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## THE LEGAL FRAMEWORK OF COMPARATIVE ADVERTISEMENT IN INDIA : A COMPARATIVE STUDY WITH UK AND USA

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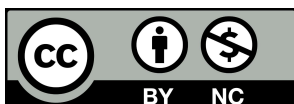
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### Keyword

Comparative advertisement, legal framework, regulations, legislation, consumer protection, trademarks, marketing, competition, ethics.

### Abstract

*This study examines the legal framework surrounding comparative advertisement in India and compares it with the regulations in the United Kingdom (UK) and the United States of America (USA). The study begins by providing an overview of the concept of comparative advertisement and its importance in the modern business environment. It then delves into the legal framework governing comparative advertisement in India, focusing on key legislation, such as the Consumer Protection Act, 2019, and the Trademarks Act, 1999. The study analyzes the provisions, restrictions, and regulatory authorities responsible for overseeing comparative advertisement practices in India. To offer a comprehensive understanding of the subject, the study compares the Indian legal framework with that of the UK and the USA. It explores the relevant legislation and regulatory bodies in these jurisdictions, such as the UK's Consumer Protection from Unfair Trading Regulations 2008 and the Federal Trade Commission Act in the USA. By examining the similarities and differences between the legal frameworks, the study aims to identify best practices and potential areas of improvement for India's comparative advertisement regulations. Moreover, the study discusses several notable cases and legal precedents in India, the UK, and the USA that have shaped the legal landscape of comparative advertisement. It examines court decisions and rulings that have influenced the interpretation and application of relevant laws in each jurisdiction. The study concludes with a summary of key findings, highlighting the areas where India's legal framework can be strengthened to ensure a fair and transparent environment for comparative advertisement. It emphasizes the importance of striking a balance between promoting healthy competitions and protecting consumers from misleading or deceptive advertising practices.*



## Introduction

The emergence of comparative advertising as a promotional tool in the consumer goods market has resulted in diverse legal issues concerning advertisers, competitors, and consumers. Comparative advertising refers to any form of advertising that attempts to derive commercial benefits by using a comparison between the advertiser's product, service, or brand and a competing product, service, or brand. While puffery involves making subjective superlative statements about one's product, denigration pertains to negative depictions of a competing product.<sup>1</sup> Comparative advertising, if not regulated, may lead to disparagement of a competitor's products and/or deceiving consumers, thereby leading to unfair competition.<sup>2</sup>

The aim of this paper is to examine the legal framework governing comparative advertising in India. It analyses the relevant provisions of the Indian Trademark Act, 1999, and guidelines issued by the Advertising Standards Council of India (ASCI) and the Monopolies and Restrictive Trade Practices Commission (MRTPC). The chapter highlights the importance of a broadly uniform standard to regulate comparative advertising activities considering the interests of the stakeholders involved, that is, the advertiser, competitor, and consumer, while keeping in mind the recent developments in consumer protection jurisprudence.<sup>3</sup>

The first section of this paper examines the nature and components of comparative advertising, that is, puffery and denigration along with the ways in which comparative advertising may be restricted. The section references relevant Supreme Court case laws and decisions, including the *Hamdard Dawakhana v. Union of India*<sup>4</sup> case, where the Apex court held that while advertisements were a form of speech, they were not constitutive of the concept of free speech. The subsequent process of economic liberalization, however, brought about substantive changes in the structure of the market for consumer goods.<sup>5</sup>

The second section of this paper provides an overview of the constitutional position of advertising in India. Advertising, in the *Tata Press v. Mahanagar Telephone Nigam Ltd.* case, has been held to be beneficial to consumers as it facilitates the free dissemination of information, leading to greater public awareness in a free market economy. The court has also held advertising to be constitutive of commercial speech, bringing it within the ambit of constitutional protection conferred by Art. 19(1)(a).<sup>6</sup>

The third section of this paper examines the multiple mechanisms available to regulate comparative advertising in India, which include voluntary and statutorily enforceable mechanisms. The section provides a comparison with mechanisms adopted in other jurisdictions and evaluates the competing interests of different stakeholders concerning the evolution of the law with regard to competitor and consumer protection rights. The section analyses recent judicial pronouncements leading to determining the tolerance standards in comparative advertising.

