CONTROL OF DECEPTIVE ADVERTISEMENTS IN INDIA

Thesis Submitted to the

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By

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Under the supervision of

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DECLARATION

I hereby declare that the thesis entitled, **"Control of Deceptive Advertisements in India"** for the award of the Degree of **Doctor of Philosophy in Law** is the record of bonafide research work carried out by me under the guidance and supervision of **Dr. V.S. Sebastian**, Former Director, School of Legal Studies, Cochin University of Science and Technology, Kochi - 22. I further declare that this thesis or any part of this thesis did not form part of any dissertation and has not been submitted by me in any other University / Institution for any other Degree, Diploma, Associateship or any other title or recognition.

Kochi,
1st February, 2018

Tina K. Stephen
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Certificate

This is to certify that the important research findings included in the thesis entitled, **"Control of Deceptive Advertisements in India"** have been presented in a research seminar held at School of Legal Studies, Cochin University of Science and Technology on 23rd August, 2017.

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This is to certify that this thesis entitled **"Control of Deceptive Advertisements in India"** submitted by Tina K. Stephen, for the award of the Degree of Doctor of Philosophy in Law is the record of bonafide research work carried out by her under my guidance and supervision in the School of Legal Studies, Cochin University of Science and Technology, Kochi – 22. All the relevant corrections and modifications suggested by the audience during the Pre-Synopsis Seminar and recommended by the Doctoral Committee have been incorporated by Tina K. Stephen in this thesis.

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PREFACE

The role that advertisements play in today's society cannot be overstated. It has the cardinal function of informing the customer regarding the goods and services available in the market and increases its visibility. Dissemination of information through advertisements in the broadcast as well as the internet medium has made its reach very wide. Comparative advertisements provide the customer with the added benefit of receiving information related to price and utility of products and services on a comparative basis. All this has helped the consumer in taking an informed decision before a purchase is made. He no more solely relies on the information given to him by the company sales person or any other random information.

But deception in advertisement strikes at the very root of this purpose. In India regulation of deceptive advertisement is scattered across various legislations. Most of these legislations are outdated as they do not address the present day challenges of consumers and companies in dealing with nascent deceptive advertising techniques. So-much-so that sometimes a consumer is oblivious to the fact that a certain information to which he is being exposed is in fact an advertisement. Comparative advertising, internet advertising, social media advertising, product placement and many new advertising techniques have made the regulation of advertisements imminent. The present Indian legislations need to be drastically revamped in order to address these issues

The self-regulatory organisation namely, the Advertising Standards Council of India also plays a central role in the regulation of deceptive advertisements. The participation of different members of the advertising industry such as the advertiser, advertising agency, broadcasters etc. makes self-regulation a good medium of regulation. But its functioning also leaves much to be desired. An analysis of the regulations and regulatory bodies pertaining to deception in advertisement has not been carried out exhaustively in the Indian context. This research tries to address this dearth of literature.

Original research is one of the most challenging aspects of life and requires constant guidance and support from different sources to find energy to accomplish it. Throughout the course of this research I have found such guidance and support from different quarters.

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Place: Kochi

1st February, 2018 **Tina K. Stephen**

CONTENTS

ABBREVIATIONS

A.	Atlantic Reporter
Admin. L. Rev	Administrative Law Review
AAF	American Advertising Federation
ADR	Alternative Dispute Resolution
AIR	All India Radio
A.I.R	All India Reporter
App.	Appeal
ASA	Advertising Standards Authority
ASCI	Advertisement Standard Council of India
ASRC	Advertising Self-Regulatory Council
BCAP	British Code of Advertising Practice
Bombay L. R.	Bombay Law Review
BRAI	Broadcasting Regulatory Authority of India.
CAP	Committee of Advertising Practice
CARU	Children's Advertising Review Unit
CBBB	Council of Better Business Bureau
CBFC	Central Board of Film Certification.
CCC	Consumer Complaint Council
C.C.C	Current Consumer Cases
C.O.D.	Crown Office Digest
CompCas.	Company Cases
C.P.J	Consumer Protection Judgments
CSEIndia	Centre for Science and Environment
D.L.T	Delhi Law Times
EASA	European Advertising Standards Alliance

EC	European Council
EU	European Union
E.C.R	European Court Reports
FICCI	Federation of Indian Chambers of Commerce and Industry
FMCG	Fast-moving consumer goods
FSSAI	Food Safety and Standards Authority of India
FTC	Federal Trade Commission
GAMA	Grievances Against Misleading Advertisements
Harv. L. Rev	Harvard Law Review
ICC	International Chamber of Commerce
I.L.R	Indian Law Reports
J.I.L.I	Journal of Indian Law Institute
NAB	National Association of Broadcaster
NARC	National Advertising Review Council
NARB	National Advertising Review Board
N.C.	National Commission
OfCom	Office of Communications
OFT	Office of Fair Trading.
SRO	Self Regulatory Organization
S.C.C	Supreme Court Cases.
S.C.L.Rev.	South Carolina Law Review
S.Ct.	Supreme Court Reporter
WHO	World Health Organization
MANU	Manupatra
MRTP Act	Monopolistic and Restrictive Trade Practice Act, 1969
MSU	Michigan State University
NAMS	National Advertising Monitoring Service

NAD	National Advertising Division
P.T.C	Patent & Trade Marks Cases.
Q.B.D	Queens Bench Division
TRAI	Telecom Regulatory Authority of India
SC	Supreme Court
S.C.C	Supreme Court Cases
S.C.R	Supreme Court Reporter
SRO	Self Regulatory Organisation
UCPD	Unfair Commercial Practices Directive
U.S.	United States Reports
U.S.C	U.S. Code
W.I.P.O	World Intellectual Property Organisation
W.T.O	World Health Organisation
WWW	World Wide Web

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18. *Havells India Ltd* v. *Amritanshu Khaitan & Ors,* 2015 (62) P.T.C. 64 (Del.).

19. *Hindustan Unilever Limited* v. *Colgate Palmolive,* A.I.R 1998 S.C. 526.

20. *Hindustan Unilever Limited* v. *Gujarat Co-Operative Milk,* Suit (L) No. 204 of 2017.

21. *Horlicks Ltd. & Anr*. v. *Heinz India, (P) Ltd.,* 164 (2009) D.L.T 539.

22. *Indian Express Newspapers (Bombay) Pvt. Ltd v. Union of India & Ors.,* A.I.R. 1986 S.C. 515.

23. *In re Glaxo Laboratories (I) Ltd. ('Glaxo') and Capsulation Services Ltd. ('Capsulation'),* UTP Enquiry No. 22/1985 Order dated 20-10-1987.

24. *Ishwar Rawat* v. *Haryana Urban Development Authority & Ors.,* III (2008) C.P.J. 351 (N.C.)

25. *John W. Rast* v. *Van Deman & Lewis Company,* 240 U.S. 342 (1916).

26. *Joint Stock Society* v. *UDV North America, Inc.,* 266 F.3d 164 (3d Cir. 2001).

27. *Kaviraj Pandit Durga Dutt Sharma* v. *Navratna Pharmaceutical Laboratories,* (1965) 1 S.C.R. 737.

28. *Kenny* v. *Gillett,* 17 A. 499 (Md. 1889).

29. *KLM Royal Dutch Airlines* v. *Director General of Investigation and Registration,* (2009) 1 S.C.C. 230.

30. *Kuoni Travels (India) Ltd.* v. *Thomas Cook (India) Ltd.,* UTP Enquiry Nos. 12,13/2001 Order.

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33. *M/S Emami Ltd.* v. *Nikhil Jain,* Order dated 31/10/2015 in Case No. 53/2013 by the District Forum, Delhi.

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35. *Marico Limited* v. *Adani Wilmar Ltd,* CS (OS) 246/2013.

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37. *N.K. Nair* v. *Chaithanya Builders and Leasing (P) Ltd.*, (1995) 1 C.P.J. 369.

38. *Novartis Consumer Health, Inc*. v. *Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578 (3rd Cir. 2002).

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40. *Pepsi Co. Inc. & Ors.* v. *Hindustan Coca Cola Ltd. & Another,* 2003 (27) P.T.C 305 (Del.) (DB).

41. *Pierce Leslie and Co. Ltd.* v. *E.J. Perumal,* I.L.R (1917) 40 Mad. 1069.

42. *Pizza Hut, Inc.* v. *Papa John's Int'l, Inc.,* 227 F.3d 489 (5th Cir. 2000).

43. *POM Wonderful LLC* v. *Coca Cola,* 134 S. Ct. 2228 (2014).

44. *R* v. *Committee of Advertising Practice,* (1991) C.O.D. 43.

45. *Reckitt & Coleman of India Ltd* v. *Kiwi TTK Ltd.,* 63 (1996), D.L.T. 29 (Del).

46. *Rohit Vaswani* v. *Era Landmarks (India) Ltd.,* Order dated 3/4/2013 in Case No. 52/2011 by the State Commission, Delhi.

47. *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks Inc.*, 902 F.2d 222 (3rd Cir. 1990).

48. *Sanjay Rastogi* v. *M/S Arsh Enterprises & Another,* Order dated 29/03/2011 in Case No. 216/2008 by the State Commission, Uttarakhand.

49. *Sakal Papers (P) Ltd. & Ors.* v. *The Union of India,* (1962) 3 S.C.R. 842

50. *Society for Civic Rights* v. *Colgate Palmolive (India) Ltd.,* 1991 (72) C.C.C. 80.

51. *Southwest Sunsites Inc.* v. *Federal Trade Commission,* 785 F.2d 1431 (9th Cir. 1986).

52. *Stanley Labs.* v. *FTC,* 138 F.2d 388 (9th Cir. 1943).

53. *Starey* v. *Chilworth Gunpowder Co.,* (1890) 24 Q.B.D. 90.

54. *Super Cassette Industries* v. *MySpace Inc,* 2011 (48) P.T.C. 49 (Del).

55. *The Scotts Company* v. *United Industries Corporation,* 315 F.3d (4th Cir., 2002).

56. *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd.,* (1995) 5 S.C.C. 139.

57. *Time Warner* v. *DirecTV,* 497 F.3d 144 (2nd Cir. 2007).

58. *United Breweries Limited* v. *Mumbai Grahak Panchayat,* I (2007) C.P.J. 102 (N.C.)

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60. *Vinoo Bhagat* v. *General Motors (India) Limited & Regent Automobiles Limited,* A.I.R. 1989 S.C. 1692.

61. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

62. *Warner-Lambert Co.* v. *Breathasure, Inc.,* 204 F.3d 87 (3rd Cir. 2000).

63. *Win Medicare Ltd.* v. *Reckitt Benckiser India Limited,* 2002 (24) P.T.C. 686 (MRTP).

64. *Zaffar Mohammad alias Z.M. Sarkar* v. *State of West Bengal,* A.I.R. 1976 S.C. 171.

Chapter 1

INTRODUCTION

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No one now can escape the influence of advertising-Pope Paul VI[1]

1.1 Introduction

Advertising is as old as civilisation and commerce. Some 3,000 years ago, shoemakers and scribes promulgated their services on clay tablets. Ancient Greeks used town criers to proclaim the arrival of ships laden with cargo of wine and spices[2].

Today, advertisements have taken over all walks of human life. From biscuits to beauty products, from hospitals to health drinks, companies invest huge amount of money in the advertisement of its products. Advertisements play a critical role in the society as it sells products and educates consumers with regards to its utility. It is not merely a business but a social activity which has substantial bearing on the life of individuals and the society as a whole. One of the primary functions of advertisements can be informing the consumer regarding the features of a product or service and there by bringing to him information such as price, utility etc. of the product. This function is better served when the advertisement is comparative in nature and provides information in relation to the competitor's products or services.

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1 Pontifical Council for Social Communications, "Ethics in Advertising", available at http://www.vatican.va/roman_curia/pontifical_councils/pccs/documents/rc_pc_pccs_doc_22021997_ethics-in-ad_en.html (accessed on 12-03-2014)

2 Lien Verbauwhede, "Intellectual Property Issues in Advertising", available at http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_advertising.pdf (accessed on 13-03-2014)

Advertisements also reaches out to those consumers to whom a sales person cannot reach.

The importance given to advertisements by the industry can be understood from the fact that Indian businesses have spent Rs.61,204 crore on advertisements in the year 2017[3]. The advertising sector has been recording a steady growth over the past few years[4].

Deceptive advertisement practices cut at the very root of the utility of advertisements. It raises ethical[5] and legal[6] concerns in the advertising context. It can also affect the consumer as it influences the consumer's belief and can have negative consequences on their finances and their health[7]. Advertisements also affect competition by way of influencing consumer choices[8]. Sometimes by giving wrong information through a deceptive advertisement, the company confuses and misguides the consumer. The consumers in such cases do not buy the product again once they come

[3] "GroupM Estimates India's Advertising Expenditure to Grow by 10% in 2017", GroupM Press Release, February 14, 2017, available at https://www.groupm.com/news/groupm-estimates-indias-advertising-expenditure-to-grow-by-10-in-2017 (accessed on 03-05-2017)

[4] In 2016 the advertising expenditure in India was Rs.57,486 crores. In 2015 this spending was only Rs.49,758 crore. But this is higher than 2014-15 when the advertisement spending was Rs.37,100 crores. In 2013-14, it was around 36,200 crores. In 2012-13 the total annual advertising spend in India was around 26,000 crores. In 2011-12 the expenditure was only slightly lower than the previous year and was at 25,594 crores.

Indian Mirror, "Indian Advertising Industry at a Glance in 2014-15", available at http://www.indianmirror.com/indian-industries/2015/advertising-2015.html (accessed on 03-05-2017)

[5] Michael R. Hymana, *et.al.*, "Research on Advertising Ethics: Past, Present and Future", Vol.23(3), Journal of Advertising, 1994, pp. 5-15, at p.5.

[6] Zhihong Gao, "Controlling Deceptive Advertising in China: An Overview", Vol.27(2), Journal of Public Policy and Marketing, 2008, pp. 165-177, at p.170.

[7] D.M.Boush, *et.al., Deception in the Marketplace: The Psychology of Deceptive Persuasion and Consumer Self-Protection*, Routledge, New York (1st edn., 2009), p.264.

[8] K.R.Lord and C.K.Kim, "Inoculating Consumers Against Deception: The Influence of Framing and Evectional Style", Vol.18, Journal of Consumer Policy, 1995, pp. 1-23, at p.16.

to know that the company has engaged in deceptive advertising and has cheated them[9].

In India, regulation of deceptive advertisements has not been subjected to a detailed study. This thesis is intended to address this dearth of literature.

1.2 Definition of Advertisement

There can be no one single definition for advertisements. Ones perception of advertisements and the connotations given to it can change day by day. Traditionally, John E. Kennedy has defined advertisement as "salesmanship in-print" and this apparently is one of the most widely used three word definition of advertisements[10]. Professor William Wells defines advertising as "a paid non-personal communication from an identified sponsor using mass media to persuade or influence an audience."[11] In *John W. Rast* v. *Van Deman & Lewis Company*[12] Mr. Justice Mckenna, dealing with advertisements said:

> advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase.[13]

[9] Shelley Frost, "Negative Effects of False Advertising", available at http://smallbusiness.chron.com/negative-effects-false-advertising-25679.html (accessed on 19-03-2014)

[10] Claude C. Hopkins, *Scientific Advertising*, Cool Publications, England (1st e-book edn., 2004), p.10.

[11] William D Wells, *et.al., Advertising: Principles and Practice,* Prentice Hall, New Jersey (3rd edn., 1995), p.11.

[12] 240 U.S. 342 (1916)

[13] *id.* at p.365-366.

> Justice Blackmun in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*[14] held that no matter what we feel regarding the quantum of advertisements that we are often exposed to, it cannot be denied that it is fundamentally dissemination of information regarding the product it tries to sell . This information can be regarding price and use of the product or regarding the seller who produced the product. In a free market economy private parties play a pivotal role in deciding the allocation of resources. It should be ensured that these decisions are reasonable and in larger public interest. And it is for this reason that there should be free flow of information.

The Code for Self-Regulation of the Advertising Standards Council of India[15] defines advertising as:

> a paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Any communication which in the normal course would be recognised as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.[16]

Thus advertising can be considered to be each of such expression made in the practice of trade, industry or of a profession with the goal of promoting the sale of goods or services.

