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“Chemical-Free” and “Organic” Claims in the Age of E-Commerce: Law, Science, and Consumer Protection in India

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ABSTRACT

The rise of concepts such as ‘Chemical-Free’ and ‘Organic’ found on e-Commerce Platforms within India reflects the increasing tension between the expectations of consumers, scientific fact, and the regulatory authority of these terms.

The areas of inquiry related to the definition, regulation, and operation of a product as chemical-free and/or organic will be examined under three main areas of law: Statutory Definition and Regulation of Chemicals in Foodstuffs as contained in The Food Safety and Standards Act of India, Statutory Definition of and Protection of Consumers from Misleading Advertising and Marketing as defined in The Consumer Protection Act of India, and Statutory Definition and Regulation of Drugs and Cosmetics as set out in The Drugs and Cosmetics Act of India.

Additionally, the investigation will review additional regulatory issues, including the certification/authority of organics and regulators of organic food products, and the entities that regulate their production and marketing. The lack of clear regulation has resulted in an unchecked grey marketing operation; therefore, these corporations are entitled to represent their products as ‘Ecologically Sustainable’, ‘Eco-Friendly’, or ‘Green’ under Federal Law without providing evidence that supports those claims.

This part will also examine scientific definitions and principles of chemically free claims and how courts have applied those definitions and principles in determining whether or not a company has made misleading advertising or has engaged in deceptive comparative advertising practices.

Finally, the entity producing these claimed ‘Chemical-Free’ or ‘Organic’ products will use both Environmental and/or Health-Based Terms in their advertising to support their claims. In formulating the company’s advertising, they may also make Deliverable and/or Intended Environmental and/or Health Claims to consumers who are likely to rely upon such claims in making their purchasing decisions.

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INTRODUCTION: THE ATTRACTION OF “CHEMICAL-FREE” LIVING

In the 20 years prior to 2020, wellness-centered consumption has undergone a cultural and commercial shift in India, leading to the opening of a large and increasing marketplace that generates billions of rupees. Initially, these changes reflected a renewed interest in using herbal remedies, products based on Ayurveda, and organic farming; however, over time, these interests have resulted in the creation of a wide range of products marketed with the notions of purity or cleanliness, environmentally friendly attributes, or ultimate improved health. Today, there are many products available for consumers to choose from, including cold-pressed oils and “clean beauty” skincare products to toxin-free household cleaners and nutritional dietary supplements—all of which are marketed with claims of purity, sustainability, and improved health.

The growth of e-commerce has played a major role in facilitating this trend through the use of advanced algorithms (i.e., recommendations based on previous purchases), search engine optimization, and the use of influencers to shape consumer preferences and behaviors. As an example, when searching for a product (e.g., face wash) via the internet, you may be presented with hundreds of options labeled as “natural,” “organic,” “paraben-free,” or “100% chemical-free” (due to the high level of competition and desire for attention to be achieved). In addition to being simply descriptors for the products, these labels function as persuasive signals and communicate a sense of safety, responsibility to the environment, and an overall sense of well-being.

As we increasingly see positive associations between eco-friendly packaging, plant-based materials, and vintage-based marketing, many of these associations have several underlying scientific and legal issues. For example, the term “chemical-free” is in violation of the basic principles of science because all materials (including plant materials) contain chemicals. The chemical constituents of the organic material that comprise the organic product itself exist in nature, and all materials contain chemicals, regardless of source (e.g., plant-based). Therefore, while some consumers may use organic products as a lifestyle trend, organic products and/or packaging are legally permitted in multiple industries (e.g., food), and in order to be considered organic, products must meet specific validated requirements. There are numerous legitimate and illegitimate uses of the terms in the marketplace, and the issue presents significant legal and regulatory challenges, including the question of determining under what contextual circumstances aspirational advertising constitutes misleading and/or deceptive advertising. How much science is sufficient to support a claim regarding health, safety, and/

or environmental attributes associated with products? Are there legal limitations for using terms in a legal context if the use of the term is not legally accurate?

The legal context for understanding claims made regarding products in India includes the laws that govern the marketing of goods in India, including but not limited to: product descriptions and product safety laws such as the Food Safety and Standards Act, the Consumer Protection Act, and the Drugs and Cosmetics Act. Each of these acts can be complemented by subordinate regulations that support their enforcement and the understanding of consumer rights, such as the Food Safety and Standards - Organic Food Regulation and the Food Safety and Standards - Advertising and Claims Regulations, all of which help to provide certainty regarding product certifications and the claims that can be made on the products.

There are multiple enforcement authorities, including FSSAI, CCPA, and the Advertising Standards Council of India, that regulate the above-mentioned acts and subordinate regulations, but there are additional normative issues that are also relevant to environmentally and medically healthy products. With the increase in consumer interest in environmentally and medically healthy products, companies are increasing their advertising to focus on environmental concerns.

The Semantics and Science of “Chemical-Free”

The term “chemical-free,” when used in a scientific sense, is simply incorrect. In terms of chemistry, the physical world is entirely made of chemical elements and/or chemical compounds. For example, water (H₂O) is a chemical compound; oxygen (O) is a chemical element; naturally occurring plant extracts consist of many different types (and combinations) of organic chemicals. There are many examples of how common ingredients used in natural products fit this description, including turmeric (which contains curcumin), neem (which contains azadirachtin), and aloe vera (which contains polysaccharides and anthraquinones), all of which have some form of chemical nature associated with them. Therefore, based on this fundamental scientific fact, it is not possible for a product to be “100% chemical-free.” Even if a product has been produced entirely from plants, it will also have naturally occurring chemical constituents in the product. Thus, in practice, the term “chemical-free” does not serve as a standard definition of a product; rather, it is a marketing term to convey a particular concept or idea to consumers.

The phrase “all-natural” has different meanings based on different contexts; however, the most common definition of “all-natural” is that of “an all-natural product,” which is typically assigned by the manufacturer as containing no

synthetic or industrial ingredients, including but not limited to: parabens, sulfates, phthalates, and petrochemical derivatives, or any artificial fragrances or synthetic preservatives.

