Chapter IV

COMMERCIAL ADVERTISING - LEGAL PERSPECTIVES
In ancient times, advertising was not known because marketing was almost entirely unknown. Whatever was produced was consumed easily. There was no surplus. With the advancement in civilization and social needs extra production was achieved which was sold to other persons. This marked the beginning of marketing. Since market place was relatively small, and because most buyers were illiterate, the original advertisers sought to attract their attention by voice, drum, horn and samples of the merchandise offered. Advancement in civilization brought through mechanical progress, education, the development of communication, transportation and postal system have changed the form but not the nature of advertisements. The crier has turned his attention to more dignified radios and television commercials. Print media has also played an important role for advertising the products. This in fact has become world wide phenomenon. In America the advertising expenditure swelled from twelve and half billion dollars in 1962 to eighteen billion dollars in 1969. In Canada, although advertising expenditure is smaller, it has increased


by 120% between 1954 and 1965 and grew relatively as a percentage of the gross national product from 1.60% in 1954 to 1.75% in 1965. In India TV revenue through ads in 1993 was 430 crores and in 1994 it came to 530 crores. The print media's ads revenue in 1993 was 200 crores and in 1994 it was 2500 crores.

**TABLE 1**

**Showing Top Five Spenders On Advertising And Publicity In India In The Year, 1992.**

<table>
<thead>
<tr>
<th>X Company</th>
<th>Net sales in Rs</th>
<th>Advt.&amp; Publicity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hindustan lever</td>
<td>1,50,658</td>
<td>4,468</td>
</tr>
<tr>
<td>I T C</td>
<td>98,157</td>
<td>2,561</td>
</tr>
<tr>
<td>Brooke Bond</td>
<td>63,877</td>
<td>2,109</td>
</tr>
<tr>
<td>Godfrey Philips</td>
<td>48,085</td>
<td>1,705</td>
</tr>
<tr>
<td>I C I</td>
<td>69,278</td>
<td>1,628</td>
</tr>
</tbody>
</table>

(Figs in Rs Lakhs)

Divergent views have been expressed relating to the role of advertisements vis-a-vis consumers. Thus two schools of thought have developed. One view is that the advertising creates noxious values to impel the (citizen) into becoming a 'virtuous consumer'. Advertising has single handedly transformed the average citizen into a passive, lazy, greedy, sensual, wooly-minded


5. The Times of India, New Delhi, Monday August 8, 1994 at 14.

materialistic, culturally depraved, whose head has become a TV tube and whose motto is "consume".

Another view is expressed by a Russian writer Kuruin in the following words:

Thanks to well organised advertising, the consumer can more rapidly find the goods needed by him, purchase them with small expenditure of time, and select the goods according to his taste ...... The presumption that a good product needs no advertising is dying.

Leaving aside the Juristic views, a survey conducted in Britain in 1975 by WOP Market research shows that consumers were

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7. Jones, The Cultural And Social Impact Of Advertising On American Society, 8. Osgoode Hall L. J. 65 at (1970). Similarly as early as 1800, Williams Cobbett referred to advertising as this species of falsehood, filth and obscenity. Richard Higgart wrote of advertising as out to achieve its ends by emotionally abusing its audiences. Pat Gierth of a well known advertising agency says that advertising "has its own quotas of visual, verbal and mental pollutants. Quoted in D. S. Nicholl: Advertising 1973 at 159. Duggan opines: Advertising, which Superficially plays an informative role, is seen in fact as a manipulative device which creates a scheme of wants in the consumer by rearranging his motives. Purchasers are induced not by the presentation of products which will satisfy existing needs in the consumer, but by appealing to his susceptibilities and subconscious drives. See A. J. Duggan, Fairness in Advertising: In pursuits of the Hidden Persuaders, II. Melb U. L Rev. 50 at 86 (1977).

8. Quoted from Marshall Goldman, Product Differentiation and Advertising: Some Lessons from Soviet Experience in Speaking of Advertising 352-53 (Toronto 1963), See also the Report of the Royal Commission on Consumer problem and inflation (the Pirie Report) 1968, PP.252-253 wherein Pirie Royal Commission says that advertisements provide five services to consumers: information, acquaintance with the variety of existing products: acquaintance with the new products and charges. Pre-shopping accumulation of knowledge to save time and to better arm the consumer with fact necessary to the purchase, and acquaintance with claims of producers.

just as satisfied purchasing unadvertised products, and a clear majority thought most advertisements were misleading or dishonest.

### TABLE 2

**CONSUMER VIEWS OF ADVERTISING**

<table>
<thead>
<tr>
<th>Agree Strongly</th>
<th>Agree</th>
<th>Disagree Strongly</th>
<th>Disagree</th>
<th>Neither</th>
<th>DK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rather buy an advertised product</td>
<td>2%</td>
<td>32%</td>
<td>39%</td>
<td>2%</td>
<td>21%</td>
</tr>
<tr>
<td>Advertisements tell the truth</td>
<td>1%</td>
<td>23%</td>
<td>52%</td>
<td>9%</td>
<td>13%</td>
</tr>
</tbody>
</table>

A survey based on interviews with nearly 9,500 consumers throughout the EEC, including Britain confirms that consumers although believe that advertising provides useful information, they are still highly sceptical of it.

### TABLE 3

**OPINIONS ON ADVERTISING IN EUROPE**

<table>
<thead>
<tr>
<th>Agree entirely</th>
<th>Agree on the whole</th>
<th>Disagree entirely</th>
<th>Disagree on the whole</th>
<th>Do not know/no reply</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advertising provides consumers with useful information</td>
<td>10%</td>
<td>40%</td>
<td>29%</td>
<td>17%</td>
</tr>
<tr>
<td>Advertising often makes consumers buy goods which they do not really need</td>
<td>38%</td>
<td>39%</td>
<td>14%</td>
<td>6%</td>
</tr>
<tr>
<td>Advertising often misleads consumers as to the quality of the products</td>
<td>38%</td>
<td>38%</td>
<td>15%</td>
<td>3%</td>
</tr>
</tbody>
</table>

In India the consumers complaints council CCC, a wing of the advertising standard council of India ASCI received more than 1,200 complaints against misleading advertisements since its inception in 1985 and around 95 per cent of these were misleading.  

Keeping in view the various points, the truth of the matter is that while there is no need to quarrel with the premise that information with respect to most product characteristics is available as a result of sellers responding to incentives generated in the market place, there nevertheless remain many areas where key information necessary for consumers to make sensible choice between rival brands or to decide whether to buy the product at all, is absent.  

Traders in order to convince the consumers that their product is having added advantages, unscrupulously resort to advertising campaign which quite often is either false or misleading. The guises under which false or misleading advertisements appear are as varied as they are ingenious. The term false or misleading advertisement has not been defined either under the Monopolies and Restrictive Trade Practices Act, 1969 or under


13. Hereinafter referred to as the MRTP Act, 1969.
the Consumer Protection Act\textsuperscript{14}, 1986. The term "false" means "not true"\textsuperscript{15}, "designed to deceive"\textsuperscript{16}, "Contrary to fact" and the term "misleading" which is wider than "false" means capable of leading into error\textsuperscript{18}. These false and misleading advertisements are covered in the commercial advertising. The courts throughout the globe have remained busy in resolving the nebulous issues surrounding them, but in India no plausible jurisprudence has been developed. The various issues germane to the commercial advertising are discussed hereunder:

**Constitutional Protection:**

*The Hamdard Dawakhana v. Union of India\textsuperscript{19}* is the first case which came up before the Supreme Court in which the constitutional Protection to commercial advertisements has been decided. The

\begin{enumerate}
\item Hereinafter referred to as CP Act, 1986. The term false advertisement has been defined under section 15(a) of the Federal Trade Commission Act, 1914 of USA in the following words: The term false advertisement means an advertisement other than labelling which is misleading in material respect; and in determining whether an advertisement is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or which the advertisement fails to reveal, facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relate under the conditions described in said advertisement, or under such conditions as are customary or usual.
\item *State v. Arnett*, 338 MO 907, 92 S.W. Ad 897, 900.
\item *Sential Life Insurance Co. v. Blackmer*, C.C.A Colo, 77 F."d 347, 352.
\item *In re Davis*, 349 Pa 651, 37 A. 2d 498, 499.
\item Donald and Heydon, Trade Practices Law, (Vol.2) 1978 at 553.
\item AIR 1960 Sc 551.
\end{enumerate}
case impugned the constitutionality of Drug and Magic Remedies (Objectionable Advertisements) Act, 1954 on the ground that unreasonable restrictions have been imposed on freedom of speech.