*A fortiori*, this paper aims to establish a comprehensive scheme of regulatory standards in India for comparative advertising. It notes the importance of balancing the conflicting interests of the stakeholders involved, keeping in mind emerging consumer protection jurisprudence, in addition to examining the existing regulatory framework in both domestic and international jurisdictions.<sup>7</sup>

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<sup>1</sup> John Peloza & Stacey Menzel Baker, The Importance of Regulatory Focus in Comparative Advertising: The Roles of Comparative Advertising, Self-Referencing, and Product Pronoun, 15 J. ADVERTISING, 63 (2017).

<sup>2</sup> David L. Kuck & Elizabeth A. Dickson, Comparative Advertising and the Limits of Free Speech, 33 J. CONSUMER AFFAIRS, 143 (1999).

<sup>3</sup> John Peloza & Stacey Menzel Baker, The Importance of Regulatory Focus in Comparative Advertising: The Roles of Comparative Advertising, Self-Referencing, and Product Pronoun, 15 J. ADVERTISING, 63 (2017).

<sup>4</sup> *Hamdard Dawakhana v. Union of India*, (1960) 2 SCR 671.

<sup>5</sup> John Peloza & Stacey Menzel Baker, The Importance of Regulatory Focus in Comparative Advertising: The Roles of Comparative Advertising, Self-Referencing, and Product Pronoun, 15 J. ADVERTISING, 63 (2017).

<sup>6</sup> Jonathan Mukwiri, Comparative Advertising in India: A Comprehensive Regulatory Framework, in REGULATING COMPARATIVE ADVERTISING: THE ROLE OF PUBLIC AND PRIVATE LEGAL MECHANISMS 325 (Margaret Tarkington & Jake Linford eds., 2016).

<sup>7</sup> *Id.*

## Nature and Components of Comparative Advertisement: Puffery and Denigration

Comparative advertising is an ad that compares the goods or services of one product with that of another.<sup>8</sup> It is a widely used method among advertisers to influence consumer behavior. According to the Advertising Standards Council of India (ASCI), comparative advertising will be deemed lawful only if it fairly and truthfully represents material, significant, verifiable, and relevant data or information. In this research endeavor, we will examine the nature and components of comparative advertising, puffery and denigration, and the ways in which comparative advertising can be restricted under the legal framework in India, including the role of regulatory bodies such as ASCI and MRTP. We will also refer to relevant Supreme Court decisions, including the *Hamdard Dawakhana v. Union of India*<sup>9</sup> case, which held that advertisements, while a form of speech, applied only to commercial speech and not to the concept of free speech.

Comparative advertising involves the comparison of one product with another and is commonly used in the advertisement industry. It is often considered to have an injurious effect on the market and involves the process of denigration. However, it is lawful if conducted in a fair and truthful manner representing verifiable and relevant data. It helps to enhance competition and stimulate sales, pushing companies to provide better products and services. Comparative advertising is distinguished by its informational content and predictive accuracy of comparison between the two products or services. Comparative advertisements must not be misleading or deceitful, and it should not require consumers to prefer one product over another.<sup>10</sup>

The nature of comparative advertising is based on two elements – *puffery* and *denigration*. Puffery refers to an exaggerated expression of opinion, not meant to be taken literally, in advertisements. The consumer may not rely on puffery to make a purchase or service decision. The exaggerations must not be misleading or deceptive, but the advertiser is free to endorse its product in a better way than the competitor's product in comparative advertising. An example of puffery could be a company boasting that their product is the best in the market despite evidence to the contrary.<sup>11</sup>

Denigration, on the other hand, involves a direct or indirect attack on a competitor's product in an advertisement. Denigration in comparative advertising is considered to be misleading and unlawful if false or without valid scientific evidence. In India, advertisements are scrutinized not only for the veracity of its claims but also because it has social responsibility. Most claims by advertising should provide a scientific rationale, and for that reason, it is essential to protect consumers from false claims from denigrating advertisements.<sup>12</sup>

Comparative advertising is legally valid only when there is no willingness of the advertisers to mislead consumers either by the use of puffery or the process of denigration. Several Indian laws deal with the regulation of comparative advertising. Under the Trademark Act, 1999, advertisements that result in comparative infringement caused by an advertiser are unlawful.<sup>13</sup> Such comparative advertising violates the principles of fair competition within the meaning of §2(1)(r). Additionally, the Consumer Protection Act, 1986, deals with false advertising that deceives or misleads its customers.<sup>14</sup>

The MRTP Act provides an appropriate mechanism for regulating fair competition in a market, yet both MRTP and the Bureau of Indian Standards, a nationally recognized organization for granting product certification in diverse sectors, recognize the use of comparative advertising. One may argue MRTP is contrary to comparative advertising since it defines advertisements as misleading by not providing complete or accurate information. However, subsequent modifications of the act in 1991 and the introduction of the

<sup>8</sup> Trademark Rules, 2017, rule 3(1)(vii).