Thus, to label a product as “all-natural” does not mean that it will be free from any chemical substances whatsoever; it simply means that most consumers will not understand any of the chemical ingredients of the all-natural product in the same way that they may understand the many other types of products that contain chemicals that could potentially harm them. In terms of how the use of terminology by both manufacturers and consumers might have an impact upon us, both the manufacturer and consumer use the same type of advertising language for their products; however, the legal definition of “all-natural” is based on scientific definitions, which can be very different from those adopted by manufacturers. Thus, when viewed from the manufacturer’s perspective, there is a conflict among the statutes governing the enforcement of misrepresentation based on the interpretation of language used in the marketing of all-natural products versus the definition of “all-natural” as it applies to manufacturing all-natural products. Therefore, while technically accurate, a technically correct all-natural product advertisement can still create an inaccurate or misleading average consumer experience.

The view of customers impacts whether ads are misleading or not, as indicated by India’s court system. One landmark ruling that proves this was *Hamdard Dawakhana v. Union of India*.^[1] The Supreme Court found that there are controls on the provision of fraudulent therapeutic medical advertisements to Indians. According to the Court, advertisements that take advantage of consumers’ gullibility and could harm public health can be subjected to commercial value. The Court also ruled that misleading therapeutic advertisements will not receive absolute constitutional protection as a legitimate commercial value.

Despite being made before the advent of today’s digital marketing and wellness branding, the ruling provides important guidance that still applies today. For example, when advertising an item like soap, moisturizing oil, or even a supplement as “Chemical Free,” it can imply without supporting evidence that other products have dangerous and/or toxic chemical compounds. If no evidence exists to support the claim, the advertisement may be an unfair business practice or misleading comparative advertising.

The Problem of Unsubstantiated Scientific Claims

Advertising has changed toward the use of technically based figures as a trust factor for their credibility; yet how much scientific evidence is used to support the claim is

not always consistent with the necessary level of evidence needed to prove the claim with a peer-reviewed study or documented by a peer-reviewed source. More regulatory agencies are developing requirements for companies to provide credible supporting documentation for any health or nutritional claims they may have based on scientific data from their own studies completed at an independent third-party laboratory. Thus, advertisements cannot be regarded as legitimate proof for a claim but will be perceived primarily as a persuasive means of attaining the desired outcome. For example, as stated in the Food Safety and Standards (Advertising and Claims) Regulations 2018, all nutrition and health-related claims in respect of advertisements must be substantiated by means of scientific evidence. Deceptive advertising, in accordance with the Consumer Protection Act 2019, will likewise be determined to constitute a misrepresentation of the potential health benefits of a product when making a health benefit claim concerning the product itself.^[2]

The pandemic revealed the importance of scientific evidence. For example, many products promoted as ‘immunity boosters’ that help prevent Covid-19 infection were sold. Many traditional remedies, supplements, and herbal mixtures were marketed with health claims that suggested protection against Covid-19 caused by SARS-CoV-2; however, many of those claims lacked clinical evidence or peer-reviewed scientific studies to support their effectiveness against the virus.^[3] As a result of the pandemic, various regulatory agencies advised manufacturers not to make exaggerated or unsubstantiated health claims.

When it comes to determining whether certain types of herbs or natural products are good for your overall health, the question to be considered is not if there are health benefits to consuming these products, but whether the specific claim made about a product having a specific health benefit (e.g., preventing you from developing an illness) is supported by credible evidence from scientific research. If a company makes a specific claim about the health benefits of its products but does not support it with credible scientific research or data that backs up its product’s status as “chemical-free” (e.g., an advertisement made by a company named Jivo Wellness, a privately held company), then that claim will not only mislead consumers but also affect

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

2 Consumer Protection Act, 2019, § 28.

3 Prajapati, S. K., Malaiya, A., Mishra, G., Jain, D., Kesharwani, P., Mody, N., Ahmadi, A., Paliwal, R., & Jain, A. (2022). An exhaustive comprehension of the role of herbal medicines in pre- and post-COVID manifestations. *Journal of Ethnopharmacology*, 296(2022)

public opinion of that company in the future. Regulatory and self-regulatory agencies have also addressed the use of the phrase "chemical-free" in specific cases as well. For instance, in responding to an advertisement by Jivo Wellness promoting its product as being "India's first chemical-free canola oil," ASCI reviewed whether or not the company could provide proof of the absence of chemicals in promotional material. It was determined that the company's claim was not substantiated because there is no way to provide proof that canola oil does not contain any chemicals, as the chemical makeup of all edible oils will contain some form of chemical. The company did not provide evidence in its promotional materials to demonstrate that there are "no other oils in the market out of which you can choose this product." Accordingly, the ASCI concluded that the company's claim was improper and required that the advertisement be changed and/or the claim removed entirely.

Companies waste money on many forms of fraudulent advertising with the use of "green" marketing systems. The term "green" means that the product is not harmful to the environment; however, when companies use scientifically-based advertising, the final results are based on scientific terms that are created by using a combination of false marketing research and, as an example, the use of a third party to provide verification of the product(s).

As an example, in a court case regarding the claim, the phrase "chemical-free" undermines one of the significant issues that protect consumers from being deceived by poor advertising, which frequently uses general terms, simplifying, and symbolic terminology to appeal to a consumer's belief system about environmental health and is also considered to be making a factual representation regarding the product.

Regulators and courts must try to juggle two different competing interests within this context. While businesses should have the right to promote their products along with the claimed benefits of those products, conversely, consumers have the right to receive honest, factual, and truthful information so they can make a decision to purchase based upon the validity of the claims made by the business. Balancing these interests will help to maintain both a level competitive playing field in the market and confidence in the information presented by businesses to their consumers.

