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# Law And Advertisement In India

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## INTRODUCTION

Advertising is an important and legitimate means for a seller to awaken interest in his products. Advertising industry in India is on the expansion spree for the last few years and has become a serious and big business growing at considerable rate. However, the growth of this industry is affected by the prevalent malpractices carried out by advertisers in order to lure the consumers and sustaining an edge over the competitors. Advertisement, often described as commercial speech, enjoys its protection under Article 19(1) (a) of the Indian Constitution. As a facet of the right to information, it facilitates the dissemination of information about the sellers and their products. However, the manner of facilitation is subject to a number of statutory provisions. This bulletin attempts to give an overview of the various regulations and their efficacy in monitoring the practices prevalent in the advertisement world.

At present in India, there is no central statutory agency or uniform legislation regulating the advertising industry. The Indian advertising market as a whole is regulated and controlled by a non-statutory body, the **Advertising Standards Council of India (ASCI)**. In the absence of uniform integrated legislation, it is necessary for advertisers to ensure that an advertisement is in compliance with all local and national advertisement laws.

## ADVERTISING AND CONSTITUTIONAL PROVISIONS

Advertising is equated with constitutionally guaranteed freedom of opinion and speech. Therefore criticizing advertising or any attempt to restrict or ban advertising is almost always considered to be an attack on fundamental rights. "Currently or in the near future, any number of cases are and will be working their way through the court system that would seek to prohibit any government regulation of ... commercial speech (e. g. advertising or food labeling) on the grounds that such regulation would violate citizens' and corporations".

Critics argue that advertising invades privacy which is a constitutional right. For, on the one hand, advertising physically invades

privacy, on the other; it increasingly uses relevant, information-based communication with private data assembled without the knowledge or consent of consumers or target groups.

### **ADVERTISING STANDARDS IN INDIA: BRIEF INTRODUCTION**

In the last few years advertising has become serious and big business. The advertising business is growing at a considerable rate. There are several legislations that control the content of advertising. Some of the principal legislations are:

- Cable Television Networks (Regulation) Act, 1955
- Press Council of India Act, 1978
- Cable Television Networks(Amendment) Rules, 2006

There are also some prominent, prohibitory legal provisions that regulate advertising. In 1985, the Advertising Standards Council of India (“ASCI”), a non statutory tribunal, was established that created a self regulatory mechanism of ensuring ethical advertising practices. ASCI is a voluntary Self-regulation council. The members comprise Advertisers, Media, Advertising Agencies and other Professional/Ancillary services connected with advertising practice. ASCI entertained and disposed of complaints based on its Code of Advertising Practice (“ASCI Code”). This Code applies to advertisements read, heard or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant number of consumers in India. Some most significant laws are listed here:

The Supreme Court was categorical in its position in the Tata Yellow Pages Case-Advertising as a "commercial speech" has two facets. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised.

“Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements.” The economic system in a democracy would be handicapped without there being freedom of "commercial speech".<sup>17</sup>

The Supreme Court had continued: Examined from another angle, the public at large has a right to receive the "commercial speech". **Article 19(1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech.** So far as

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<sup>17</sup> Tata Press Limited v Mahanagar Telephone Nigam Limited and Others, Judgment of the Supreme Court, dated, 03/08/1995. Citation: 1995AIR (SC) 2438.

the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through the advertisements.

The protection of Article 19(1) (a) is available to the speaker as well as to the recipient of the speech.

The Supreme Court was significantly led by Judgment of the American Courts. The American Courts in 1940s had doubts if advertisement could be protected by the freedom of speech. This doubt had reflected in the Indian Supreme Court's decision in 1960 in the Hamdard Case.<sup>18</sup>

The Supreme Court, giving the judgment in the **Tata Yellow Pages Case in 1985, in the backdrop of revisions which had taken in the position of the American courts, was categorical.**

We, therefore, hold that "commercial speech" is a part of freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution.

It was also considered expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by **article 47 of the Constitution; Section 3(a) of the defines 'advertisement' as including: 'any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas'**

## **LAWS RELATED WITH ADVERTISEMENTS WHICH ARE IN OPERATION IN INDIA**

**The India Penal Code, 1860**, prohibits the dissemination of any obscene matter under section 292 and 293 This Act also prohibits the publication of matter connected with unauthorized lotteries and publication of appeals using national symbols for furthering the prospects of any candidate at an election.