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[14] 425 U.S. 748 (1976)

[15] Hereinafter referred to as ASCI.

[16] See, Advertising Standards Council of India, Code for Self-Regulation in Advertising, 1985, the definition clause.

From the few definitions given above we may come to a conclusion that advertising is nothing but the dissemination of information regarding the goods and its source. Practically looking at it, it is nothing but influencing someone's opinion regarding the article or services to be sold thereby inducing him to buy those goods or services.

1.3 Advertising: Judicial Perspective

In India courts have made an attempt to define advertisements from as early as the 1960's. The courts have also made an attempt to interpret advertisements vis-à-vis the constitutional right to speech and expression. The Honourable Supreme Court made such an interpretation while deciding on the case of *Hamdard Dawakhana* v. *Union of India*[17]. In this case it has been held that "an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed". It was further held that:

> when an advertisement takes the form of a commercial advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech, for the object is not propagation of ideas social, political or economic or furtherance of literature or human thought; but the commendation of the efficacy, value and importance of the product which it seeks to promote.[18]

The Supreme Court went on to decide that the right to publish and distribute commercial advertisements cannot be said to be a part of freedom of speech guaranteed by the Constitution.

[17] A.I.R. 1960 S.C. 554.

[18] *id* at p.563.

But the stand taken by the Supreme Court in *Hamdard Dawakhana case*[19] was later reversed in *Indian Express Newspapers (Bombay) Pvt. Ltd* v. *Union of India & Ors.* [20], and the court stated that as this case was in furtherance to an American case, and because the American case has been over-ruled in the US, the same should be done in India as well. The court further was of the opinion that the *Hamdard Dawakhana case*[21] was very broadly stated and that the state should not rely on it much. It further stated that only because commercial advertisements were issued by businessmen, they cannot be denied the protection under Article 19(1)(a) of the Constitution.

The Supreme Court in *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd.*[22] clarified the *Indian Express Newspapers case* [23] and held that "publication of advertisement is a free commercial speech" and hence protected under Article 19(1)(a) of the Constitution. Advertising which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product advertised. The public at large is benefited by the information made available through advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing 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". In relation to the publication and circulation of newspapers, the Supreme Court in *Indian Express Newspaper case*[24], *Sakal Paper case*[25] and

[19] *Supra* n.17.

[20] A.I.R. 1986 S.C. 515.

[21] *Supra* n.17.

[22] (1995) 5 S.C.C. 139.

[23] *Supra* n.20.

[24] *Supra* n.20.

[25] *Sakal Papers (P) Ltd. & Ors*. v. *The Union of India*, (1962) 3 S.C.R. 842.

Bennett Coleman case[26] has authoritatively held that any restraint or curtailment of advertisements would affect the fundamental rights under Article 19(1)(a) in relation to aspects of publication, circulation and propagation. Thus it was held that "commercial speech" was a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. The Supreme Court in this case has also made a comparison with the US position on advertisement and stated that the government was free to suspend any "commercial speech" that was made by the company if such speech was deceptive or false in nature. A commercial speech according to the court can be restricted easily if the Government has a reasonable basis to do the same.

According to the Supreme Court the right to advertise has two aspects. The first one includes the commercial aspect where advertisements come within the ambit of right to speech and expression. But the second aspect to advertisement is from the perspective of the consumer and it relates to its rights to receive information which is a part of right to life envisaged under Article 21 of the Constitution. The Supreme Court has rightly stated in *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd*[27] that "public at large is benefited by the information made available through the advertisement."

The restrictions to freedom of speech have been envisaged under Article 19 (2) of the Constitution. There could not be any kind of restriction on the freedom of speech and expression other than those mentioned in Article 19 (2). In *Tata Press Limited* v. *Mahanagar Telephone-Nigam Ltd*[28], the Supreme Court further observed that commercial speech which is deceptive, misleading or untruthful would be hit by Article 19(2) of the Constitution and can thus be regulated or prohibited by the State.

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[26] *Bennett Coleman & Co. & Ors* v. *Union of India & Ors,* A.I.R. 1973 S.C. 106.

[27] *Supra* n.22.

[28] *Supra* n.22.

1.4 Deceptive Advertisement

Legal consideration rather than ethical considerations, serve as the primary influence for the vast majority of marketing managers in their advertising strategy development and decision making[29]. So it is vital that regulatory definition of deceptive advertisement should be well demarcated. None of the Indian statutes provide a comprehensive definition of deceptive advertisement. This ambiguity surrounding the precise ambit of deception in advertisements in India has led to the creation of potentially deceptive advertising claims even though the marketer feels he is in full compliance with the law.

As per Aaker, deception is found when an advertisement is input into the perceptual processes of some audience and the output of that process (a) differs from the reality of the situation and (b) affects the buying behaviour to the detriment of the consumer[30]. Gardner points out that, where an advertisement is construed as deceptive by a consumer, a very important role is played by the consumer's existing beliefs and experiences which interact with the advertisement which he has been exposed to. Considering deceptive advertisement as a behavioural construct Gardner states that:

> if an advertisement (or advertising campaign) leaves the consumer with an impression or belief different from what would normally be expected if the consumer had reasonable knowledge, and that the

[29] Joel J.Davis, "Ethics in Advertising Decision-making: Implications for Reducing the Incidence of Deceptive Advertising", Vol.28, The Journal of Consumer Affairs, 1994, pp. 380-394, at p.383.

[30] David A. Aaker and George S. Day, *Consumerism (Search for the Consumer Interest)*, Free Press, New York (1974), p.138.

> impression and/or belief is factually untrue or potentially misleading, then deception is said to exist.[31]

Gardner has attempted to create a classification of deceptive advertising[32]. He created three categories, the first one being the unconscionable lie in which the claim made is absolutely false. The second category is where there can be a claim-fact discrepancy. In this case the given claim requires some further qualification so that it can be adequately evaluated. The third category is that of claim belief interaction where the existing beliefs of the consumers interact with the advertisement in hand to create a deceptive impression or belief in the mind of the consumer. This, Gardner says, happens even when the advertiser in not actually making a deceptive claim expressly or impliedly.

Russo suggested another categorisation namely fraud, falsity and misleadingness[33]. The first category namely fraud, was explained as an intentional falsity made by the advertiser with an aim to deceive the consumer. The second category, falsity, speaks of a discrepancy between the claim in the advertisements and the actual fact in hand and the third category, misleadingness, was explained primarily from the perspective of the consumer where there is a discrepancy between the fact and the consumers belief.

Armstrong and Russ[34] gave a two way classification to deception, depending on whether the claim is about the product's attributes, usage etc., or whether it is due to false express claims, false impressions created by omitting relevant information,

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[31] David M Gardner, "Deception in Advertising: A Conceptual Approach", Vol.39, Journal of Marketing, 1975, pp. 40-46, p.41.

[32] *id* at p.43.

[33] J. Edward Russo *et.al.*, "Identifying Misleading Advertising*",* Vol.8, Journal of Consumer Research, 1981, pp.119-131, at p.138.

[34] Gary M. Armstrong and Frederick A. Russ, "Detecting Deception in Advertising", Vol.23, M.S.U Business Topics, 1975, pp.21-32, at p.30.

not substantiating claims etc. This bifurcation fits into the classification schemata developed by other authors as described above.

There are several theory based classifications of deceptive advertising as mentioned above. But in practice, the following types of deceptive practices are observed in advertising.

(i) Bait-and-switch offers

In such offers the advertiser advertises a lower, less expensive type of product, but when the customer requests for this product the same is said to be unavailable, and therefore the customer is made to switch to a higher, usually a more expensive product[35].

(ii) False promises

Impossible promises are made through advertisements. These promises cannot be fulfilled, because they are impossible to perform[36]. For example, Foodyoga Health Clinic advertisement promised a loss of 15 Kgs in 3 months with no dieting, no exercise and no medicine. It was found to be deceptive by ASCI because it was impossible to achieve the said target.

(iii) False testimonials

The use of celebrities to endorse a product in-order to lure a customer is seen as a very common advertising technique. In such form of advertisements, the

[35] Brenda L Berkelaar and Patrice M Buzzanell, "Bait and Switch or Double-Edged Sword? The (Sometimes) Failed Promises of Calling", Vol.68(1), Human Relations, 2014, pp.157-178, at p.160.

[36] *Supra* n.33 at p.24.

celebrity often claims to have used the advertised product and guarantees its quality, usefulness etc.[37]

(iv) Misleading comparisons

Certain advertisement claims which make a comparison and which are difficult to verify fall within this category[38]. For example, a claim by a jeweler that his gold is the best quality gold in the world is difficult to prove.

(v) Visual distortions

The depiction of products in sizes different from the original product, or colour or brightness different from the original one to be sold can be called visual distortion[39]. For example, in cases of online purchase it is found that products such as dress materials etc. are shown in very bright colours but when the consumer actually sees the product, she realises that it is nothing similar to what she saw on the website.

(vi) Partial disclosures

In these kind of advertisements certain selected features of a given product are advertised and certain other related features which are not so attractive are not mentioned. For example, a mobile phone is advertised as having battery life of twenty-four hours and costs just Rs.10,000. But what is not mentioned in the advertisement is the requirement of a special charger for which payment has to be made separately over and above the cost stated in the advertisement.

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[37] Federal Trade Commission, "Guides Concerning the Use of Endorsements and Testimonials in Advertising" available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf (accessed on 25-10-2016)

[38] *Supra* n.22.

[39] Dean K. Fueroghne, *Law & Advertising: A Guide to Current Legal Issues*, Rowman and Littlefield Publication, United Kingdom (4th edn., 2017), p.53.

(vii) Fine print qualifications

Important conditions to a certain claim in an advertisement is given in small print. This leads to deception as important conditions escape the notice of the consumer. For example, a product such as chyawanprash on their packaging claims that it provides "3 times more immunity". The fine print says that the claim of "3 times more immunity" is based on "preclinical study on NK cells". Preclinical studies mean that it has not been tested on humans yet[40].

(viii) False comparisons

The comparison of two dissimilar products in order to show that the advertiser's product is superior on certain compared characteristics[41]. For example, if two soaps are compared for their germ fighting features, where one is an antiseptic soap and the other is a beauty soap, the comparison can be categorised as false comparison.

The above given categories are just a few out of the many different ways in which deceptive advertisements are launched in the market. As these advertisements can confuse and mislead the consumers, its proper regulation is imminent.

1.5 Deceptive Advertisements and the Indian Judiciary

The concept of deceptive advertisement was evolved by the courts over a period of time. New dimensions were added to the concept of deceptive advertising by different courts and tribunals.

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[40] A complaint was filed with the Advertising Standards Council of India against Dabur Chyawanprash which is a Dabur India Ltd. product. The complaint was upheld by the Consumer Complaints Council in January, 2014 and the use of fine prints was held to be a deceptive.

"ASCI Recommendations January 2014", available at https://ascionline.org/index.php/january-2014.html (accessed on 19-05-2015)

[41] William F. Arens, *et. al*., *Contemporary Advertising*, Irwin Inc., Illinois (10th edn., 2004), p.65.

One of the initial cases which also is a landmark decision regarding deceptive advertising was *Lakhanpal National Ltd* v. *M.R.T.P. Commission And Another*[42]. The case stated that, before deciding a case of deceptive advertisement it should be decided whether the given representation contains a false statement and is deceptive and, further what is the effect of such a representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. The position will have to be viewed with objectivity in an impersonal manner. This falsity should be substantial in nature as far as that advertisement is concerned. Some advertisers even use tricky language in their advertisement which leads to the consumer getting deceived, even if the specific fact might be true. In such cases also it can be said that there is deception.

The court also discussed one very important aspect which was considered as a key element of deceptive advertisement in many jurisdictions. This was 'the capacity of a deceptive advertisement to affect the economic behaviour of the consumer'. Many other jurisdictions have considered this as a key element for, example in Europe, Article 2(2) of the European Union Council Directive[43] has considered this as a key aspect.

In *Vinoo Bhagat* v. *General Motors (India) Limited & Regent Automobiles Limited*[44] the court considered this aspect regarding deception in an advertisement leading to affecting the economic behaviour of the consumer. In this case, the advertisement was in such a fashion that the consumer was made to believe that he was buying a German car manufactured in Germany. But later he got to know that

[42] A.I.R. 1989 S.C. 1692.

[43] European Council Directive on Misleading Advertising (84/450/EEC)

[44] (2005) 3 C.C.C. 79.

the car was manufactured in Australia by Holden Company which was a subsidiary of the US company General Motors. The consumer was deceived through such an advertisement. His buying behaviour was affected and the National Consumer Disputes Redressal Commission ordered for replacement of the vehicle.

The above ratio has been reiterated in many other cases including *General Motors (I) Private Ltd.* v. *Ashok Ramnik Lal Tolat & Anr* [45], where the advertisement, by using tricky language, misled the consumer into buying a different product than what he actually intended to buy. Here the consumer was passionate of long distance driving and was desirous of buying a sports utility vehicle[46]. The Appellants brochure stated that "the vehicle is an SUV to end all SUVs". Thus the brochure was designed in such a manner that the consumer was made to believe that he was buying an SUV whereas the car actually was a normal passenger car. The car was not fit for "off-road, no road and dirt road" driving and also had many defects. The Supreme Court held that such an advertisement can be considered deceptive in nature and appropriate remedy was given to the consumer. The court further held that the fact that there are alternate options for the consumer will not mitigate the deception[47].

In *KLM Royal Dutch Airlines* v. *Director General of. Investigation and Registration*[48] it was held that a failure to disclose a material fact when a duty to disclose that fact has arisen, will also constitute a deceptive advertisement.

In re Glaxo Laboratories (I) Ltd. ('Glaxo') and Capsulation Services Ltd. ('Capsulation')[49] it was observed by the Monopolies and Restrictive Trade Practices

[45] (2015) 1 S.C.C. 429.

[46] Hereinafter referred to as SUV.

[47] *M/S. Cox & Kings (I) Pvt. Ltd.* v. *Mr. Joseph A. Fernandes, and Anr.*, 2006 (1) C.P.J. 129 (N.C.)

[48] (2009) 1 S.C.C. 230.

[49] UTP Enquiry No. 22/1985 Order dated 20-10-1987.

Commission[50] that injury is an important element of deceptive advertisement. The Commission held that section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 could not be invoked in spite of the fact that the given representation was an unfair trade practice because a very important ingredient of loss or injury was absent. But in *Society for Civic Rights* v. *Colgate Palmolive (India) Ltd*,[51] in a full bench decision of the Commission, the majority view held that the phrase "and thereby causes loss or injury to the consumers of such goods and services'' simply meant that when a trade practice fell within any of the categories envisaged under Section 36A of the Monopolies and Restrictive Trade Practices Act[52], it will be presumed that injury to the consumer has occurred. This presumption will stand even if no actual injury or loss has been proved. The definition related to unfair trade practice in India has been widened based on the provisions of the U.S. anti-trust laws[53].

From an analysis of the above given decisions certain important elements of deceptive advertisements have been identified. These elements are as given below:

a) A claim that is made explicitly or implicitly creating a certain belief.

b) This belief is regarding the characteristic of a particular product or service.

c) This claim is false or unsubstantiated.

d) This claim is such that it would affect the purchasing behaviour of the consumer.

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[50] Hereinafter referred to as the MRTP Commission.

[51] 1991 (72) C.C.C. 80.

[52] Hereinafter referred to as the M.R.T.P. Act.

The Act has been repealed and replaced by the Competition Act, 2002. The Competition Commission of India replaced the MRTP Commission.

The object of the M.R.T.P. Act, which was enacted on the recommendations of the Dutt Committee, was to ensure that there should not be concentration of wealth in a few hands. The Act also aimed at prohibiting monopolistic and restrictive trade practices in the market.

[53] Christopher Heath, *Intellectual Property Law in Asia*, Kluwer Law International, Germany (1st edn., 2002), p.464.

1.5.1 Tests for Identifying Deceptive Advertisements

Courts and forums have in the course of deciding cases related to deceptive advertisements, evolved a few tests to determine whether an advertisement is deceptive or not. Some of the most important tests which have been so evolved include:

(a) Reasonable person test, and

(b) Impression test.