Organic Food Claims: Statutory Precision

The Food Safety and Standards Act, 2006

Food goods are regulated under the relevant regulations of the Food Safety and Standards Act, 2006 ("FSS Act").

The FSS Act provides a comprehensive legal framework designed to protect food safety and food quality, along with ensuring that consumers receive full transparency regarding food items. One of the main purposes of the FSS Act is to prohibit the making of false or misleading representations in respect of food items when advertising or selling them, specifically to prevent consumers from being deceived through these types of practices.

Section 24 of the FSS Act itself sets out the most important provisions of the FSS Act in relation to misleading advertisements and unfair trade practices regarding food products. Section 24 prohibits any advertisement relating to a food product from being published or displayed if the advertisement contains false, misleading, or exaggerated representations relating to that food product.^[4] However, an advertisement could still be regarded as false, misleading, or exaggerated and therefore in violation of the FSS Act and all rules and regulations promulgated pursuant to the FSS Act. Therefore, as a general rule, any advertisement and promotional material relating to a food product must be presented accurately, truthfully, in a consistent manner, and within a formal and reasonable expression of the information conveyed.

According to Section 24 of the Foodstuffs (Certification & Labeling of Foods) Regulations, 2017, it is illegal to use unethical methods to incentivize the purchase, provision, or utilization of foods. It is prohibited to misrepresent through statements (verbal or written), images, or other visual means the identity or characteristics of any given food item. An advertisement must not misrepresent a product's standard, quality, grade, composition, or volume. Likewise, an advertisement must not misrepresent the benefits or necessities of eating a certain food item. If a business wants to promise a certain health benefit or impact, it must provide legitimate evidence that supports that claim.^[5]

The intention of these restrictions is to foster transparency regarding how consumers are advertised to about food. By having the law require truthful advertisement of food products to consumers, this allows consumers to make well-informed decisions and helps provide equal competition between businesses for food products.

Section 52 of the FSS Act provides enforcement mechanisms and penalties for violating the principles contained in Section 24. Therefore, Sections 52 and 53 make the general prohibition against misleading conduct enforceable through legal consequences. Misbranding of food is addressed under Section 52.

4 Food Safety and Standards Act, 2006, § 24.

5 Food Safety and Standards Act, 2006, § 24.

Misbranding is not limited to labeling errors; it can also occur when the manner in which food is packaged, presented, or marketed creates confusion for consumers regarding these aspects of the food product.^[6] For example, if the way in which a food product is packaged indicates that the ingredients, country of origin, or quality of the food do not accurately reflect the actual characteristics of the food product, the product may be considered misbranded. A person or business that engages in manufacturing, storing, distributing, selling, or importing a misbranded food product for human consumption may incur a monetary penalty of up to three lakh rupees. There is a broad scope of liability for misbranding violations; all parties involved in the supply chain, including both the manufacturer and any intermediary entities in the supply chain, will be liable for these violations if they assist in the distribution of the misbranded food product.

The goal of corrective action (as opposed to just punishment) is also included in Section 52. For instances of misleading labeling, an adjudication officer may order relief by requiring corrective action on misleading labels or destruction of the misbranded product in cases of severe violations of Section 52. This approach supports food safety regulation goals to prevent consumer harm and to ensure that there is a sound marketplace rather than simply punishing violators after their actions have created harm. From a legal standpoint, the operation of Section 52 is based on strict accountability. As a result, it does not require the plaintiff to establish that he or she has suffered harm as the result of a misbranded product. All that must happen is that placing a misbranded product into the marketplace creates liability on behalf of the person who placed that product into the market. This prevention-oriented approach is consistent with the foundational philosophy of food regulation, which focuses on risk prevention instead of providing post-harm remedies.

The definition of the offense contained in Section 52 includes a tight accountability model of the kind known in analytical terms—that is, the act of placing a misbranded product into the market does not require proof of consumer injury in order to be found guilty—and therefore its purpose is in keeping with the prevention-based rationale of the food safety law, which places greater emphasis on achieving risk prevention than on providing remedies to consumers after they have been harmed.

Section 52 focuses on the actual item being sold, while Section 53 focuses solely on the way in which it has been advertised (by the act of publication). The law addresses the publishing of advertisements that misrepresent food

products and therefore mislead consumers about their nature, composition, or quality. It also covers the advertising of items that contain false guarantees. The financial penalties under Section 53 are significantly larger than those provided for under Section 52, with a maximum penalty of up to 10 lakh rupees.^[7] The maximum dollar amount for Section 53 (i.e., \$1 million) is indicative of the legislative recognition that the risk of harm from misleading advertising is greater than the risk of harm from misleading label content. A misleading label will directly affect the consumer/owner at the point of sale; however, a misleading advertisement may impact thousands or millions of potential customers all at once, particularly with the proliferation of digital advertising methods.

The evidence clarification provided in Section 53 is important as it makes clear to advertisers that simply having on their product a correct composition statement will not relieve them of liability. That is to say, regardless of whether the list of ingredients is accurate, if the overall impression created by the advertisement is misleading, the advertiser may still be found liable. It is also evidence of a sophisticated understanding of the consumer’s psychology because the means of creating deception can take many forms, including emphasis, omission, imagery, and contextual framing, as well as through factual untruths.

When combined, Sections 24, 52, and 53 exhibit multiple layers of enforcement. They collectively provide an enforcement mechanism starting from a general prohibition of unfair and misleading conduct through Section 24, an enforcement mechanism against misbranding as it relates to each individual product, and an enforcement mechanism against misleading advertising as it relates to the modes of communication about food. Thus, they represent an integrated statutory approach to deceiving the consumer in relation to businesses engaged in the manufacture and sale of food.

As the legal system considers the broad principles of jurisprudence to be the underlying basis for the law, these provisions demonstrate that the regulation of food products in India is not limited to issues of contamination and/or adulteration; rather, there are also issues with respect to the integrity of the information provided to consumers about those products. The law seeks to protect consumers from the adverse effects of misinformation regarding food, such as replication of “organic” claims, false statements regarding “chemical-free” food, and/or inflated health and service promises. By denying consumers accurate information regarding food products, the law ultimately protects public health indirectly by allowing consumers to make better-in-

6 Food Safety and Standards Act, 2006, § 52.

7 *Id.* § 53.

formed decisions.

