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Proliferation in False and Misleading Advertisements in Digital Media Age in India

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ABSTRACT

Advertisers now have an easier time targeting specific groups thanks to social media, which can sometimes result in the dissemination of information that is false or misleading. It is possible for advertisements to take the form of fake news articles or social media posts that make health claims that are not supported by evidence, which could put the health of consumers at risk. Advertisers now have an easier time targeting specific groups thanks to social media, which can sometimes result in the dissemination of information that is false or misleading. It is possible for advertisements to take the form of fake news articles or social media posts that make health claims that are not supported by evidence, which could put the health of consumers at risk. The number of advertisements that contain misleading claims is growing, particularly in the digital space. ASCI discovered that 81 percent of the 8,299 advertisements that were examined in 2023-24 were deceptive. Influencers on social media frequently promote products without adhering to the appropriate regulations. On July 9, 2024, the Supreme Court ordered that Patanjali Ayurveda have to produce an affidavit in order to ascertain whether or not the request that was made to social media platforms in order to remove the misleading advertisements has been granted. This article will cover the aspect that in order to preserve the trust and loyalty of consumers, it is necessary to implement ethical guidelines and technological advancements in order to guarantee transparency and authenticity in consumer advertising.

Keywords: Advertisement, Misleading Advertisements, Digital, Celebrity, Regulators.

I. INTRODUCTION

Advertising is one of the most significant contributors to the global economy in terms of revenue. It is responsible for the creation of employment opportunities, both directly and indirectly, and it has an impact on a significant portion of the population. When it comes to advertisements, approximately 75 percent of the population in India is exposed to them through

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television, while almost the entire population is exposed to them through radio³. Promotion of a product, brand, or service can be most effectively accomplished through the use of advertisements, which are readily available in either print or digital formats. The primary purpose of an advertisement is to provide the target consumers with information about the products and services that are being offered, to persuade them that their facilities are superior to those of their competitors, and to keep the prospective customers aware of the products and services that are being offered. The advertisements should therefore make it possible for individuals to make well-informed decisions regarding their purchases.

Advertising is a beneficial tool as long as the techniques used are fair. Due to intense competition that exists in the market, the pressure that is consequently exerted to attract a greater number of customers, and the persistent urge that traders have to increase their sales, profits, and business, advertisers frequently resort to deceptive and misleading campaigns without providing any scientific or clinical data to back up their claims. When deceptive and fraudulent advertising tactics are used online by advertisers, aimed at attracting consumers by luring through false or misleading messages about products, about its qualities and utilities it is punishable. False and misleading advertisements affect consumer's "right to be informed" and results in injuring consumer interest as well as the competing commercial brands. There is no doubt that consumers are misled by false advertisements, and that competitors are harmed and hurt as a result. In point of fact, they violate a variety of rights that customers have, including the right to be adequately informed, the right to make choices, and the right to be protected from potentially hazardous products and services. Because of this, the misleading advertisements have a detrimental effect on the choices that consumers get to make⁴.

(A) What Influences Consumers?

In today's world, the proliferation of audio-visual advertisements can be attributed to the widespread use of various technologies such as radio, television, telephones, and computers. When it comes to putting a brand in the spotlight and attracting the attention of consumers, advertisements are an extremely important factor. They are constructed on narratives that convey to customers the distinctive selling proposition of a particular brand. Nevertheless, it is said that certain brands resort to making misleading claims in their advertisements in order to increase their market share of consumers. In order to attract customers, advertisements are

³ M. Trehan & R. Trehan, (2010) Advertising and Sales Management. New Delhi. V K Publications, p 39.