It was laid down:

An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Art 19(a) which it seeks to aid by bringing it to the notice of public. When it takes the form of commercial advertisement which has element of trade or commerce it no longer falls within the concept of freedom of speech, for the object is not the propagation of ideas, social, political or economic or furtherance of literature or human thought, but the commendation of the efficacy, and importance of certain goods.

The advertisements prohibited by section 3 of Act of 21 of 1954 relate to commerce or trade and not to propagation of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Art. 19(1)(a).

It is submitted that the judgment of the Supreme court is erroneous. To say that an information not in the interest of general public cannot reap the benefits of guarantee enshrined in Art.19(1)(a) is one thing, but to say that an information with a motive to promote commercial interest cannot qualify for the "speech" so as to enjoy the constitutional guarantee of freedom is entirely different.

The importance of information to the operation of efficient markets is by now fairly well accepted. For the proper utilization of money and right purchasing decision, the consumer must

20. Id. at 563.
21. Ibid.
have information. Advertising is a medium of information and persuasion, providing much of the day to day education and facilitating the flexible allocation of resources necessary to free enterprise economy. Neither profit motivation nor desire to influence private economic decision necessarily distinguishes the peddler from the preacher, the publisher or the politician. However, this should not be interpreted to mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of information necessary for subserving public good from that which is false, deceptive or misleading.

The above cited opinion of the Supreme Court was fortified by the views of the US Supreme Court expressed in *Valentine v. Chrestensen*, wherein it was laid down that the constitution imposes no such restraint on government as respects purely commercial advertising. It is amusing to note that this judgment had already been disapproved when our apex court quoted it with approval.


25. Quoted at 563 Supra note 13.
In *Cammarano v. United States*\(^{26}\), it was stated:

*Valentine v. Chrestensen* ruling was casual, almost offhand. And it has not survived reflection. That freedom of speech of the press directly guaranteed against encroachment by the federal Government and safe-guarded against state action by the Due process clause of the fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature ... Those who make their living through exercise of first Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

Later on the US Supreme court in a number of cases\(^{27}\) held that the commercial advertisements do enjoy protection of the first amendment. But nonetheless this protection is by no means absolute. This was made clear in a landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*\(^{28}\). In *Central Hudson Gas & Electric corporation v. Public Service Commission of New York*\(^{29}\), four pronged test was propounded.


\(^{27}\) For instance in *Pittsburgh Press Co v. Pittsburgh Common on Human Relations*, 37 L. Ed. 2nd 669 (1973), an ordinance that forbade newspapers from running help wanted ads in sex designated columns was upheld. Nevertheless, it was conceded that these ads though are classic examples of commercial speech, are not entirely without first amendment protection. Similarly in *Bigelow v. Virginia*, 44 L. Ed. 2d 600 (1975), the court invalidated a state statute which prohibited the advertising of abortion services and made such advertising a misdemeanor.

\(^{28}\) 425 US 748 96 S.ct 1817, 48 L. Ed 2d 346 (1976). The court said, "We of course do not hold that (Commercial Speech) can never be regulated in any way. Some forms of commercial speech regulations are surely permissible.

(a) The Commercial advertisement must be truthful and not misleading (b) It has to be established that asserted governmental interest because of which commercial advertisement is attempted to regulate is substantial. (c) If both inquires yield positive answers, then it has to proved that the said regulations directly advances the governmental interest and (d) the governmental regulations are not excessive than are necessary to serve that interest.

The Supreme Court in *Indian Express Newspaper Bombay Ltd. v. Union of India* over-ruled the Hamdard Dawakhana case and held that the observations made in that case are broadly stated. The commercial advertisement cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen. In a recent case of *TATA Press Ltd v. Mahanagar Telephone Nigam Ltd*, the Supreme Court went ahead by extending the protection of Art. 19(1)(a) not only to advertisers but also consumers. It was laid down that this Article guarantees not only the freedom of speech and expression, it also protects the rights of the individual to listen, read and receive the said speech. So far as the economic needs of citizens are concerned, their fulfilment has to be guided by their information disseminated through the advertisements. The protection of Article is available to the speaker as well as to the recipient of the speech.

30. AIR 1986 Sc 515.
31. Id at 547.
31a. AIR 1995 Sc 2438
32. Id at 2448.
Application of Mensrea:

Since the famous case of *Pasley v. Freeman*[^32a], the liability under common law for false representation requires scienter or knowledge of false-hood essential. This common law principle however, has not been extended by the courts in the statutes aiming at protecting consumers which are silent on the requirement of scienter.

In United States as a general rule courts do not inquire into good or bad faith of the advertiser or the purpose of the advertisement in passing upon its truth or falsity. The point for consideration in such cases is whether under the facts and circumstances in connection with the publication of the advertisement, the language in and of itself, without regard to good or bad faith is calculated to deceive the buying public[^32b]. "Calculated" however, does not mean "intended" but "apt" to deceive[^33]. The rationale of this principle is that even innocent misrepresentation involves some element of fraud, they (representors) must therefore extricate themselves from it by purging their business methods of a capacity to deceive[^34].

In Australia in order to make it clear that the intention is not necessary for the proscription of a trade practice as deceptive or false, the words "or is likely to mislead or deceive"

[^32a]: (1789) 3 T. T. 51.

[^32b]: Ford Motor Co. v. F. T. C 120 F 2d 175 See also F. T. C. v. Real Product Corp., 90 F 2d 617; L & C Mayers Co. v. F. T. C. 97 F 2d 365; Bear Mill Mfg., FTC, 98 F 2d 67.


were inserted in section 52\textsuperscript{35} of the Trade Practices Act, 1974 through an amendment in the year, 1977. It is now made clear through the judicial gloss that intention to deceive is not necessary\textsuperscript{36} and this is so, both, where it is alleged that the conduct in question was in fact misleading or deceptive as well as where it is alleged that it was likely to mislead or deceive\textsuperscript{37}.

