

Regulating Misleading Advertisements: Legal Provisions and Institutional Framework

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In view of its adverse effect on consumer welfare, misleading advertising is sought to be regulated in most of the countries of the world. This note presents the legal provisions and institutional framework that regulate misleading advertisements in our country such as the MRTP Act, the Consumer Protection Act, etc.

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Though advertising has a positive contribution to make, one needs to recognize that advertising has immense manipulative power and capacity to harm the consumer and the public interest, Unscrupulous and excessive advertising not only leads to increased distribution costs, resulting in increased selling price, but also tends to tempt the buyer to buy what he does not necessarily need. Vance Packard, one of the most vehement critics of advertising, has rightly pointed out the manipulative and misleading effects of advertising:

Large-scale efforts are being made, often with an impressive success, to channel the buyer's thought processes and purchasing decision by the use of insights gleaned from psychometry and social sciences, with the result that many of us are being influenced and manipulated far more than we realize, in the patterns of our everyday lives.¹

Objective of Legal Control

The objective of regulating misleading advertising is to ensure that advertisements do not distort the facts about the product and mislead the buyer through subtle implications, omissions, and false statements about the quality, quantity, features or other characteristics of the product or any service accompanying the product, e.g., repair and maintenance.

Regulatory Measures

In view of its enormous capacity to harm the

¹Packard, Vance (1957). *The Hidden Persuaders*, New York: Pocket Books, pi.

public and the consumer interest, unfair advertising is sought to be regulated in almost all major countries of the world. In India, statutory provisions for the regulation of misleading advertising are contained in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), and the Consumer Protection Act, 1986 (CPA). The regulatory measures for misleading advertisement under the MRTP Act and the CP Act are similar to a certain extent. Under both the enactments, a misleading or deceptive advertisement amounts to unfair trade practice (UTP).² Moreover, the regulatory measures under the two major consumer protection legislations are applicable to goods as well as services and to private as well as public undertakings. The statutory provisions for the regulation of misleading advertisements of drugs and magic remedies are contained in the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. These provisions are briefly stated below.

Concept of Unfair Trade Practice

A comprehensive definition of UTP is given in Section MA of the MRTP Act. An identical definition of UTP appears in Section 2(r) of the CPA. Thus, the concept of unfair trade practice under the two legislations is the same. However, the mechanism for regulation of UTP under the two legislations is somewhat different.

A UTP, in so far as it relates to advertising, refers to any unfair method or deceptive practice adopted for promoting the sale, use or supply of any goods, or for the provision of any service. Moreover, the following three advertising practices are particularly specified as unfair trade practices:

- Making false claims and misleading advertisements.
- Offering of bargain prices or pseudo discounts.
- Conducting of pseudo sales promotion contests.

The provisions relating to the regulation of unfair trade practices were incorporated in the MRTP Act, 1969, with effect from August 1, 1984.

False Claims and Misleading Advertising

As provided under Section 36A (1) of the MRTP Act, the following statements, whether made orally or in writing or by visible representation, would amount to an unfair trade practice:

- Falsely representing that the goods are of a particular standard, quality, quantity, grade, composition, style or model.
- Falsely representing that the services are of a particular standard, quality or grade.
- Falsely representing any re-built, second hand, renovated, reconditioned or old goods as new goods.
- Representing that the goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits, which such goods or services do not have.
- Representing that the seller or supplier has a sponsorship, approval or affiliation which he does not have.
- Making a false or misleading representation about the need or usefulness of any good or service.
- Giving any warranty or guarantee about the performance, efficacy or length of life of a product that is not based on an adequate test.
- Making to the public a misleading or false
 - i) Warranty or guarantee for a product or service.
 - ii) Promise to replace, maintain or repair an article or to repeat or continue a service until it has achieved a specified result.
- Misleading the public about the price of any product or the charge of any service.
- Giving false or misleading facts disparaging the goods, services or trade of any person.

It has been clarified that for the purpose of determining whether any statement amounts to a false representation or a misleading advertisement, each of the following types of statements shall be deemed to be a statement made to the public.

- Any statement expressed on an article offered for sale or on its wrapper or container.
- Any statement expressed on anything attached to, inserted in, or accompanying an article offered for sale, or on anything on which the article is mounted for display or sale.
- Any statement contained in anything that is sold or in any other manner made available to a member of the public.

