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THE DARK SIDE OF MARKETING: UNMASKING MISLEADING ADVERTISEMENTS TO EMPOWER INDIAN CONSUMERS

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ABSTRACT

Consumers want value for money in the form of higher-quality goods and services. Modern technical innovations have undoubtedly had a significant impact on the quality, availability, and safety of goods and services. The saddest aspect is that consumers are victims of a variety of unscrupulous and exploitative activities, one of which is misleading or deceptive advertising, which has a far-reaching impact on consumers. In today's Indian context, the concepts of "consumer are sovereign" and "consumer is the king" are mere myths. Advertisements, as a form of communication, capture the attention of many consumers. It has become an essential component of Indian business today. However, using advertisements to entice consumers with unsubstantiated claims is detrimental to their interests. Companies like Patanjali, PepsiCo, Johnson & Johnson, Fair & Lovely, and others have been fooling customers for many years. The Consumer Protection Act of 2019 establishes a methodology for how the Indian judicial system would handle cases involving misleading advertisements. It thus, protects innocent consumers from unethical trade practices and ensures that consumers are not duped into a trap by falsely describing the product or services, providing a false guarantee, deceiving consumers as to the nature, substance, quantity, or quality of such product or service, or intentionally concealing important information. The Act also empowers the "District Collector" to investigate consumer rights violations resulting from false information and report to the Central Consumer Protection Authority (CCPA). CCPA can levy fines against those individuals and entities that are involved in misleading advertisements. In addition to the aforesaid, the researcher would also focus on how to safeguard the consumer from misleading advertisements by raising consumer awareness and making corporations accountable.

KEYWORDS: Consumers, Misleading Advertisements, Consumer Protection Act of 2019, Central Consumer Protection Authority, Consumer awareness and corporate accountability.

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INTRODUCTION

“Trying to do business without advertising is like winking at a pretty girl through a pair of green goggles.

You may know what you are doing, but no one else does.”³

- **Cyrus McCormick**

Advertising is a means of communication that informs a company’s target audience about its current and prospective products or services. It does this through advertising to persuade the public to use its products/goods or services by putting across an appeal that the product/goods or services are relevant, and that by using them, one would gain a social, economic, or even psychological advantage over persons who do not use these goods or services.

Advertisements provide essential information about the product, such as its uses, benefits, and how it compares to competitors and by providing accurate information company builds trust and credibility with consumers.⁴

Advertisements can take various forms, including newspaper, television commercials, print ads, advertisement in cinema, web series, you tube, Instagram, blogs, magazines, emails, online banners, social media posts, radio spots, and outdoor billboards. Effective advertisements create demand for products and services, leading to increased sales therefore, Companies spend a significant amount of money on advertising (both online and offline). Though, it has become a vital part of Indian business today but, when advertisement is used to induce consumers by way of unsubstantial claims, it is against their interests. Many companies such as Patanjali, PepsiCo, Johnson & Johnson, Fair & lovely etc, have mislead the consumers for years. Misleading advertisements are promotional materials that provide false, exaggerated, or deceptive information to persuade consumers to purchase a product or service. Such misleading advertisements always have a negative effect on society, directly or indirectly affecting every member of its ecosystem. This makes the consumers root for a fantasy when reality is very different.

The three main categories in which misleading advertisements can be classified are -

- a. Fraudulent
- b. False &
- c. Misleading.

Fraudulent means that the advertiser distorts the real facts and projects the products or services as something it is not.

Falsity can also refer to an advertising lie on parameters like price, quantity, and availability. Misleading

³ Shubhank Khare, “Protection of Consumers with Reference to Misleading Advertisement in India: A Critical Analysis” *4 International Journal of Legal Developments and Allied Issues* 352 (2018).

⁴ False Or Misleading Advertisements Under Consumer Protection Act 2019, *available at*: https://lawcorner.in/false-or-misleading-advertisements-under-consumer-protection-act-2019/#google_vignette (Last Visited on June 20, 2024).

though any media focuses on a consumer's belief. Misleadingness requires that the advertiser observe the false belief of consumers in relation to exposure to the advertisement. Unfair and misleading advertisements are not just unscrupulous but also, they distort competition and consumer choices.

Misleading and unfair advertisements violates several rudimentary consumers rights, such as:

“The right to choose, the right to be informed, right to safety, protected against unsafe goods and services, as well as, unfair trade practices.”