In Canada section 33(c)\textsuperscript{38} of the Combines Investigation Act, 1923 prohibits a representation relating to price if that representation is materially misleading. The Ontario Supreme Court in \textit{R v. Allied Towers Merchants limited}\textsuperscript{39}, held that there is nothing in the express language of section 33 C(1) disclosing any intention that mens rea, in the sense that the materially misleading representation made must be known to be such by the accused, is not an essential ingredient of the offence.

\begin{flushleft}
\textit{\textsuperscript{35} Section 52 now reads as : A corporation shall not in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive...}


\textit{\textsuperscript{37} Taperell, Vermeesch and Harland, Trade Practices and Consumer Protection, 610 Para 1414 (1983).}

\textit{\textsuperscript{38} Section 33 C(1) runs as : Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public by any means whatever concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction......}

\textit{\textsuperscript{39} (1965) 20. R. 628, (1966) 1 C.C.C 220.}
\end{flushleft}
In England it is an offence to make knowingly or recklessly a false statement about the service, accommodation or facilities. As to recklessly, a statement is deemed to be made so if it is made regardless of whether it is true or false, whether or not the person making it had reasons for believing that it might be false. It was made clear in BFI Warehouse Ltd v. Nattrass, that recklessly does not imply dishonesty. The prosecution need to show only that the defendant did regard to the truth or falsity of his statement even though it cannot be proved that he deliberately closed his eyes to the truth. This rather diminishes the force of mens rea requirement. In view of the difficulties surrounding this provision it is perhaps not without significance that it has been omitted from the otherwise very similar Hong Kong Trade Descriptions ordinance, 1980.

In India section 36-A of the MRTP Act, 1969 and section 2-(r) of the CP Act defines unfair trade practice. Throughout this definition words like, falsely, intentionally and knowingly

40. Section 14 of the Trade Descriptions Act, 1968.
41. Section 12(2)(b).
42. (1973) 1 All ER 762.
44. Id 341
45. For instance Sub-clause (i) states: falsely represents that the goods are of particular standard, quality, grade, composition, style or model; see also Sub-clause (ii), (iii),(vi).
46. Clauses 2,3 & 5.
47. Clause 4.
have been used. These words denote nothing but mens rea. Then should mens rea be imported in the definition of unfair trade practice and in its presence trader be not held liable to compensate for any loss or injury to consumer, etc. under sections 12(e) and 14 of the MRTP and CP Acts respectively? The answer to this question is flatly no, for the following reasons.

The class of practices legislated in the Act are not criminal in any real sense but are practices prohibited under penalty. The efficacy of the two Acts cannot be attritioned by reading mens rea in the liability for compensation to the consumer who has suffered loss due to the false representation. The compensation is the only tangible remedy available under the two Acts to deter the unscrupulous trader. The other remedy available i.e. 'cease and desist order' in MRTP Act applies only to the future conduct.

The Supreme court while interpreting the provisions of another consumer protection legislation, i.e. Prevention of Food Adulteration Act, 1955 which involves criminal prosecution, excluded the application of mens rea in the offences under the Act. If mens rea can be excluded in the criminal offences, why cannot be the same dispensed with in the misrepresentations involving only penalty.


In Australia under Section 53 of the Trade Practices Act, 1977 and in Canada, section 33 C(i) of the Combines Investigation Act, 1923, criminal prosecution can be launched against the accused and the liability is strict. These enactments deal with the same subject matter as our MRTP Act and CP Act and similar phrases as falsely, intentionally and knowingly have been used but these phrases were interpreted as not including mens rea.

The Sachar Committee had recommended some defences under section 36 A, but these defences did not find favour with the legislature when the chapter on unfair Trade Practice was incorporated in the MRTP Act. This shows that the parliament also in its wisdom thought it in-advisable to make this compensatory remedy available only in presence of mens rea.

**Standard of Protection:**

One of the objectives behind the law aiming to curb unfair trade practices is to protect the general public from false and misleading advertisements. The question is whose intelligence in

50. For clause (1) of section 36-A defences recommended were:

1) that the act or omission giving rise to the offence was result of a bonafide error; or (b) that he took reasonable precaution and exercised due diligence to prevent the occurrence of such error and that he took reasonable measures forthwith, after the representation was made, to bring the error to the attention of the class of persons likely to have been reached by the representation.

2) the person whose business it is to publish or arrange for publication of advertisement and did not know or had reason to suspect that its publication would amount to contravention of any such provision shall not be liable under the Act. See for further details, The Report of the High-Powered Expert Committee on Companies and MRTP Acts, 1978 at 271.
the general public should be treated as a standard in order to determine the character of an advertisement. The choices include: "the reasonably intelligent consumer", the "average consumer", and the "most naive hypothetical consumer".

In America it is fool hardy to claim that advertising literature will only be read by a certain part of the public. Thus it is worthless argument that "one putative audience will not read and the other will not heed to an advertisement". The advertisement must not mislead general public and general public has been defined as that vast multitude which includes the ignorant, the unthinking and the credulous who in making purchases do not stop to analyse but too often are governed by appearances and general impressions. The average purchaser has been variously characterised as not straight thinking, subject to impressions, uneducated, and grossly uninformed; he is


56. Berkey and Gay furniture Co v. F.T.C., 42 F 2d 427 (CCA 6th, 1930)
influenced by prejudice and superstition; and he wishfully believes in miracles, allegedly the result of progress in science.

The purchaser is not duty bound to suspect or discredit the advertisers claims, and the vendor knowing this must act accordingly. The ordinary purchaser is not conversant with the technical cant of the sciences, and he is untrained in the Law. The language of the ordinary purchaser is casual and unaffected. He is not an expert in grammatical construction or an educated analytical reader and therefore, he does not normally subject every word in the advertisement to careful study.

58. In the matter of Great Britain Spiritualist Church, 29 F.T.C. 782 (1939).
59. Supra note 46 at 680.
62. D.D.D Crop v. F.T.C., 125 F 2d 679 (CCA 7th, 1942); Sebvone Co v. F.T.C., 135 F 2d 676 (CCA 7th, 1943).
63. Supra note 55.
64. Chairman Miller of the Federal Trade commission suggested that section 5 be amended to (1) require that a deception be material (2) preclude a challenge to a statement of opinion on deceptiveness grounds; and (3) require that deceptiveness be tested on the basis of perceptions of a reasonable consumer standard rather the most gullible consumer standard suggested by many of the cases construing section 5. However, other members showed disagreement with the Chairman's desire to see the commissions power to attack deception further limited. See 1056 BWA Antitrust and Trade Reg. Rep 589 (1982).
In India the Sacher Committee had also endorsed the "average purchaserstandard" as a test to determine the character of a trade practice. But the Supreme court in *relakhanpal National Ltd v. MRTP commission*, failed to lay down any clear cut principle. The apex court started with a "common man's test" and concluded with a "reasonable man's intelligence" as a standard, the court observed;

When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? 

The judgment was influenced by the law as stated in Halsbury's law of England relating to representation. Therein it is stated that the test by which representation is to be judged is to see whether the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee.

It is submitted that the law enunciated in the Halsbury's law of England reflects the hey days of Caveat Emptor. This time

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65. Supra note 50 at 263.
66. AIR 1989 Sc 1692. This is the first case decided by the Supreme Court relating to UTP under section 36 A of the MRTP Act.
67. Id at 1695.
68. Quoted with approval at 1695.
honoured doctrine has now been metamorphosised in to Caveat Venditor. Both, MRTP Act and CP Act reflect this change\textsuperscript{70}. Thus this "reasonable representee" standard cannot hold water any more.

There is no denying the fact that the Indian consumers are not only unorganised, ignorant, ill informed and ill advised, they are also ignorant of their rights. Consumers are not conscious of the surreptitious methods of the traders. Traders are fully in know of the plight of the consumers. They therefore, harvest it to the maximum. So it will not serve any worthwhile purpose if "reasonable man's" standard is upheld, leaving vast majority of credulous, gullible and unthinking, unprotected. However, this "common man's" test cannot be regarded as a general standard applicable in all situations. The context in which an advertisement is addressed should also be taken into account. For example, where an advertisement for a specialised equipment is directed at an expert group, such as engineers, the standard will be different as against the advertisement addressed to general consuming public or directed to children.