Now that e-commerce and digital advertising continue to evolve, the importance of Sections 52 and 53 has become more significant than ever. Today, online listings, influencer promotions, and algorithm-generated ads can create a misleading representation in an extremely expedited timeline. As such, the statutory framework establishes that misleading claims made via digital transmission are not immune from accountability simply because they are transmitted digitally.

Accordingly, Section 24 is a shield that outlines the general principle that any representation about food must be truthful and not misleading. Sections 52 and 53 are swords that will impose financial penalties and corrective orders on those who violate the above-referenced principle. Collectively, these provisions demonstrate that food manufacturers and suppliers have a legal duty to ensure integrity in the labeling of food products and in advertising for food products.

Additionally, under the Act, the FSSAI will have much greater regulatory powers than under the previous FSSA. Under the FSSAI Act, the FSSAI will be responsible for developing and issuing regulations related to food labeling, certification, and advertising practices. If any product is marketed as ‘organic’ and does not have the appropriate certification, the FSSAI may consider it to be misbranded; therefore, the FSSAI can take appropriate regulatory action against the company involved in the manufacture or distribution of the misbranded product.^[8]

As a result of these factors, food law in India has a two-pronged purpose: to protect consumers from contaminated or adulterated food and to assure that they receive reliable and accurate information about the foods they purchase. Food misrepresentation (whether it is in the form of making false claims about the food being “organic,” misrepresenting the chemical composition of the food, or misrepresenting the health benefits of certain foods) can greatly affect consumers’ purchasing decisions and can cause consumers to lose faith in the food industry as a whole.

The digital marketplace makes it more relevant to apply such provisions now than ever before. Large numbers of people can be reached quickly online through such media as online platforms or influencer marketing by means of an algorithm-driven advertisement. The FSS Act’s legal protections are thus of increasing importance in ensuring that any promotional claims are accurate and documented.

Food Safety and Standards (Organic Foods) Regulations, 2017

In India, the word ‘organic’ used to define an item of food is not something put on the label as a mode of advertising but instead is governed by a systematic method of certification to which the Food Safety and Standards Authority has established guidelines through the Food Safety and Standards (Organic Foods) Regulations, promulgated in 2017. These guidelines were developed through the Food Safety and Standards Act of 2006, which sets forth requirements for food products that are labeled as ‘organic’ in order to provide specific and verifiable assurances that the term ‘organic’ is not being misused and that consumers are able to continue their trust in organic food.

Regulation 4(1) of these regulations includes a central regulation that states all food products must follow a mandatory compliance requirement if they are marketed as organic or intended to be sold as organic (meaning that the product is qualified as “organic”). Compliance means meeting one of the recognized certification systems. These systems include:

- The National Program on Organic Production (NPOP)
- The Participatory Guarantee System for India (PGS-India)
- Any other type of certified organic system or standard as determined by the FSSAI (Food Safety and Standards Authority of India).^[9]

Due to this regulation, there has been a development of a ‘gatekeeping system’ for organic claims. Businesses’ organic claims must fit the ‘organic’ regulation and cannot simply be a general descriptive expression. Organic is now a legally defined category of items that must be verified through formal certification, rather than through subjective claims. In linking organic claims with certified systems, the law has removed all subjective claims and systematically substituted all subjective claims with objective verification as compliance standards.

The regulations have a third type of standard; one that can be declared by the food authority. The importance of this is that the regulatory structure can stay flexible to allow for changes in both international standards and domestic policies. The food regulatory authority can create new certification processes as they need them, as these processes would occur via the food authority without needing to revise any of the parent legislation currently in place. If the regulations are flexible, then they will be most suited to

8 Food Safety and Standards Act, 2006, § 16.

9 Food Safety and Standards (Organic Foods) Regulations, 2017, Regulation 4(1).

the changing and increasingly global nature of the organic food marketplace.

Regulation 4(1) legally changes “organic” from being simply a marketing term to requiring a valid legal definition. Thus, an individual producer may use environmentally sound agricultural techniques; however, that produce will not be able to be marketed as “organic” unless it meets the criteria set forth by one of the recognized certification programs.

Though there are stringent certification requirements established by the regulation, it does recognize the real-world barriers small-scale farmers face. Thus, to be more accommodating, Regulation 4(2) provides a partial exemption from the requirement of obtaining official certification at NPOP or PGS-India for small original producers who are selling their products locally and/or directly to customers.¹⁰ The main goal of this exemption is socio-economic. The formal certification process can sometimes be expensive and can also involve significant amounts of effort and time for the small-scale farmer. By eliminating the requirement for mandatory certification when a small-scale farmer sells directly to consumers and/or locally, the regulation encourages local and/or traditional farming methodologies and the commensurate selling practices while also reducing small- and/or local-farmer compliance burdens.

Nonetheless, the boundary for this exemption is quite limited. The exemption applies only when both of the following conditions are met:

- (a) the seller is a ‘small original producer’ according to the classification established by The Food Authority, and
- (b) the sale occurs between the seller and the end user(s) directly, i.e., without any third party intermediary(s).

The exemption does not apply once a product has expanded its distribution methods to further-reaching sources, including retail stores, structured supply chains, and/or e-commerce outlets. At this time, formal certification will be mandated by law to guarantee regulatory control and protection of consumers.