Hon’ble Supreme court had said in the case of ***“Dabur India v. Colortek Meghalaya Pvt. Ltd.,⁵ that an advertisement is protected under Article 19(1)(a) of the Constitution as long as it is not false, misleading, or deceptive in nature.”*** In another case of ***“Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.,⁶ hon’ble Court has held that an advertisement can praise or magnify the product keeping in mind that it does not disparage a rival product.”***

Further, in order to protect consumers from such advertisements that were confusing or unfair, the hon'ble Supreme Court of India issued directions to all advertisers to furnish "self-declarations" before issuing any advertisement in the media for their products.⁷

Advertisers will be required under the ADARI guidelines to "expressly clarify that their displays shall not mislead or falsely represent about any fact of their products or services so as not to lead the consumers into error." Advertisers wanting to air their TV commercials would need to fill in the affidavits in the 'Broadcast Seva Making' it a single window system for all stakeholders involved in seeking permissions, registers, and licenses for various broadcast related activities to the Ministry of Information and Broadcasting depot.⁸

Our Consumer Protection Act of 2019 acts as an exception to the rule of caveat emptor and protects the rights of consumers from misrepresentation, false statements or misleading advertisements. ‘Section 10’ clearly states that the ***“Central Consumer Protection Authority”*** is being established to regulate the matters relating to misleading advertisements which violate the consumer rights.⁹

Before advent of new consumer protection Act of 2019, ***“Advertising Standards Council of India (ASCI)”*** is the only self-regulatory authority. It had adopted a code for self-regulation in advertising. ASCI has been active in monitoring advertisements and has introduced guidelines, especially concerning health and nutrition claims, to ensure that advertisements are not misleading.

⁵ Dabur India Ltd v. Colortek Meghalaya Ltd, 2010 (42) PTC 88 (Del.).

⁶ Pepsi Co Inc v. Hindustan Coca Cola Ltd., 2003(27) PTC 305 (DEL).

⁷ Indian Medical Association v. Union of India, Writ Petition (Civil) No.645/2022.

⁸ Regulating Misleading Advertisements in India, *available at:* <https://www.drishtias.com/daily-updates/daily-news-analysis/regulating-misleading-advertisements-in-india> (Last Visited on June 21, 2024).

⁹ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 10.

Some well-known brands were purportedly claiming that their product offerings, such as against effectiveness of COVID-19, were obvious. Some among the list were advertising by Asian Paints, Sairam, Lifebuoy, Berger Paints and Kent Ro. The government also noted this and took rest on such allegations.

Through this study, we will examine the present legislative framework governing deceptive advertisements, identify problems with them, and make recommendations for modifications as needed.

THE LABYRINTH OF MISLEADING ADVERTISEMENTS

Misleading advertisements in India have been a significant concern, leading to regulatory actions and consumer backlash. For instance:

Horlicks Growth +

The advertisement claimed that Horlicks Growth+ could make children “grow taller, stronger and sharper.” The Advertising Standards Council of India (hereinafter referred as ‘ASCI’) found the claims to be unsubstantiated and misleading as the product did not have enough scientific backing to support the promises. ASCI asked the company to withdraw or modify the advertisement.

Amway Nutrilite

Amway advertised that Nutrilite Daily was a “complete supplement for daily nutrition needs.” This claim was found to be misleading as it gave the impression that ‘Nutrilite Daily’ alone could meet all daily nutritional requirements, which was not scientifically proven. ASCI directed Amway to withdraw or modify the advertisement to accurately reflect the product's benefits.

Dabur Chyawanprash

Dabur advertised that consuming Chyawanprash could protect individuals from ‘COVID-19’. The claim was misleading because there was no scientific evidence that Chyawanprash could prevent or cure COVID-19. ASCI intervened, and the advertisement was modified to remove the misleading claim.¹⁰

HUL’s Lifebuoy

An advertisement depicted a healthcare professional recommending Lifebuoy soap over others. This was misleading as there was no scientific basis or specific endorsement from the healthcare community for Lifebuoy over other soaps. ASCI instructed Hindustan Unilever Limited (HUL) to modify the advertisement

¹⁰ ASCI asks Dabur to ‘modify or withdraw’ Chyawanprash ad claiming Covid protection, *available at:* <https://www.afaqs.com/news/advertising/asci-asks-dabur-to-modify-or-withdraw-chyawanprash-ad-claiming-covidprotection#:~:text=The%20Advertising%20Standards%20Council%20of%20India%20%28ASCI%29%20has,of%20the%20product%20daily%20provided%20protection%20against%20COVID-19> (Last Visited on June 21, 2024).

to remove the implied endorsement by healthcare professionals.