**The Press and Registration of Books Act, 1867** which mandates that every copy of a paper or book printed in the country, must contain the name of the owner, editor, publisher, and place of printing date and price of publication.

**Indian Telegraph Act 1885:** Control of Government over broadcasting rests in Article 246 of the Indian Constitution and in several other laws including the ITA 1885 and the Indian Wireless Act 1933. The current broadcasting policy is based on Article 19(2) of the Indian Constitution and the AIR code of 1970.

**The India Post Office Act, 1898** imposes prohibition on the transmission of any indecent or obscene matter through the post and allows for inspection in the

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<sup>18</sup> Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Another v. Union of India and others, a judgment of the Supreme Court. Citation: [SCR 1960 (2)].

interest of public safety. Under this act, it is prohibited to transmit by post of tickets, proposals, etc., relating to unauthorized lotteries.

Section 23 of the Act provides any postal articles sent by post in contravention of the provisions may be detained. Section 19A and 20 provides to allow opening and destroying or disposal of them in such a manner as the Central Government may direct by rule, respectively. According to section 20 of the Act, contravening the provisions is punishable with imprisonment for a term, which may extend to one year or fine or with both.

**The Emblems and Names (Prevention of Improper Use) Act, 1950** forbids the use by any private party of certain names, emblems etc.

**The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954** (Act 21 of 1954) has been enacted which is an Act to control the advertisements of drugs in certain cases, to prohibit the advertisements for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. Any notice, circular, label, wrapper or other document and any announcement made orally or by any means of producing or transmitting light, sound or smoke are considered as Advertisement.

**The Prize Competitions Act, 1955** (Act 42 of 1955) prohibits the publication of matter with unauthorized prize competition.

**The Young Person (Harmful Publications) Act, 1956** (Act 93 of 1956) prohibits the dissemination and publication likely to encourage antisocial tendencies and deemed to be harmful to persons under the age of twenty years.

**The Copyright Act, 1957 (as amended upto August, 2012)**, which protects the original work of writers, artists, musicians, dramatists, film and video producer and other creative persons from being pirated. Infringement of copyright or other rights conferred by Copyright Act is an offence. It shall be punishable with imprisonment, which may extend to one year or with fine or with both?

**The children Act, 1960** prohibits the disclosure of names, address and any other particulars of any child involved in any proceedings.

**The Press Council Act of 1965:** It established the first press council of India in 1966 which was dissolved in 1975 during the emergency but was re-established under the Press Council Act of 1978. The Council comprises 28 members and a chair. The council has the power to initiate, hear and adjudicate complaints against the press as well as against the authorities.

**Competition Act 2000** defines unfair trade practice to cover several acts aimed at promoting the sale, use of supply of any good, or the provision of any services which cause loss or injury to the consumers of those goods and services. Disobedience to Act has made punishable with imprisonment for a term which may extend to ten thousand rupees or with both.

**The Prevention to Insults to the National Honor Act, 1971** forbids the bringing into contempt of the national flag or the constitution of India in any manner.

**Contempt of Courts Act, 1971** relates to the willful disobedience of judicial orders and the like and to any publication which interferes with or undermines the administration of justice. For example, a journalist is guilty of contempt of court if he or she publishes a report on a case held in camera (in the private chamber of judge).

**The Criminal Procedure Code, 1973** empowers the government to declare certain copies of publications forfeited and to issue search warrants for such publications that offends Indian Penal Code provisions relating to public order or security of the state.

**The Prize Chits and Money Circulation Schemes (Banning) Act, 1978** imposes a prohibition in respect of chit and money circulation schemes.

**The Indecent Representation of Women (Prohibition) Act, 1986** forbids the depiction of women in an indecent or derogatory manner in mass media. Such offences are punishable with imprisonment extending up to two years and with a fine extending up to two thousand rupees on first conviction and for second and subsequent convictions, a minimum term of six months extendable to five years together with a minimum fine of ten thousand rupees extendable to one lakh rupees is prescribed.

**Prasar Bharti Act, 1990** envisaged the setting up of 22 member parliamentary committee to oversee the autonomous corporation as well as a Broadcasting Council to hear complaints.