In addition to providing additional provisions for the new development of food distribution systems, Regulation 4(3) specifically covers the role of aggregators and intermediaries. Aggregators/intermediaries collect organic food from smallholder farmers and deliver it to consumers, either by using an organised retail arrangement or by contacting consumers through digital platforms.¹¹ Under this added provision, aggregators/intermediaries are allowed to be

exempt from full certification requirements, but they must meet certain regulatory criteria, such as maintaining comprehensive records of traceability for all products they sell as organic. Traceability records enable regulatory authorities to conduct supply chain audits if there are any doubts about the authenticity of the products being sold as organic. In addition, the regulation specifies that the FSSAI organic logo cannot be displayed on any products sold under the exceptions provided, as the FSSAI organic logo is only for use on products that are certified by a recognised organic certifying body. Displaying the FSSAI organic logo on a certified organic product would undermine the credibility of the certified organic producers and potentially mislead the consumers.

Efforts to strike a balance between flexibility in regulations for farmer intermediaries and protection for the consumer can be seen in this provision. Farmer intermediaries are allowed to sell organic food products from small farmers as long as they disclose their certification status; therefore, consumers will not be misled into thinking that they are receiving organic foods through an unclear certification process. In addition, traceability requirements and limitations on the use of logos will help reinforce the consumer’s understanding of the certification status of a product through the intermediary’s certification status.

There are several guidelines set forth in the regulations that define how non-compliant food items will be treated if they are labelled as or marketed as organic. These guidelines generally follow the following framework:

1. **Presumption of certification**— Most organic products must be certified by an appropriate agricultural or organic certifier that has approved methods of farming and production standards for the item to carry an “organic” label.
2. Small specialty produce farms selling directly to customers will have exemptions from having to comply with the regulation. This will provide some relief to small farms due to their lesser economic realities but will not impact the integrity of the certification program.
3. The regulations provide guidance on how products must be labelled so that consumers have accurate knowledge regarding the product’s origin and whether or not it is legally entitled to bear the organic label. Even if a product has reduced standards for being certified organic, there are still safeguards in place (for example, record-keeping requirements, a ban on using the official organic logo) to ensure that the consumer has access to accurate information regarding the product’s origin and whether or not it has a certified organic status.

10 Food Safety and Standards (Organic Foods) Regulations, 2017, Regulation 4(2).

11 Id. Regulation 4(3).

The Food Safety and Standards Act's Sections 24, 52, and 53 generally prohibit such practices. The Organic Foods Regulations outline the conditions under which food may be sold as organic. If a food product is marketed as organic and does not meet the conditions of the Organic Foods Regulations, it is potentially misbranded and/or misleadingly advertised, resulting in the possibility of regulatory enforcement. These provisions are especially significant in the digital marketplace, where many online retailers will include the keyword "organic" in their product search results to attract consumers. Selling a product as organic that does not have an appropriate certification or that is exempt from certification, while displaying an organic certification logo, may violate regulatory requirements.

The organic food regulations of India assert that they are serious foundation legislation for an important legal definition: "organic" is not just a phrase representing a particular way of living or how to market food products but is a legally defined term that is defined through meeting certain established organic certification processes. The law seeks to protect both the public's trust in organic food as well as the integrity of organic agriculture by mandating that organic food be looked to as a certification based on certified compliance with the organic standard; that certified organic omissions will have some limited circumstances defined; and by requiring that organic food products be traceable back through the supply chain to their point of origin. Therefore, the term organic, when applied to a product, represents legal liability for providing an accurately labelled product that is subject to regulatory oversight and authority.

Cosmetics and Personal Care: The Regulatory Lacuna

Compared with the food-related legislation in India, there is a marked disparity between how cosmetics are regulated versus food items. Food functions under fairly well-defined regulatory criteria, whereas the cosmetics and personal care industry is subject to a less clearly defined and structured regulatory environment. This has important consequences for the growing popularity of marketing terms such as "organic," "natural," "herbal," and "chemical-free" in the beauty and wellness markets.

The Cosmetics and Drugs Act, 1940 governs all cosmetic products sold in India and has regulations issued by the Government of India. The overall objective of the Cosmetics and Drugs Act governs cosmetic products, therefore, to provide and make sure all cosmetic products in India are safe for the consumer using the following methods: A) how the cosmetic product is made in India;

B) how to test the cosmetic product to verify quality control; C) how to restrict the use of harmful ingredients in cosmetics; D) how to properly label cosmetics. In addition to the above, the Indian Government has established Government Agencies that control imports of cosmetics into India while establishing standards for the purpose of preventing the distribution or sale of adulterated and counterfeit cosmetics within the country. The majority of the regulations set forth in the Cosmetics and Drugs Act are designed to ensure the safety of consumers using cosmetics. The primary goal of the Drugs and Cosmetics Act is to ensure that no cosmetic products manufactured in India contain potentially hazardous or unsafe levels of substances and that all manufacturers are required to operate under acceptable sanitary conditions. One limitation of the Act is that it provides no definition or regulation for the use of the terms 'natural,' 'organic,' 'herbal,' or 'chemical-free' for marketing purposes.

Because of the lack of clear definitions associated with the cosmetics industry's regulation, there is currently a regulatory "grey area." When key words are not defined in regulatory theory, businesses may define those terms in accordance with what they believe to be correct. As such, cosmetic manufacturers can use such terms in their branding strategy yet will not be held to a universal standard of legal definition for these same terms as companies in the food sector who have to adhere to the Food Safety and Standards (Organic Foods) Regulations 2017, which require certification for claims made regarding organic foods. In contrast to the regulations set out for foodstuffs, there is no certification process or equivalent legislation in the cosmetics industry, which provides its participants with little guidance regarding the substantive value of the product it currently produces and sells to consumers.

As far as practices go, there are many ways cosmetic companies typically make use of labelling. One such way is through self-declaration. A brand can use a self-declaration process to say that the product is "organic" or "natural" by reference to the company's own policies around choosing ingredients for inclusion in their products. A company may assert to have "natural" products because they did not use certain synthetics, like parabens or sulfates, as part of their formulation. Many times, though, the company will be unable to have that claim verified by an independent authority.