Thus, the representation to the public includes every communication, whether expressed on the wrapper, container or the package of an article, in a point-of-purchase display or window display or through the mass media — newspaper, magazine, radio, television, posters, hand bills, direct mail, hoardings, product demonstration, and gift articles. Thus, public representation encompasses all forms of promotion and marketing communication — advertising, personal selling, publicity, sales promotion, packaging, and labelling.

Bait Advertising

The publication of any advertisement for the sale of a product or service on a bargain price is also not permitted under the MRTP Act [Section 36A (2)]. It would be an unfair trade practice if a person publishes any advertisement, whether in the newspaper or otherwise, for the sale, at a bargain price, of goods or services that are not intended to be offered for sale at the advertised price or for a reasonable period or in a reasonable quantity.

Saks Promotion Contests

As provided under the MRTP Act [Section 36A(3)], an advertisement shall amount to an unfair trade practice if the advertiser offers any pseudo gift or prize to those participating in the sales contest or creating an impression that something is being given free of charge when it is fully or partly covered by the amount charged in the transaction as a whole. Moreover, conducting of any contest, lottery or game of chance or skill, for the purpose of promoting the sale of any product or any business interest, will also amount to an unfair trade practice.

In many cases, the gift or prize offered free of charge along with the product is not really free — its cost is already included in the price of the product. Offering of any such gift or prize would amount to an unfair trade practice in two cases:

- When the intention of the seller is not to provide the gift or prize, i.e., the gift offer is not intended to be honored.
- When an impression is created that something will be given free while its cost is fully or partly included in the price of the product offered for sale.

Under the garb of promotional contests, sellers lure the unsuspecting and gullible consumers to buy unnecessary products.

Regulation of Misleading Advertising under MRTP Act

Under the MRTP Act, misleading or deceptive advertising is sought to be regulated by way of a 'cease and desist' order, or any other appropriate direction, issued by the MRTP Commission. Before passing such an order, the Commission is required to conduct an inquiry into the alleged misleading advertisement. The MRTP Commission is empowered to initiate such an inquiry on any one of the four bases (Section 36B):

- A complaint received from any consumer or any registered consumers' association or any trade association.
- A reference received from the central government or any state government.
- An application received from the Director-General of Investigation and Registration.³
- On its own knowledge or information (*suo moto*).

³The Director-General of Investigation and Registration (DGIR) is an officer appointed by the Central Government to assist the MRTP Commission in the regulation of unfair, restrictive, and monopolistic trade practices. He is expected to act as a watch-dog of public interest.

For conducting an inquiry, the Commission enjoys certain powers of a civil court such as summoning any witness and examining him on oath. The inquiry proceedings before the MRTP Commission are deemed to be judicial proceedings. Pending the completion of the inquiry, the Commission can issue a temporary injunction against the advertisement alleged to be unfair or deceptive, so that the erring party is restrained from carrying on the objectionable practice (Section 12A of the MRTP Act).

On completion of the inquiry, if the Commission is of the opinion that the said advertisement is prejudicial to the public interest or to the interest of any particular consumer or to consumers in general, it can direct the party concerned to discontinue the advertisement and not to repeat the same in future. Such an order is generally referred to as a 'cease and desist' order.

The Commission can also direct the person concerned to publish a corrective advertisement in the specified manner (Section 36D of the MRTP Act). Furthermore, the Commission can award suitable compensation against any loss or damage caused, to any person as a result of the impugned unfair advertisement (Section 12B of the MRTP Act).

Moreover, if there is an agreement relating to the impugned advertisement between the advertiser and any other party such as the advertising agency, media, etc., the Commission can 'Hectare the agreement as void or can direct the parties concerned to modify or terminate

Besides the above-mentioned statutory action, the company indulging in misleading advertising also gets adverse media publicity as the orders passed by the Commission are often reported ; in newspapers and other media.

The order passed by the Commission is a mandatory order, enforceable like a court order or decree. It can be appealed to only before the Supreme Court of India, on specified grounds (Section 55 of the MRTP Act). Non-compliance with the Commissioner's order amounts to an

offence, punishable with imprisonment and/or fine (Section 48C of the MRTP Act).