Patanjali Products

Patanjali has faced multiple accusations of making exaggerated claims about the benefits of their products, including claims that certain products could cure serious diseases. Many of these claims were found to lack scientific evidence and were deemed misleading. Various advertisements were either pulled from circulation or modified following ASCI guidelines and consumer complaints.

Kurkure

An advertisement for Kurkure snacks claimed that the product contained “40% less fat than regular potato chips.” The claim was misleading because the comparison was made to an unspecified standard and could mislead consumers about the health benefits of the product. The “ASCI” directed the company to withdraw or else, modify the advertisement to avoid making unsubstantiated comparisons.

Fair & Lovely

Advertisements for formerly ‘Fair & Lovely’ which is now ‘Glow & Lovely’ implied that the cream could significantly lighten skin tone. The claims were found to be misleading and perpetuated unrealistic beauty standards. In response to regulatory pressure and public backlash, Hindustan Unilever rebranded the product and toned down the claims of fairness, focusing instead on overall skin health.¹¹

Santoor Soap

The advertisement suggested that Santoor soap could give users younger-looking skin. The claim was deemed misleading as it suggested guaranteed results without sufficient evidence to prove so.

Patanjali Coronil

Patanjali claimed that their product ‘Coronil’ could cure COVID-19. The claim was found to be misleading as there was no scientific evidence to support that ‘Coronil’ could cure or prevent COVID-19. The Ministry of AYUSH intervened, and Patanjali was directed to stop advertising ‘Coronil’ as a COVID-19 cure.¹²

¹¹ Fair & Lovely’ Gets Changed to ‘Glow & Lovely’; Emami Threatens Legal Action Against HUL, *available at*: https://lawstreet.co/business/fairandlovely-emami-hindustanunilever/#google_vignette (Last Visited on June 22, 2024).

¹² Coronavirus: The misleading claims about an Indian remedy, *available at*: <https://www.bbc.com/news/56172784> (Last Visited on June 22, 2024).

LEGAL FRAMEWORK ON MISLEADING ADVERTISEMENTS

Consumer Protection Act of 2019

The Consumer Protection Act of 2019 is the fundamental law addressing misleading advertisements in our country. The term “misleading advertisement” has been defined in ‘Section 2(28)’ of the Act, 2019 which is as follows: “*Misleading advertisement in relation to any product or service, means an advertisement, which:*

- *falsely describes such product or service;*
- *gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service;*
- *conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice;*
- *deliberately conceals important information.*”¹³

Under ‘Section 10’ of this Act, a ‘Central Consumer Protection Authority’ has been established to regulate matters relating to misleading advertisements. The section reads as:

“Establishment of Central Consumer Protection Authority -

(1) The Central Government shall, by notification, establish with effect from such date as it may specify in that notification, a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.

(2) The Central Authority shall consist of a Chief Commissioner and such number of other Commissioners as may be prescribed, to be appointed by the Central Government to exercise the powers and discharge the functions under this Act.

***(3) The headquarters of the Central Authority shall be at such place in the National Capital Region of Delhi, and it shall have regional and other offices in any other place in India as the Central Government may decide.*”¹⁴**

The ‘Central Authority’ ensure that no incorrect or misleading advertisement is shown in respect of any goods or services which violates the provisions of Act, rules or regulations made thereunder.¹⁵

This ‘Central Authority’ have its investigation wing headed by a ‘Director-General’ for the purpose of conducting an inquiry or investigation under the Act as may be directed or ordered by the Central Authority.¹⁶

By virtue of ‘section 17’, a complaint regarding misleading advertisement can be made before the ‘Central

¹³ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 2(28).

¹⁴ *Id* at 9.

¹⁵ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 18 (C).

¹⁶ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 15.

authority', 'District collector' or the 'Commissioner of regional office'.

“Complaints to authorities. - A complaint relating to violation of consumer rights or unfair trade practices or false or misleading advertisements which are prejudicial to the interests of consumers as a class, may be forwarded either in writing or in electronic mode, to any one of the authorities, namely, the District Collector or the Commissioner of regional office or the Central Authority.”¹⁷

'Section 16' states that 'District Collector' can investigate into the matter which is within its jurisdiction. The section reads as:

“Power of District Collector.- The District Collector (by whatever name called) may, on a complaint or on a reference made to him by the Central Authority or the Commissioner of a regional office, inquire into or investigate complaints regarding violation of rights of consumers as a class, on matters relating to violations of consumer rights, unfair trade practices and false or misleading advertisements, within his jurisdiction and submit his report to the Central Authority or to the Commissioner of a regional office, as the case may be.”¹⁸

Section 19 states about the power of 'Central Authority' to refer the matter for an investigation.