⁴ Global Advertising Lawyers Alliance (GALA), False and Misleading Advertisements in India available at <https://www.lexology.com/library/detail.aspx?g=55951606-036e-4f42-b0dd-156a32cd53b4> assessed on July 01, 2024.

constructed on such lines and are placed in such an intelligent way on multimedia with the assistance of artificial intelligence, in order to ensure, that when an adult, whether they are male or female, or a child, opens social media platforms (such as Facebook, Instagram, Twitter, Snapchat, etc.), they will receive advertisements that are tailored to their preferences. One of the most important aspects of celebrity branding is the recognition of the brand. To be able to establish a brand by its name, attributes, and logos is what is meant by the term "brand recognition." This refers to the ability of the general public to recognise a brand. It is most successful when a brand is recognised without a company name and is then exposed by the customer through visual signifiers such as logos, slogans, and colours. This is the most difficult situation to implement successfully. In order to capitalise on the credibility and trust that they have among customers, brands often seek out celebrities to endorse their products. Celebrity endorsers usually recognised and have a positive influence on buyer purchasing decisions. The data by campaign India indicate that film stars held a significant influence, comprising more than 80% of the advertising scene in 2023. Following closely were sports personalities at 12% and television stars at 7%. More than 50% of celebrity-endorsed ads originate from the top 3 (Food and beverages, Personal care/hygiene and Services) sectors, with over three-fourths stemming from the top 7 sectors (other four are Household products, hair care, building material and personal healthcare). 'E-com-Gaming' was the top category for which maximum celebrities from different professions endorsed brands, followed by 'E-com-Online Shopping'. In terms of gender representation within advertisements, male film actors were featured in 42%, while actresses were prominent in 39% during this period⁵.

An important component that influences customers is emotional ties. People can experience joy, excitement, or even nostalgia from a well-made video advertisement, and this emotional connection can strengthen brand loyalty and influence consumer behaviour. Consumer decisions are influenced by celebrities, regardless of whether the message conveyed by the celebrity was accurate or misleading⁶. Take, for instance, a flurry of surrogate advertising in which actors and cricketers are seen endorsing. Cricketers Virender Sehwag, Sunil Gavaskar and Kapil Dev are seen endorsing Kamla Pasand, a pan masala brand, which has been advertising 'cardamom' on TV. Actors like Shah Rukh Khan, Ajay Devgn and Akshay Kumar too endorse Vimal, a tobacco brand, which has been beaming surrogate commercials for

⁵ Available at <https://www.campaignindia.in/article/celebrity-endorsed-ads-continue-to-grow-in-india-tam-adex-report/494738> assessed on July 01, 2024.

⁶ There has been a staggering 803 percent jump in complaints against brand advertisements featuring celebs. Yet, nobody—neither brands nor celebs—is playing responsibly. Rajiv Singh, Dhoni, Kohli, celebs and the menace of misleading ads, May 18, 2023, available at <https://www.forbesindia.com/article/m.a.d-marketing-advertising-decoded/dhoni-kohli-celebs-and-the-menace-of-misleading-ads/84995/1> assessed on July 01 2024

‘elaichi’ (cardamom).

II. PROLIFERATION OF THE WORLDWIDE WEB

The Internet is a major component of a country's infrastructure and the primary foundation of economic and social activities worldwide. India has more than 820 million active internet users at present. In 2023, internet penetration grew eight per cent year-on-year⁷. So online footprint, digital advertising continues to gain in importance. Be it search engine marketing, social media ads, or display banners on third-party websites, digital advertising is present everywhere around us⁸. The digital ad spending growth rate moderated to 15 per cent at Rs 39,714 crore in 2023 from 35 per cent in 2022 at Rs 34,405 crore⁹. There are enormous opportunities for expansion across a wide variety of channels and topics, which bodes well for the future of digital advertising in India. Taking advantage of the growing digital landscape is absolutely necessary because the growth is skewed towards digital media, and by year-to-year digital media will account more than 50% of the total advertising market. Because of the proliferation of the internet, marketing strategies have shifted from more conventional approaches to newer, more digital forms. Smart devices are popular among people of all ages and from all walks of life, and they are used in everyday life by people of all ages. Therefore, digital marketing has taken the place of traditional marketing. In today's world, "online shopping" has become the latest "hit." Various tools, such as emails, WhatsApp messages, text messages, and various social media platforms, such as Facebook, Twitter, Instagram, and LinkedIn, are utilised by marketers in order to communicate with their intended audience. These strategies are being utilised by the marketers in order to promote the products that they are selling. Websites, blogs, and other online platforms are also being utilised for this purpose. Using such tools, it is possible to reach a large audience located in any part of the world in a short amount of time, and the brand can be publicised in an instant. These strategies are extremely sophisticated, and they can also be utilised to target a very specific audience¹⁰.