\textsuperscript{70} MRTP Commission in Director General V. Iyer and Sons p Ltd. (1991) 3 Comp L J 190, held that when a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such representation on the common man. Id at 192.
Defence of puffing:

The defence of puffing has roots in common law and is available both, under law of Torts and Sale of Goods Act. It was bequeathed by Caveat Emptor doctrine. By virtue of defence of puffing a wide latitude is allowed to traders in extolling the qualities of the things they have to sell. Purchasers are expected to be capable of exercising reasonable judgment and discrimination and they cannot complain merely because their own opinion of the goods may fall far below that of the seller. So long therefore, an advertiser confines himself to general praise of his goods, he is fairly safe, no matter how exaggerated his praise may be. The rationale of puffing defence has been explained in *Kirchner v. FTC*, in the following words:

True, as has been reiterated many times, the commissions responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable. This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability with respect of every conceivable misconception, however outlandish, to which his representation might be subject.

71. An American commentator opines: The term which grew up in an era of Caveat Emptor, reflects the view that the buyer should expect a considerable amount of actual lying by sellers eager to dispose of their goods. See *Developments in the Law - Deceptive Advertising*, (1967) 80. Harv.L Rev. 1054.

72. Bishop, *Advertising and the Law*, Benn, 2nd Ed. at 47. It is also said about puffing that "it is a privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would be influenced by such talk". See Prosser, *Handbook of the Law of Torts* 732 (4th Ed. 1971).

73. 63 FTC 1282 (1963).
among the foolish or feeble-minded .... A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.  

The defence of puffing which was the concomitant result of caveat emptor was surprisingly received by the courts in various countries, while deliberating on the issues involving consumer. In India the MRTP Commission also considered puffing as defence. In re Weston Electronics ltd. and another, the Commission observed:

The phrase 'Zero failure' is capable of many interpretations and dominant impression that it leaves is that the TV set manufactured by the respondent is technically close to perfection. It should be remembered that the use of hyperbole is an indispensable ingredient of good advertisement, unless it becomes indistinguishable from falsehood.

The underlying argument in the defence of puffing is that no reasonable man shall believe such advertisement as true. But this

74. Id. at 1290.

75. In Germany, a claim of the florist that he has the most beautiful flowers in the world was considered as mere puff. 3 Reimer 385. In England, a land partly useless but described as very fertile and improvable was held as puff in Dimmock v. Hallet, (1886) L.R. 2 Ch. App. 21. In America it has been held as merely puff to describe a tooth paste as being one which will beautify the smile or to claim that a particular motor oil was the perfect lubricant which would enable a motor car to travel an amazing distance See Bristol Meyer v. FTC 1950-51 Trade Cases 62, 722 (1950); Kidder oil Co. v. FTC, 117 F 2d 892 (1941)

defence cannot reconcile with the "common man's" test as enun-
ciated in determining the character of an advertisement. When we
say law is meant to protect those who believe in miracles\textsuperscript{77},
inexperienced and credulous\textsuperscript{78}, puffing defence cannot find the
niche in the citadel of consumer protection laws. After all an
advertiser will not resort to puffing unless he has a faith that
gullible consumers will be allured by his campaign\textsuperscript{79}. It is
obvious that the fatuous may be deceived by claims that the more
intelligent or experienced purchaser will readily recognise as
mere puffing\textsuperscript{80}. The remarks of Handler on this point deserves
mention; the maxim that a reasonable latitude must be conceded to
the salesman and advertiser in boasting his own product, presup-
poses a defeatist attitude and an analytically fallacious ap-
proach\textsuperscript{81}. Thus it is believed that modern courts will be less
willing that some of the older cases suggest to encourage elo-
gistic statements where there is a real risk of deception\textsuperscript{82}. It

\textsuperscript{77. Supra note 58.}

\textsuperscript{78. Supra note 52.}

\textsuperscript{79. An American author, Preston, argues that advertisers would
not puff unless they thought that some consumers would be-
lieve their claims. As a result Preston would prefer to make
the puffing advertiser fully liable for his claim see Prest-
ton, The Great American Blowups; puffery in Advertising And
Selling (1975); See also Kinter, A Primer on the law of
Deceptive Practices 97, 192-93 (2d. ed. 1978).}

\textsuperscript{80. Supra note 2 at 671.}

\textsuperscript{81. Handler, False Advertising under the wheelerlea Act (1939) 6
Law and contemp. Prob. 91, 99.}

\textsuperscript{82. Supra note 37 at 616.}
is pertinent to mention here that British Columbia Trade Prac-
tices Act, 1974 under-section 2(3) makes commercial puffery action-
able. Therefore, one is reminded of the opinion expressed by an
Australian court while interpreting the Consumer Protection Act, 1969 (N.S.W):

The Act under consideration is a Consumer Protection
Act. Its general objective is to provide safeguards for
the weaker party in numerous commercial transac-
tions .... one of the major evils to be controlled is
false and misleading advertising. It is an Act there-
fore, which is setting standards for advertiser ..... It is for the Act to control advertisers and not for
what are claimed to be present advertising standards to
mould the law.

Television Commercials:

Television commercials have given new dimension to the false
and misleading advertisements. Sometimes it is not possible to
advertise a product with its natural colour or with the composed
substances, for example true colours of coffee, orange juice and
iced tea are lost in transmission on a television screen and
artificial substance must be substituted to obtain a natural
look. The hot television lights require the use for example, of
mashed potatoes for ice cream, and shaving cream to get the kind
of head that is normal on a glass of beer. This involves the
problem of interpretation of television commercials. One possible
interpretation is to treat demonstration merely a dramatization

83. Section 2(3) reads as: The use, in any oral or written repre-
sentation, of exaggeration, innuendo, or ambiguity as to a
material fact, or failure to state a material fact..."

84. CRW Pty Ltd. V. Sweden, 1972 AR (N.S.W) 17 at 36-37.

85. Jonathan M Purver, et.al., Business Law, Text and Cases,
(1983) at 1011.
of the express claim made in the advertisement. Thus demonstra-
tion is unconnected with the express claim and so long express
claim is true, the advertisement will not be treated as deceptive
even though demonstration was accomplished by trickery.
Second approach is to interpret television demonstration as a
warranty without taking into account the express claim. Thus the
demonstration obtained by employing trickery will be considered
as deceptive but it is not necessary that the demonstration
should prove the express claim made in the ad. The third approach
is the amalgam of the first two, i.e. to interpret a television
demonstration both a warranty that the result could be duplicated
without trickery and as proof of the express claim made in the
advertisement. A demonstration which failed either of these tests
would be considered deceptive and would not be permitted.86

It appears that the American Supreme Court in FTC V. Colgate
- Palmolive Co87 has leaned in favour of the third approach. In
this case advertiser sought to demonstrate that its shaving cream
had super-moisturizing properties which permitted the shaving of
sand paper, and thus it would be effective in shaving the tough-
est beards. Since on television screen sand paper appears as a
plain coloured paper, the cream was applied instead of plexiglass
covered with sand, which was then swept clean by a razor. The
record showed that the sand paper could not be shaved unless it

86. Stewart E; The Law of Comparative Advertising : How Much
is soaked for some eighty minutes. The following principles were laid down:

1) If it becomes impossible or impracticable to show simulated demonstration on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs;

2) if the inherent limitation of a method do not permit its use in the way a seller desires, the seller cannot by material representation compensate for those limitations;

3) where in order to substantiate an asserted claim, test, experiment or demonstration is made which is false, in other words test, experiment or demonstration is not what is claimed in a commercial, the commercial will be misleading;

4) where the prop is not being used for additional proof of the product claim eg mashed potato in place of ice cream, it will not be misleading but where the purpose is to give the viewers objective proof of the claims made eg in Rapid Shaving Cream, the commercial will be misleading.