Since the incorporation of the provisions of regulation of unfair trade practices on August 1, 1984, the MRTP Commission has taken decisions on 1500 cases of false and deceptive advertisements. In a majority of these cases; the Commission took a serious view of such practices and either passed a 'cease and desist' order or accepted an undertaking from the respondents under section 36D(2) of the MRTP Act that the impugned unfair advertising practice would be discontinued and would not be repeated in future. Despite legal action provided against unscrupulous advertisers, there is no respite from the spate of misleading and deceptive advertisements in the mass media.

Surrogate Advertising

Certain liquor manufacturing companies seek to promote liquor surreptitiously to circumvent die legal ban on advertising of liquors. In the cases of Phipson & Co. Ltd. and Herbertson Ltd.*the Commission held that the publication of advertisements by liquor manufacturers, ostensibly in the name of any product other than the liquor sold under identical brand name intended to circumvent the legal ban on advertising of liquor, did not amount to an unfair trade practice. This is a disquietening decision and has received adverse public reaction. The Commission's ruling virtually gives a green signal to unscrupulous advertisers.

On September 8, 2000, the Central Government had announced a complete ban on the telecast of alcohol and tobacco advertisements in the country. The amendment to the Cable TV Networks (Regulation) Act, 1995, which took effect from September 8, 2000, also sought to prevent surrogate advertising. The Act prohibits all advertising which "directly or indirectly" promotes the production, sale or consumption of tobacco, cigarettes, and alcohol. Advertisements promoting synthetic baby food have also been banned.

⁴UTP inquiries Nos 20 and 22 of 1986, both decided on 3.7.1989.

Regulation of Advertising under CPA

Although the definition of UTP given in the CPA is the same as the one used in the MRTP Act, the mechanism for its regulation under the CPA is substantially different. The regulatory provisions of the CPA are to be enforced through the redressed of grievance by a three-tier, quasi-judicial machinery, set up at the district, state, and the national levels, known as the District Consumer Disputes Redressal Forum, the State Consumer Dispute Redressal Commission, and the National Consumer Disputes Redressal Commission, respectively. There are nearly 500 district forums (one in each of the districts) and 32 State Commissions (one in each of the states and union territories) in the country, besides the National Commission set up at New Delhi.

A complaint against any unfair trade practice (which includes misleading or deceptive advertising) as well as defective goods, deficiency in service, charging of excessive prices, and offering of unsafe products for sale can be filed before the appropriate consumer court by any consumer or a recognized consumers' association or the Central Government or the State Government [Section 2(1)(b) of the CPA].

Consumer courts enjoy the powers of a civil court for purposes of hearing the cases filed before them [Section 13(3) of the CPA]. They are required to follow a simple procedure for the disposal of cases without adhering to technical rules of evidence. These are meant to provide speedy relief to the aggrieved persons.

In the case of a UTP, a consumer court can pass a 'cease and desist' order against the erring party, award a suitable compensation to the aggrieved person, and order the payment of costs incurred by the winning party in pursuing the case (Section 14 of the CPA).

Thousands of complaints are received and adjudicated upon by these consumer courts every month. The majority of the cases pertain either to a deficiency in a service or defective goods encountered by consumers. The number of cases pertaining to unfair trade practices arising out of misleading and deceptive advertising is negligible.

Regulation under Drugs and Magic Remedies (OA) Act

The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, seeks to curb undesirable advertisements pertaining to drugs and magic remedies as such advertising was considered to encourage self-medication of harmful drugs. The Act lists the diseases and disorders in respect of which advertising is banned (Section 3 and Schedule of the Drugs and Magic Remedies Act, 1954). Section 4 of the Act provides that no person (other than the government) shall take part in the publication of any advertisement relating to a drug if it contains any matter which, (a) directly or indirectly gives a false impression regarding the true character of the drug, or (b) makes a false claim for the drug, or (c) is otherwise false or misleading in any particular material.

There is no separate machinery for the enforcement of the regulatory measures of the above-mentioned Act. The violation of the provisions is deemed to be a criminal offence. The enforcement of such an important piece of legislation has been far from satisfactory.

Regulation under Trade Marks Act

False and misleading advertisements may also attract regulatory measures provided in the Trade Marks Act, 1999. As provided in Section 103 of the Act, any person who (1) falsifies any trademark or (2) falsely applies to goods or services any trademark, or (3) applies any false trade description to goods or services, shall be punishable with imprisonment and fine. Moreover, under Section 107 of that Act, making of false representation of a trademark as registered shall be an offence, punishable with imprisonment and/or fine.