III. MISLEADING ADVERTISEMENTS AND REGULATORY FRAMEWORK

Advertising that is honest and ethical is necessary in a market that is both competitive and buyer-friendly. On the other hand, the advertising industry has been subjected to a great deal of criticism for making claims that are either misleading or exaggerated in relation to the products,

⁷ Annapurna Roy, How India is using the Internet, *The Economic Times*, March 10, 2024, New Delhi.

⁸ Information Resources Management Association (ed.), *Digital Marketing and Consumer Engagement: Concepts, Methodologies, Tools, and Applications: Concepts, Methodologies, Tools, and Applications*, IGI Global, 2018

⁹ Raghav Aggarwal, High growth rate in Indian digital advertising a thing of the past: Report, *Business Standard*, Feb 19, 2024

¹⁰ Vibha Mathur and Saloni Arora, *Digital Marketing*, PHI Learning Pvt. Ltd., Delhi 2020, Preface p xi.

goods, and services that are being advertised. Additionally, the market is responsible for the formation of unfair trade practices by providing asymmetric information through advertisements that are misleading. As a result, the implementation of institutional safeguards has become an unavoidable necessity in India in order to safeguard consumers from being exploited. Section 6 of the Consumer Protection Act contains a description of the rights of consumers, and Section 2(r) of the act defines unfair trade practices. The Consumer Protection Act was enacted in 1986 with the purpose of protecting the rights of consumers. The Consumer Protection Act 2019 has widened the scope of the definition of "consumer" to include persons who buy or avail of goods or services online or through electronic means. The Consumer Protection Act 2019 has also included definition of advertisement as any audio or visual publicity, representation, endorsement or pronouncement made by means of, inter-alia, electronic media, internet or website. The Consumer Protection Act, 2019 defines "misleading advertisement" as a product or service that deliberately conceals "important" information¹¹. The CCPA has notified the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements¹², 2022¹³ with the objective to curb misleading advertisements and protect the consumers, who may be exploited or affected by such advertisements¹⁴.

To safeguard consumers from unfair trade practices in e-commerce, the Department of Consumer Affairs has already notified the Consumer Protection (E-commerce) Rules, 2020 under the provisions of the Consumer Protection Act. These rules, inter-alia, outline the responsibilities of e-commerce entities and specify the liabilities of marketplace and inventory e-commerce entities, including provisions for customer grievance redressal. The Department has noticed emergence of unfair trade practices known as "dark patterns" which involve using

¹¹ Under the Consumer Protection Act, 2019, misleading advertisement in relation to any product or service is defined as an advertisement, which— (i) falsely describes such product or service; or (ii) 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; or (iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or (iv) deliberately conceals important information.

¹² Misleading advertisement is now defined under section 2(28) of the Consumer Protection Act, 2019. The present guidelines define "bait advertisement", "surrogate advertisement" and clearly provides what constitutes as "free claim advertisements"

¹³ The CCPA has notified the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 on 9th June, 2022. These guidelines inter-alia provide for; (a) conditions for an advertisement to be non-misleading and valid; (b) certain stipulations in respect of bait advertisements and free claim advertisements; and, (c) duties of manufacturer, service provider, advertiser and advertising agency. Guidelines deals with prohibition of surrogate advertising, free claims advertisements, children targeted advertisements, and advertisements that are prohibited by law. Guidelines, 2022 specifically define amongst others, the expression "bait advertisements", "endorser" and "surrogate advertising".