The second method is voluntary certification provided by private certified companies. Some businesses get their certification via an internationally recognized certifying body such as Cosmos or USDA Organic when they export products globally to other countries. Many companies use certification to establish additional credibility in market-

ing their products, although the use of private certification is not required by Indian cosmetic regulations.

The third method is the use of hybrid marketing claims, where product descriptions indicate that they were manufactured using organic materials. Although some products may contain only organic materials in part, most likely, a significant portion of the product may contain standard (customer-grade) components. These terms are used because regulations from different countries (either specific state or federal) do not provide easy definitions to assist consumers in understanding these terms clearly.

The consumer perception of the product can be difficult to manage because of the issues that arise from the product specifications alone. A product labeled as “100% organic face cream” might lead an average consumer to assume that the product was certified to some degree, either by a governing body or through a rigorous application of standards or procedures. Unfortunately, there is currently no legal regime in India that requires any cosmetics to be certified in this respect, which allows manufacturers an extraordinary amount of latitude in terms of how they represent their product(s). This regulatory omission has resulted in misleading representations being addressed under the broader legislation protecting all consumers (i.e., the Consumer Protection Act, 2019). The Consumer Protection Act defines a misleading advertisement as an advertisement that either provides false representation of the product (e.g., false guarantee), or an advertisement that creates the impression that the quality, composition, or standard of the product will somehow be inferior to what was represented to the consumer, or an advertisement where the material fact was purposely omitted.

The CCPA can take action for violating the Consumer Protection Act, Section 21 by requiring advertisers to stop using false advertising claims or modifying the advertisement, fining manufacturers or advertisers, and in some cases preventing people from endorsing a product for a specified period of time. An example of how these rules apply to advertising for cosmetics would be advertising that a cosmetic product was “100% chemical-free” but it contains synthetic preservatives, artificial fragrances, or petrochemical derivatives. This would be classified as misleading advertising. Another example of misleading advertising would be if a company advertised their product as safer/better than competitive products without supporting evidence of that claim.

In cosmetic marketing, other common words and phrases

found include “dermatologically tested,” “clinically proven,” and “toxin-free.” All these phrases tend to imply some type of scientific rigor surrounding the product’s development or approval; however, the documentation or disclosure of the data used to make these assertions is frequently not available in public records. In determining what documents are permissible, the critical issue from a legal perspective is whether an empirical basis existed for supporting the claim at the time the claim was made. Courts have consistently ruled that all aspects of an advertisement must be factually correct, as well as convey an accurate overall impression to the consumer, even if there are individual elements in the advertisement that are technically true.

Judicial determinations of advertising disputes establish this principle. In *Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd.*, the Supreme Court has established that advertisements to consumers should not provide misleading information with respect to the product’s effectiveness. Similarly, in *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.*, the Delhi High Court has established that scientific claims made in advertisements must be supported by reliable evidence. When applying those principles to the cosmetics industry, a product titled “chemical-free” will be deemed misleading if it contains popular synthetic ingredients such as phenoxyethanol, regardless of whether those ingredients are permitted by law in cosmetic formulations. The issue at hand is whether or not the ingredient is safe to consumers; rather, it is how accurately the claim reflects the product.

New regulations will make it much more complex for digital marketplaces to comply with laws regarding healthy foods. Most online marketplaces depend on an algorithm that uses keywords for businesses to promote their products. For example, if your product had the word “organic” in its listing, it would get a higher listing on the search results than a company that does not use these words in its listing.

This trend creates competitive tension in the marketplace for goods sold electronically. Businesses may have an incentive to use “green” or “wellness” terms to continue to exist in the digital marketplace, even though these terms may be loosely defined or not supported by certification processes at best. The Consumer Protection (E-commerce) Rules, 2020 seek

12 Consumer Protection Act, 2019, § 2(28).

13 Id. § 21.

14 *Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd.*, (2014) 12 SCC 1.

15 *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.*, (2010) 42 PTC 88 (Del).

to alleviate some of these issues by requiring online platforms to have accurate product descriptions and to have processes in place to address consumer complaints. But there is little consistency in how claims like “organic” or “natural” are verified in electronic marketplaces.

In India, there is a significant discrepancy concerning its regulatory oversight between cosmetics and food products. Food is subject to rigorous certification systems for claiming the use of organic ingredients in connection with those products, while the cosmetics industry is not required to meet the same rigorous standards with respect to organic certification and must instead adhere only to general consumer protection guidelines. As such, there is a need for improved distribution and promotion regulations where cosmetic products make use of organic-related terminology in order for there to be an accompanying level of assurance that the claimed benefits would be delivered using those products.

The Consumer Protection Act, 2019: A Paradigm Shift

The Consumer Protection Act, 2019, is a major step forward in improving India’s consumer protection laws and provides greater protection against unlawful trading practices and false or misleading advertisements than did the predecessor Consumer Protection Act, 1986 (“the prior Act”), through a more complete definition of such activities and the establishment of a Central Regulatory Authority (i.e., Central Consumer Protection Authority or CCPA) with broad enforcement authority over unlawful trade practices.

Under the prior Act and prior law, the remedies available for consumer protection were based largely on the submission of complaints by an individual to a consumer grievance tribunal — a mechanism that provided a means for relief from well-documented individual complaints; however, the system failed to effectively address any widespread marketplace practices affecting large groups of consumers. The 2019 Act provides a mechanism for regulatory authorities to be able to take proactive enforcement actions even in the absence of individual complaints about unlawful acts affecting consumers.

The section deals with misleading advertising and allows the CCPA to take a wide range of measures in relation to adverts that are found to be misleading or deceptive, such as ordering the advertiser to cease/discontinue or change the advertisement, imposing monetary fines, and prohibiting endorsements for a period of time by the endorser. The monetary penalties prescribed under the act have deterrent effects, and for the first offence, the CCPA can issue fines

of up to ₹10 lakhs, whereas second or subsequent offences will incur maximum fines of ₹50 lakhs. There are penalties on endorsers that have promoted misleading advertisements and may prohibit endorsers from making endorsements for a period of time. This demonstrates that there is a growing recognition of the fact that modern advertising very much depends upon celebrity endorsement and the use of influencer marketing, which can have a significant impact on the behaviour of consumers.