Justice Harlan in his dissent while arguing that the FTC should use that standard which evaluates only the accuracy of the representation as seen by the viewer on the screen, and that what goes on in the studio should not matter to the commission, he posed the following interesting questions:

would it be proper for respondent colgate, in advertising a laundry detergent to "demonstrate" the effectiveness of a major competitor's detergent in washing white sheets, and then "before the viewer's eyes", to wash a white (not a blue) sheet with the competitors detergent? The Studio test should accurately show the quality of the product, but the image on the screen would look as though the sheet had been washed with an ineffective detergent. All

88. For a comment on this judgment see Robert Pitsofsky, Beyond Nader: Consumer Protection And the Regulation of Advertising, Harv. L.R. Vol.90(1977) at 687
that has happened here is the converse: a demonstration has been altered in the studio to compensate for the distortions of the television medium, but in this instance in order to present an accurate picture to the television viewer. 89.

However, it seems that Justice Harlan's poser received answer from the commission in *Matter of Union Carbide Corp* 90 that through the use of the demonstration and the statements used in conjunction therewith, respondent represents, directly or by implication that such demonstration is evidence which actually proves how the product demonstrated is superior than the competing brands.

Thus in America, both, courts and commission have thus decided to treat televised demonstrations as representing proof of the claims which means that the advertisement would have to be accurate at both ends of the television camera. 91.

**Comparative Advertising:**

Comparative advertising concept is as old as the art of selling itself. 92 The species of comparative advertising like its genus is double edged. It can act as an effective tool for consumer information and right purchasing decision. But it may also be used to mislead consumers by projecting false, incomplete,

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89. 380 US at 398.
90. 79 F.T.C. 124 (1971).
91. Supra note 86 at 109.
distorted or insignificant comparisons\textsuperscript{93}. Inspite of its advantages, the European legal systems have traditionally prohibited or severely restricted the practice of comparative advertising as it has been seen from the viewpoint of rival competitors as a form of unfair competition\textsuperscript{94}. In Germany if such ads are understood as making comparisons with competitor's products, they fall within the general prohibition against comparative advertising\textsuperscript{95}.

Under common law, the courts without any reservation took a consistent stand that the comparative advertising is not disparagement of one man's goods to project their inferiority over the goods of another. In \textit{White v. Mellion}\textsuperscript{96}, it was held that when all that is done is making comparison between the plaintiff's goods and the goods of the person issuing the advertisement, this cannot be regarded as a disparagement of which the law will take cognizance and the raison de'etre of this policy was enunciated in \textit{De Beers Abrasive Product Limited V. International General Electric Company of New York Limited}\textsuperscript{97} that a trader may puff his

\textsuperscript{93} There is every possibility that consumer may rely more on comparative advertisements. As callman states: Grammatically the superlative is of stronger import than the comparative. In comparative advertising, however, the contrary is often true because puffing by superlatives is either discounted or ignored. See Callman, The Law of Unfair Competition, Trade Marks, And Monopolies (ed. 1968)


\textsuperscript{95} Warren S Grimes; Control of An Advertising in the United States And Germany : Volks Wagen Has a Better Idea: Harv. L. R Vol.84 (June, 1971) at 1794.

\textsuperscript{96} (1895) Ac 154.

\textsuperscript{97} (1975) All ER 599.
own goods even though this may, logically speaking, involve the
denigration of a rival's goods. Since puff was considered a good
defence in case of false or misleading advertisement and can be
said as an extension of Caveat Emptor doctrine, nevertheless,
objectionable point is to give latitude to a trader to disparage
goods of another by making a comparative statement which is
false. This licence to a trader to denigrate the goods of another
was given by Lindley M. R. in Hubbock and Sons V. Wilkinson,
Heywood and Clark Limited\(^98\) when he said "to say that one's own
goods are better than other people's ..... even if each particu-
lar charge of falsehood is established, it will only come to this
that it is untrue that the defendants paint is better than or
equal to that of the plaintiff's for saying of which, no action
lies. However, realising the anticonsumer effect of this blanket
rule. Walton J in De Beers Abrasive Products Limited V. Interna-
tional General Electric Co of New York Limited\(^99\) held that cer-
tain forms of comparative advertising may give rise to an action
for slander of goods and to draw a line between the permissible
and the impermissible, the test to be applied is whether a
"reasonable man would take the claim being made as being a seri-
ous claim or not\(^100\). He rejects the alternative test as to wheth-
er there had been a specific allegation of defects or demerits,
because such allegations can be made which would not be taken

\(^{98}\) (1899) IQB 86 (CA).

\(^{99}\) Supra note 97.

\(^{100}\) Id at 605.
seriously: a claim for example, that a Rolls-Royce car sinks in water when claimant's car does not\textsuperscript{101}. The precise solution to this problem is given by Holdson L.J. in \textit{Cellacite and British Uralite Ltd V. Robertson Co Inc}\textsuperscript{102}, he said the general position in law is "Comparison - yes, but disparagement - no" where a trader makes detailed and untrue disparagements, he lays himself open to an action for slander of goods.

At present, the consumer protection legislations namely, the Federal Trade Commission Act, 1914 of America, Combines Investigation Act of Canada, The Trade Practices Act, 1974 of Australia, Monopolies And Restrictive Trade Practices Act, 1969 and Consumer protection Act, 1986 of India do allow comparative advertising\textsuperscript{103}, provided of course that is not false or misleading. However, to determine whether a particular comparative advertisement is false, misleading or not, is not free from difficulty. For the reason (a) there is no clear line between "Comparative and Non-Comparative". (b) a considerable amount of puffery has traditionally been allowed in advertising, the same is true in case of comparative advertising. The limits of permissible puffery are far from being clear. In India there is also no clear cut

\textsuperscript{101} Criticising this approach of Walton J, R G Lawson opines: This test is misconceived. Such claims as he instanced be cause of their nature do not infact point to defect or demer its. Rolls Royce cars are not meant to float in water. See R G Lawson, Advertising Law (1st Ed. 1978) at 259.

\textsuperscript{102} Times, 23rd. July, 1957.

\textsuperscript{103} These Acts regulate only false or misleading advertisements. Therefore, there is no harm in making truthful advertisements including comparative advertisements.
legislative policy regarding the cases in which a trader through comparative advertising projects true but insignificant comparisons or when he described accurately competitors goods but exaggerated the merits of his own goods. Besides the quality comparisons, there is no legislative or judicial policy regarding the price comparisons.

In Australia it has been said that the comparative advertising is permissible unless it fails to compare "like with like". This can be further elaborated by holding that the quality has to be compared with the quality of competitor's goods and price with the price, and it is also permissible to the trader to project his goods as more superior and less expensive as compared to his competitor.

The puffing is considered a defence in false and misleading advertisements, both in America as well as in India. However, in America, in order to check the possible misuse of this defence, it has been emphasised that there is a difference between the mere claim of superiority and assertion of fact that implies an ability on the part of the defendant to substantiate the assertion.