1.5.1.1 *Reasonable Person Test*

As the law wants to protect the general public or common man against deceptive advertisements, the concept of "general public" or "common consumer" requires clarity. The Sacchar Committee[54] way back in 1978 had endorsed the "average purchaser" standard as a test to determine the character of a trade practice[55]. But the Supreme Court in some of the earlier cases such as the *Lakhanpal National Ltd. case*[56] failed to lay down any clear cut principle of the "common consumer" or "reasonable person". The apex court relies on the "reasonable man's intelligence" as a standard to test if there is deception in an advertisement. The court has used the "reasonable man" test to determine if a certain advertisement will be perceived as deceptive or not. The court goes on to say that when a "reasonable man" sees an advertisement, and he derives more than one meaning for that given advertisements, not a single one of these multiple meanings or interpretations should be deceptive in

[54] Justice Rajindar Sachar, *Report of The High-Powered Expert Committee on Companies and MRTP Acts*, 1978, p.263, available at http://reports.mca.gov.in/Reports/30Rajindar%20Sacher%20committee%20report%20of%20the%20High-powered%20expert%20committee%20on%20Companies%20&%20MRTP%20Acts,%201978.pdf (accessed on 23-09-2015)

[55] K Sampath, "New Challenges in Service Sector", in Vallanadu Narayanan Viswanathan (ed.), *Consumer Rights in Service Sector*, Concept Publishing Company, New Delhi (2008), p. 27.

[56] *Supra* n.44.

nature[57]. The term, reasonable person, has evolved during the period of *caveat emptor* which states that the buyer beware. The principle is that the buyer should expect some amount of hyper-bole or lying from the seller in the process of attempting to sell his goods. This view has been maintained by the court even in very recent cases[58].

But this interpretation should be analysed in the backdrop of the Indian conditions where we find that there is a huge consumer base which is illiterate, ignorant and highly gullible. In such a scenario, it would be wrong to apply this test in a blanket fashion as the advertiser who knows it, is ready to exploit this ignorant consumer group. The reasonable person test should also be analysed in the back drop of the '*caveat venditor*' rule as now there is a shift towards the principle of 'seller-beware'[59]. The seller should now look at his advertisement and ask himself the question whether the given advertisement has the capacity to deceive a reasonable consumer, and if it does, the same should not be published.

1.5.1.2 *Impression Test*

The impression test is an offshoot of the reasonable person test and it fine tunes this test. Rather than scrutinising the bits and pieces of a single advertisement, an overall impression created by the advertisement on a reasonable person should be taken into consideration. Way back in 1987 itself it was held that the courts will check the general impression that is created by the advertisement on an average consumer, rather than looking at the nitty-gritties of the advertisement [60].

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57 *Colgate Palmolive Company & Anr* v. *Hindustan Unilever Ltd.*, 206 (2014) D.L.T. 329.

58 *Hindustan Unilever Limited* v. *Gujarat Co-Operative Milk*, Suit (L) No. 204 of 2017, available at https://indiankanoon.org/doc/55113949/ (accessed on 25-10-2017)

59 Farooq Ahmad, "False and Misleading Advertisements – Legal Perspective", Vol. 38(2), J. I. L. I., 1996, pp. 168 – 183, p.177.

60 *Supra* n.40.

In *Pepsi Co. Inc. & Ors*. v. *Hindustan Coca Cola Ltd. & Another*[61], the court opined that most people who watch advertisements on the electronic media, such as television, get deeply influenced by it as it effects the psyche of the viewers. Therefore, an advertiser has to virtually walk on a tight rope while telecasting a commercial and repeatedly ask himself the question, what impact would the commercial have on the mind of a viewer?[62]

1.6 Existing Legal Framework for Deceptive Advertising in India

In India, laws pertaining to deceptive advertisements are spread across different legislations prominent among them being the Consumer Protection Act, 1986, Trademarks Act 1999, Cable Television Networks (Regulations) Act, 1995 and Cable Television Networks (Amendment) Rules, 2006, The Drugs and Cosmetic Act, 1940, The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954, The Food Safety & Standards Act, 2006, The Monopolies and Restrictive Trade Practices Act, 1969 and many more. But most of these legislations do not elucidate the concept of deceptive advertisement in detail.

Other than the above given legislations there is also a self-regulatory body namely the Advertising Standards Council of India which deals with advertising in India. ASCI is a non-statutory body created to ensure ethical practices in advertising and is composed of advertiser's, media, advertising agencies and other professional/ ancillary services connected with advertising[63]. ASCI has also developed an ASCI

[61] 2003 (27) P.T.C 305 (Del.)

[62] *Dabur India Ltd.* v. *M/S Colortek Meghalaya Pvt. Ltd.,* 2010 (42) P.T.C 88 (Del.)

[63] Federation of Indian Chambers of Commerce and Industry, "Advertising Standards in India: An Introduction", available at http://www.ficci.com/Sedocument/20240/Survey_on_Advertising_ Standards.pdf (accessed on 01-04-2014)

Code[64] which is voluntarily adhered to by those in the industry but is in no way mandatory.

India has a huge array of general as well as sectoral legislations to address the issue of deceptive advertising. Inspite of a catena of legislations, the instances of deceptive advertisements in India is on the rise. A thorough analysis of the existing laws and case laws along with the self-regulatory authorities is required to comprehensively clarify the interpretation, verification, and remedial mechanism of deceptive advertisement in India. The research will also attempt to make a comparative analysis of the mechanisms followed in other jurisdictions to deal with issues related to deceptive advertisements.

1.7 Statement of the Problem

Whether the present regulatory regime which is predominantly based on laws of the 80's and before is adequate to regulate the complex ingenious deceptive advertisement practises of the present day. The regulatory regime includes the self-regulatory regime as well.

1.8 Object of the Study

1. Conduct a diagnostic study to identify the lacunae and weaknesses of the existing legal framework on deceptive advertisements.

2. Evaluate the efficacy of the self-regulatory system in tackling with issues related to deceptive advertisements.

3. To evaluate the efficacy of the existing redressal mechanism for deceptive advertisements and to suggest appropriate changes.

[64] The ASCI Code for Self-Regulation of Advertising Content in India, 1985.

1.9 Research Questions

The following are the research questions framed on the issues:

RQ 1. Whether the present regulatory framework adequately protects a 'Consumer' from deceptive advertisement?

RQ1. a. Whether the institutional framework under the present legislations are equipped to provide the consumer adequate protection against deceptive advertisement?

RQ1. b. Whether the claim substantiation procedure of a deceptive advertisement claim is clear and predictable from the perspective of the consumer?

RQ1. c. Whether the consumer is adequately protected against internet based deceptive advertisements?

RQ1. d. Whether the present regulatory system provides adequate remedies to a consumer against deceptive advertisements?

RQ. 2 Whether the present regulatory framework adequately protects a competitor from deceptive advertisement?

RQ.2.a. Whether the claim substantiation procedure of deceptive advertisements is clear and predictable from the perspective of the competitor?

RQ. 2.b. Whether there are adequate remedies available for the competitor against deceptive advertisement?

RQ. 3 Whether the principle self-regulatory organisation namely the Advertising Standards Council of India is efficient to regulate deceptive advertisement practices?

RQ. 3. a Whether the ASCI system is structurally efficient?

RQ. 3. b. Whether ASCI's decision making process is efficient?

1.10 Outline of the Chapter

This thesis is divided into seven chapters and the First Chapter introduces the research and sets a precinct for the same. The chapter delineates the concept of deceptive advertisement and maps its jurisprudential evolution.

The Second Chapter makes a detailed analysis of the different legal provisions pertaining to deceptive advertisement primarily in the Consumer Protection Act, 1986 and the repealed MRTP Act, 1969. The chapter also briefly states the important provisions under the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954, and the Food Safety and Standards Act, 2006. The working of a few important regulatory authorities and its efficiency as far as dealing with cases of deceptive advertising is concerned has been covered. The chapter also analyses the reforms initiated in the regulatory framework by the Consumer Protection Bill, 2015.

The Third Chapter comparatively analyses control over deceptive advertising practices of various jurisdictions to explore whether any of the practices in these jurisdictions can be adopted to the Indian regulatory regime. The chapter primarily analysis the legal system in two jurisdictions namely, US and UK.

The Fourth Chapter analyses the claim substantiation process followed by different judicial forums (Consumer Forums, the erstwhile MRTP Commission and civil courts) in the country. It analyses the issues related to burden of proof, different

types of claims, different types of evidence etc. The Chapter briefly looks into the claim substantiation procedure followed in different jurisdictions. The chapter also attempts to highlight the benefits of predictability in the claim substantiation process.

The Fifth Chapter examines a very important mechanism to check deceptive advertising namely self-regulation. The international practices of self –regulation in different jurisdictions namely U.S., U.K. and Sweden have been looked into. An analysis of these bodies have been made on certain parameters. These parameters include the complaints procedure, decision making process, especially the independence of self-regulatory organisations during decision making. It also looks into the enforcement of their decisions and the interaction of these bodies with different state agencies. The aspect of preclearance of advertisements before they are published and the need for monitoring of advertisements has also been studied. The accessibility of these bodies to all stakeholders of the advertising industry including companies and the consumers has been studied.

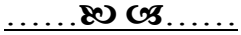
The Sixth Chapter comparatively analyses the international practice of self-regulation in different jurisdictions with that of the Indian self-regulatory system. The Chapter has studied the primary self-regulator in the advertising industry namely, the Advertising Standards Council of India. The Chapter tries to examine the strengths and weaknesses of the self-regulatory body and attempts to understand its role in co-regulating the advertising industry along with state agencies. Lastly the Chapter also makes suggestions regarding mechanisms to strengthen the Advertising Standards Council of India.

The Conclusion Chapter summarises the analysis of all other chapters and provides suggestions for improvement of the regulatory regime pertaining to deceptive advertisements in India. The Chapter takes each research question and enumerates how the research has answered these questions and provides suggestions

for each of those issues. Apart from the research question based suggestions, general suggestions have also been provided for improvement of the system.

1.11 Conclusion

There are a plethora of ways through which advertising can be done today. But the laws that govern these advertisements are in a very nascent stage and thus it can be suggested that there is an insufficiency in its regulation. Even marketing researchers and advertisers believe that the future of advertising is nothing but the way in which it is regulated. The do's and don'ts of advertising is very crucial for any person involved in its making and publication. There are laws that address issues related to advertising but these laws are insufficient to address the increasing legal tangles that advertisers often get into today. Advertisers are seen to give priority to the sale of their products, and law seems to take a back seat. Legal consideration rather than ethical consideration should serve as the primary influence for majority of the marketing managers in their advertising strategy development. But this would not be possible as long as we lag behind in creating a proper legal framework which addresses this issue. With the bombardment of advertisements, it is imminent to clarify what regulations should be followed and what is further required. We also need to analyse whether self-regulation is effective in India and whether ASCI is able to play the role of a regulator effectively. Thus this research attempts to create a regulatory predictability in the now loose and unclear advertising arena.



Chapter 2

LEGISLATIVE RESPONSE TO DECEPTIVE ADVERTISING IN INDIA

Chapter 2

LEGISLATIVE RESPONSE TO DECEPTIVE ADVERTISING IN INDIA

2.1 Introduction

India has an extremely fast growing advertising market[1]. But this growth is not complimented with a mature legislative environment. There is no statutory regulatory body which regulates or monitors this sector[2]. In order to understand the deficiency of the existing Indian regulatory regime on deceptive advertising it is important to have a comprehensive study of the same and comparatively analyse it with that of other jurisdictions. This chapter analyses the Indian statutory regulations which govern the advertising industry. The legislations in this context are numerous but only those which are capable of creating an impact on a large scale have been selected for the purpose of this study. The regulatory mechanism in other jurisdictions will be handled in the next chapter.

As mentioned in the previous chapter, the laws pertaining to advertisements in India are spread across different legislations[3]. Those enactments which address the

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1 Harsha Jethmalani, "General Elections - More Money for Media: Pitch-Madison", Moneycontrol, 24 February, 2014, available at http://www.moneycontrol.com/news/business/general-elections-=-more-money-for-media-pitch-madison_1046725.html (accessed on 13-06-2014)

2 Riddhish Joshi, "Techniques of Deceptive Advertisements and Laws and Agencies for Advertisement Regulation in India", Vol.4(12), International Journal of Marketing and Technology, 2014, pp. 211-226, at p.219.

3 Consumer Protection Act, 1986, Trademarks Act, 1999, Cable Television Networks (Regulations) Act, 1995 and Cable Television Networks (Amendment) Rules, 2006, Drug and Magic Remedies

issue of deception in some detail have been selected for the purpose of this study and are given below.

2.2 The Monopolies and Restrictive Trade Practices Act, 1969

The Monopolies and Restrictive Trade Practices Act, 1969[4] was enacted with a view to curb monopolistic, restrictive and unfair trade practices. The section related to unfair trade practice was included in the MRTP Act in 1984 on the recommendation of the Sachar Committee. The Committee had observed that the MRTP Act, 1969 had absolutely no provisions which could protect the consumers from deceptive advertisements[5]. It also strongly suggested that the welfare of the consumers should never be left to be decided by market dynamics as perfect market in practise never existed[6]. The Committee stated that, "there is now a greater recognition that consumers need to be protected not only from the effects of

(Objectionable Advertisement) Act, 1954, Code for Commercial Advertising on Doordarshan and All India Radio, The Drugs and Cosmetic Act, 1940, The Transplantation of Human Organs Act, 1994, The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954, The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Advocates Act, 1961, Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992,Securities and Exchange Board of India Act, 1992, The Prize Chits and Money Circulation Schemes (Banning) Act, 1978, Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, Public Gambling Act, 1867, the Lotteries (Regulation) Act, 1998 and the Prize Competitions Act, 1955, Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, The Food Safety & Standards Act, 2006, The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, The Monopolies And Restrictive Trade Practices Act, 1969, etc.

4 Hereinafter referred to as the MRTP Act.

5 Justice Rajindar Sachar, *Report of the High-Powered Expert Committee on Companies and MRTP Acts*, Ministry of Law, Justice and Company Affairs, 1978, p.7, available at http://reports.mca.gov.in/Reports/30Rajindar%20Sacher%20committee%20report%20of%20the%20Highpowered%20expert%20committee%20on%20Companies%20&%20MRTP%20Acts,%201978.pdf (accessed on 22-09-2014)

6 S. Chakravarthy, "MRTP Act Metamorphoses into Competition Act", available at www.cutsinternational.org/doc01.doc (accessed on 05-08-2015)

restrictive trade practices but also from practices which are resorted to by the trade and by the industry to mislead and dupe consumers."[7]

The Committee suggested that as there was no protection for the consumer against false and deceptive advertising, a section on unfair trade practise should be inserted. Earlier the MRTP Act, 1969 only had provisions which dealt with monopolistic and restrictive trade practices and a section dealing with unfair trade practice[8] was thus introduced into the Act in 1984. The intention behind the introduction of the section was not to curb advertising but to see to it that advertising does not become counterproductive[9].

The Act defined unfair trade practice under Section 36A[10]. It listed out certain kinds of unfair trade practices. These practices were only illustrative as the section

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7 *Supra* n.5 at p.262.

8 Hereinafter referred to as UTP.

9 Leela Kumar, "MRTP Commission and Competition Commission of India", available at http://dx.doi.org/10.2139/ssrn.2429261 (accessed on 6-10-2014)

10 Section 36A of the MRTP Act, 1969 states that - "a trade practice which, for the purpose of promoting the sale, use or supply of any good or for the provision of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;

(1) the practice of making any statement, whether orally or in writing or by visible representation which,---

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or mode;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, re-conditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

sees the use of the word *including* which means that the practices are inclusive. This

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof; Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(vii) makes to the public a representation in a form that purports to be ---

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation - For the purposes of clause (1), a statement that is ---

(a) expressed on an article offered or displayed for sale, or on its wrapper or container, or

(b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale, or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement. Explanation --- For the purpose of clause (2), bargain price; means ---

(a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

(b) a price that a person who reads, hears, or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

made the scope of UTP's quite wide[11]. So now the ambit was so wide that even if a deceptive practice did not fall within the definition it could still be considered as UTP if it seems to be unfair or deceptive for some reason. In the case of *KLM Royal Dutch Airlines* v. *Director General of Investigation and Registration*[12], it was held that what constitutes false and deceptive representation would differ from case to case. It is impossible to create an exhaustive list describing all kinds of deceptive practices and neither can such practices be put into one bucket. The court stated that there was no doubt that an advertisement can be considered as deceptive if it is published purposefully with an intention to deceive and mislead the consumer or is made so recklessly that no effort has been taken to verify its correctness. In cases where the advertiser has a duty to disclose a certain fact and the same has not been done, in such cases also the representation is said to be deceptive.