<sup>9</sup> *Hamdard Dawakhana v. Union of India*, (1960) 2 SCR 671.

<sup>10</sup> Parag Rastogi, *Comparative Advertising in India – An Analysis*, RLDA Journal, 2013.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Trademark Act, 1999, §30(1).

<sup>14</sup> Consumer Protection Act, 1986, §2(1)(r).

Competition Act in 2002 allow competition and fair dealing in a market. An advertisement must comply with the rules of ASCI, which include a clause of substantiation of claims.<sup>15</sup>

In *Hamdard Dawakhana v. Union of India*, the Hon'ble Supreme Court held that advertising as a commercial speech is not constitutionally protected by the free speech principle of Article 19(1)(a) of the Indian Constitution but deemed to be protected by the principle of fair competition. It is also essential for advertisements to be fair and truthful. The Court held that advertisers cannot rely on the right to free speech and freedom of expression to propagate false or misleading information.<sup>16</sup>

Comparative advertising is a widely used method of promotion in India. It is therefore crucial that advertisers recognize the legal framework governing comparative advertisements, avoid the use of denigration unless backed up scientifically, and refrain from making misleading or false claims. Comparative advertising is valuable when it is factual, truthful and based on relevant data, and the advertiser must support the claims made with substantiative and scientific evidence. Moreover, compliance with the advertising code of ethics is necessary to ensure promotions remain socially responsible. In conclusion, it is essential that truthful, informative advertising not mislead consumers and protect the honest interests of a market.

### Legal Framework of Comparative Advertising in India

Comparative advertising in India has long been a contentious issue, often at the forefront of discussions related to the regulation and monitoring of advertising practices in the country. Any attempt to regulate advertising practices must be made keeping in mind the constitutional position towards advertising provided under Article 19(1)(a) of the Constitution of India. While advertising was initially held to be outside the purview of free speech, the changing economic landscape of the country saw a shift in the constitutional position towards advertising, which was upheld in the landmark case of *Tata Press v. Mahanagar Telephone Nigam Ltd.* This chapter will delve deeper into the legal framework of comparative advertisement in India and examine the different regulatory bodies and acts that provide guidelines for comparative infringement caused by advertisers.<sup>17</sup>

At its core, comparative advertising refers to an advertisement that compares the products, goods, or services of one advertiser to that of another. Comparative advertising has gained increasing popularity, with advertisers seeking to gain a competitive advantage over each other in the marketplace. However, such advertisements have been subject to legal scrutiny, with the Advertising Standards Council of India (ASCI), the Monopolies and Restrictive Trade Practices Act of 1969 (MRTP), and the Trademark Act of 1999 providing guidelines for comparative advertising and preventing comparative infringement caused by advertisers that could mislead consumers.<sup>18</sup>

The ASCI has been established as a self-regulatory body for monitoring advertising practices in India. Its mandate includes the regulation of advertising practices and the promotion of ethical advertising practices. ASCI also provides guidelines for comparative advertisements. One notable example is the ASCI Guidelines on Disparagement in Advertising, which lays out the framework for comparing products, goods, or services in an advertising campaign while also ensuring that the competing brands are not unfairly portrayed. This is critical to promoting a level playing field for advertisers while also safeguarding the interests of consumers.<sup>19</sup>

The MRTP Act of 1969 is another important piece of legislation that provides guidelines for comparative advertising in India. The Act is designed to prevent monopolies and restrictive trade practices in the marketplace. The MRTP Act prohibits advertising that could lead to misleading claims, false promises, or representations that are not based on facts. Additionally, it also prohibits comparative advertising that could disparage any competing product or service directly or indirectly. The act provides for the establishment of a

<sup>15</sup> Advertising Standards Council of India, The ASCI code of conduct.

<sup>16</sup> *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

<sup>17</sup> Charlotte J. Romano, *Comparative Advertising in the United States and France*, 25 NW. J. INT'L L. & BUS. 371 (2004-05).

<sup>18</sup> Advertising Law in India, <https://www.ibanetwork.com/advertising-law-india/>, last accessed on May 11, 2023.