These provisions are intended to prevent the use of fraudulent marks and thereby protect the interest of consumers as well as legitimate businessmen. The Act also seeks to curb the use of trademarks which are 'deceptively similar' to a trademark already registered in someone's

name, and to prohibit 'false trade description.' These two expressions are exhaustively defined in clauses (h) and (i), respectively, of Section 2(1) of the Act. These provisions are, to a considerable extent, similar to the provisions relating to the regulation of unfair trade practices contained in the MRTP Act.

Regulation by SEBI

In order to protect the investor from unscrupulous practices of companies offering shares and debentures to the public, the Securities and Exchange Board of India (SEBI) has issued comprehensive guidelines. It is mandatory for such companies to make certain disclosures in their offer documents.

The Guidelines on Advertisements contained in the SEBI (Disclosure and Investor Protection) Guidelines, 2000, provide that an advertisement for the issue of shares, etc., must be truthful, fair, and clear and should not contain any statement which is untrue or misleading. An issue advertisement shall be considered to be misleading, if it contains:

- Any statement made about the performance or activities of the company in the absence of necessary explanatory or qualifying statements, which may give an exaggerated picture of *the* performance or activities.
- An Inaccurate portrayal of past performance or its portrayal in a manner which implies that, past gains or income will be repeated in the future.

Moreover, an issue advertisement should not contain any statement which promises or guarantees any rapid increase in profits.

Under the SEBI Guidelines, the term 'advertisement' has been assigned very wide meaning. As defined under the Guidelines, advertisement includes notices, brochures, pamphlets, circulars, showcards, catalogues, hoardings, placards, posters, insertions in newspapers, pictures, films, cover pages of offer documents, as well as radio, television, etc.

Self Regulation of Advertising

The internal or self regulation of misleading and deceptive advertising is sought to be achieved through the machinery of the Advertising Standards Council of India (ASCI), Mumbai, which is a voluntary organization of advertisers, advertising agencies, and the media (i.e., proprietors or publishers of newspapers, periodicals, TV commercial channels, etc.). ASCI has adopted the Code of Self Regulation in Advertising, which is intended to control offensive contents of advertisements. It seeks "to achieve the acceptance of fair advertising practices in the best interest of the ultimate consumer." In fact, it applies to every advertisement read, heard or viewed in India, directed to Indian consumers, even if it originates or is published abroad.

ASCI seeks to ensure that advertisements conform to its Code of Self Regulation which requires advertisements to be: (a) truthful and fair to consumers and competitors; (b) within the bounds of generally accepted standards of public decency and propriety; and (c) not used indiscriminately for the promotion of products, hazardous or harmful to society or to individuals, particularly minors.

ASCI also entertains complaints against advertisements which are considered by the Consumer Complaints Council (CCC) which takes into account the viewpoints of the advertiser also. It is empowered to issue appropriate directions to the advertiser where it finds that the particular advertisement violates the guidelines. It endeavors to achieve compliance with the decisions through "reasoned persuasion and the power of public opinion."

Though ASCI has been in existence for a period of 15 years, there is a lack of awareness about the Code of Self Regulation in Advertising among the practitioners in advertising as well as the consumers.

Codes for advertising have also been developed by Indian Newspapers Society (INS), Doordarshan, and the All India Radio. However, these codes lack legal backing and are not

effectively enforced. There is an urgent need to make these codes effective.

Advertising and Children

Advertisements mould the needs of consumers to a large extent and influence their social behaviour. Irresponsible advertising has a harmful effect on the vulnerable sections of the society, namely, children, youth, and the poor. Many of the television advertisements are directed towards children and the youth. They do not contain any information about the product's nutritional value. In fact, many of the products advertised are habit-forming and provide little value for money.

Many advertisements targeted at children violate the code formulated by ASCI as the ingredients of the product are harmful to

children's health. As per the ASCI code, no advertisement targeting children should contain anything, whether in illustration or otherwise, which might result in their physical, mental or moral harm or which exploits their vulnerability.

Conclusion

Though comprehensive legal framework for the control of unfair, deceptive, and misleading advertising in India exists, the practice continues almost unabated. Consumers and their organizations must assert their rights against unscrupulous businessmen indulging in such a practice and bring such cases to the notice of the enforcement agencies, which, in turn, have to play the role of a watch-dog of public interest.