioner's product was plainly evident. It was also clear from the audio component that the petitioner's product was being expressly denigrated. Considering the deep impact that the electronic media has on the psyche of the consumers, the Court upheld the request for an interim injunction, restraining the petitioner from broadcasting the denigrating advertisement.

The law on the point in the United States has sought to bring about a clear demarcation between instances of puffery and those of active denigration, with statements of opinion, as opposed to verifiable statements of fact, being termed as simple puffery. Generally, puffery has four characteristics: it is general and vague; it makes a claim that is immeasurable, unquantifiable or unverifiable; it is presented as a subjective statement; and it is the kind of claim upon which consumers are unlikely to rely.[52] Thus it is contingent on the assumption that all consumers are reasonably governed by common sense. In the abovementionedcase[53], the respondent compared its product in a general manner with that of the petitioner, rather than restricting itself to a comparison of the degree of whiteness as could be provided. It may be said that as the degree of whiteness is a specific measurable claim,[54] asserting superiority on such basis is not a denigration of the competing product. In addition, while drawing a line between simple puffery and denigration, the Court might take into account that there are also certain ambiguous differences between fair and foul conduct. The Federal Trade Commission in the United States has observed that the key evil in comparative advertising is deception, not utter falsity, and recognizes that "even if a statement is literally true, it may still be deceptive

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51 *Supra* note 42.

52 *See generally* Blue Cross of Greater Phila., 898 F.2d at 926; Smith-Victor Corp. v. Sylvania Elec. Prod., Inc., 242 F. Supp. 302, 308 (N.D. Ill. 1965); Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co., 228 F.3d 24, 39 (1st Cir. 2000); Omega Eng'g, Inc. v. Eastman Kodak Co., 30 F. Supp. 2d 226, 259 (D. Conn. 1998); as cited in Charlotte J. Romano, *Comparative Advertising in the United States and France,* 25 NW. J. INT'L L. & BUS. 371.

53 *Supra* note 49.

54 *See* Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co., 228 F.3d 24, 39 (1st Cir. 2000) (commenting "standing alone, ["Whiter is not possible"] might well constitute an unspecified boast, and hence puffing. In context, however, the statement invites consumers to compare Ace's whitening power against either other detergents acting alone or detergents used with chlorine bleach ... . It is a specific, measurable claim, and hence not puffing.").

if it is misleading in its overall effect, or if it is subject to more than one interpretation, one of which is not true, or if the statement is true only in limited circumstances."[55]

A more recent dispute has arisen between Procter & Gamble ('P&G') and Hindustan Unilever Ltd ('HUL'),[56] wherein the latter has contended that the latest advertisement of the former's shampoo brand 'Pantene' is false and misleading in asserting that the said product was the most preferred one in the Indian market. In addition, it was alleged that the said campaign was disparaging Unilever's brand 'Dove'. The hoardings put up by P&G towards the end of July 2010 depicted a 'mystery shampoo' which ''80% women say is better than anything else.'' P&G's move was immediately countered by Unilever, which came out with a parallel campaign of 'Dove', saying, "There is no mystery. Dove is the No.1 shampoo''.[57] It later filed a complaint with the Advertising Standards Council of India ('ASCI') against P&G's original assertion of popularity, terming it as misleading and untrue, as the conclusions were based on an old study conducted in Thailand, rather than indicating recent trends in the Indian market. ASCI upheld the complaint and recommended that P&G desist from engaging in any advertising campaign of such nature. Unilever has subsequently approached the Delhi High Court to seek an authoritative determination of the issue.[58]

## V. CONCLUSION

An analysis of the law governing comparative advertising in India reveals that in the absence of a dedicated legislative mechanism regulating the same, a largely makeshift approach has been followed, with diverse aspects of the same being determined with reference to inconsistent standards. Such an approach is insufficient on a sustainable basis, as the selective application of diverse laws leaves behind a trail of lacunae in any attempt to determine the question in a comprehensive manner. In order to arrive at a uniform standard or level of tolerance, the twin components of simple puffery and denigration have to be addressed keeping in mind the nature such representations. Herein, it is relevant to note that while the level of permissibility with regard to puffery has been varying, the position on denigration has been largely

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55 Paul T. Hayden, *A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common law Tortuous Unfair Competition,* 76 Iowa L. Rev. 67 (1990-91).

56 Financial Express Bureau, HUL complaint against P&G's shampoo upheld, September 21, 2010, available at http://www.financialexpress.com/news/hul-complaint-against-p&gs-shampoo-upheld/684836/fe (Last visited on September 25, 2010).

57 Times News Network, *Shampoo Ad: HUL drags P&G to Court,* September 17, 2010, available at http://timesofindia.indiatimes.com/business/india-business/Shampoo-ad-HUL-drags-PG-to-court-/articleshow/6568938.cms (Last visited on September 23, 2010).

58 *Supra* note 49.

consistent. Further, it is essential to incorporate the interests of all the concerned stakeholders, including manufacturers, advertisers, competing parties and consumers. The Consumer Protection Act, 1986, though commonly viewed as an effective mechanism to regulate the subject, has proved insufficient as it excludes from its purview competing manufacturers and sellers. On the other hand, the traditional view as had been adhered to by our courts for almost a decade fell short in terms of addressing the demands of consumer justice. The self-regulatory process as has been established by the advertising industry has been relegated to a purely recommendatory function, with it having no enforcement mechanism to ensure compliance with its directives.

A possible method to evolve a more comprehensive scheme of regulation may be in allowing the advertising industry to suggest the broad structure for the same, while ensuring that the rights of both the competitor and consumer are safeguarded. This may be done by way of adopting the model as has evolved in Britain, with the norms as prescribed by the advertising body being legally enforceable. Such norms may be used to determine certain uniform standards with regard to both simple puffery and denigration, keeping in mind the demands of consumer justice and fair competition. While the necessity for introducing a more comprehensive regulatory regime cannot be overemphasized, it must be remembered that advertising disputes, being commercial in nature, should preferably be resolved within the market. The courts in this regard should not allow themselves to be used as instruments for the settlement of market disputes, with their intervention being required only in case of any express violation of the law.