On the question of insignificant comparisons, neither the MRTP Commission nor Consumer Redressal Agencies found any occasion to deliberate. The American courts have failed to take any consistent stand. In *P Lorillard Co v. FTC*\(^ {107} \), the Reader's Digest had published an article indicating that its laboratory tests had shown that all cigarette brands were more or less equal in tar and nicotine content, and the difference that did exist were so slight that they would not make any difference in the physiological effect on the smoker. However, a table attached with the article did show that the old Gold cigarettes tested, contained less nicotine tars and resins than the other brands, of course the difference was utterly without meaning so far as efficacy upon the smoker is concerned. Nevertheless, lorillard ran an advertising campaign stressing the fact that old Gold was found lowest in tars, nicotine and resins, while making no mention of the basic thrust of the article. The commission passed cease and desist order and court of Appeals also did not change that. The concern however, of the commission and court was not that Lorillard highlighted insignificant difference but the advertisement was edited in such a way as to create an entirely false and misleading impression, not only as to what was said in the article, but also as to quality of the company's cigarettes. Since court emphasized only the misrepresentation of the Reader's Digest article and not the deceptiveness of the claim itself, so it is not clear whether the result would have been

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107. 186 F. 2d 52 (4th Cir, 1950).
been the same if, rather than relying on the Reader's Digest article, the Lorrillard Co had conducted its own tests showing that old Gold contained less tars and nicotine than other brands and then advertised this fact. The *International Parts Corporation*\(^{108}\) did exactly the same. It advertised its electric welded muffler as safer than conventional mufflers. Expert evidence showed that the continuous weld was more leak proof but there was no danger of carbon monoxide gas leaking from any well made muffler. So the court of appeals found that the expert testimony sufficiently supported the advertising claim and vacated the FTC's cease and desist order. However, this opinion was not carried in *Matter of Ever Sharp, Inc.*\(^{109}\). "Ever sharp" ran an advertisement of his own Schick Krona Chrome blade with that of competitor's stain-less steel blade. The magnified pictures of these two types of blades showed after using these blades five times, the stainless steel blade gets more corroded and advertisers then asked the viewer to decide which blade he would prefer to use. The commission found that the corrosion that occurred after five shaves did not materially affect shaving performance and that the advertisement was therefore misleading.

Commenting on this judicial wavering, Stewart E. rightly observes:

> there is no mechanical formula for deciding when a comparative advertisement is deceptive. The goal of FTC actions and policy should be to allow advertisers to

\(^{108}\) *International Part Corporation v. F.T.C.*, 133. 2nd 883 (7th cir 1943)

\(^{109}\) 77 F.T.C. 686 (1970)
present as much potentially useful information as possible without encouraging the dissemination of false and misleading advertising. Even if the FTC policy is not always apparent, the mere fact of commission regulation may dissuade comparative advertisers from issuing less than truthful advertisements. Due to the relatively few comparative claims, which have been fully evaluated, however, the precise path which the commission's regulation will take, remains largely in the realm of conjecture.

However, it is suggested that the insignificant comparisons should be declared as misleading otherwise an advertiser will focus more on insignificant comparisons and will derive benefit out of all proportions. This approach is more demanding in goods involving health and safety of the consumers.

Where an advertiser after truthfully stating the merits of the competing product, falsely embellishes his own, there is an unfair trade practice. This was laid down by the American Court in Electronic Corp. of America V. Honey Well Inc. However, in B. H. Bunnco V. A. A. Replacement Parts Co. it was emphasized that so long as the origin of the substandard parts is clear to the buyer, it will not be an unfair method of competition. The Uniform Deceptive Trade Practices Act, 1964 which has been adopted by several American states grants a cause of action both in


111. 428 F. 2d 191 (1st Cir. 1970).

112. 451 F. 2d. 1254 (5th Cir. 1971).

113. The 1964 Act or its 1966 revision which made only minor changes, has been adopted in its entirety or in substantial part in Colorado, Delaware, Georgia, Hawaii, Illinois, Maine, Minnesota, Nebraska, New Mexico, Ohio, and Oklahoma. Connecticut and Florida adopted the Act for a period but have since repealed it in favour of individual state statutes.
case of disparagement and in cases where an advertiser misrepresents the quality of his own goods. In India on the other hand although this issue has not been yet resolved either by the commission or by courts, nevertheless, such business practices shall be treated as unfair ones. Since an advertiser misrepresents his own goods, such misrepresentation will be no less unfair by mere fact that the advertiser fairly states the quality of his competitor's goods.

Price comparison has also posed many problems as there is no legal provision either in the MRTP Act, 1969 or in the CP Act, 1986 relating to the permissible and impermissible price comparisons. In America Price Comparison Advertising Code regulates three types of direct price comparisons.

1) Comparisons between the seller's price and the price at which the seller offered or sold merchandise in the past;

2) Comparisons between the seller's price and the price at which the merchandise will be offered in the future; and

3) Comparisons between the seller's price and that of a competitor. Where the comparison relates to a former price of the seller (e.g. formally priced at $10.00 now $8.00). The items compared must either have been sold or offered for sale at the price within the last 90 days immediately preceding the date of the advertisements. If the comparison does not relate to an item sold or offered for sale during the 90 days period, the date, time or seasonal period of such sale or offer must be disclosed in the advertisement. In any case, the code provides that no price comparison be made based upon ... a price which exceeds ... (the seller) ... cost plus normal mark up regularly used by him in the sale of such property or services.

114. UDTPA section 3(a).
Where the comparison relates to a seller's future price (e.g. Now $5.00 next month $7.00), the future price must take effect on the date disclosed in the advertisement or within 90 days after the price comparison is stated in the ad. The stated future price must then be maintained by the seller "for a period of at least 4 weeks after its effective date, except where its compliance becomes impossible because of the circumstances beyond his control.

Where the comparison relates to competitor's price (valued at $20.00 our price $15.00), the code requires that the competitor's price must relate to goods or services that were advertised or sold in the preceding 90 day's period. In addition, the price must be representative of prices at which such consumer property is sold or advertised in the trade area in which the price comparison is made. The code also requires the seller to disclose that the price used as a basis for the comparison was not the seller's own price. Finally the code requires the seller to disclose conspicuously the general nature of the material difference in the property or services. In England also the Consumer Protection Act, 1987 through section 21 provides guidance to determine permissibility of price comparison.

115. See for detailed account of this code, Supra note 103.

116. See infra commentary on subclause (ix).
In India the Advertising Standards Council (ASCI) chapter IV, provides that the advertisements containing comparisons are permissible in the interest of vigorous competition and public enlightenment provided:

1) It is clear what aspects of the advertisers' product are being compared with what aspects of the competitors' product;

2) The Comparisons are factual, accurate and capable of substantiation;

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

4) The advertisement should not unfairly denigrate attack or discredit other products, advertisers or advertisements directly or by implication;

5) The subject matter 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.

The above guidelines do not have force of law. It is suggested that these guidelines be incorporated in the both Acts so as to enable the redressal agencies to assess objectively the trade practice in question.

Instead of making any precise claim, an advertiser may use such vague terms for instance, less than regular price, list or recommended price, competitive price, area price or he may claim that his price is special price or consumer can save money by buying his product. The question is how to determine the truthfulness of such claims?

In Canada many of the above terms were put to judicial gloss nevertheless, it is not easy to ascribe any standard meaning
applicable to all these situations\textsuperscript{117}. The pragmatic approach is adopted in America in the FTC's statement of policy regarding comparative advertising wherein it has been laid down that the commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques. The ultimate question in such situations is whether or not the advertisement has a tendency or capacity to be false or deceptive. This is a factual issue to be decided on a case by case basis\textsuperscript{118}.

\textbf{Interpretation of Advertisements}

Traditionally, the legal control over the claims made in representation\textsuperscript{119} revolve around the narrow goal of prohibiting false and misleading statements by asking whether a particular

\textsuperscript{117}In Eddie Black (1962), 38 CPR 140 and Allied Towers Cases (1965) 15 Mc Gill LJ 654 "Regular price has been defined as the price at which it (an article) is ordinarily sold generally in the area in which the representation (as to regular price) is made. Similarly without assigning any meaning to the expression "list price" judge Sweet in Allied Towers case (1965) 15 Mc Gill LJ 654 held that the list price is not an unfamiliar term to retail buyers and that these people realise that retailer some times sell below their price. In R. v. Becker, (1963), 15 Mc Gill LJ 654. The Term "Save over" was held to be capable of more than one interpretation and held that the words "save over" $100 coupled with the inclusion of the advertiser's price did not necessarily disclose an offence under section 33c notwithstanding the fact that the highest price at which such items had previously been sold was $269, some what less than $269 which was suggested by the ad. However, R. V. Pattons place limited (1968), 57 CPR 12 an opposite interpretation was given to the term "save over".