¹⁴ In exercise of the powers conferred by section 18 of the Consumer Protection Act, 2019, to CCPA, the Guidelines were notified. Centre issues 'Guidelines on Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022', Press Information Bureau Delhi Jun 10, 2022

design and choice architecture to deceive, coerce, or influence consumers into making choices that are not in their best interest. The Department of Consumer Affairs (DoCA) conducted an interactive consultation in Mumbai on June 13, 2023 with various stakeholders including Advertising Standards Council of India (ASCI), e-commerce companies, industry associations etc. The Department of Consumer Affairs has urged the e-commerce companies, industry associations to refrain from indulging in any design or pattern in the online interfaces of their platform that may deceive or manipulate consumer choices and fall into the category of dark patterns¹⁵. The Department in 2022-23 has launched “Jagriti”, a mascot for empowering consumers and generating awareness of their rights. Jagriti is projected as an empowered young consumer¹⁶.

The Advertising Standard Council of India (ASCI), which is a self-regulating organisation that operates on a voluntary basis, was established in 1985 with the purpose of contributing to the development of advertisement standards. In order to safeguard the interests of consumers, the Advertising Standards Council of India (ASCI) has made a commitment to the cause of self-regulation in advertising. In order to increase the public's confidence in advertising, the primary goal of the Advertising Standards Council of India (ASCI) is to encourage responsible advertising. The Advertising Services Council of India (ASCI) was established with the backing of all four industries that are associated with advertising, namely advertisers, advertising agencies, the media (including broadcasters and the press), and other organisations; for example, market research companies. For ASCI, the Consumer Complaints Council (CCC) serves as the organization's beating heart and soul. In the event that any advertisement fails to adhere to the rules that have been established, advertising may be held accountable for violating the legal grounds in India. In India, there are a number of laws that pertain to some aspect of advertising. Some other enactments are:

Drug and Magic Remedies (Objectionable Advertisement) Act, 1954 (DMRA): This Act purports to regulate the advertisements of drugs in certain cases and to prohibit the advertising for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith¹⁷. Supreme Court has taken a serious view of misleading ads, amendments to strengthen the Act have been in limbo with the Union health ministry¹⁸.DMR Act and Rules

¹⁵ Consumer Protection Act, 2019 protects consumers involved in online transactions, Press Information Bureau Delhi Aug 02, 2023

¹⁶ Unstarred Question No. 1503, Rajya Sabha answered on 15.12.2023 by Shri Ashwini Kumar Choubey the Minister of State, Consumer Affairs, Food and Public Distribution.

¹⁷ Section 4 of the act states prohibition of misleading advertisements relating to drugs.

¹⁸ Rema Nagarajan, Amendments-to-Tighten-Law-on-Misleading-Drug-Ads-stalled-since-2020, The Times of India, Apr 30, 2024.

thereunder encompass the provisions for prohibition of misleading advertisements and exaggerated claims of drugs and medicinal substances including AYUSH medicines and for the penalty to be imposed on the defaulters¹⁹.

Drugs and Cosmetics Act, 1940: Classifies drugs under various schedules based on their potential risks and requirements for prescription, sale, and storage. The Act regulates the advertising and promotion of drugs and cosmetics to prevent misleading claims and ensure responsible marketing practices. Section 29 of the Act imposes penalty upon whoever uses any report of a test or analysis made by the Central Drugs Laboratory or by a government analyst, or any extract from such report, for the purpose of advertising any drug. Unlike the Drugs and Cosmetics Act, 1940, DMRA brings within its ambit medicines of all systems including Ayurvedic drugs. This is why many of the complaints against Patanjali's drugs were filed under DMRA as they claimed to cure/treat diseases listed under the DMRA²⁰. In order to check the veracity of misleading advertisements of AYUSH medicines, State/UT Governments are empowered to enforce the legal provisions under Drugs & Cosmetics Act, 1940, Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954 and rules there under²¹.

Food Safety and Standards Act, 2006: As per the provision of the Food Safety and Standards Act, 2006 (FSS Act, 2006), the misleading claims and advertisements on food products are prohibited and punishable offences under Section 23 and 24 of the FSS Act, 2006. Section 53 of this Act provides a penalty of up to Rs. 10 lakhs for false and misleading advertisements relating to the description, nature, substance or quality of any food. The Advertisement Monitoring Committee at the Food Safety and Standards Authority of India (FSSAI) flagged 32 fresh cases of food business operators (FBOs) making misleading claims and advertisements. They were found to be in contravention of the Food Safety and Standards (Advertisements & Claims) Regulations, 2018²².