The Supreme Court has again discussed the concept of false, inaccurate, deceptive and misleading advertisements with regards to unfair trade practice as envisaged under Section 36 A of the MRTP Act in *Lakhanpal National Ltd* v. *M.R.T.P. Commission and Another*[13]. Lakhanpal Industries Ltd. entered into a collaboration for the manufacture of Novino batteries with M/s Mitsushita Electric Industrial Co. Ltd. of Japan which was the owner of the well-known trade name, National Panasonic. Lakhanpal Industries in its advertisements claimed that Novino batteries were made in collaboration with National Panasonic. This was challenged by M/s Mitsushita Electric Industrial Co. Ltd as unfair trade practices. The MRTP Commission observed that it was an unfair trade practice. On appeal the Supreme Court of India held that, even though, literally, the representation made by Lakhanpal Industries was inaccurate, it could not be held to be an unfair trade practice. It was

[11] *Maruti Suzuki India Ltd.* v. *Rajiv Kumar,* A.I.R. 2010 S.C. 3141.

[12] (2009) 1 S.C.C 230.

[13] A.I.R. 1989 S.C. 1692.

observed by the court that it is not material whether the manufacturing company is indicated by its actual name or by its description with reference to its products. It further held that when there is a doubt regarding a particular statement or representation falling within the ambit of deceptive advertisement, the test to be applied is whether the advertisement has a false or deceptive statement. Also, how is a common viewer effected by such an advertisement? Does the viewer come to a wrong conclusion regarding the features of the product? It is not only enough that the given representation is literally correct, but analysis is also required as to whether there is indirect deception through the given advertisement. The advertisement needs to be checked in an objective manner to arrive at a right conclusion.

Under the MRTP Act, the complainant could be anyone including a trader, a trade association, a consumer, a registered consumers' association, the Central or State Government. The scheme of the Act gives a lot of importance to public interest. This means that if any advertisement affects any member of the public that person can approach the Commission. The Director General appointed under the MRTP Act, or the Commission can also, if required, take a case *suo motu*[14]. But the problem that came up when the section relating to unfair trade practice was verbatim carried into the Consumer Protection Act was that this legislation clearly protects only consumers. So the option under the MRTP Act where either a trader or a trade association could bring a complaint or where the MRTP Commission could take a case *suo motu*, was cancelled. The MRTP Commission's right to take *suo motu* action was especially relevant as this right is now not available with the Consumer Court.

[14] Section 36 B of the MRTP Act, 1969.

Table 1: Number and percentage of complaints made by different complainants before the MRTP Commission[15]

Complainant	***Cases***	***Percentage***
Individual consumers	*473*	*65.24*
Government	*4*	*0.55*
Trader / Company	*108*	*14.90*
Suo Motu	*83*	*11.45*
Consumer association	*49*	*6.76*
Trade association	*8*	*1.10*
Total	*725*	*100*

There is no dispute that when we look at the frequency of the complaints it can be noted that the maximum number of complaints before the MRTP Commission were filed by consumers. But from the remaining figures it can be gathered that 16% of the complaints were made by traders and trade associations and the remaining 11.45% of the complaints were taken up *suo motu.* These categories of complaints will no longer be admissible as under the Consumer Protection Act neither can the consumer courts take a case *suo motu* nor does it allow cases to be filed by traders' or trade associations. But the government can still make a complaint if it so wishes. The complainant can now only be a consumer. Thus the Consumer Protection Act becomes insufficient as far as disputes between competitors are concerned[16]. No

[15] Raman Mittal, *et.al.,* "Regulating Unfair Trade Practices: An Analysis of the Past and Present Indian Legislative Models", Vol.39(1), Journal of Consumer Policy, 2016, pp. 91-109, at p.100.

[16] Section 12 of the Consumer Protection Act, 1986 - Manner in which complaint shall be made -

(1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by—

(a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;

(b) any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;

other legislation has filled this void successfully and a proper legislation is inevitable to take care of this.

In the case of *DG (I & R)* v. *Asian Townville Farms Ltd.*[17], a cease and desist order was requested by the Director General against the respondents for indulging in unfair trade practice, by way of deceptive advertisements, for attracting investors to invest in their business. The advertisement made claims regarding tax free returns, guaranteed income, excellent productive quality of land, technical know-how from a reputed company, etc. The Commission held that it would not be possible for an Indian consumer with average literacy to understand the exaggeration of these claims made. They would take all the claims to be true and would go ahead and invest in the same. Thus considering the advertisement as deceptive the MRTP Commission allowed the complaint.

The MRTP Act, 1969 was repealed because of many factors including the changes in the Indian economy due to new government policies related to globalisation and privatisation. The Act also failed to curb cartels because of its toothless character. The MRTP Commission's "cease and desist" orders could be enforceable only through courts. Also, the problems with regards to extra-territorial jurisdiction, critical for curbing cross border anti-competitive practices, made a mockery of the complaints in that regard[18]. The Commission had the power to award compensation for loss or damage only in cases where an application is made by the

(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) the Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

[17] (1986) 60 CompCas. 1008.

[18] Kumkum Sen, "Toothless MRTP is Laid to Rest", Business Standard, January 20, 2013, available at http://www.business-standard.com/article/economy-policy/-toothless-mrtp-is-laid-to-rest-109091400054_1.html (accessed on 22-12-2013)

central government, the state government or party suffering the loss or damage. Over and above all these reasons it was also a fact that the Commission was poorly sourced which to some extent effected its functioning[19].

2.3 Consumer Protection Act, 1986

When the MRTP Act, 1969 was replaced by the Competition Act, 2002, the subjects under the MRTP Act were divided between the Competition Act and the Consumer Protection Act. Section 36A of the MRTP Act was adopted *pari materia* in section 2(1)(r) of the Consumer Protection Act, 1986. The cases related to unfair trade practice were now referred to the Consumer Courts under the Consumer Protection Act rather than the MRTP Commission under the MRTP Act as was the case earlier.

The State Consumer Commission decided on a case of unfair trade practice while admitting a complaint by the Mumbai Grahak Panchayat against United Breweries Limited and Western Railway. Mumbai Grahak Panchayat alleged that the parties adopted unfair trade practices in displaying a few advertisements on the coaches of Western Railway trains in a deceptive manner[20]. United Breweries Limited advertised Bagpiper Soda as India's number one and worlds number three soda. This description matches with Bagpiper whisky and not Bagpiper Soda'. There was no Bagpiper Soda in the market at that time. The second advertisement was pertaining to the London Pilsner soda where it was stated that a 250 ml. pint soda was available for Rs.16. But on inquiry, it was found that 'London Pilsner' had come out with a 250 ml. bottle of beer and the complainant's volunteers had actually purchased a bottle of London Pilsner (250 ml.) beer costing Rs.16. An advertisement of London Pilsner on train coaches proclaimed "Ab Cold Drink Out". Here an attempt was being made to substitute Cold drinks with beer and the statement seemed

[19] Alok Goyal and Mridula Goyal, *Business Environment*, V K Publications, New Delhi (2008), p.646.

[20] *United Breweries Limited* v. *Mumbai Grahak Panchayat*, I (2007) C.P.J. 102 (N.C.)

to create an impression that consuming cold drinks was not trendy. There was a third advertisement of Derby Special soda. Later, it was found that there was no Derby Special soda anywhere in the market and there was Derby Special whisky available with wine dealers. The State Consumer Protection Council observed that these are unfair and deceptive trade practices and ordered corrective advertisements of the railway coaches.

From these cases it is quite evident that the complainants invariably are consumers or consumer groups and that the Act becomes insufficient as far as disputes between competitors are concerned[21]. Even if it is argued that the right given to the consumer and consumer associations are sufficient to efficiently challenge a deceptive advertisement, still there is yet another problem related to delay. A consumer court order does not take effect until a period of 30 days has elapsed as this is the time that has been given to a consumer to appeal against an order. Now this delay can defeat the very purpose of filing the complaint. Even if it is hypothetically presumed that consumers will effectively be able to fight a case of deceptive advertisement, still the inbuilt delay in the system often kills its efficacy. Though the consumer courts do have the power to grant interim injunctions under

[21] Section 12 in the Consumer Protection Act, 1986 provides the manner in which complaint shall be made.

(1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by—

(a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;

(b) any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;

(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) the Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

Section 13(3B) this power is used scarcely[22]. The Consumer Protection Act also states that there is a limitation period for bringing a case before a consumer forum, which is two years from the date when the cause of action arose[23]. This limitation was not prescribed under the MRTP Act and thus a person could approach the commission at any time.

In many instances for an advertisement claim to be substantiated certain investigations would also be required. For example, if there is a complaint that one bottle of drinking water is highly contaminated, then an investigation would be required to find out if the whole batch of water available with the seller is of a similar nature or not. For this proper investigation should be carried out. The MRTP system had an in-house inquiry and investigation wing namely, the Director General of Investigation and Registration, which undertakes the inquiry process *suo motu* or on a complaint made to the Commission. This feature is missing from the Consumer Protection Act, 1986 because when the MRTP Act, 1969 was repealed substantive provisions related to unfair trade practice went to the Consumer Protection Act and the Competition Act was bestowed with the procedural power to investigate[24]. To fruitfully investigate a case of unfair trade practice it is important that there should be an investigation body. Presently, whenever an investigation is required under the Consumer Protection Act, an advocate is appointed as a commissioner to make a spot inspection[25]. Through a few cases the opinion was formed that the Act did not

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22 Section 13(3B) of the Consumer Protection Act, 1986 -

Where during the pendency of any proceeding before the District Forum, it appears to it necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case.

23 Section 24A of the Consumer Protection Act, 1986.

24 Shruti Srivastava, "MRTPC's 'Unfair Trade' Practices Not in New Act, Govt. Tells Watchdog", Indian Express, May 16, 2011, available at http://archive.indianexpress.com/news/mrtpc-s–unfair-trade–practices-not-in-new-actgovt-tells-watchdog/791244/ (accessed on 10-03-2015)

25 *N.K. Nair* v. *Chaithanya Builders and Leasing (P) Ltd.*, (1995) 1 C.P.J. 369.

provide for such an appointment, but a quasi-judicial body in exercise of its inherent powers for meeting the ends of justice may make such appointments[26].

The Consumer Protection Bill, 2015 has made a provision under Section 16 for the formation of a Central Consumer Protection Authority which could conduct investigations, either *suo motu* or on a complaint or on a reference made by any Consumer Disputes Redressal Agency[27]. From the Bill it can be gathered that the Authority can also issue safety notices for goods and services, and pass orders for recall of goods and against deceptive advertisements. But the Bill which was introduced in August 2015, is yet to be passed by the parliament.

One of the main reasons for reconsidering this 29 year old legislation was an increase in the number of deceptive advertisements which in turn led to increased instances of consumer deception[28]. In terms of providing remedies, the consumer courts, as in the case of the MRTP Commission, have the power to direct parties to issue corrective advertisement[29].

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26 *Pierce Leslie and Co. Ltd.* v. *E.J. Perumal*, I.L.R (1917) 40 Mad. 1069.

27 Section 16 (ix) of the Consumer Protection Bill 2015 provides -to conduct investigations, either *suo motu* or on a complaint or on a reference made by any Consumer Disputes Redressal Agency under Chapter IV, into violations of consumers' rights, conduct search and seizure of documents or records or articles and other forms of evidence, summon delinquent manufacturers, advertisers and service providers and to record oral evidence and direct production of documents and records as may be prescribed by the Central Government;

28 Akhileshwar Pathak, "Cooling-off" and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directive", Vol. 41(1), Vikalpa, 2016, pp. 1-8.

29 Section 14(l)(hc) of the Consumer Protection Act 1986 provides- to issue corrective advertisement to neutralise the effect of misleading advertisements at the cost of the opposite party responsible for issuing such misleading advertisements.

2.4 The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954

The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 also speaks about deceptive advertisements under Section 4 and 5. The intention behind the enactment of this law was to curb advertisements with a view to prevent self-medication and self-treatment. The statement of object and reasons of the Act states that:

> in recent years there has been a great increase in the number of objectionable advertisements published in newspaper or magazines or otherwise relating to alleged cures for venereal diseases, sexual statements and alleged cures for diseases and conditions peculiar to women. These advertisements tend to cause the ignorant and the unwary to resort to self-medication with harmful drugs and appliances or to resort to quacks who indulge in such advertisements for treatments which cause great harm.

The Act very clearly has been drafted for the prohibition of advertisements relating to certain drugs or magic remedies for treating certain diseases and disorders[30].

Under Section 3 of the Act a list of diseases and disorders have been provided in respect of which advertising is banned[31]. The guidelines for deceptive advertisements relating to drugs and magic remedies[32] include those which,

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30 Rifat Jan, *Consumerism and Legal Protection of Consumers*, Deep and Deep Publications, New Delhi (1st edn., 2007), p.82.

31 Section 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act,1954 prohibits any person from taking part in the publication of any advertisement of a drug which suggests or is calculated to lead to the use of the drug for any of the following purposes:

(i) directly or indirectly give a false impression regarding the true character of the drug; or

(ii) makes a false claim about the drug; or

(iii) is otherwise false or misleading in any material particular[33].

To illustrate the concept of deceptive advertising under the Act the following example may be useful. In *Zaffar Mohammad alias Z.M. Sarkar* v. *State of West Bengal*[34], a homeopathic doctor carried out an advertisement claiming to cure special diseases such as oldness in youth, all sorts of defects in nerves etc., with new methods and new machines. It stated that if a person needs a cure he should meet this well known, world-famous, experienced, registered physician at the earliest. The Supreme Court held that the advertisement by the appellant is most likely to trap the ignorant and the unwary and thus deceptive in character.

The Act in general is considered to be a very poorly enforced piece of legislation. For example, an area of concern in India is the advertisements relating to certain magic remedies especially astrological products such as rings, talisman, amulets, pendants, statutes etc. But the Act does not mention anything regarding such

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(a) the procurement of miscarriage in women or prevention of conception in women;

(b) the maintenance or improvement of the capacity of human beings for sexual pleasure;

(c) the correction of menstrual disorder in women; or

(d) the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the schedule, or in the rules made from time to time.

[32] "Magic Remedy" includes a talisman, mantra, kavacha and any other charm of any kind which is alleged to possess miraculous powers for or in the diagnosis, cure, mitigation, treatment or prevention of any disease in human beings or animals or for affecting or influencing in any way the structure or any organic function of the body of human beings or animals.

[33] Section 4 of the Drugs and Magic Remedies (Objectionable Advertisement) Act,1954 dealing with the prohibition of deceptive advertisements relating to drugs.

[34] A.I.R. 1976 S.C. 171.

products which make broad promises such as good fortune, peace, prosperity and similar claims which cannot be technically or scientifically proved[35].

Also, in traditional medicine such Ayurveda and siddha, innumerable advertisements are being published which claim remedies for various diseases. This lacunae in the legislation was recently pointed out by the Parliamentary panel attached to the Health Ministry which suggested that there should be an amendment to the legislations[36]. It stated that:

> the Act has not made the desired impact on curbing misleading advertisements related to Ayush[37] drugs and the Press Council of India also does not have sufficient powers to curb such advertisements as the guidelines carry only ethical backing. Directorate of Audio-visual Publicity also does not have regulatory powers over private advertisements. Keeping all the above factors in view, the Committee observes that there is an imperative need for stringent norms in the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and

[35] Sapna Agarwal and Anushree Chandran, "Astrology Product Advertisements Face Government's Ire" Live Mint, June 15 2011, available at http://www.livemint.com/Companies/ DECmOHZMC2 vJfEECrCgk8J/Astrology-product-advertisements-face-government 8217s-ire.html (accessed on 15-10-2014)

[36] Joseph Alexander, "Most States Fail to Act Tough on Misleading Advertisements on Ayush Drugs", Pharmabiz, January 27, 2014, available at http://www.pharmabiz.com/NewsDetails. aspx?aid=80013&sid=1 (accessed on 27-02 2015)

[37] AYUSH stands for Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy. It was formed on the 9th of November 2014 to ensure the optimal development and propagation of AYUSH systems of health care. Earlier it was known as the Department of Indian System of Medicine and Homeopathy (ISM&H) which was created in March 1995 and later renamed as AYUSH in November 2003. Its focus is on the development of Education and Research in Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy.

urgent measures need to be taken to amend the said Act to tackle the menace of misleading advertisements related to Ayush drugs.[38]

In early 2016, changes to the existing Drugs and Cosmetic Rules was proposed by the Union ministry of Ayush so that it would become illegal to advertise cures for some 35 medical disorders by traditional medicine manufacturers. These medical conditions would include baldness, dark skin, dwarfism and others[39].