\textsuperscript{118}16 CPR 14.15 (1980).

\textsuperscript{119}The words, representation, statement and advertisement have been used interchangeably here, although there is a well established difference between these terms see Given v. C. Holland (Holdings) Pty (1977) 15 ALR 439.
claim is false or true. This hardly serves now the purpose. As Boorstin puts it:

The broadest of the distinction which no longer serve us as they did, is the distinction between true or false; Well-meaning critics (including many in the advertising profession) who say the essential problem is false advertising are firing volleys at an obsolete target ....... Advertising fogs our daily lives less from its peculiar lies than from its peculiar truths. The whole apparatus of Graphic Revolution has put a new elusiveness, iridescence and ambiguity into every-day truth in 20th century America.

It has now been recognised that the aim of advertising is to provide consumers with product information which can operate on two levels; informative and persuasive. The informative context brings to the attention of a potential buyer the type of the commodity or service put to sale, its quality, serviceability, usefulness and price. The persuasive context of an advertising message refers to that part of the advertisement which attempts to translate latent wants on the part of an individual into an effective demand for goods, and service, encouraging the prospective customer to purchase a specific product or service advertised.

The MRTP Act, 1969 and CP Act, 1986, before amendments in 1991 and 1993 respectively like other legislations, confined legal control to "informative" level. The incorporation of


compendious words like "unfair method" and unfair or "deceptive acts" through the above amendments have widened the scope of the two Acts. There is now no reason not to censure a representation which falsely persuades the consumers to purchase for example the tooth paste which will make them more popular or sexually more appealing. This claim cannot be treated differently from a claim that it makes teeth 25 per cent whiter than any other brand or that it will prevent cavities.¹²³

The consumers can be persuaded to purchase by a number of ways, one of them being testimonial advertising. This technique involves the use of a third party to vouch for the quality or efficacy of the advertised item. The endorsement can come from celebrity - usually in the sports or entertainment field (e.g. Sunil Gawasker advertising Dinesh & Vimal suiting, Kapil Dev sports shoes, Ms. Universe lirill soap and Ms World Hair shampoo). This endorsement can also come from an expert or group of experts who in the opinion of consumers occupy better position to evaluate the merits of the product.

These deceptive advertisements can raise numerous questions. For example is it misleading to use a celebrity endorsement if the celebrity does not really use the product? Is it misleading to disclose that celebrity is being paid? It is deceptive not to disclose that while some experts think that the product is desirable, others disagree.

In India neither MRTP commission nor Redressal Agencies under CP Act had occasion to deliberate on these issues. In America, the Federal Trade Commission promulgated in 1975, the first of its final Guides on Endorsements and Testimonials in Advertising\textsuperscript{124}. These guides can prove helpful to both, the MRTP commission and consumer fora for resolving issues relating to testimonial advertising.

Under these guides an endorsement must always reflect the honest opinions, findings, beliefs or experience of the endorser\textsuperscript{125}. Advertisers are forbidden to present endorsements out of context or continue using them if they no longer have faith or belief that the endorser continues to subscribe to the views presented to the public\textsuperscript{126}. Where the advertisement represents that the endorser uses the endorsed product, then the endorsement must have been a bonafide user of it at the time endorsement was given\textsuperscript{127}. The payment or promise of payment to an endorser, however, need not be disclosed\textsuperscript{128}.

Apart from guidelines, the Federal Trade Commission in \textit{F T C v. Cooga Mooga Inc.}\textsuperscript{129} held that endorser will be personally responsible for false claim. The implications of the order are

\textsuperscript{124} 16 C.F.R. 255 et seq (1980), 4 CCH Trade Reg. Rep. 39,038
Additional guides were issued in 1980 See 45 Fed. Reg. 3870 (1980).

\textsuperscript{125} Id. 255.1 (a).

\textsuperscript{126} Id. 255.1 (b).

\textsuperscript{127} Id. 255.1 (c).

\textsuperscript{128} Id. 255.5.

\textsuperscript{129} 92 F.T.C. 310 CCH Trade Reg. Rep. 21,417 (1978).
significant because they provide a strong incentive for a celebrity endorser to independently verify the claims made in advertisements before being associated with a product. This principle can be applied in India also if any claim of endorser is found false. The informative content of advertisement has raised many problems for interpretation. Although there is consensus that the false and misleading ads are bad, few however, agree about how best to tell whether an advertisement is misleading. In the course of interpretation of ads, rules were formulated by various courts. An overview of these rules is as follows.

1. To determine whether a representation is misleading, it cannot be resolved by merely examining whether it is correct or not in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly a statement which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively than a literally correct statement. It is therefore, necessary to examine that does a consumer on reading the advertisement form a belief different from what the truth is?

2. This consumer belief can be determined by two methods: (i) to ascertain the effects of the advertisement which the advertiser's handiwork will have on the eye and mind of the reader. For example an advertisement might be deemed to be deceptive if it deceives some consumers by

130. For instance the statement that tea rusk was made in Holland, Michigan may be true but the impression it conveys is that the product is of Dutch origin. U.S. v. Schuruzan (177 DCWD Mich 1910); The statement that an imported perfume was "bottled in U.S.A" necessarily implies that the blended mixture was imported, Fioret sales C. v. F.T.C, 100 F 2nd 358 (CCA 2nd, 1938); Statement that a radio has two tubes without disclosing the fact that one did not function and was merely a rectifying tube is misleading. In the Matter of Radio wire Television, Inc 34 FTC 1278 (1942).


causing them to hold a false belief about the product. (ii)
to ascertain the character of the advertisement, without
explicit reference to the ad's effect on consumers. For
example an ad is deceptive if it makes a factual claim and
that claim is false. The Federal Trade Commission in United
States and MRTP Commission in India have adopted this ap­
proach. Thus once a claim is identified to have been made in
the advertisement it is then easy to decide whether that
claim is true or false. However, it is a difficult task to
determine which claims an advertisement can fairly be read
as making. For this net impression test has been suggested
which will involve inquiry in the advertisement in its
entirety. In other words entire mosaic should be viewed
rather than each tile separately.\textsuperscript{133}