**Cable Television Networks (Regulation) Act, 1994** which mandates the registration of cable network before starting operations, specifies the use of standard equipment, requires a programme code and prohibits the transmission of certain programmes. The regulation legalizes the seizure and confiscation of equipment and imposition of penalties for non-compliance.

**The All India Radio Code** for commercial advertising originally covers advertising on television also. It lays down standards of conduct for advertisers. The code of commercial advertising on Doordarshan published in 1986 now lays down standards of conduct for advertisers on Indian television.

## **CODE AND CONDUCTS RELATED TO ADVERTISING**

Several code and conducts are introduced by legal structure on India to govern and control over the advertisement, publishers, editors, ad designers, printers etc. so that proper and ethical presentation of the content could be administered. Some of the related code and conducts are as follows:

### **1. INDIAN PENAL CODE 1860 AND ITS SECTIONS RELATING TO ADVERTISING**

In 1860, a comprehensive law, the Indian Penal Code was enacted. It contained offences like defamation and obscenity which writers, editors, publishers and printers must avoid. The sedition was added to it in 1870, promoting enmity between classes in 1898, outraging religious feelings in 1927 and assertions against national integration in 1927. Various sections of this law that potentially Affect the operations of the press are as under. Section 144 of IPC intended to maintain public order & Penal Code provisions on sedition (124A).

Section 124-A was a simple version of the law of sedition passed in 1870. It prohibited the promotion of hatred or contempt or disaffection with the Government using words, spoken or written or by signs or visible representation.

Section 124A on sedition included public disorder as a gist of offence, it would be protected by clause (2) of article 19. Thus, a limit was put on the width of the ambit and scope of the section. The validity of section 505 which makes the spread of rumors or reports with intent to induce any officer of the army, navy or air force to mutiny or an offence similarly against public tranquility, etc. was also upheld by the Supreme Court. Section 295A of the IPC provides for punishment for deliberately and maliciously outraging the religious feelings of any class of citizens. While Section 505 of IPC makes publication or circulation of any statement, rumor or report punishable, if it is made with the intent to cause any officer of the army, navy or air force to mutiny or other disregard or fail in his duty as such.

## **2. INDIAN CONTRACT ACT 1872 AND ITS SECTIONS RELATING TO ADVERTISING**

It is mentioned that there is no specific section of this Act directly related to advertising but the communication of proposals under various sections have been described under this Act. The section 3 of the Act define the communication of the proposals, the acceptance of proposals and revocation of proposals and acceptances. They respectively are deemed to be made by any act or omission of the party proposing, accepting or revoking by which intends to communicate such proposal, acceptance or revocation or which has the effect of communicating it.

### **Orders of the apex consumer court pertaining to misleading advertisements:**

In its order in the case of M.R.Ramesh VS M/S Prakash Moped House and Others,( RP No 831 of 2003)<sup>1</sup> the apex consumer court warned against advertisements that use fine print to hide crucial information pertaining to products and services, thereby misleading the consumer, and by awarding substantial compensation to the consumer, who was misled by such an advertisement, the National Commission made it clear that it would not take such

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<sup>1</sup> RP No 831 of 2003  
Bench: D Wadhwa, R Rao, B Taimni

violations of consumer's right to information lightly. Its advice to manufacturers and service providers is "advertisements should not mislead and should give a clear picture of the quality of the goods sold".

This case pertains to a motorbike – Hero Honda CD- 100 that Mr M.R.Ramesh bought in Bangalore in February 1993. His contention was that at the time of purchase, he was assured that the bike would run 80 kms on a litre of petrol. However, the bike gave 22 kms less than promised . He filed before the National Consumer Disputes Redressal Commission, New Delhi, an advertisement published in October 1993, wherein the manufacturer had made such a claim about the mileage of the motorcycle. **CABLE TELEVISION NETWORK REGULATION ACT, 1995**

The cable Television Network Regulation Act mandates that all advertisements transmitted through the cable television network adhere to the Advertising Code formulated under it. Briefly, the code stipulates that all advertisements should conform to the laws of the country, the product advertised should not suffer from any defect or deficiency as mentioned in the Consumer Protection Act, 1986 and should not contain references which are likely to lead the public to infer that the product advertised has some miraculous property or quality which is difficult of being proved. Any 'Authorized Officer', either the district magistrate or the sub divisional magistrate or the commissioner of police or any other officer notified by the central or the state government can take action against any violation of the Advertising Code.