The Act specifies that liability is not exclusively the responsibility of the manufacturer. All parties (advertiser, endorser, and/or publisher) involved in disseminating false messages about a product will be liable. The Act recognizes that false or misleading advertising typically derives from the entire advertising ecosystem working together (as opposed to a single entity making false or misleading statements), which results in this broad scope of liability across all participants. Additionally, there have been numerous judicial decisions involving advertising and commercial speech that illustrate the legal principles behind this regulatory approach. The Courts in India have made it clear that they balance the interests of commercial free speech with the need to protect consumers from being misled.

An example is *Reckitt & Colman of India Ltd v M.P. Ramachandran*, where the Calcutta High Court looked at the boundaries of comparative advertising as businesses are allowed to promote their products by showing the benefits of their own product while also comparing it to other products but cannot promote their product by providing potentially misleading statements about competing products or trying to hurt the reputation of competitors by making false or misleading statements. The case confirms that while certain types of “puffery” will be permissible in advertising in some cases, the use of false or misleading claims in advertising is not acceptable.

In *Colgate Palmolive (India) Ltd. v. Hindustan Unilever Ltd.*, the Supreme Court added to the existing principles of advertising claims in regard to showing how effective one brand of toothpaste is compared to others. The Court held that advertisements should not create misconceptions about a product’s characteristics and/or benefits, regardless of whether each element of the advertisement was accurate in its own right or the overall impression given to consumers is false, because they will only view the entire advertisement as one piece of information.

16 Consumer Protection Act, 2019, § 21.

17 *Reckitt & Colman of India Ltd. v. M.P. Ramachandran*, 1999 PTC (19) 741 (Cal).

In the case of *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.*,^[18] the Delhi High Court considered how commercial speech interacts with the freedom of expression, as guaranteed under Article 19(1)(a) of India’s Constitution. The Court also found that advertising is a form of commercial speech and therefore has some degree of protection under the Constitution. Although there is no complete protection for commercial speech or advertising, misleading advertisements and advertisements that provide false factual information are not within the scope of free speech under the Constitution because they interfere with the consumer’s right to receive accurate and reliable information.

These judicial rulings bind together as evidence of an important legal concept; although commercial entities may advertise to promote their products, including highlighting their advantages, they must do so in a way that is honest and equitable with respect to other competitors’ businesses. Thus, while businesses can promote their products at will, they should not engage in misleading advertising practices against other businesses, nor should they engage in advertising that distorts the marketplace.

With the passing of the Consumer Protection Act, 2019, the principles set out by these

courts were put into place in a properly structured regulated way. The CCPA now has both investigatory and enforcement powers, which give it a more effective means of regulating misleading advertising than in the past. Instead of just responding to individual complaints, the CCPA now has the ability to take action against behaviors that threaten large-scale consumer interests. This change indicates a growing understanding of how the consumer market works, especially in the digital age. Currently, through social networks, online marketplaces, and social influencing events, a modern advertising campaign can easily reach millions of consumers in a very short amount of time. This means misleading information can be disseminated quickly and effectively create a large impression on consumers.

The 2019 Act seeks to ensure that advertising practices comply with the principles of transparency, fairness, and consumer protection through a stronger enforcement mechanism and by widening the boundaries of accountability. It also acknowledges that an honest and truthful representation of information is a critical basis of individual consumer welfare as well as for preserving the integrity of the marketplace and consumer confidence and trust.

18 *Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.*, 2003 (27) PTC 305 (Del).

The Role of Advertising Standards Council of India

In India, the process of regulating advertisements largely falls to the Advertising Standards Council of India (ASCI). While there are certain areas of advertisement law for which the ASCI may not be required to follow statutory provisions, such as those that are developing or in transition, it nevertheless plays an important role in regulating the standards and conduct within these developing regions. The ASCI functions as a self-regulatory organization to provide a mechanism for the development of standards for the advertisement of products and services, and to provide a way to handle disputes regarding the use of those advertisements.

The ASCI’s Code for Self-Regulation in Advertising has developed into an excellent source of credible regulation, and both the courts and government agencies often consider the ASCI Code when disputing advertising matters.

The main goal of the ASCI is to have truthful, fair, and non-deceptive advertising.^[19] To help achieve this goal, according to its rules, advertisers must have sufficient evidence at the time of making any statement that the claim made by them is true. This requirement is especially important for marketing statements about health, safety, or environmental benefits in products purchased by consumers from the food, wellness, and personal care categories. For example, ASCI has recently reviewed a number of advertisements that made use of expressions such as “chemical-free,” “natural,” “organic,” or “100% safe.” These types of claims are frequently stated in an absolute sense and may lay strong impressions on the consumer at the time of purchase. ASCI’s stance has been to determine whether or not the claims can be substantiated objectively and whether or not the claims could create a misrepresentation of the product to those consumers who are not technical in nature but are unaware of the content of the product.

An excellent illustration can be found in the case of *Jivo Wellness Pvt. Ltd.*, which promoted its canola oil as “the first chemical-free oil in India.” This assertion received a challenge based upon the fundamental premise that all food-related oils, as well as all food items, are made up of various kinds of chemical compounds. Therefore, when the company was asked to produce any evidence to support their claim that their oil could be considered chemical-free compared to any other similar product, the company could not prove why their oil should have been described

19 The Advertising Standards Council of India. (n.d.). *The code for self-regulation in advertising*.

as chemical-free and how it differed from other types of oils in the same fashion. The ASCI arrived at its findings based on how consumers interpreted statements made by Jivo Wellness Pvt. Ltd. rather than on the literal definitions of words used in the prior assertion. Accordingly, although Jivo Wellness intended to convey that its canola oil was free from non-harmful chemicals, the phrase “chemical-free” without further modification implies to consumers that product competitors sell their oils with various harmful chemicals. Such implications will lead to consumer confusion concerning the purchase of oils and create an unfair competitive edge for oils manufactured by Jivo Wellness Pvt. Ltd.^[20]