<sup>19</sup> ASCI Guidelines on Disparagement in Advertising, [https://www.ascionline.org/images/pdf/disparagement\\_guidelines\\_oct20.pdf](https://www.ascionline.org/images/pdf/disparagement_guidelines_oct20.pdf), last accessed on May 11, 2023.



quasi-judicial body, the MRTP Commission, which has been tasked with monitoring and enforcing the provisions of the act.<sup>20</sup>

The Trademark Act of 1999 is yet another important piece of legislation that regulates competitive advertising. The act provides protection for trademarks in India and prohibits the use of any mark, name, or symbol that may mislead consumers. The Act also prohibits the use of any mark that is similar or identical to another registered trademark. Comparative advertising that infringes on trademarks will be regarded as a violation of the Trademarks Act of 1999, and the infringed party will be entitled to adequate compensation.<sup>21</sup>

In conclusion, comparative advertising has gained considerable prominence in India as advertisers seek to gain a competitive edge. However, the practice has been subject to intense legal scrutiny, with multiple regulatory bodies providing guidelines for advertising practices. The ASCI, the MRTP Act of 1969, and the Trademark Act of 1999 are essential pieces of legislation that regulate and prevent comparative infringement caused by advertisers. It is important for advertisers to consider the guidelines provided and ensure compliance to safeguard the interests of consumers. Although comparative advertising is allowed in India, advertisers are required to be cautious while issuing comparative ads as any breach of regulations can lead to repercussions and legal liability.<sup>22</sup>

Advertising is a crucial aspect of product promotion and competition in India, whereby businesses use various techniques to highlight their products' advantages over their competitors. Comparative advertising is one of the most common methods used to provide information about products, and it plays a vital role in the Indian advertising industry. In the absence of dedicated statutory mechanisms to regulate the dissemination of untruthful or disparaging material through such mediums, the responsibility of regulating advertising in India has been assumed by several governmental authorities and tribunals.<sup>23</sup> This paper is a research endeavor focused on examining the legal and statutory framework of comparative advertising in India and India's regulatory framework for comparative advertisements.

In India, matters related to untrue and misleading advertising were adjudicated upon by the Monopolies and Restrictive Trade Practices ('MRTP') Commission under the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act'). The MRTP Act defined an 'unfair trade practice' under §36A to include any false representation of goods with regard to their quality, quantity, or utility.<sup>24</sup> 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. 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. However, the MRTP Act was subsequently repealed by virtue of §66 of the Competition Act, 2002.

The Competition Act, 2002, was enacted to promote competition in the market and to prevent monopolies. The Act lays down provisions to regulate anti-competitive agreements and to prevent the abuse of dominant position by the companies. In the present case, the competitor paid compensation to the influencer to write a negative review about the product, which eventually resulted in a decrease in sales. This can be viewed as an attempt to reduce competition in the market, which is a violation of the Competition Act, 2002.

In *Samir Agarwal v. CCI*<sup>25</sup>, the Competition Commission of India (CCI) held that anti-competitive agreements or practices are not only limited to traditional business practices but also include online platforms or e-commerce entities. The CCI held that online marketplaces must not engage in any practices that may create competition concerns in the market. As per Section 27 of the Competition Act, 2002, if any person violates the provisions of the Act, including anti-competitive practices, they can be penalized with a penalty of up to ten

<sup>20</sup> The Monopolies and Restrictive Trade Practices Act, 1969, <https://www.mca.gov.in/Ministry/pdf/MRTPact1969.pdf>, last accessed on May 11, 2023.

<sup>21</sup> The Trademarks Act, 1999, [https://ipindia.gov.in/writereaddata/Portal/IPOAct/1\\_43\\_1\\_Trademark-Act-1999.pdf](https://ipindia.gov.in/writereaddata/Portal/IPOAct/1_43_1_Trademark-Act-1999.pdf), last accessed on May 11, 2023.

<sup>22</sup> A.L. Saha, Comparative Advertising in Indian Market: An Exploratory Study, 6 J. Acad. Indus. Res. 144-147 (2017).

<sup>23</sup> Aastha Sharma & Renuka Sane, Regulating Comparative Advertising in India: A Legal Analysis, 9 J. Indian L. & Soc'y 121 (2018).

<sup>24</sup> Monopolies and Restrictive Trade Practices Act, 1969, §36A.

<sup>25</sup> *Samir Agarwal v. CCI*, (2018 SCC Online Comp 23).

percent of their three years' preceding turnover. The aggrieved party can also seek compensation for any loss incurred due to anti-competitive practices.

In *Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Ltd*<sup>26</sup>, the CCI imposed a fine on Hyundai for engaging in resale price maintenance, a practice to fix the price of the product without any discount. The CCI held that such practice limits the consumer's ability to find the lowest prices and results in higher prices than the competitive prices. Therefore, the e-commerce platforms can file a complaint with the CCI against the competitor for engaging in anti-competitive practices, and seek compensation for any loss incurred.