The Drugs and Magic Remedies (Objectionable Advertisements) Act prohibits any person from taking part in the publication of any advertisement related to any magic remedy or to indirectly make any efficacy claims for any of the purposes specified in Section 3. In case the drug violates the provisions relating to deceptive advertisement, the manufacturer, packer, distributor or seller of the drug will be asked to produce all information related to the drug. But in this case, the publisher or the advertising agency etc. who is involved in the dissemination of any advertisement relating to a drug cannot be deemed to have made any contravention merely by reason of the dissemination of any such advertisement[40].

The Act also has a specific limitation period. The penalty clause under Section 7 of the Drugs and Magical Remedies Act states that in case of first conviction the punishment would be imprisonment which may extend to six months or with fine or with both, and in case of subsequent conviction the punishment would be imprisonment which may extend to one year or with fine or with both. When read

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38 *95th Report on Demands for Grants 2016-17 (Demand No. 5) of the (Ministry of AYUSH)*, Department-related to Parliamentary Standing Committee on Health and Family Welfare, 29th April, 2016, p.42, available at http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/95.pdf (accessed on 15-12-2016)

39 Sumi Sukanya, "Plan to Exorcise 'Magic' Cure Ads", The Telegraph, April 22, 2016, available at http://www.telegraphindia.com/1160423/jsp/nation/story_81797.jsp#.V3DeLhI8hdg (accessed on 24-10-2016)

40 R. 3 of the Drugs and Magic Remedies (Objectionable Advertisements) Rules, 1955.

with Section 468 of the Criminal Procedure Code it is clear that, a court cannot take cognizance of a deceptive advertisement which is punishable with imprisonment up to six months or with fine or with both after the expiry of one year of its commission. It might happen that it would take some time for a person to decide if an advertisement needs to be challenged. But these sections create a limitation within the Act which would stop such advertisements from being challenged. In *Sablok Clinic* v *The State of Delhi* [41] a notice was issued by the Drug Controller against the publisher of an advertisement in a newspaper which stated that the use of a particular medicine prescribed by the given clinic would result in enhancing and improving sexual pleasures in human beings. The Court said that the case will not stand on the ground that the notice was served 13 months after its publication in the concerned newspaper. Thus Section 468 of the Criminal Procedure Code was attracted in the given case. These can be seen as certain limitations of the Act.

2.5 The Trade Marks Act, 1999

Deceptive advertising has been covered under the Trade Marks Act, 1999 as well. In certain cases, the trademark in itself can be a deceptive message and can mislead the consumer. Say for example the mark "Mylanta Night Time Strength" used as an over-the-counter heartburn product, creates the impression that the product gives all-night relief from heart burns, whereas that actually was not the case[42]. It was a normal heartburn formulation which was effective alike at any time of the day. It had no special effect at night. Another example would be that of "BreathAsure". Now the name itself suggests that the user will get fresh breath after using the product. This claim anyhow did not have any scientific proof[43]. This can

41 27 (1985) D.L.T. 171.

42 *Novartis Consumer Health, Inc*. v. *Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578 (3rd Cir. 2002)

43 *Warner-Lambert Co.* v. *Breathasure, Inc.*, 204 F.3d 87 (3rd Cir. 2000)

also be applicable to trade descriptions which might give a false impression regarding the quality, quantity, performance or any other feature of the product or service. In the Indian trademark law this has been covered under false trade descriptions[44]. In such cases the trademark itself can be deceptive in character if it misguides the consumer regarding the quality or character of a product or service. The "false trade description" will include all trade descriptions in connection to the product which are deceptive[45]. This description may relate to the concerned good's

[44] Section 2 (i) of the Trademark Act 1999 states that, "false trade description" means -

(I) a trade description which is untrue or misleading in a material respect as regards the goods or services to which it is applied; or

(II) any alteration of a trade description as regards the goods or services to which it is applied, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue or misleading in a material respect; or

(III) any trade description which denotes or implies that there are contained, as regards the goods to which it is applied, more yards or metres than there are contained therein standard yards or standard metres; or

(IV) any marks or arrangement or combination thereof when applied—

(a) to goods in such a manner as to be likely to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose merchandise or manufacture they really are;

(b) in relation to services in such a manner as to be likely to lead persons to believe that the services are provided or rendered by some person other than the person whose services they really are; or

(V) any false name or initials of a person applied to goods or services in such manner as if such name or initials were a trade description in any case where the name or initials—

(a) is or are not a trade mark or part of a trade mark; and

(b) is or are identical with or deceptively similar to the name or initials of a person carrying on business in connection with goods or services of the same description or both and who has not authorised the use of such name or initials; and

(c) is or are either the name or initials of a fictitious person or some person not bona fide carrying on business in connection with such goods or services,and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act.

[45] K C Kailasam and Ramu Vedaraman, *Law of Trademark and Geographical Indication*, Wadhwa Publications, Nagpur (2005), p.733.

quantity, quality, fitness for a certain purpose, performance, source from where the good was manufactured etc. The section also states that a person shall be punished for applying false description if he is not able to prove that he did not have the intent to defraud[46]. This act which is punishable with both fine as well as imprisonment gives a leeway to the accused by providing certain defences. The onus is on the prosecution to prove that the offence in question has been committed. The grounds of defence for the accused thus includes, acted without intent to defraud, acted inadvertently or under a mistake, or that he did not have knowledge about the trademark, acted innocently etc.

The defence of lack of intention to commit deception can be applied in instances where a person is able to prove that his action was not meant to induce a buyer to buy the particular thing which he might have otherwise rejected[47]. This part of the legislation provides a leeway for the wrong doer to get away. Though the court interprets 'intention to defraud' very stringently, but the fact that it can be taken up as a defence itself creates a possibility for the accused to take a chance with it. Stringent legislations not allowing any exceptions other than those available under Section 151 (c)[48], and section 124 (1)[49] of the Trademark Act should be permitted.

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46 Section 103 of the Trade Marks Act, 1999.

47 *Starey* v. *Chilworth Gunpowder Co.*, (1890) 24 Q.B.D 90.

48 Section 151 of the Trademark Act, 1999 - Savings in respect of certain matters in Chapter XII.— Nothing in Chapter XII shall –

(c) be construed so as to render liable to any prosecution or punishment any servant of a master resident in India who in good faith acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master and as to the instructions which he has received from his master.

49 Section124 of the Trademark Act, 1999 - Stay of proceedings where the validity of registration of the trade mark is questioned, etc.—

(1) Where in any suit for infringement of a trade mark—

(a) the defendant pleads that registration of the plaintiff's trade mark is invalid; or

The availability of the defence of absence of 'intention to defraud' now opens a pandora's box and makes it an uphill task for the plaintiff to prove that the person actually did not intend to commit the offence.

The Act under Section 29(8) also speaks about infringement of trademark through dishonest advertising practices. Dishonest advertising, in the trademark context can be seen, for example, in cases of comparative advertising. Comparative advertisement is a boon for the consumer as it provides comparisons between different products. But if the same comparative advertisement is deceptive it becomes a bane for the consumers, competitors and the public at large. In fact the trademark law is a good means to challenge a competitors deceptive advertising practise because as stated by the US Supreme Court in *POM Wonderful LLC* v. *Coca Cola*[50], a competitor has the best information regarding the consumers approach to a certain marketing technique adopted by the rival company. The competitor's knowledge regarding the rival company's unfair competition practise can be more precise and updated than that of any other state body or regulators. It is this knowledge and expertise which is by companies sue competitors.

Section 29(8) of the Trademark Act,1999 states that, a registered trade mark is infringed by any advertising of that trade mark if such advertising—

(b) the defendant raises a defence under clause (e) of sub-section (2) of section 30 and the plaintiff pleads the invalidity of registration of the defendant's trade mark, the court trying the suit (hereinafter referred to as the court), shall,—

(i) if any proceedings for rectification of the register in relation to the plaintiff's or defendant's trade mark are pending before the Registrar or the Appellate Board, stay the suit pending the final disposal of such proceedings;

(ii) if no such proceedings are pending and the court is satisfied that the plea regarding the invalidity of the registration of the plaintiff's or defendant's trade mark is prima facie tenable, raise an issue regarding the same and adjourn the case for a period of three months from the date of the framing of the issue in order to enable the party concerned to apply to the Appellate Board for rectification of the register.

[50] 134 S. Ct. 2228 (2014).

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

The term 'honest practices' as used in Section 29(8)(a) has not been defined either in the Act or in the Rules. But in *Holterhoff* v. *Freieslebben*[51], a decision of the European Court of Justice it was held that:

> the precise delimitation of 'honest practices' is of course not given in the Trade Marks Directive. By its very nature, such a concept must allow for a certain flexibility. Its detailed contours may vary from time to time and according to circumstances, and will be determined in part by various rules of law which may themselves change, as well as by changing perceptions of what is acceptable. However, there is a large and clear shared core concept of what constitutes honest conduct in trade, which may be applied by the courts without great difficulty and without any excessive danger of greatly diverging interpretations.[52]

The Paris Convention for the Protection of Industrial Property, 1883 has made an effort at defining ''honest practices in industrial or commercial matters". The Convention provides that, the following in particular shall be prohibited,

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

[51] Case C-2/00[2002] E.C.R. 1-4187.

[52] *Id*. at p.4203.

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

3. indications, the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods[53].

The terms 'takes unfair advantage of' and 'is contrary to honest practices in industrial or commercial matters' are of importance in the context of comparative advertising. In India, as in many other jurisdictions such as the UK, comparative advertising is legally allowed. But it is subject to certain restrictions. One of the accepted rules of comparative advertisement is that it should not be deceptive[54]. Though comparative advertising is allowed, it is actionable under the Trade Marks Act only in cases where the plaintiff can prove that;

i. the defendant in the advertisement has made a representation which is deceptive;

ii. this representation might deceive a potential consumer; and

iii. the given deception can influence the purchasing decision of the consumer and thus it can called material deception[55].

For example in the case of *Hindustan Unilever Ltd* v. *Reckitt Benckiser*[56] the High Court of Calcutta analysed the legality of four comparative advertisements published by Reckitt Benckiser and Hindustan Unilever. The first advertisement

[53] Article 10bis (3) of the Paris Convention for the Protection of Industrial Property, 1883.

[54] Article 3a(1), European Council Advertising Directive 97/55/EC.

[55] *Pepsico Inc*. v. *Hindustan Coca Cola*, 2001 P.T.C. 699 (Del.)

[56] 2014 (57) P.T.C. 78.

portrays Dettol Kitchen Gel as killing 100 percent more germs than the leading dish wash of the day. The second advertisement is similar to the first advertisement, with the significant difference that instead of using the term leading dishwash, the name 'VIM' is clearly shown. The third advertisement shows Lifebuoy Soap- a product of HUL, as having 100% germ removal capacity while Dettol Antiseptic Liquid was shown to have close to none. The fourth advertisement shows an antiseptic liquid as unsafe for children while stating that VIM was safe owing to its natural ingredients.

All the advertisements were found to be unfair, not with honest intention and tending to lower the reputation of the comparing goods. Thus in the given case Section 30 of the Trade Marks Act, 1999 was attracted[57]. The court further observed that a comparison should not be more than a "puff". If this comparison is shown as a serious one, then it would amount to denigration of the competitor's trademark. This cannot be allowed and will be prohibited by the courts. Only in such instances the court will interfere. Which means that the company is free to resort to general comparative advertisements where there is no denigration of trademarks.

Hence it can be concluded that comparative advertisements are permitted, provided the advertisement is honest, fair and not detrimental to the reputation of the goods. Even if section 29 (8) of the Act is said to be a very effective mechanism, but as can be gathered from the tenor of the legislation, the Act only protects the proprietor of a trademark. The company can use many mechanisms including consumer surveys to prove that a particular advertisement was deceptive. But other members of the general public cannot use the section in case an advertisement seems to be misleading. Even when a company files a case under this Act, it is hit by the usual delays and latches. The Act should be supported by a system which includes

[57] Section 30 of the Trade Marks Act, 1999 states that one can use the mark of another for the purpose of identifying the goods with a proprietor, but such use had to be honest and no unfair advantage or detriment to the repute of the trade mark was to be caused.

proper monitoring, and quick action in cases of a trademark violation through deceptive means of advertising.

2.6 The Food Safety and Standards Act, 2006

The Food Safety and Standards Act, 2006 is another legislation which addresses the issues related to misleading advertisement. It is a law passed to consolidate several food regulations in India[58]. The Act was drafted after taking into consideration different international agreements as well as the relevant food law in other developed countries[59]. It almost deals with the entire life cycle of food, which is from its manufacture up till its final consumption[60].

Deceptive advertisements are addressed under the Act in the backdrop of sellers trying to make false claims about their food products to consumers, with an aim to induce the consumer to buy it. The Act mentions that no advertisement relating to standard, quality, quantity or grade-composition, and no representation concerning the need for, or the usefulness of any food can be made which is misleading or deceiving or which contravenes this Act or its rules and regulation[61].

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[58] Some of the older regulations which were consolidated into the new Act were the Prevention of Food Adulteration Act, 1954, Fruit Products Order, 1955, Meat Food Products Order, 1973, Vegetable Oil Products (Control) Order, 1947, Edible Oils Packaging (Regulation) Order 1988, Solvent Extracted Oil, De- Oiled Meal and Edible Flour (Control) Order, 1967, Milk and Milk Products Order, 1992.

[59] Sunetra Roday, *Food Hygeine and Sanitation*, Tata McGraw Hill Publication, New Delhi (2nd edn., 2011), p.316.

[60] The short title of the Food Safety and Standards Act, 2006 states thus, "An Act to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected there with or incidental thereto."

[61] Section 24 of the Food Safety and Standards Act, 2006. Also see, *infra* for detailed discussion.

In cases where the buyer has any complaint regarding the product there is a specific complaints process that has been put in place. Under the Act a consumer can file a complaint before the Designated Officer with regards to a food product that he has purchased and finds defective. In such cases the food material is submitted to the Food Analyst as given under the Act. In case the food is found to be contaminated the Designated Officer refers the case to the Food Safety Officer to file with the adjudicating officer. If the adjudicating officer thinks that the complaint is proved based on evidence, then the Food Business Operator can immediately take an appeal to the Appellate Tribunal under section 70 of the Act within a period of 30 days.

The Act thus prohibits unfair trade practices and tries to reinforce the principle that consumers should not be misled under any circumstances. A mechanism to take care of grievances has also been established. The much talked about Food Safety and Standards Authority of India[62], which is responsible for protecting and promoting public health through the regulation and supervision of food safety laws, was established under this Act.

The Act also deals with marking and labelling of food products meant for sale, distribution etc. in a particular format as specified by the regulations[63]. It also states that these labels should not contain any false or deceptive statements regarding the food products which are so packed. This deceptive information could be anything from the nutritive value of the product to the place of origin of the product etc.

Section 24 of the Act deals with restrictions on advertisements. According to the section an advertisement is considered to be deceptive when a seller-

a. falsely represents that the foods are of a particular standard, quality, quantity or grade composition;

[62] Hereinafter referred to as FSSAI.

[63] Section 23 of the Food Safety and Standards Act, 2006.

b. makes a false or deceptive representation concerning the need for, or the usefulness of the product;

c. give to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof.

Section 52 and 53 of the Act deals with deceptive advertisements as well as sale of misbranded food [64] . Under the Act the penalty for publishing a deceptive advertisement may extend up to ten lakhs. But the Act is very specific in nature, and deals with a very specific domain, namely food[65]. The regulation of food standards is very important and the authority under the Act plays a very important role in this regard.