ASCI has intervened regarding claims made for products that were claimed to possess an organic status. One example of this is the products produced by Yours Forever Organic Products, which were advertised as “100% Certified Organic.” When ASCI received the complaint against Yours Forever, their responses failed to provide valid, legal documentation showing their product was, in fact, certified as organic, based upon a known and documented entity. For this reason, ASCI ordered that the product remove or modify the claim in order to avoid misleading consumers. The only issue like this would be with regards to the advertising conducted by Organic India Pvt. Ltd. Their claim of “100% Certified Organic” for products advertised across an entire line of products drew complaints regarding the viability of the claim to support all the products included in the advertisement. After ASCI reviewed the documentation submitted by the company, ASCI concluded that they did not possess enough evidence available to substantiate this inclusive claim and then ordered that the advertisement be revised so as to not misrepresent the certified status of the mentioned products.^[21]

Known as the “Certificates of Conformance,” businesses are therefore required to provide supporting evidence when making these types of claims. Examples of supporting documentation include laboratory testing, professional expertise, and proof of compliance with relevant regulatory or certification bodies.

The ASCI does not have direct enforcement authority under the law; however, both industry compliance and referred accountability are its methods for exercising influence. Most advertisers will adhere to ASCI’s recommendations on a voluntary basis due to the risk of escalating

matters to government regulators (e.g., CCPA) or relevant authorities if they fail to do so. In most cases, continued non-compliance with ASCI’s acceptance criteria will also damage their own market reputation and credibility. Through its complaint-handling and guidance processes, ASCI is also able to act as an initial regulatory filter on behalf of the public by addressing potentially misleading advertisements prior to such advertisements being subjected to formal legal dispute or statutory enforcement. Thus, ASCI promotes responsible advertising practices and consumer transparency by encouraging advertisers to substantiate their claims and to change any potentially problematic advertisements.

In those industries utilizing environmental and health-related advertisement effects increasingly as a means of advertising, ASCI works to ensure the validity of these claims through evidence-based standards of advertisement. Consequently, ASCI supports the need for genuine sustainability and health-oriented marketing and does not permit the exploitation of such concepts for the purposes of advertising without reliable evidence that can meet legal requirements.

TOWARD DOCTRINAL COHERENCE

India’s legal framework for making claims like “organic” and “chemical-free” has been found to be at once multi-layered and not uniform in nature. The law provides a more clear-cut set of standards for the food sector through statutory and subordinate regulations that outline the science associated with using the term “organic.” The establishment of certification systems, traceability requirements, and labeling rules in the food sector has created a linkage between the organic claims made by food producers and proven compliance. However, the process of making claims within the cosmetic and personal care industry is far less defined. Expressions such as natural, herbal, or chemical-free are very commonly used in marketing even though the statute has no specific definition for these terms.

Under the Consumer Protection Act 2019, consumers are offered a broad level of protection from misleading advertising across all categories of goods and services. The Central Consumer Protection Authority (CCPA) has been established to have regulatory power over misleading and deceptive advertising claims, allowing the CCPA to impose penalties and/or take action against persons or companies that make such claims and/or are responsible for misleading or deceptive advertising. However, the current CCPA enforcement process tends to be reactive since it focuses on addressing misleading claims after they are made public, rather than specifying the precise scope or

20 Advertising Standards Council of India. (2019). Complaint against Organic India Pvt. Ltd. ASCI Case Report.

21 Advertising Standards Council of India. (2017). Complaint against Organic India Pvt. Ltd. ASCI Case Report.

nature of permissible advertising language about goods or services within specific market sectors prior to publication. Because of this uncertainty, there is still no assurance about how far you can go in your advertising language to promote your products or services.

To create a more cohesive regulatory system, it will be necessary to reform existing regulations rather than simply adding additional regulations. One possible avenue for reform is to develop clear statutory or regulatory definitions of commonly used terms relating to cosmetics, such as “natural” and “organic.” Examples of creating measurable standards include establishing minimum amounts of natural ingredients that must be present in all cosmetic products sold in the United States and requiring all manufacturers to disclose the exact composition of each ingredient used in their products; this will reduce confusion about what constitutes an acceptable product and will ensure more consistency between the cosmetics and food sectors because there is already a certification model for food products based on quantifiable measures.

An additional significant change is stronger requirements for scientific justification of health and environmental claims. Ads making statements such as “100% chemical-free” or “clinically proven toxin-free” should provide credible and verifiable proof supporting these claims. Having access to appropriate proof should either be available in regulated submissions or in public disclosure to add transparency and help prevent companies from making unfounded claims.

The increasing rise in the use of online marketplaces has

created additional regulatory challenges. Many online platforms organize the way they present their products based on certain words, for example, by denoting some of their items as being “organic,” “natural,” or “environmentally friendly.” If these words are assigned without adequate validation of the product’s compliance with the definition of the word, then the algorithms used to determine what shows up in search results may be unwittingly amplifying false claims about the products and creating an unfair playing field within that online marketplace. Therefore, requiring platforms to verify the certification of the products being assigned the designation of “organic” could be one way of improving the accuracy of what is displayed in the search results on that platform.

An important component of regulatory reform is improving institutional coordination. In India, the FSSAI, CCPA, BIS, and ASCI have responsibility for regulating product claims and advertising. All of these agencies would benefit from better cooperation and coordination among their own regulatory efforts – for example, by creating common guidelines or joint advisories or by coordinating the enforcement of their laws, which would reduce the fragmentation of regulation and provide better guidance for businesses.

The desired outcome of regulatory reform is to establish preventative rather than punitive measures against false or deceptive advertising and other misleading claims. To achieve this goal, the legal framework must provide sufficient standards, promote disclosure, and facilitate marketing practices that are based on substantial evidence.