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'). The definition of 'unfair trade practice' as under §36A has been incorporated *pari materia* in §2(1)(r) of the CP Act. While this provision has put 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. 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.<sup>27</sup> The Consumer Protection Act, 1986 was repealed and was replaced by the Act of 2019. The Consumer Protection Act, 2019, lays down provisions for consumer protection against false and misleading advertisements constituting an unfair trade practices. Section 2(47) of the Act defines an unfair trade practice as a trade practice that involves false representation or misleading of goods or services. The sub-clause (j) of sub-section (47) of the Section 2 of the Act further provides that "making any statement, whether orally or in writing or by visible representation including, by means of electronic record ... gives false or misleading facts disparaging the goods, services or trade of another person" constitutes an "unfair trade practice". Furthermore, under Section 2(28), a misleading advertisement is defined as an advertisement that falsely describes a product or service or gives a false guarantee or conveys an express or implied representation that would constitute an unfair trade practice.

In the case of *Pepsico India Holdings Pvt Ltd v. Hindustan Coca-Cola Beverages Pvt Ltd*<sup>28</sup>, the Delhi High Court held that disparaging a rival's product is permissible only if such statements are factual and fair. The Court stated that if the statements are derogatory, false, or misleading, it would constitute an unfair trade practice. Under Section 17 of the Consumer Protection Act, 2019 before the CCPA or institute proceedings before the District Commission under Section 36 of the Act, the aggrieved party can file a complaint seeking compensation for any loss suffered due to such unfair trade practices. Furthermore, In *Dr. Meenakshi Jain vs. Rohan & Ors.*<sup>29</sup>, the National Consumer Disputes Redressal Commission held that endorsements or recommendations by celebrities or influencers must be based on their personal experiences and should not contain false, misleading or exaggerated claims. It was held that such endorsements influence consumers' purchasing decisions, and therefore, celebrities must be responsible and not violate consumers' trust.

Also, the E-Commerce Rules, 2020, were enacted to ensure fair business practices by e-commerce platforms and to protect consumer interests. These rules are applicable to all e-commerce entities operating in India, including those that own, operate, or manage an e-commerce marketplace. E-commerce platforms are required to adhere to the provisions of these rules and are liable for any violation.

Under the E-Commerce Rules, 2020, intermediaries, including social media influencers, are required to comply with the disclosure requirements regarding their relationship with the sellers or manufacturers. Rule 5(3) of the E-Commerce Rules, 2020, mandates that all sellers and service providers must ensure that their advertisements are truthful and not misrepresentative in any manner to the consumer. Furthermore, Rule 4(3) read with Rule 6(2) & 6(3) of the Rules endows a legal duty on the ecommerce entities that "no e-commerce entity shall adopt any unfair trade practices, whether in course of business on its platform or other".

<sup>26</sup> *Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Ltd*, (2018 SCC OnLine CCI).

<sup>27</sup> Amarnauth S. Amarasinghe, Comparative Advertising in India: A Legal Overview, 10(1) The IP Law 16 (2021).

<sup>28</sup> *PepsiCo India Holdings Pvt Ltd v. Hindustan Coca-Cola Beverages Pvt Ltd* (2015 SCC Online Del 10752).

<sup>29</sup> *Dr. Meenakshi Jain vs. Rohan & Ors.*, (2017 SCC Online NCDRC 1).

The comparative advertisement infringes the advertisement trademark act 1999.<sup>30</sup> The advertiser cannot use any of the registered trademarks or logos of a competitor company without proper authorization. Any use of such registered trademarks or logos for commercial gain may result in an infringement lawsuit under Section 29(8) of the Trade Marks Act, 1999. For example, in *Pepsico India Holdings Private Ltd. v/s Hindustan Coca-Cola Beverages Private Ltd. & Ors.*, the Delhi High Court held that comparative advertising by showing the visual comparison of packaging of the rival's product with an identical or similar product demonstrates name, trademark, or brand guidelines of the rival, that could lead to misrepresentation and confusion in the minds of buyers about the affiliation of competing products.<sup>31</sup>

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. 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.<sup>32</sup>

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. A comparison may be drawn between this non-implementable model of self-regulation and similar mechanisms that have been instituted in other jurisdictions. In the United Kingdom, for instance, the Committee on Advertising Practice (CAP) is an industry-funded regulator. Still, its codes are administered by the Advertising Standards Authority (ASA), which is an independent statutory body, set up by the advertising industry under the ASA and OFCOM Directors' Agreement. ASA's equivalent in the United States of America is the National Advertising Division (NAD) of the Better Business Bureau.