But the law has major challenges including non-availability of sufficient number of officials and bribery which has been very rampant and the traders often managing to get away from the legal loopholes. The laboratory facilities and staff

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[64] Section 52 of the Food Safety and Standards Act, 2006 - Penalty for misbranded food -

(1) Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is misbranded, shall be liable to a penalty which may extend to three lakh rupees.

Section 53 of the Food Safety and Standards Act, 2006. - Penalty for misleading advertisement.-

(1) Any person who publishes, or is a party to the publication of an advertisement, which-

(a) falsely describes any food; or

(b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees.

[65] Section 2 (1) (j) of the Food Safety and Standards Act, 2006. - "Food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substance.

knowledge to handle technical issues is also a concern[66]. Advertising issues relating to food is very critical as the sector is plagued with deceptive advertisements and misbranding. Advertisement aimed at children is an especially sensitive issue as the advertisements here are targeted to an extremely vulnerable group[67] who often have no knowledge about the goods and go by the flashy advertisements alone. There is no refuting the fact that this law was made with all good intentions, but as long as the same is not efficient and serves the purpose for which it had been created, it simply adds on to the already existing stack of legislations.

2.7 The Cable Television Networks (Regulation) Act, 1995

The electronic media in India is regulated by the Cable Television Network (Regulation) Act, 1995. The Act states that "no person shall transmit or re-transmit through a cable service, any advertisement, unless such advertisement is in conformity with the prescribed advertising code."[68] But this Act is considered to be

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[66] V. Balambal Ramswamy, "Ethical Values of Food Safety", in Soraj Hongladarom (ed.), *Food Security and Food Safety for the Twenty-first Century*, Springer Publication, Singapore (2015), p. 40.

[67] "Vulnerability can be defined as belonging to a socio-economic group likely to be less empowered (low income, low education), or lacking full capacity to operate as consumers (due to disabilities, diseases, allergies, or specific behaviours such as credulity, addictive behaviour, etc.). Areas where all consumers are potentially vulnerable are those where they are unable to verify the validity of their choices for themselves, for example for lack of technical expertise, time pressure or other favourable circumstances at the time of a purchasing decision, or when choices are influenced by sophisticated marketing methods."

European Commission, "*Commission Staff Working Document on Knowledge-enhancing Aspects of Consumer Empowerment 2012 - 2014"*, 2012, p.30. available at http://ec.europa.eu/consumers/eu_consumer_policy/our-strategy/documents/swd_know-enhan_cons-empwrmnt_2012_en.pdf

Vulnerability can be very subjective. For example, advertisement of toys or energy drinks to children, fairness creams to dark skinned individuals, advertisements of medicines to ill and disabled etc. can be considered as advertisement to vulnerable groups. Advertisement of educational courses can be considered as advertisement targeting vulnerable group namely students.

[68] Section 5 of the Cable Television Network Regulation Act, 1995.

highly insufficient in the backdrop of several instances[69]. There is an advertisement Code which has been formulated under the Act. The Code stipulates that there should not be any violation of legislations such as the Consumer Protection Act, in-terms of providing goods or services not conforming to the published standards, or against the Drugs and Magical Remedies Act, 1954 by advertising products that promise remedies which can neither be proved scientifically nor technically. But it is quite obvious that these provisions are not being followed as we often come across numerous advertisements belonging to the above mentioned two categories.

The Advertising Code[70] was formulated in 1994, but an order for setting up the district and state level monitoring committees was issued only in 2005 by the Ministry of Information and Broadcasting. In 2008 it was felt that the working of both the district as well as the state level monitoring committees were not satisfactory and so guidelines were issued to ensure effective functioning of the committees by bringing clarity in their roles. The guidelines also stipulated for the establishment of a complaint cell headed by a nodal officer at the district level[71]. These bodies which were set-up after much deliberation did not accept complaints against violation of the Code by national channels if such complaints were not forwarded to the Information and Broadcasting Ministry through the chief secretary of the state. This part of the guideline was not helpful in any way to the consumers[72]. So though the systems have been put in place it does not seem helpful to the vast majority of consumers especially against deceptive advertising.

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69 Sudhanshu Ranjan, "Regulating the Visual Media: Self-regulation has Failed", Astha Bharati, 2010, available at http://www.asthabharati.org/Dia_July%20010/sudh.htm (accessed on 23-07-2014)

70 The Advertising Code was created under R. 7 of the Cable Television Network Rules, 1994.

71 Ministry of Information and Broadcasting, Order No.2301/7/2003-BC.III, dated 19-02-2008.

72 Pushpa Girimaji, *Misleading Advertisements and Consumer*, Indian Institute of Public Administration Publication, New Delhi (2nd edn., 2013), p.15.

The Act also established an 'Authorized Officer'[73], who would generally be 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 to be an authorised officer within such local limits of the jurisdiction as may be determined by that government. Now this Authorized Officer can take action against any violation of the Advertising Code[74]. These Authorised Oficers have been given the power to prohibit transmission or re-transmission of any programme if it violates the Advertising Code. But this section states that "No court shall take cognisance of any offence punishable under this Act except upon a complaint in writing made by any authorised officer."[75] This further creates a condition for the court to take action. These multiple layers of procedures deter complainants from filing and pursuing a case.

2.8 Code for Commercial Advertising on Doordarshan and All India Radio

Code for Commercial Advertising on Doordarshan[76] provides that advertisements should be truthful. It should not deceive the general public by giving them distorted facts or deceptive statements. It should not deceive the viewer with regards to:

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73 Section 2 (a) of the Cable Television Networks (Regulation) Act, 1995.

74 Point 5 of the Information and Broadcasting Ministry Order, dated 19th February 2008 states that- Under Section 19, the Authorized Officer is also empowered to prohibit transmission of certain programmes in public interest if any programme or channel carried by it, is not in conformity with the prescribed programme code referred to in Section 5 and advertisement code referred to in Section 6 of the Act or if such programme is likely to promote on grounds of religion, race, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, linguistic or regional groups or castes or communities or which is likely to disturb the public tranquility.

75 Section 18 of the Cable Television Networks (Regulation) Act, 1995.

76 Advertisements aired on Doordarshan and All India Radio are required to be in compliance with this Code which is issued by the Director General of each Doordarshan and AIR respectively.

(i) the specific features of the product such as the products ingredients, use, origin etc,

(ii) the cost of the product or the terms of its purchase,

(iii) the after sale services which might be provided to the consumer such as, delivery of the product maintenance support, return options etc,

(iv) testimonials with regards to the efficacy of the product and personal experiences and recommendations for a product or service[77].

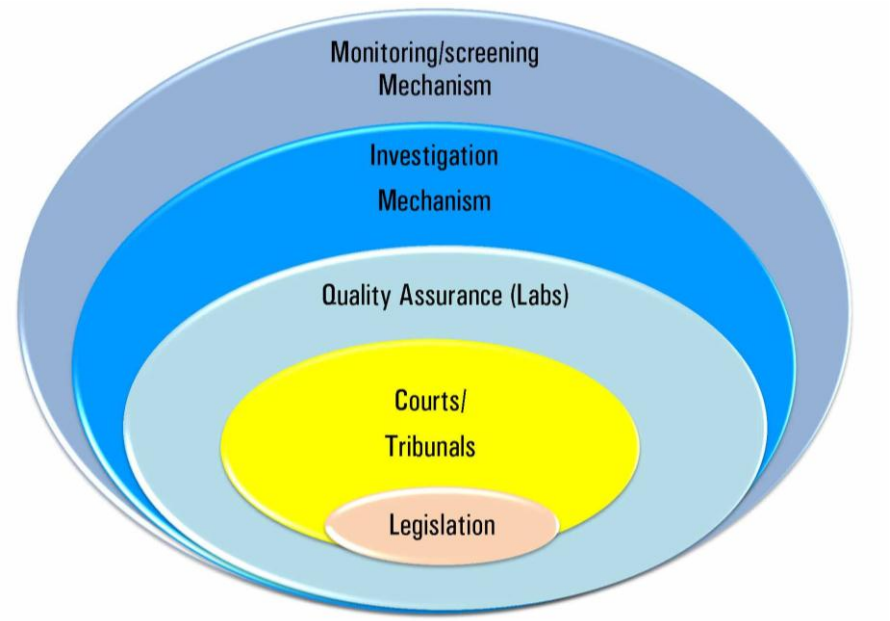
However, it is not applicable to all TV channels. The Act mentions that whenever a claim is made in an advertisement the advertiser should be in a position to substantiate these claims[78]. The Code also lacks legal backing and is not effectively enforced as it is seen as an ethical code of advertisement and thus lacks enforceability.

2.9 Institutional Framework

Along with proper regulatory mechanism, existence of a robust institutional framework is also critical in the crusade against deceptive advertisement. A proper institutional framework would encompass, a good investigative body, an effective monitoring mechanism, efficient quality control mechanisms such as laboratories to check the veracity of the advertisement claims, effective forums for adjudication of disputes etc.

[77] Section 27 of the Code for Commercial Advertising on Doordarshan

[78] Kruti Shah, *Advertising and Integrated Marketing Communications",* McGraw Hill Education, New Delhi (1st edn., 2014), p.841.



Components of an institutional framework

In India as the regulation of deceptive advertisement is scattered over various legislations, it lacks a coherent institutional framework against deceptive advertising. Each of these existing elements of institutional framework has to be analysed to understand the shortcomings of the system and suggest remedial measures. Aa the different elements of an efficient institutional mechanism has been discussed below.

2.9.1 Investigative Authorities

An efficient and competent investigative authority is lacking in India. There are various investigative authorities envisaged under different statutes. These statutes have been listed below;

2.9.1.1 *Monopolies and Restrictive Trade Practices Act, 1969*

MRTP Act, 1969 had a strong investigative authority as envisaged in Section 8 of the Act to investigate unfair trade practices. The Section envisaged appointment of a Director General of Investigation[79]. Under Section 11 the DGI assists the

[79] Hereinafter referred to as DGI.

commission in proving a prima facie case against the respondent by proving existence of UTP. To form an opinion, the DGI takes into consideration the below given factors;

i. history of the trade in hand,

ii. nature of the restriction,

iii. nature of the agreement, and

iv. mischief sought to be remedied by the agreement.

The DGI had *suo motu* rights under the Act to look into acts of UTP. The DGI also had the power to appear before the commission and present the case. In the case of UTP, it is mandatory that the Commission should refer the case to the DGI for preliminary investigation.

In India, the Monopolies and Restrictive Trade Practices Act, 1969 was replaced by the Competition Act, 2002 (the Competition Act) but, UTP related cases continued under the Consumer Protection Act, 1986 which did not have any investigative arm like the MRTP Act or its scion the Competition Act, 2002.

2.9.1.2 *Food Safety and Standards Act, 2006*

The Food Safety and Standards Act, 2006 consolidated various legislations that were implemented by various departments and ministries in the food domain. Food Safety and Standards Authority of India[80], formed under the Act has food related surveillance process. It receives food related complaints from the consumers and can also conduct special investigations. The Act creates the post for a Designated

[80] Hereinafter referred to as FSSAI.

Officer[81] in each district who would investigate the complaint. The Act also creates the Food Safety Officer[82] in specific local areas. The FSO collects samples of food from different food suppliers and sends it to the food analyst. Food Safety Committees are also established in specific local areas.

2.9.1.3 *Food and Drug Administration*

The Food and Drug Administration[83] has the responsibility of enforcing the food and drug related laws. The authority has the power to monitor and find the manufacture and sale of food, drugs and cosmetics without proper license. The FDA also exercises monitoring powers with regards to the quality of drugs and cosmetics in its given jurisdiction. FDA has specific power to investigate and prosecute sellers who violate the provisions of law relating to food drugs and cosmetics. If in the course of these investigations it is proved that any of the relevant laws have been violated, then the Authority can prosecute the wrong doers. The FDA also has the right to recall these products including food, drugs or cosmetics from the market. The Authority has certain rights of screening advertisements of drugs which fall within the prohibited category[84]. But the efficacy of such screening is still questionable.

2.9.2 Laboratory Facilities

2.9.2.1 *The Drugs and Cosmetics Act, 1940*

Proper laboratory facilities are a very important part of the institutional mechanism for combating deceptive advertising. Central Drugs Laboratory, Kolkata,

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81 Hereinafter referred to as DO.

82 Hereinafter referred to as FSO.

83 Hereinafter referred to as FDA.

84 Directorate of Food and Drugs Administration, "About Food & Drug Control Organisation", available at http://www.dfda.goa.gov.in/about-fda/food-drug-control-organization (accessed on 07-12-2016)

is the National Statutory Laboratory of the Government of India for Quality Control of Drugs and Cosmetics under the Drugs and Cosmetics Act, 1940 and Drugs and Cosmetics Rules, 1945. It is under the direct administrative control of the Drugs Controller General, Directorate General of Health Services, Ministry of Health and Family Welfare. It is the oldest Laboratory under the Drugs and Cosmetics Act 1940 to act as an appellate authority in the matter of dispute regarding Drugs Standard[85].

There are seven central drug testing laboratories under the Central Drugs Standard Control Organization. These are at Kolkata, Mumbai, Chennai, Guwahati, Chandigarh, Kasauli and Hyderabad. The Central Drug Laboratory, Kolkata is the appellate laboratory for testing of drugs and is NABL accredited for chemical and biological testing. The Central Drug Testing Laboratory, Mumbai is a statutory Laboratory and tests samples of Drugs from ports, new drugs and oral contraceptive pills. It is also an appellate laboratory for copper T-intrauterine contraceptive device and tubal rings. The Central Drugs Testing Laboratory, Chennai is accredited by the National Accreditation Board for Testing and Calibration Laboratories for both chemical and mechanical sections and is also the appellate Laboratory for condoms. The Regional Drugs Testing Laboratory, Guwahati is accredited for both biological testing and chemical Zone and tests drug samples received especially from States in the East Zone. The Regional Drug testing Laboratory, Chandigarh tests survey samples as well as samples sent by drugs Inspectors[86].

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85 Central Drugs Standard Control Organization, "Central Drugs Testing Laboratories", available at http://www.cdsco.nic.in/forms/list.aspx?lid=1425&Id=0 (accessed on 23-01-2016)

86 Directorate General of Health Services, "Central Drugs Testing Laboratory", available at http://dghs.gov.in/content/290_3_CentralDrugsTestingLaboratoryMumbai.aspx (accessed on 27-01-2016)

2.9.2.2 *Food Safety and Standards Act, 2006*

Laboratories are the backbone of the Food Safety and Standards Act, 2006. The working conditions and quality of analysis of laboratories are required to be strengthened and managed properly so that the Food Safety Authority has a proper check on the food articles supplied in the market for consumption to the common man as per various provisions of the Food Safety and Standards Act, 2006 and its related Rules. At present the working conditions of the laboratories are anything but functional. The laboratories include;

1. Central Food Laboratory, Kolkata,
2. Food Research and Standardization Laboratory, Ghaziabad/ Central Food Laboratory, Ghaziabad,
3. Central Food Laboratory, Mumbai,
4. Central Food Laboratory, Kolkata Extension Centre at Raxaul, and
5. Central Food Laboratory, Ghaziabad Extension Centre at Sonouli.

These laboratories which were built on soft loans taken from the world bank to the tune of Rs.320 crores, are in a very bad state. Most of these laboratories are under staffed. Many have not become fully operational and many of them still do not have the proper infrastructural support to conduct testing such as continuous electricity, raw materials for proper testing, machinery and equipment maintenance etc.[87]

[87] Satya Prakash, "Status of Food Laboratories in India", CSEIndia, 25th July, 2012, available at http://www.cseindia.org/content/status-food-laboratories-india (accessed on 27-01-2016)

2.10 Conclusion

As can be gathered from above, there are a plethora of laws that govern advertising in India. But there is no law which specifically integrates the issues regarding advertising. In the absence of a uniform advertising law, it has become an uphill task for advertisers to identify and follow the particular laws which would be applicable to them. From a consumer perspective, the present legislations are found to be largely ineffective to tackle the issues regarding advertising especially at a time when consumers are being bombarded with advertisements. As noted above, the present regulations have been subject to umpteen number of limitations and its effectiveness is not satisfactory. The very fact that the provisions relating to advertisements have been spread across many legislations creates a confusing situation for all the stakeholders. Except certain legislations, in all others, execution becomes a major challenge.