The main problem with this code is the enforcing agency. Such an advertising code should be enforced by an independent regulator, like say a broadcasting regulator and certainly not the police. In Australia, for example, the Broadcasting Regulator looks at violations of advertising codes on television.

### **3. DRUGS AND MAGIC REMEDIES (OBJECTIONABLE ADVERTISEMENTS) ACT, 1954**

The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, basically prohibits four kinds of advertisements pertaining to drugs and magical cures. Section 3 of the Act says that no person shall take any part in the publication of any advertisement promoting a drug or leading to the use of a drug for

- a) The procurement of miscarriage in women or prevention of conception in women
- b) The maintenance or improvement of the capacity of human being for sexual pleasure
- c) Correction of menstrual disorders in women.

Section 3 further prohibits any advertisement promoting drugs for the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or

condition specified in the Schedule and the schedule lists a number of diseases, disorders or conditions such as diabetes, cataract, cancer, fevers (in general), obesity, rheumatism, impotence, high or low blood pressure, female diseases, epilepsy, stature of persons, venereal diseases, glaucoma, sterility in women, dropsy etc.

Section 4 of the Act prohibits advertisements relating to a drug if the advertisement contains any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false claim for the drug or is otherwise false or misleading.

Section 5 of the Act prohibits advertisements of magic remedies for treatment of certain diseases and disorders. Violation of the law attracts imprisonment for six months or fine or both, for first conviction and for subsequent conviction, imprisonment for a year or fine or both.

Earlier, AIDS/HIV was not in the Schedule of the Act. But subsequently, the union ministry of health decided to include the disease in the schedule to the Rules, so that it would prohibit misleading advertisements for the cure of AIDS and help regulatory authorities take action against such advertisements.

What prompted this move was the Kerala High Court's order in 2002, against the manufacture, sale and promotion of the ayurvedic drug "Immune QR" as a sure cure for AIDS. In response to public interest litigation, the Bombay High Court had also restrained Mr Majid from making "tall and unfounded claims" about the drug. (Press Information Bureau press release, titled "Kerala High Court bans magic drug; court order<sup>2</sup> to be severe deterrent for quacks", dated February 22, 2002).

#### **4. The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 and The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Amendment Act, 2002**

This law is also against misleading advertisements. It prohibits advertisements and promotion of infant milk substitutes, feeding bottles, and infant foods because their promotion creates a misconception and thereby misleads consumers into believing that infant foods or milk substitutes sold in the market are as good or better than mother's milk.

#### **Section 3 of 7 the Act says that**

No person shall;

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<sup>2</sup> *Bail Appl..No. 2848 Of 2012 () vs By Advs.Sri.Nagaraj Narayanan*



**(a)** Advertise or take part in the publication of any advertisement, for the distribution, sale or supply of infant milk substitutes or feeding bottles or infant foods.

**(b)** Give an impression or create a belief in any manner that feeding of infant milk substitutes and infant foods is equivalent to or better than mother's milk.

## **7. THE INDECENT REPRESENTATION OF WOMEN (PROHIBITION) ACT, 1986**

Act punishes the indecent representation of Women , which means “the depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals. In the Act, advertisement includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

## **CONCLUSION**

At present, there are numerous regulations monitoring the display of obscene and misleading advertisements in India. However, it is not uncommon to see various advertisements which are patently false and misleading promoting dubious products and making unsubstantiated claims. In reality, most of these ads are ignored by the consumers and go unnoticed by the statutory bodies, so in order to enforce the regulations the need of the hour is whenever an advertisement breaches public confidence, the regulators should take immediate action against the violators. It is crucial that ASCI should be given a binding force for regulating all kind of advertising modes such as print, electronic etc. similar to the existing television advertisements, which will prevent the newspapers and advertising agencies from violating the existing law. The proposed Broadcasting Services Regulation Bill, 2007 is also expected to bring about a major change in the regulatory mechanism of advertising in India with its content code, a scheme of broadcasting content certification and stringent penalties on contravention of its provisions. However, this Bill is also being debated for being arbitrary and completely vesting the command and control of the electronic media with the government.