“Central Authority may, after receiving any information, complaint or directions from the Central Government or of its own motion, conduct or cause to be conducted a preliminary inquiry as to whether there exists a prima facie case of violation of consumer rights or any unfair trade practices or false or misleading advertisements, by any person, which is prejudicial to the public interest or to the interests of consumers and if it is satisfied that there exists a prima facie case, it shall cause investigation to be made by the District-General or by the District Collector.”¹⁹

Those suspected premises, documents, and record articles are allowed to be searched and seized as may be necessary to ascertain the violation of information consumer rights.

If an advertisement is found to be untrue or misleading, the 'Central Authority' may give instructions to discontinue or modify the advertisement.

It empowers the Central Authority to impose a financial penalty on any party found in a misleading advertisement, whether it is on the manufacturer, endorser, or publisher. He/it shall be liable for a minimum/maximum penalty of ten lakh rupees (Rs.10,00,000).²⁰ Further, in the case of subsequent violations by a manufacturer/endorser, additional penalty to the tune of up to fifty lakh rupees can be imposed by the Central Authority.²¹

If the 'Central Authority' believes it is necessary, it can impose a penalty on the maker, endorser, or publisher

¹⁷ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 17.

¹⁸ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 16.

¹⁹ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 19.

²⁰ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 21(2).

²¹ *Id.*

of the false advertisement of the product. It may, by order, impose on manufacturer or endorser a penalty which may extend to ten lakh rupees (Rs.10,00,000). Provided that the ‘Central Authority’ may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to fifty lakh rupees.²²

On finding upon an inquiry that a person or organisation has issued a misleading advertisement or caused to publish for the benefit of a person, the Central Authority may impose a penalty extending to ten lakh rupees on such person or organisation.²³

“While determining the penalty, regard shall be had to the following, namely:

- (a) the population and the area impacted or affected by such offence;*
- (b) the frequency and duration of such offence;*
- (c) the vulnerability of the class of persons likely to be adversely affected by such offence; &*
- (d) the gross revenue from the sales effected by virtue of such offence.”²⁴*

Misleading Advertisements and Endorsements Guidelines (2022)

All advertisements are subject to these rules, regardless of the format (print, electronic, or online). They go after:

- Producers, suppliers, or dealers whose goods or services are promoted.
- The companies that create the ads, advertising agencies.
- Sponsors who show up in commercials.²⁵

Although not stated clearly, it appears from the standards that websites and TV networks that publish advertisements are not held directly accountable. The Consumer Protection Act (CPA) does, however, provide some protection under Section 21(6). If platforms run advertisements in the regular course of their business and have no prior information that the advertisement is misleading, they cannot be penalized for doing so.

Valid Advertisements & Disclaimers:

If an advertisement follows these guidelines, it is deemed legitimate and not deceptive:

- Truthful Representation: The product or service is not overstated or given incorrect information.
- Scientific Accuracy: Statements must be supported by substantiated data.

²² *Id.*

²³ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 21(4).

²⁴ The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 21(7).

²⁵ Prevention of misleading advertisements – Analysis of guidelines issued by Central Consumer Protection Authority, *available at*: <https://www.lakshmisri.com/insights/articles/prevention-of-misleading-advertisements-analysis-of-guidelines-issued-by-central-consumer-protection-authority/#> (Last Visited on June 25, 2024).

- Consumer Rights: Avoid using them as differentiators in your marketing.
- Scientific Consensus: Steer clear of assertions that go against accepted scientific wisdom.
- Risk Disclosure: Provide accurate information regarding the dangers of not purchasing the product.
- Content Accuracy: Verify that statements made in reliance on publications are accurate.
- Adherence to Sector-Specific Laws: Respect laws that are particular to the marketed good or service.²⁶

It may happen that occasionally, during large production, there may be inadvertent failures to live up to promised claims. To be eligible for this exemption, the advertiser must, however, show that:

- *Product failures are within acceptable bounds;*
- *Advertised specimen can normally fulfil the promise; and*
- *Prompt action is taken to correct the deficiency for customers.*

It is also stated in the guidelines that while disclaimers can resolve problems and clarify claims, they cannot contradict the principal claims, withhold information about the claims, or correct previously stated erroneous claims. Disclaimers must be synchronized with voiceovers in audio advertising and prominently placed on packaging in the same language and typeface as the claim (preferably on the same panel).²⁷ Suppose advertisement might be in Hindi and disclaimer is in Urdu language, obviously in such a case, Hindi speaking population will not understand. Therefore, the disclaimer shall be in the same language as the advertisement.