The Consumer Protection Act, 1986 for example, is one of the most important laws to combat deceptive advertisements. Here the consumer forum can adjudicate a case only if a complaint is filed by a consumer. The Consumer Court has no *suo motu* powers[88]. The law can be made more effective than what it is presently, because there is high level of awareness among consumers about this legislation[89]. Thus from an analysis of the Act it is very clear that the Consumer Protection Act neither provides power to the consumer courts to take a case *suo motu*, nor has the Act put in place the institutional mechanism to investigate a case. A proper investigative mechanism with well-defined investigative powers such as, the power to enter into business premises and access to business related documents,

[88] The Consumer Protection Bill 2015 has made provisions for *suo motu* action. However, the Bill is still pending before the parliament.

[89] Ramesh Bhat, "Characteristics of Private Medical Practice in India: A Provider Perspective", Vol.14(1), Health, Policy and Planning, 1999, pp. 26-37, p.32.

appointment of experts to analyse these documents, power to call witnesses where ever required, ceasing sample goods and mechanisms for analysing these products etc. needs to be included. Without this mechanism the consumer courts will not be able to function effectively.

The lack of an investigative body is a major handicap as many of the cases relating to deceptive advertisements were taken *suo motu* by the erstwhile MRTP Commission. The Act also has a very effective weapon in its armoury, which is Section 14 (hc). This section deals with corrective advertisements which can be ordered by the consumer forum. But even these remedies are not being adequately used[90].

The Cable Television Networks (Regulations) Act, 1995 is another legislation which has provisions against deceptive advertisements. This Act also has established Monitoring Committees. But from the present outpour of deceptive advertisements, it is quite clear that this Act is also quite ineffective in dealing with deceptive advertising.

Of-late we have read and heard a lot about the Food Safety and Standards Act, 2006, thanks to the Maggi noodles fiasco. Inspite of the occurrence of such a major controversy, no real action was seen to be taken. Advertisements relating to food should be specially monitored as it directly affects the public health at large. But under the present Act even if an advertisement is found to be misleading there is no provision to order for a corrective advertisement which is very important to change the consumer perception regarding a product.

The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 is one of the most violated legislations in the advertisement context[91]. Inspite of the

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90 *Supra* n.72 at p.26.

91 Rajendra Kumar Nayak, *Consumer Protection Law in India : An Eco-Legal Treatise on Consumer Justice*, N. M. Tripathi Pvt Ltd, Bombay (1st edn., 1991), p.277.

provision for imprisonment and fine, the Act still has not been successful in creating a deterrent on violators. The Act also has a very limited scope and addresses issues related to very specific diseases.

Advertisements targeting children is another sensitive area which requires proper regulations as children are an extremely vulnerable audience. In the US an independent self-regulatory agency, namely Children's Advertising Review Unit works for the promotion of responsible advertising to children under the age of twelve in all media. It has drafted guidelines which are quite subjective so as to address the issues related to an extremely vulnerable child audience[92]. In countries such as Denmark, Sweden, Norway etc. too there are specific laws that regulate advertisements to children[93].

But in India there is a lacuna which exists in this area. The laws in India that govern advertising to children include, The Young Persons (Harmful Publications) Act, 1956, the Infant Food Act, 1992 which prohibits the advertising of infant milk substitutes and feeding bottles, The Information Technology Act, 2000 which deals with penalising harmful publication or transmission of any message which is salacious to children and which can corrupt the minds of children in any way, the

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92 In the United States Children's Television Act, 1990 states that advertisers should limit the duration of advertising in children's television programming to not more than 10.5 min/h on weekends and not more than 12 min/h on weekdays.

In the UK there are specific regulations regarding celebrity kids from appearing in any advertisements before 9 p.m. Further advertisement of products which are based on kid's television programmes are stopped two hours before the particular programme. Advertisements must not be such that the children get deceived regarding its nutritional value and form a wrong impression regarding the same. None of the advertisements should be designed in such a fashion that it promotes excessive eating habits in children. These are applicable in many other instances such as promoting unhygienic or damaging oral health practises. For example, if an advertisement encourages consumption of chocolates throughout the day it would create a wrong impression regarding oral hygiene and can violate the Children's Television Act, 1990.

93 Corinna Hawkes , *Marketing Food to Children: The Global Regulatory Environment*, World Health Organization, 2004, pp.5-15, available at http://apps.who.int/iris/bitstream/10665/42937/1/9241591579.pdf (accessed on 15-09-2015)

Cable TV Networks (Regulation) Act, 1995 which deals with advertisements related to children and lays the guidelines that the advertisements shown on television should not denigrate children, should not contain any vulgar scenes or any explicit language or any indecency that can be harmful to children. Doordarshan's Code for Commercial Broadcasting, the Cable Television Networks (Regulation) Act, 1995 and even the Advertising Standards Council of India Code for Self-Regulation in Advertising, 1985 sets ethical standards with regards to advertisements to children.

Most of these have broad regulations such as prohibiting depiction of children as beggars, encouraging unsafe behaviour in children, prohibiting advertisements which make children feel inferior without the particular product etc. All these guidelines are good but not sufficient[94].

There has to be specific and clear regulations with regards to different aspects of advertisements to children such as the use of movie stars to endorse kid's products, especially products related to food, beverages, health drinks and non-prescription drugs such as cod liver oil etc., the volume of advertisements during, before and after a kid's programme etc. literature suggests that 65% of the eating and drinking choices made by children are based on advertisements. So it is essential that these advertisements should be properly regulated[95].

There are plethora of legislations in India, which address the issues related to advertising. The above mentioned legislations are just a few among them, but there are many more which have not been included due to research related limitations. These innumerable legislations have not helped in effectively handling deceptive advertisements which seems to be on the rise and pose new challenges every day. Thus we cannot say that the present legislations are efficient enough to deal with the

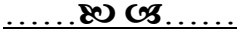
[94] *Supra* n.66 at p.848

[95] Naresh Kumar Sharma and Ramesh Agarwal, "Study and Impact of Advertising on Children with Special Reference to Eating Habits in India", Vol.1(1), International Journal of Transformations in Business Management, 2011, PP-2-3, at p.2.

challenges posed by deceptive advertising. Many of them are drafted in such a fashion that there are loopholes from where the advertiser can easily escape. For example, in a civil suit by a consumer against a particular deceptive advertisement, if a consumer is not able to prove that he actually bought a particular good because he was induced to do so by a certain deceptive advertisement, he would have a very weak case. The consumer sometimes does have problems in proving this point which ultimately results in him losing the case. None of the legislations quite help the consumer in this regard as to how to go about with bringing in proof and proving deception.

Recently, it was reported that South Korea's antitrust agency, Fair Trade Commission, levied a record fine of Won 37.3 Billion (US Dollar 32 Million) from the German automaker Volkswagen as it resorted to false advertising as regards the vehicles emission standards. Apart from this, criminal charges against 5 Volkswagen executives was also sought. Volkswagen had admitted last year that it had cheated on diesel emission tests. The Fair Trade Commission said that Volkswagen exaggerated its advertising between December, 2007 and November, 2015, thereby, falsely asserting that its cars sold in Korea met the emission standards[96]. In India too, the regulations should be strong enough so that we are able to detect false advertisements and are able to punish the company and its executives based on the gravity of the deceptive advertisement.

Thus from the above analysis it can be easily deduced that the present set of regulations are quite ineffective. In India other than the statutory regulation of advertising, there also exists a self-regulatory body namely the Advertising Standards Council of India. A detailed analysis of this system is made in the following chapters.



[96] Hyunjoo Jin, "South Korea to Slap VW with Record Fine, Pursue Executives Over Emissions Ads" Reuters, December 7, 2016, available at https://www.reuters.com/article/us-volkswagen-southkorea/south-korea-to-slap-vw-with-record-fine-pursue-executives-over-emissions-ads-idUSKBN13W094 (accessed on 28-12-2016)

Chapter 3

ADVERTISING REGULATION: AN INTERNATIONAL PERSPECTIVE

Chapter 3

ADVERTISING REGULATION: AN INTERNATIONAL PERSPECTIVE

3.1 Introduction

Every country has its own unique way of dealing with misleading advertisements which primarily depends on that countries legal, social, economic, cultural set-up among others[1]. Depending on the above given factors each country decides whether it should regulate advertising through statute, self-regulation or both. In fact, the way in which a country regulates its advertising is a reflection of its socio-cultural beliefs.

Understanding the advertising regulations of different countries is important because these regulations differ from jurisdiction to jurisdiction. In certain countries the advertisement of certain products would be prohibited while in others the same would be allowed. In the US as well as in the UK, which are the two main jurisdictions under study in this chapter, both statutory as well as self-regulatory systems co-exist.

The US has a history of having strong anti-trust legislations from as early as the 1800's in order to prevent concentration of economic power[2]. These legislations

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1 Barbara Mueller, *Dynamics of International Advertising: Theoretical and Practical Perspectives*, Peter Lang Publishing, New York (2nd edn., 2011), pp.291-292.

2 Gordon E. Miracle and Terence Nevett, *Voluntary Regulation of Advertising: A Comparative Analysis of the UK and US*, D.C. Heath, Lexington (1987), pp.48-52.

led to greater competition and lesser co-operation. Later when the Federal Trade Commission Act, 1914[3] was enacted it became the principle legislation against deceptive advertising. The Federal Trade Commission[4] was entrusted to look into issues regarding unfair and deceptive acts or practices in commerce. One important feature of the legislation was that it principally looks into consumer welfare. Other than the FTC, there are twenty or more other federal administrative bodies which also have control over American advertising[5]. In cases where advertisements are challenged by competitors on grounds of being misleading, the Lanham Act, 1946 can also be used[6]. US also has a self-regulatory system for curbing misleading advertisements, and the Advertising Self-Regulatory Council[7]is one of the prominent bodies in this regard.

In the UK, both regulatory as well as the self-regulatory systems (through the Advertising Standards Alliance) co-exist. The U.K. Fair Trading Office, established in the year 1973, has wide powers for the regulation of advertising. Office of Communications[8] is the government regulator and competition authority for broadcast, telecommunications and postal industries in the UK. In 2004 Ofcom delegated its powers to the Advertising Standards Alliance with regards to its responsibility of overseeing the compliance to the broadcast advertising codes. But Ofcom supports the Advertising Standards Alliance and still retains the power to take license compliance action against advertisers who default in complying with its

3 Hereinafter referred to as FTCA.

4 Hereinafter referred to as FTC.

5 S.S. Kaptan, *Advertising Regulation*, Sarup and Sons Publication, New Delhi (1st edn., 2003), p.10.

6 Ross D. Petty and R.J Kopp, "Advertising Challenges: A Strategic Framework and Current Review", Vol. 35 (2), Journal of Advertising Research, 1995, pp. 41-55.

7 Hereinafter referred to as ASRC.

8 Herein after referred to as Ofcom.

decisions[9]. The UK self-regulatory body is considered to be far more successful in regulating advertising as compared to many other self-regulatory bodies in other jurisdictions.

There are many similarities as well as many disparities among jurisdictions in the regulation of advertising. Some of the common areas of regulations which are found in many jurisdictions alike is, for example, the regulation of tobacco advertising. In the U.S. for example, the Family Smoking Prevention and Tobacco Control Act, 2009 was made effective during the term of President Barack Obama. This regulation brought restrictions on the marketing of tobacco especially those targeted towards minors. "Audio advertisements are not permitted to contain any music or sound effects, while video advertisements are limited to static black text on a white background. Any audio soundtrack accompanying a video advertisement is limited to words only, with no music or sound effects."[10] UK on the other hand has seen regulations restricting television advertising of cigarette from as early as 1965 though non-television advertising continued. In 2002 the Tobacco Advertising and Promotion Act was passed by the parliament with a view to ban the advertising of tobacco products to the public at large except in certain exceptional situations[11].

Advertisement of alcoholic beverages is another area where many countries have similar legislations. Within the EU itself different countries regulate advertisements relating to alcoholic beverages differently. In France, the French Government banned the advertising of alcoholic beverages on television through what was famously known as the Evin Law, 1991 named after the former French

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9 The House of Commons, Health Committee, "Alcohol", First Report of Session 2009-10, Volume II, 10 December 2009, p.264.

10 Mathew R. Herington, "Tobacco Regulation in the United States: New Opportunities and Challenges", Vol. 23(1), Health Lawyer, 2010, pp. 13–17 at p.15.

11 Tony Allen, *Age Restricted Sales: The Law in England and Wales*, Troubador Publishing Ltd., UK (2nd edn., 2015), p.30.

health minister Claude Evin who was instrumental in passing the law. This law which was passed in 1991 was considered to be very stringent as it prohibited alcohol advertising on television as well as in cinemas. But advertisements in other media were allowed under the direction that a health warning was mandatory. Another feature of this law which was considered as an extreme regulation was the banning of alcohol companies from sponsoring sporting or cultural events.

In the UK the self-regulatory body through the British Code of Advertising Practice regulates alcohol advertising. For broadcast advertisements there is a co-regulatory arrangement between Ofcom and ASA, but it is not involved in the everyday regulation of advertising[12]. In the US the advertising of alcoholic beverages is regulated by self-regulatory bodies through codes. The regulation very clearly states that advertisements can be placed in media where 70% of the audiences who view these advertisements are above the age of twenty one years[13]. As the self-regulatory mechanism is doing well, federal regulation has not yet been introduced. Jim McGreevy, president and chief executive officer of the Beer Institute opined that since 1930's the beer brewers and beer importers had a system for self-regulation in place. The system was very flexible and updated, as the same was periodically reviewed by the self-regulatory body. The system was doing so well that it had been often lauded by the Federal Trade Commission[14].

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[12] Simon J. Robinson and Alexandra J. Kenyon, *Ethics in Alcohol Industry*, Palgrave McMillan, UK (2009), p.53.

[13] David Ambrosini, "Legal Aspects - Regulation and Self-Regulation", available at http://www.cabrillo.edu/~dambrosini/50Web/classsessions/session17legal.htm (accessed on 12-09-2014)

[14] Katie Richards, "Alcohol Ads Increased 400% Over 40 Years, But Americans Aren't Drinking More", available at http://www.adweek.com/news/advertising-branding/alcohol-ads-increased-400-over-40-years-americans-arent-drinking-more-163668 (accessed on 23-09-2014)

3.2 United States

Nearly 40% of the world advertising spending happens in the U.S. and this is why the study of advertising in the U.S. is important[15]. In the United States, there are state and federal deceptive advertising laws that prohibit various types of deceptive advertising. At the federal level there is the Federal Trade Commission Act, 1914 and the Lanham Act, 1946[16]. The Act through the Federal Trade Commission is responsible for regulating unfair methods of competition and for interpreting deceptive advertisements in the U.S. The Lanham Act,1946 on the other hand provides a private right of action to any person who believes that he or she is or is likely to be damaged by the use of any false description or representation in connection with any goods or services in commerce.

U.S. also has a self-regulatory mechanism for regulating advertisements. National Advertising Division[17] of the Council of Better Business Bureau is a voluntary self-regulatory body for advertising. NAD reviews national advertising for its truthfulness and accuracy, and aims to foster public confidence in the credibility of advertisements. Policy and procedures for NAD are established by the Advertising Self-Regulatory Council[18].

Most states have separately passed laws dealing with unfair and deceptive trade practices, with some adopting the Uniform Deceptive Trade Practices Act,1964 to govern state-law claims. Several states have also passed false advertising statutes as a supplement or alternative to this Act. Advertising claims may also be subject to

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15 Ross D. Petty, "Advertising Law in the United States and European Union", Vol.16(1), Journal of Public Policy and Marketing, 1997, pp. 2-13, at p.8.

16 The Lanham (Trademark) Act,1946 is the primary federal trademark statute in the United States.

17 Hereinafter referred to as NAD.

18 Hereinafter referred to as ASRC.

industry-specific laws and regulations for example, the Wool Products Labeling Act, 1939 provide a number of rules for the advertisement of clothing. Over and above this the television networks also have network advertising guidelines that spell out important factors in determining which advertisements are proper for television viewing.