3. Once it is determined that a representation is misleading,

it will be declared so only when it is material and capable

\textsuperscript{133}Ibid, See also Puxu Pty Ltd. v. Parkdale Custom Built Furniture Plight Ltd. (1980) 31 ALR 73; Henderson v. Pioneer Homes Ply Ltd. (1980) 29 ALR 597 at 604; Rolls-Royce Motors Ltd. v. DIA (Engineering Ltd. (1981) 6TPC at 700-1; Colgate-Palmolive Pty Ltd. v. Rexona Pty Ltd (1981) 37 ALR 391 Stuart Alexander Pty Ltd. v. Blenders Pty Ltd. (1981) 37 ALR 161. For contrary opinion See Richard Crasswell; Interpreting Deceptive Advertising, Bost Univ. L. Rev. Vol. 65 July 1985. at 676. The learned author opines that if the advertisement is viewed as making false claims, it will be banned as deceptive and consumers may lose the truthful information as well. But if the advertisement is viewed as making only truthful claims, it will be permitted to continue unchanged, and at least some consumers will continue to draw mistaken inference. This dilemma in his opinion could be resolved in several different ways. For example one approach would be to hold the advertiser responsible only for those inferences that were the fault of the advertisement itself, but not for those that were the fault of the consumer. This was adopted in fact by the author from the opinion expressed by Nelson and Hoyer, In corrective Advertising And Affirmative Disclosure Statement; The potential For Confusing and Misleading the Consumer, 46 J. Marketing 61, 70 1982; Another approach is to make greater use of consumer surveys to identify the beliefs which consumers actually form when exposed to the challenged ads. This view was expressed by Gardner in Deception in Advertising: A Conceptual Approach, 39 J. Marketing 40, 41-45 (Jan 1945) see also for the similar opinion, Gellhorn, Proof of Consumer Deception Before the Federal Trade Commission 17 kans. L.Rev. 559, 561 (1969); However, Crasswell has himself suggested that Law should select the meaning that will minimize the overall injury to consumers. Id at 677.
of affecting purchasing decisions\(^{134}\). Inaccuracies in unimportant details will not be fatal\(^{135}\). The expression "material" is not to be interpreted in terms of value but rather degree to which the purchaser is affected\(^{136}\).

4. Where a statement is capable of bearing two meanings, one of which is true and the other false, the mere fact that one possible meaning is true will not necessarily prevent finding of deceptiveness\(^{137}\). However, where a statement can convey a secondary meaning, it may be allowed, even though the primary, original meaning could not be truthfully asserted, if it is shown that the word in fact has a secondary meaning to the general public\(^{138}\).

5. Since it is an overall impression of a representation which has to be taken into account, a representation standing alone may be treated as deceptive but due to the presence of qualification or, limitation such prejudicial effect may be erased\(^{139}\). However, qualification should be equally effective\(^{140}\) and it must not directly contradict the

\(^{134}\) See FTC v. Royal Milling Co, 288 US 212, 216-7 (1973) (deceived into purchasing an article which they do not wish to buy); Pep Boys-Manny, Moe & Jack, Inc v. F.T.C. 122 F. 2d 158, 161 (3rd cir 1941) (makes the average purchaser unwillingly ..... purchase that which he did not intend to buy); F.T.C v. Colgate-Palmolive Co., 380 US 374, 386 (1965) ('fact which would constitute a material factor in a purchaser's decision to buy').

\(^{135}\) Halsbury's Laws of England (Ed. 4th para 1044& 1045).


\(^{137}\) Murray Space Shoe Corp v. FTC 304 F 2d 270,272; US v. 95 Barrels of Vinger, 265 Us 438 443 (1924). In Australia it was held in CRW Pty Ltd. v. Sneddan 1972 AR (NSW) 17 that offering of used cars for sale on payment of low deposits was held misleading as to type of credit transaction involved and misleading as to the range of potential customers to whom such credit was available.


\(^{140}\) J B Williams Co; 3 Trade Reg. Rep 17, 339 at 22, 449 F.T.C. DKE. No 8547, 1965. It was made clear that the main wording must not imply that the limitation on the original claim is of little significance; similarly in Feil v. F.T.C 285 F. 2d 879 (9th Cir,1960) it was held that a claim made in layman's language is not effectively limited by technically phrased qualification.
original assertions or be so vaguely worded as to create further uncertainty. The qualification must be atune with the pitch of the main statement. In other words, if an advertisement is in writing, qualification must be in the same bold letters as the main statement.

6. The advertisement may be misleading because things are composed or purposefully printed in such a way as to mislead. In case of advertisements, common law principle will apply to the extent that seller is not generally bound to disclose information which may be relevant to a prospective purchaser's decision but if he does speak on any given matter he is bound not to distort the information he gives by revealing only part of the truth.

7. Consumer is considered to have been wronged when he does not get goods or service of the stated quality made in the advertisement. It is no defence that although the product was of lower quality than claimed it was still worth the price charged.

8. Where an advertiser is making a claim which is not susceptible of objective proof for example a claim that the product will produce a subjective sensation which is a matter of taste of emotion and will greatly vary from person to person. In such cases physical factors which produce the sensation can be examined objectively. For example, a claim that a cigarette was not irritating will be determined by a measurable fact i.e. whether irritating constituents are present in the smoke.


144. See Sachar Committee's Report. at 263. See also Boots Company (India) Ltd. Bombay, UTPE NO. 401 of 1987 decided on 17.11.1988.


146. Supra note 138.

9. Since the findings of the MRTP Commission in Society for Civic Rights v. Colgate Palmolive Ltd.\textsuperscript{148} that a representation is misleading if it has capacity or tendency to mislead, is even after the amendment to MRTP Act and CP Act, a valid exposition of law, so law will be violated even if no person was in fact induced to enter into contract as a result of that representation\textsuperscript{149}. Moreover, it will also be irrelevant that any false or misleading statement was in fact corrected prior to any sale which has been made\textsuperscript{150}. However, such correction will affect the cease and desist order, or injection which the Commission may otherwise grant\textsuperscript{151}. There may also be palliation in the compensation which may be granted to the injured consumer.

10. When an advertiser is making a false or misleading claim. It has to be scanned in order to ascertain whether that claim is a promise, prediction\textsuperscript{152} or opinion\textsuperscript{153}. If it falls in the category of promise it should be declared false or misleading and not otherwise irrespective of the fact whether the promise was made.

\textsuperscript{148} (1991) 3 Comp LJ. 378.

\textsuperscript{149} DG v. Body Wrap Company (India) P.Ltd. UTPE No. 83/1986 UA No. 146 of 1986) decided on 27.11.1986.

\textsuperscript{150} The rationale of this principal which in American literature is called "first contact deception" has been explained in an American case of CRW Pyt Ltd v. Snedden, 1972 AR (N.SW) 17 in the following words; The evil in such cases is the bringing of people to the appellants premises by misleading statements. Once there, it may be true enough that they will be told precisely what transaction is available and the circumstances under which it is available. But then they are the captives of the advertiser and available to be persuaded to enter into some other transaction......

\textsuperscript{151} In the matter of Super Computronics (p) Ltd (1992) 3 Camp LJ. 303.

\textsuperscript{152} In Thompson v. Master touch TV series (1977) 15 ALR; it was held that the prediction that "Should earn $ 400 Per week minimum" did not constitute false statement.

\textsuperscript{153} In DG V. Guinea Mansion (1988) 2 Comp LJ at 144. MRTP Commission held that the expression "most artistic Jewellery" is not synonymous with the "best jewellery of the land". The term art is for human skill. Art finds expression in objects in which skill may be expressed. Art is something personal and every artist has its own style and design. It depends upon one's perception.
11. The advertiser cannot assert the defence that the purchaser was contributorily negligent. Since consumer law is aimed at protecting unthinking, credulous, ignorant and gullible consumers, so they are generally assumed to be negligent. Indeed, the commercial advertiser seeks to capitalize upon this careless approach of the consumers and thus induces them to purchase.

154. However, in England the position is that a promise as to what a speaker will do at sometime in the future cannot be a false trade description under the Trade Descriptions Act, 1968. See Beckett v. Cohen (1973) 1 All ER 120. For a criticism of English cases see Milner, "The Rape of the Trade Description Act". (1975) 38 MLR 694. However, in Australia it has been made clear that this distinction cannot be applied while interpreting section 52 of the Trade Practices Act, 1974. See Goldring, "The Trade Practices Act" 1974 - 75 and the Law of Innocent Misrepresenting 1976 50 ALR 126 at 135-6.

155. Belmont Laboratories v. FTC, 103 F 2d 538 (CCA 3rd 1939).