Where an advertiser fails to meet the requirements laid down by the ASCI, a complaint can be filed with the Consumer Complaints Council ('CCC') of the ASCI. However, it is important to note that the CCC does not have punitive powers, and its role is limited to directing the errant advertiser to withdraw the impugned advertisement, modify the said advertisement, or provide suitable clarifications or disclaimers with regard to the representations made therein. In *Baby & Childcare Products Association v. Hindustan Unilever Limited*<sup>33</sup>, it was alleged that Unilever India made unfair comparisons and disparaging remarks, thus breaching ASCI guidelines for the advertisement of its baby care brand, which sought to show the rival baby soap as inferior and harmful to babies. ASCI upheld the complaint, directing Unilever "to withdraw or modify the commercial

<sup>30</sup> Trade Marks Act, 1999, §29(8).

<sup>31</sup> *Pepsico India Holdings Private Ltd. v/s Hindustan Coca-Cola Beverages Private Ltd. & Ors.*, 2018 SCC OnLine Del 7175.

<sup>32</sup> Aastha Sharma & Renuka Sane, *Regulating Comparative Advertising in India: A Legal Analysis*, 9 J. Indian L. & Soc'y 121 (2018).

<sup>33</sup> *Baby & Childcare Products Association v. Hindustan Unilever Limited*, Consumer Complaint No. 173/2011.

to the extent of the objectionable parts or to suitably modify it within a period of two weeks from the date of receipt of this decision.”<sup>34</sup>

In *Surya Ortho-Care Private Limited v. Dabur India Limited*<sup>35</sup>, Dabur India Limited’s brand “Dabur Red Paste” appeared to refer to Surya Ortho-Care Private Limited’s “Excel” brand, in a disparaging and derogatory manner. In response, Surya Ortho-Care Private Limited filed a suit, alleging trademark infringement and disparagement of its product. The court observed that an advertisement could be said to be disparaging where it damages the product or brand of others and amounts to a misrepresentation of fact, which is likely to deceive the public. The court stated that a ruling cannot be made solely on the defendant’s defense of the comparative advertisement being truthful. Dabur India Limited was restrained from publishing and telecasting any advertisement showing Excel in a disparaging or derogatory manner.

The Indian advertising industry has employed several advertising techniques, whereby businesses use different tactics to highlight their products’ advantages over their competitors. One such tactic is comparative advertising, which is a powerful tool for creating differentiation and promoting competition between businesses. The regulatory authorities have also made various efforts to regulate comparative advertising in India. However, the absence of dedicated statutory mechanisms has placed heavy reliance on the Consumer Complaints Council (‘CCC’) of the ASCI, which has been an insufficient deterrent to discourage unethical advertising. Therefore, the need for a dedicated statutory body governing advertising in India is crucial to prevent the negative impact of comparative advertising on its competitiveness. Additionally, self-regulation models can be supplemented by independent statutory bodies that will ensure fair play in the advertising industry. The relevant provisions concerning comparative advertising and trademark infringement lawsuits have been imperative in settling legal disputes and promoting fair trade practices in the advertising industry.

### Comparison with Legal Framework of UK & US on Comparative Advertisement

The UK’s self-regulatory mechanism for advertising was established in response to concerns over the advertising industry raised by the Monoley Committee on Consumer Protection in 1962. Under the threat of external regulation, the UK industry established a self-regulatory mechanism to satisfy policymakers and consumers alike. The Advertising Standards Agency (ASA) was established with the objective of ensuring that advertisements were legal, decent, honest, and truthful. A fundamental difference between the ASA and the Advertising Standards Council of India (ASCI) is the former’s ability to enforce its directives. The ASA has entered into an agreement with newspapers and journals to not carry any advertisement that it deems to have breached the Advertising Code set out by it. The code provides that advertisers should not unfairly attack or discredit other businesses or their products. 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.<sup>36</sup>

The US Constitution does not protect false and deceptive advertising under the First Amendment. Advertisements of such nature may be banned, or advertisers may be asked to alter them so as to include warnings, disclosures and corrections. The leading regulatory body in the US is the Federal Trade Commission (FTC), which defines the scope of federal regulation and 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 its ability to require that advertisers substantiate the accuracy of their assertions. However, the FTC offers little immediate relief to a competitor who may be hurt by false and misleading comparative advertising. Hence, aggrieved parties have to take direct recourse to the courts in order to obtain injunctive relief against deceptive advertisements.<sup>37</sup>