Young Persons (Harmful Publications) Act, 1956: According to law in India advertisements for cigarettes, liquor, paan masala, products that are harmful to the public continue to find a place despite the ban imposed by the government in private channels, cable, and through the use of surrogates. Examples include Mc. Dowell's Soda, and Wills lifestyle stores which are seen as surrogate advertising for Mc Dowell's Whiskey and Wills cigarettes respectively. Section 3 of the Young Persons (Harmful Publications) Act, inter alia, imposes penalty for

¹⁹ Mechanism to Deal with the Misleading Advertisements, PIB Delhi, Jun 28, 2019.

²⁰ Supra note 15.

²¹ Supra note 16.

²² Saptaparno Ghosh and Sumeda, Explained/Misleading food ads and regulations to curtail them, The Hindu, May 07, 2023.

advertising or making known by any means whatsoever that any harmful publication²³ can be procured from or through any person²⁴. Act prohibits advertisements relating to any harmful publication (i.e., any publication that tends to corrupt a person under the age of 18 years by inciting or encouraging him or her to commit offences or acts of violence or cruelty or in any other manner whatsoever).

The Prize Competitions Act, 1955 (Act 42 of 1955): The online gaming boom is partly fuelled by large-scale and intensive advertising. Any competition whether a crossword, ad prize, missed word, prize competition, picture prize competition in which prizes are offered for the solution without proper license from the authorities is covered under this Act²⁵. These fruitful gaming advertisement campaigns have also bred the problem of false advertising. To attract new subscribers, the game operator usually offers game props and other gaming service items as gifts. With the rise of short video platforms, live streamers promote games by displaying game links in livestreaming or short videos and offer special benefits to the audience who have registered for game accounts. Surrogate advertising for this is done by various companies using celebrities to popularize their product to the general public through social media, print and television commercials.²⁶ By this medium of online advertising they are indulge in betting and gambling²⁷ which is largely illegal in India, with a few statutory exceptions at the State-level. This is established by the Public Gambling Act, 1867.

Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021, which on its face prohibits advertising of online betting and gambling and places the responsibility on intermediaries, such as Facebook, Instagram etc., to ensure that users do not advertise gambling services; Section 69A of the IT Act further allows the Indian Computer Emergency Response Team (CERT-in) to block websites promoting: “hate content, slander or defamation of others, promoting gambling”. Betting advertisements are further prohibited under the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements 2022 (Guidelines) under the Consumer Protection Act, 2019; the Advertising

²³ “Harmful publication” includes publications portraying commission of offences, acts of violence, cruelty, or incidents of a repulsive or horrible nature which would tend to corrupt a young person into whose hands it might fall.

²⁴ 3 (c) advertises or makes known by any means whatsoever that any harmful publication can be procured from or through any person,

²⁵ Section 11 of the act includes penalties for other offenses in connection with prize competitions, including advertisements.

²⁶ Aahna Mehrotra ,Advertising of Betting Websites in India, available at <https://www.asianracing.org/email/202311qb-advertising-of-betting-websites-in-india> assessed on July 05, 2024.

²⁷ Future Gaming, led by Santiago Martin, bought Rs 1,394 crore electoral bonds, paid Rs 6,000 crore GST. Facing ED probes, he caused Rs 910 crore loss to Sikkim govt in Future Gaming’s Santiago Martin on ED, IT radar for over a decade, the Times of India, March 15, 2024 (New Delhi). Mahadev Betting App Case was also opened in March 2024.

Standards Council of India (ASCI) Code; and the Cable Television Network Rules, 1994 (Rules) which together prohibit any advertisement of harmful products and situations like – alcohol, tobacco and betting & gambling²⁸.