The Allure of the Elusive Bargain: The Bait Advertisement

The term “bait advertisement” refers to a deceptive tactic employed in marketing. It entices consumers with the promise of incredibly low prices for goods, products, or services. However, upon closer inspection, it becomes frustratingly difficult to acquire the advertised items at those prices. This creates a sense of false scarcity, pressuring potential customers to consider alternative, often more expensive, options. They are not outright prohibited; they must meet certain requirements only then they are allowed:

- *Don't trick customers into purchasing things they don't need.*
- *Make sure there is enough supply to satisfy the expected demand. Indicate in detail the reasons for your restricted availability (if any).*
- *Indicate any more terms (such as age or regional restrictions) that may have an impact on availability, supply, or demand. Avoid misleading customers regarding the state of the market.*

Surrogate advertising is used to promote products which are banned from advertising due to government

²⁶ *Id* at 25.

²⁷ ASCI GUIDELINES FOR DISCLAIMERS MADE IN SUPPORTING, LIMITING OR EXPLAINING CLAIMS MADE IN ADVERTISEMENTS, *available at*: <https://www.ascionline.in/wp-content/uploads/2023/07/Amendments-Disclaimer-Guidelines-July-2023.pdf> (Last Visited on June 27, 2024).

regulations. Surrogate advertising employs a clever tactic: promoting a brand or product that closely resembles a banned item. This strategy aims to maintain brand awareness and visibility despite the ban. However, the law cracks down on such “indirect advertisements.” Essentially, it prohibits any attempt to circumvent existing legal restrictions by portraying a surrogate ad for a banned good or service as an advertisement for something entirely permitted. This ensures that the spirit of the law protecting consumers from harmful products is upheld.²⁸

The advertising landscape recognizes the vulnerability of children and has enacted safeguards to protect them. Certain advertisements are deemed off-limits if they:

- **Glamorize Danger:** These ads promote or trivialize behaviors that could put children at risk.
- **Exploit Inexperience:** They capitalize on a child’s lack of life experience to push products or services.

Advertisements that endorse, motivate, or excessively imitate behaviour that could be hazardous for children, or exploit their lack of experience, trustfulness, or loyalty, are banned. Advertising directed at children should not encourage negative body image or suggest that the advertised products are superior to natural or traditional foods that children might eat.

UNRAVELLING THE LABYRINTH: SOLUTIONS AND RECOMMENDATIONS

Our examination reveals some inherent weaknesses within the statute that threaten to impede the Act’s intended goals. Notably, the Act fails to provide a clear definition of “unfair” when outlining misleading advertisements. This omission creates a situation where: **“any advertisement could be deemed misleading if, through its actions or inactions, it fosters unfair trade practices.”** However, the very notion of “unfairness” hinges on subjective interpretation, leaving it vulnerable to exploitation.

Furthermore, the Act restricts the ability to file claims solely to consumers who have directly purchased a specific product or service. This presents a potential roadblock, as there are situations where legal entities who would not qualify as traditional consumers might wish to pursue claims in the public interest.

“An Act that clearly states protection of public interest as its primary objective ironically does not create an avenue for vigilant citizens to file a case in public interest or a Public Interest Litigation.”

As a suggestion, we should work towards enhancing consumer awareness is vital in combating misleading advertisements. Educated consumers are better equipped to identify and challenge deceptive marketing practices. Creating a public awareness campaigns and consumer education programs plays a significant role in this regard.

Online platforms need to implement stricter monitoring and control mechanisms to prevent the spread of false

²⁸ Surrogate Advertisement, *available at*: <https://www.clearias.com/surrogate-advertisement/> (Last Visited on June 28, 2024).

information. Collaboration between tech-companies and regulatory bodies is essential in this regard.

CONCLUSION

Companies engaging in misleading advertising risk damaging their reputation. Consumer trust is crucial for business success, and once lost, it is challenging to regain. Ethical advertising is essential for long-term sustainability and brand loyalty.

While India has made significant strides in addressing misleading advertising through legislative and regulatory measures, continuous efforts are required to enhance enforcement, consumer awareness, and industry cooperation. The combined efforts of the government, regulatory bodies, businesses, and consumers are crucial to creating a fair and transparent advertising landscape in India.