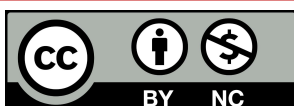
In India, the legal framework for comparative advertising is governed by the Trademark Act, 1999, and the guidelines provided by the Advertising Standards Council of India (ASCI) and the Monopolies and Restrictive

<sup>34</sup> Advertising Standards Council of India, Complaints Upheld by CCC, available at <https://ascionline.org/index.php/complaints/cases-decided-by-the-ccc> (last visited on May 11, 2023).

<sup>35</sup> *Surya Ortho-Care Private Limited v. Dabur India Limited*, 2013 SCC OnLine Del 3522.

<sup>36</sup> *Focus v. Times of India*, 2002 (7) SCC 144 (India).

<sup>37</sup> *Id.*





Trade Practices Act (MRTP), which provides guidelines for comparative infringement caused by advertisers. Section 30(1) of the Trademark Act provides that use of a registered trademark in a comparative advertisement shall amount to infringement if such use is likely to cause confusion. An example of this was seen in the case of *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*, where TVS advertised that the fuel efficiency of its bike was better than Bajaj's bike, but used a deceptively similar mark to Bajaj's trademark. The court held that the advertisement was likely to cause confusion and disallowed the use of the advertisement.<sup>38</sup>

The ASCI is a self-regulatory organization that regulates the content of advertisements in India [3]. The ASCI's code of practices and self-regulation is recognized and endorsed by the Ministry of Information and Broadcasting.<sup>39</sup> The guidelines provide that a comparative advertisement must be factual, clear, and not misleading.<sup>40</sup> The advertisement must make a fair comparison between the products or services being advertised.<sup>41</sup> In the case of *Hindustan Unilever Limited v. Reckitt Benckiser (India) Private Limited*, the court held that the comparison made by the defendant was unfair as it was based on an invalid test.<sup>42</sup>

The MRTP also provides guidelines for comparative advertising in India. It ensures that comparative advertising should not contain false or misleading information or be likely to deceive the consumers in any way. It must not disparage the goods or services of competitors or show them in a bad light. The MRTP recognizes that comparative advertising must be truthful and must not exploit the goodwill or reputation of the competitor.<sup>43</sup>

The legal framework for comparative advertising in India, the UK, and the US all have some similarities but differ in some aspects. While the UK and US have self-regulatory bodies that enforce their directives, India has the ASCI, which is a self-regulatory organization endorsed by the Ministry of Information and Broadcasting. The legal framework for comparative advertising in India is governed by the Trademark Act, 1999, and the guidelines provided by the ASCI and MRTP. The laws in all three countries ensure that comparative advertising is factual, clear, and not misleading and that it does not make unfair comparisons or disparage the goods or services of competitors.

### Balancing Competitor's Interests and Consumer's Interests

The common law position on comparative advertising was determined by the Chancery Division in *De Beers Abrasive v. International General Electric Co.*<sup>44</sup> The court held that statements conveying the impression that a competitor's product was superior to a plaintiff's product were examples of puffery and that such instances of puffery constituted a manufacturer's professional liberties. The court further held that it was legitimate for a market competitor to want to draw away a plaintiff's customers. The only limitation imposed on such a use of puffery was that the advertiser was barred from actively denigrating the product of a competitor. Any representation seen as deprecating or rubbishing the rival product was actionable.

The Indian courts adopted the De Beers Abrasive approach to comparative advertising in *Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.*<sup>45</sup> The court held that a trader was allowed to declare its goods as being the best or better than its competitors' goods, even if such declarations were not true. The court also held that it was permissible to compare the advantages of one's goods over another's for the purpose of saying that one's goods are the best or better. However, such a trader was not allowed to slander or defame the goods or the manufacturer of such goods of a competitor. If such defamation was proven, an action would lie for recovery of damages for defamation against the trader. The court also passed an order of injunction against the

<sup>38</sup> Trademark Act, 1999.

<sup>39</sup> Advertising Standards Council of India (ASCI), Self-Regulation in Advertising in India.

<sup>40</sup> ASCI Guidelines for Comparative Advertising, available at [https://www.ascionline.org/pdf/guidelines\\_for\\_comparative\\_advertising.pdf](https://www.ascionline.org/pdf/guidelines_for_comparative_advertising.pdf).