IV. SUPREME COURT ON MISLEADING ADVERTISEMENTS

When it comes to advertisements that are misleading, the Supreme Court has levelled competition by holding celebrities and influencers equally accountable for their actions. According to the order that was issued by the Supreme Court on May 7, 2024 celebrities, social media influencers and advertisers will be equally responsible and liable if they endorse and publish deceptive and misleading advertisements campaigns or services. These public figures are solely responsible for conducting due diligence. The highest court in the land, in its directive, brought attention to the significant influence that endorsements from public figures, celebrities, and other influential people have on the decisions that consumers made. It stressed the need for these individuals to act responsibly when endorsing products in advertising campaigns²⁹. Before broadcasting or publishing any advertisement, advertisers are now required to submit a self-declaration, and there are no exceptions allowed if this declaration is not made.

The Supreme Court reprimanded Patanjali Ayurved, led by Baba Ramdev, for flouting court orders on misleading advertisements³⁰. Despite an apology, the court doubted the sincerity of the company's remorse and warned of contempt charges. Patanjali faced scrutiny for continuing ads despite an undertaking not to, leading to potential legal consequences³¹. The company co-founded by self-styled yoga guru Baba Ramdev, is facing contempt proceedings for endorsing misleading advertisements in violation of the orders of the top court. He submitted to the Court that he had made requests to social media intermediaries and e-commerce platforms to pull out advertisements on these products³².

Supreme Court in the case of Indian Medical Association vs. Union of India³³ stated that advertisers/advertising agencies and endorsers are equally responsible for issuing false and misleading advertisements. Such endorsements that are routinely made by public figures, influencers, celebrities etc. go a long way in promoting a product. It is imperative for them to

²⁸ Ibid.

²⁹ Indu Bhan, Celebs and influencers will be held liable for misleading ads, warns Supreme Court, *The Economic Times*, May 8, 2024, New Delhi.

³⁰ The company had been issuing advertisements that denigrated the allopathy system of medicine.

³¹ Indu Bhan, Patanjali misleading ads case: SC raps Baba Ramdev for 'absolute defiance', says contempt plea to be taken to logical conclusion, *The Economic Times*, Apr 02, 2024 (New Delhi)

³² Stopped sale of 14 products whose manufacturing licences were suspended: Patanjali to Supreme Court, *The Hindu Bureau*, July 09, 2024.

³³ Writ Petition (Civil) No.645/2022 in the Supreme Court of India decided on 7 th May, 2024.

act with a sense of responsibility when endorsing any product and take responsibility for the same, as reflected in Guideline No.8 of the Guidelines, 2022 that relates to advertisements that address/target or use children for various purposes and Guideline No.12 that lays down the duties of manufacturers, service providers, advertisers and advertising agencies to ensure that the trust of the consumer is not abused or exploited due to sheer lack of knowledge or inexperience. Guideline No.13 requires a due diligence to be undertaken for endorsement of advertisements and requires a person who endorses a product to have adequate information about, or experience with a specific good, product or service that is proposed to be endorsed and ensure that it must not be deceptive. No advertisements shall be permitted to be run on the relevant channels and/or in the print media/internet without uploading the self-declaration.

(A) How to Control Misleading Advertisement Online

Advertisement has been around for a long time and is now an integral part of any commercial marketing strategy. Producers use it to attract consumers to their commercial offerings and increase product consumption. A misleading advertisement is defined as any advertisement or promotion that misrepresents the nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities in order to mislead the consumer via television, radio, or other electronic media, newspapers, banners, posters, handbills, wall-writing, and so on. If an advertisement misleads the public a complaint can be registered along with a copy/video/audio of such advertisement through the web portal of the GOI at <http://gama.gov.in> to bring it to the notice of the Government.

As there are many regulators and legislations to control misleading advertisement, sole regulator having jurisdiction over all sectors to control false and misleading advertisement is recommended. The unification of many laws currently existing into a single comprehensive legislation will greatly assist simplification. Comprehensive legislation should be developed as a model for regulation that ensures a balance between commercial enterprises' "right to advertise" vis-à-vis consumers' "right to be informed." Under this legislation an agency can be created that prohibit misleading advertising even before it is published.