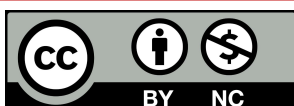
<sup>41</sup> *Hindustan Unilever Limited v. Reckitt Benckiser (India) Private Limited*, (2006) 131 DLT 400 (India).

<sup>42</sup> Monopolies and Restrictive Trade Practices Act.

<sup>43</sup> *Id.*

<sup>44</sup> *De Beers Abrasive v. International General Electric Co.* 1975 (2) All ER 599.

<sup>45</sup> *Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.*, 1999 PTC (19) 741



defendant, restraining him from broadcasting a certain advertisement, as it was found to be denigrating the product of the plaintiff.

The introduction of the Consumer Protection Act, 1986 (CPA) brought about a significant shift in the legal position of comparative advertising. In *Glaxo Smith Kline Consumer Healthcare Ltd. v. Heinz India Private Ltd. and Ors.*<sup>46</sup>, the court rejected the traditional position of comparative advertising as held in Ramachandran and held that the consumer was an equally important stakeholder in the market as the competing manufacturers. The court observed that the protection of the interests of consumers was required while regulating comparative advertising. Under the CPA, any statement giving false or misleading facts, disparaging the goods of a competitor, or constituting an unfair trade practice was prohibited.

In recent times, comparative advertising has become more pronounced in India, especially in the FMCG and automobile sectors. The courts have been proactive in protecting the interests of consumers while balancing them with the interests of market competitors. The introduction of new regulations and guidelines has helped in regulating comparative advertising in India. The ASCI has a code of self-regulation that lays down guidelines for comparative advertising. ASCI's guidelines emphasize the importance of truthful and honest advertising and bar advertisements from making any false or misleading comparisons.<sup>47</sup>

The legal framework of comparative advertising in India has undergone a significant shift over the years, with an initial disregard of consumer rights being replaced by a more inclusive attitude. The protection of the interests of the consumer has been brought to the forefront thanks to new regulations and the courts' proactive approach to balancing consumer interests with market competitors' interests. The courts' new approach to comparative advertising has helped in regulating the advertising industry and promote ethical marketing practices in India

## Conclusion

The legal framework for comparative advertising in India is a complex and largely makeshift mechanism, with different aspects being determined by inconsistent standards. The selective application of diverse laws has resulted in numerous gaps in comprehensively determining the question. The absence of a dedicated legislative mechanism regulating comparative advertising has resulted in a lack of consistency in the level of permissibility with regard to puffery, while the position on denigration has been largely consistent.

While evaluating the regulatory framework, it is pertinent to note the interests of all the concerned stakeholders, including manufacturers, advertisers, competing parties and consumers when regulating the industry. The concept of consumer protection is necessary to secure the interests of the end-users. The Consumer Protection Act, 1986, has proven to be insufficient in regulating this subject, as it fails to include competing manufacturers and sellers within its purview.

The traditional view held by the Indian courts for almost a decade was insufficient in addressing the demands of consumer justice. The self-regulatory process established by the advertising industry has been relegated to a purely recommendatory function, lacking an enforcement mechanism to ensure compliance with its directives.

A more effective system for comprehensive regulation could be possible by allowing the advertising industry to come up with a broad structure for regulation while keeping the interest of both the competitor and consumer at the forefront. Looking towards the British regulatory structure, it is evident that norms suggested by the advertising body are legally enforceable. Such norms, if adopted in India, may lead to determining uniform standards, with the demands of consumer justice and fair competition in mind, for both simple puffery and denigration.

It is essential to strike a balance between the need for a comprehensive regulatory regime and the preference of resolving advertising disputes within the market. The court, in this regard, should not allow itself to be used as an instrument for the settlement of market disputes, as disputes relating to advertising are commercial in nature, and the court's assistance should only be sought in cases where the express violation of the law occurs.

<sup>46</sup> *Glaxo Smith Kline Consumer Health Care Limited v. Heinz India Private Limited and Ors.*, 2007 (2) CHN 44

<sup>47</sup> Advertising Standards Council of India, Monopolies and Restrictive Trade Practices Commission, Trademark Act, 1999.

India's legal framework for comparative advertising is still in its nascent stages, with a predominantly makeshift approach being followed with respect to different aspects within the industry. A dedicated legislative mechanism that determines a uniform standard with respect to simple puffery and denigration must be established, with the interests of all stakeholders, especially consumers, at the forefront. The British regulatory model and the adoption of enforceable norms by the advertising industry could be a possible method for evolving a more comprehensive regulatory mechanism in India.

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