3.2.1 Federal Trade Commission

Federal Trade Commission is an independent agency of the United States government which looks into the issues relating to unfair methods of competition in commerce. Initially when the FTC was established in 1914 it was primarily concerned with competition and it was concerned with deceptive advertising only to the extent to which it effected competition. The effect of deceptive advertising on consumer interest somehow did not seem to be an area of concern. Also, FTC's ability to control deceptive advertising was considered to be quite ineffective. A Congressional Committee had even gone up to the extent of calling the regulation of deceptive advertisement by the FTC as "impotent"[19]. In 1931 the U.S. Supreme Court in the case of *FTC* v. *Raladam*[20] stated that in the absence of any injury to the competitor the FTC could not take any action to prohibit an advertisement claiming it to be deceptive. Here what the Supreme Court did was to restrict the FTC powers to take any action for the protection of consumers. But this decision in one way led to the Wheeler –Lea amendment in 1938 which in turn led to the insertion of the present Section 5 by which "deceptive acts and practises" were added to the list of "unfair methods of competition" in the FTC Act. But while these words were added no attempt was made to explain the words "unfair or deceptive" methods of competition. This was done in the year 1964 when the FTC devised a test to

[19] Hearing before the Subcommittee on Government Operations, "False and Misleading Advertising", 85th Cong., 2d sess., 2668 (1958)

[20] 283 U.S. 643 (1931)

determine whether a particular act is unfair or deceptive. This test was designed by the FTC and later was called the S&H rule after the Supreme Court in the case *FTC* v. *Sperry and Hutchinson Company*[21] approved the test.

So, to decide whether an act is unfair, the FTC would use a three pronged test namely (1) whether the practice offends public policy (2), whether it is immoral unethical oppressive or unscrupulous, (3) whether it causes substantial injury to the consumers. The FTC further stated that, in cases where all the three elements were present it can be concluded that the given act falls under Section 5 even if there is no earlier case of prohibiting it. There is a huge array of decisions which clarify and interpret the different methods through an advertisement can be considered deceptive. It will also be considered as violating Section if it is morally objectionable and negatively affects the interest of the consumer.[22]

FTC was given the power to make investigations against companies without any specific complaint, issue cease and desist order and fine companies for not complying with the cease and desist orders. Now the need for proving injury to competitor no longer existed. In 1975 the FTC's authority was further broadened and it had been given broader powers such as punishing violations of cease and desists by non-respondents, promulgating industry-wide advertising rules and obtaining injunctions[23].

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21 405 U.S. 233 (1972)

22 Alexander Simonson, "Unfair Advertising and the FTC: Structural Evolution of the Law and Implications for Marketing and Public Policy", Vol.14(2), Journal of Public Policy & Marketing, 1995, pp. 321-327, at p.322.

23 Sam Peltzman, "The Effects of FTC Advertising Regulation", Vol.24(3), The Journal of Law and Economics,1981, pp. 403 – 448, at p.404.

3.2.1.1 *FTC and Deceptive Advertising*

One of the basic missions of the FTC has been the prevention of anticompetitive or deceptive or unfair business practises which in turn has a negative impact on the consumers. Section 5 of the FTC Act brings out the dual responsibility of the Commission. It prohibits ‘‘unfair or deceptive acts or practices in or affecting commerce”. Some of the activities which the Commission considers deceptive includes false criticism of competitor’s products, ambiguous statements, deceptive pricing, false testimonials etc. The Commission was given the primary responsibility of ensuring that the competition as well as consumer protection against unfairness and deception was maintained[24]. The FTC enforces its truth-in-advertising laws in no matter which medium it may be published including in newspapers and magazines, online, mail, or on billboards or buses[25]. It carefully monitors claims especially in categories such as food, over-the-counter drugs, dietary supplements, alcohol, and tobacco and on conduct related to high-tech products and the internet.

The FTC has been given rule making power under Section 18 of the Act to prevent unfair and deceptive acts and practises[26]. The FTC has also been given powers to prescribe interpretative rules and general guidelines regarding unfair and deceptive advertisement which is subject to congressional review. As stated earlier Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”[27]. Under the FTC Act, an advertiser is required to have a reasonable

[24] Miles W. Kirkpatrick, “Advertising and the Federal Trade Commission”, Vol.1(1), Journal of Advertising, 1972, pp. 10-12, at p.11.

[25] Federal Trade Commission, “Truth in Advertising”, available at https://www.ftc.gov/news-events/media-resources/truth-advertising (accessed on 28-04-2015)

[26] 15 U.S. Code § 57a, (1975)

[27] 15 U.S. Code § 45 (1914)

basis for all objective product claims before the claims are made[28]. The FTC, which brings administrative actions under the provisions of the FTC Act, issued its Policy Statement on Deception in 1983 explaining the different factors it considers in evaluating false advertising claims. The FTC enumerated three primary factors, "a representation, omission or practice that is likely to mislead the consumer, the perspective of a consumer acting reasonably in the circumstances and the representation, omission, or practice must be a 'material' one."[29] In summary, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. The FTC has also suggested that the following factors should be considered while deciding on the reasonableness of a particular claim;

1. Type of claim that has been made.
2. Type of product regarding which the claim has been made.
3. Consequences of the false claim.
4. Degree to which the consumers might probably rely on these claims.
5. Type of evidence available for making the claim[30].

While exercising its rule making power the FTC should have "reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent" [31]. This should be done after a notice for the

[28] Peter Sloane and Rachel M. Weiss, "Advertising Country Questions", available at http://www.leasonellis.com/wp-content/uploads/2013/04/Advertising_country_questions_US_8-102-2196.pdf (accessed on 02-01-2014)

[29] Federal Trade Commission, "FTC Policy Statement on Deception", available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (accessed on 24-09-2015)

[30] *Supra* n.20.

[31] Robert V. Labaree, *The Federal Trade Commission: A Guide to Sources*, Garland Publishing Inc., New York (1st edn., 2000), p.452.

proposed rule is served by the FTC. In 1994 the FTC introduced a new three-part test for determining unfairness. It clarified that to justify a finding of unfairness the injury must satisfy three tests: (a) it must be substantial; (b) it must not be outweighed by any countervailing benefits to consumer or competition that the practice produces; and (c) it must be an injury that consumers themselves could not reasonably have avoided[32].

3.2.1.2 *Remedies by FTC in Case of Misleading Advertisements*

The remedies which the FTC can provide include among others a cease and desist order. Here the FTC simply notifies the company that as their advertisement was found to be deceptive, they need to stop the same immediately and sign a consent letter agreeing to the same. In cases where the deception exists and the company refuses to sign the consent letter a cease and desist order will be issued. The cease and desist order is issued by the Administrative Law Judge based on an administrative trial conducted by the FTC. Thus the process of issuing it is an administrative one. This process can take almost a year. In instances where the case is decided in favour of the FTC then the order will be issued and if required an appeal from this order can be taken to the full five member commission.

Since 1938, after the Wheeler-Lea Amendment, the FTC could under section 13 of the Act seek preliminary injunctive relief in cases which involved deceptive advertising in sale of food, drugs, devices and cosmetics. In 1973 an amendment was made to the FTC Act and Section 13(b) was inserted[33]. Now the FTC could seek injunctive relief from a Federal Court for the violation of any legal provision which

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[32] Federal Reserve, "Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices", available at https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf (accessed on 23-06-2015)

[33] Peter C. Ward, "Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?", Vol.41(4), The American University Law Review, 1992, pp. 1139-1197, at p.1142.

was enforced by the FTC. Unfair methods of competition and deceptive acts or practices, to name a few, were situations where such injunctions were used[34]. In *Southwest Sunsites Inc.* v. *Federal Trade Commission*[35] the FTC sought an injunction against Sunsites Incorporated to prevent them from dispersing their property in any manner. It was a case where false claims were made in an advertisement by the company regarding an investment in West Texas. An injunction was sought to safeguard the interest of the purchasers in case FTC wins the case. The trial court refused the request but the Fifth Circuit decided in favour of the Commission. It held that while the Congress inserted section 13(b) into the Act it was intended that all traditional equitable remedies should be available to the courts. The court stated that, in such cases strong evidence was not required to prove that the assets should not be sold. It would be sufficient if it is proved that the same is "reasonably necessary" to provide appropriate remedy in future. In case where the FTC is satisfied that a misleading advertisement was published with the knowledge that the advertisement was misleading, the FTC can order consumer refunds which is done in almost one-third of all advertising cases.

The FTC has another remedy namely corrective advertisement which can be ordered in situations where an advertisement has created a false impression in the minds of the consumers. The best example for this can be the Listerine mouth wash campaign which was run by Warner-Lambert for almost 50 years[36]. This campaign created an impression in the minds of the consumer that Listerine mouthwash can prevent and heal sore throats and cold. In 1977 the FTC found the advertisement to be deceptive and ordered for a corrective advertisement. The corrective advertisement

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34 Boris W. Becker, "Injunction Powers of the Federal Trade Commission: Immediate Relief from Deceptive Advertising", Journal of Advertising, Vol. 12(3), 1983, p 44.

35 785 F.2d 1431 (9th Cir. 1986)

36 *Warner-Lambert Co.* v. *Federal Trade Commission*, 562 F.2d 749 (D.C. Cir. 1977)

campaign was run by Warner-Lambert for 16 months at a cost of ten million U.S. dollars.

The reason why corrective advertising was ordered in the *Warner-Lambert* case was because of the presence of several unique circumstances which include;

a) a long period of 50 years for which the false advertisements had been published,

b) the advertisements clearly claimed that Listerine was effective in preventing and treating sore throats and colds,

c) the marketing research of Warner-Lambert's showed that about 60% of consumers actually believed that Listerine could prevent and treat sore throats and colds, and

d) Listerine had 50% share of the mouthwash market and thus it can be concluded that the advertisement was by-and-large successful.

But since the *Warner-Lambert* case FTC never issued a corrective advertisement till 1995 when Robert Pitofsky[37] became the chairman of FTC. Now the FTC had the chance to clarify the grounds in which an order for corrective advertisements can be given which was done through the *FTC* v. *Novartis*[38] case. In this case the FTC filed a complaint against Novartis, the manufacturer of Doan's

[37] Robert Pitofsky served the FTC as Director of the Bureau of Consumer Protection from 1970 to 1973. This period is of special relevance because it was during this period that corrective advertising was first proposed as a remedy for deceptive advertising. Robert Pitofsky in his Harvard Law Review article has opined that in many cases an illegal advertisement results in the company capturing a certain market share. This market share is retained by the company till the consumer is informed about this wrong information which was given by the company. For this purpose, corrective advertisements are necessary to eliminate the information from the market.

Robert Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising", Vol. 90 (4), Harv. L. Rev., 1977, pp. 661-701.

[38] 223 F.3d 783 (D.C. Cir. 2000)

Pills, alleging that the advertisements for Doan's had been misleading insofar as they suggested that Doan's offer more effective relief for back pain than other pain relievers. The judge deciding the case stated that though the superiority claim made in the advertisement was implied, but the continuity of the implied messages made it almost express.

The case has helped in reinforcing the point that FTC can grant corrective advertisements in cases where an advertisement campaign has been going on for a reasonably long period (eight years in the given case). Such advertising campaigns are capable of creating and reinforcing certain beliefs, and these can have a long lasting effect on the consumer. In such cases corrective advertising becomes essential. The Commission decided that the company needs to publish its corrective advertisement for one entire year on all its packaging and advertisements. This was not applicable where a television or radio advertisements was for a duration of less than 15 seconds. The corrective advertisement was to continue till the company had spent an amount equal to the what it had spent annually for the period during which it was published [39].

The FTC further explained that it is not only the advertiser but also the advertising agency which can be made liable for a deceptive advertisement. The advertising agency which facilitates the publication of such an advertisement should also be made liable where the claim made in the advertisement is false. This would be applicable both in cases where the claim is express or implied[40].

Thus the advertising agencies can also be made liable if they have participated in the dissemination of the deceptive advertisement. It is not enough that an agency is assured by the advertiser that a particular claim can be substantiated, rather what is

[39] Michael B. Mazis, "*FTC* v. *Novartis*: The Return of Corrective Advertising?", Vol.20(1), Journal of Public Policy and Marketing, 2001, pp.114-122.

[40] Steven W. Colford, "FTC Warns Agencies; Eyes Tobacco, Cable", Advertising Age, October 2, 1990, p.6.

important is whether the agency knows or should have known that the claim made in an advertisement was false or deceptive[41]. Though the Lanham Act,1946 also provides for prosecuting the advertising agencies, this is often not done [42].

3.2.2 Lanham Act

False advertising under the Lanham Act, 1946[43], is an increasingly popular cause of action because of its broad applicability and ability to remedy competitive harm[44]. As previously mentioned, Lanham Act provides a private right of action to any person who believes that he or she is or is likely to be damaged by the use of any false description or representation in connection with any goods or services in commerce. The word 'private person' under the Act is strictly interpreted and a number of requirements must be met before a private person can sue for a Lanham Act violation. First, only competitors have a standing to bring a Lanham Act suit in federal or state court, so a potential plaintiff can only sue for the false advertising of its competitors[45]. Next, to be actionable under Lanham Act a communication must be made in commercial advertising or in the promotion of goods and services. Third, the communication must contain a false or misleading statement, description, or

41 Federal Trade Commission, "Advertising and Marketing on the Internet: Rules of the Road", available at https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road (accessed on 04-12-2014)

42 Ross D. Petty, *The Impact of Advertising Law on Business and Public Policy*, Quorum Books, Westport (1st edn., 1992), p.22.

43 Also known as the Trademark Act of 1946.

44 Courtland L. Reichman and M. Melissa Cannady, "False Advertising Under the Lanham Act", available at http://www.kslaw.com/library/pdf/reichmancannady-rp.pdf (accessed on 23-11-2014)

45 *Joint Stock Society* v. *UDV North America, Inc.,* 266 F.3d 164 (3d Cir. 2001). In this case it was held that "Section 43(a) of the Lanham Act is intended to provide a private remedy to a commercial plaintiff who meets the, burden of proving that its commercial interests have been harmed by a competitor's false advertising. This is not to say that a non-competitor never has standing to sue under this provision; rather the focus is on protecting commercial interests that have been harmed by a competitor's false advertising and securing to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not."

representation of fact which misrepresents the nature, characteristics, qualities or geographic origin of an advertiser's or its competitor's goods, services or commercial activities and, fourth, the false statement must be material to a consumer's purchasing decision[46].

Separate statements should be viewed in the context of the entire advertisement. Courts are required to view the "entire mosaic" of the advertisement rather than "each tile separately." Visual images are part of the message. For example, the visual component of an advertisement for pasteurized orange juice depicted juice from freshly squeezed oranges being poured directly into the carton. The message conveyed by the visual image was deemed to be false advertising under the Lanham Act as the juice was processed before it was packed. The message should be viewed from the perspective of the target audience. The target audience's sophistication or lack thereof, affects his perception regarding the advertisement, that is whether the advertisement is false or misleading[47].

Below given are the different ways in which the FTC Act and the Lanham Act are applied to advertising techniques in the U.S. They are often the subject matter of legal dispute.

3.2.3 Different Kinds of Claims in the US –Legal Perspective

(i) Puffery

Puffing is not actionable in United States. Courts are more inclined to characterize an advertisement as puffing if it has some or all of the following characteristics:

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[46] James B. Astrachan, "False Advertising Prime", available at http://www. aboutfalseadvertising.com/ index1_files/False%20Advertising%20Primer.pdf (accessed on 18-02-14)

[47] *Coca-Cola Co*. v. *Tropicana Products, Inc*., 690 F.2d 312 (2nd Cir.1982)

1. the relevant purchasers could not reasonably be expected to rely on the claims made in the advertisement;

2. the advertisement does not purport to compare a competitor's product to that of another, nor does it purport to disparage another competitor's product;

3. a general claim of superiority that is so vague that it can be understood as nothing more than a mere expression of opinion; or

4. the advertisement consists of subjective claims that cannot be proven true or false, i.e., claims that do not imply independent corroboration and do not suggest to consumers the existence of quantitative or other substantial support[48].

(ii) Express and Implied Claims

False advertising claims are actionable under the Lanham Act regardless of whether the claim is expressly stated or simply implied. Implied claims can arise in a variety of situations. Sometimes the slogans, descriptions, and photographs may be combined in such a manner that the result may create a misleading impression, even though each standing alone may not be actionable. For example, in the case of *Stanley Labs.* v. *FTC*[49] it was observed by the court that use of "M.D." in conjunction with the phrase "dependable safeguard" may lead to the conclusion that the product has contraceptive uses. Similarly, an entire package, taken as a whole, may be implicitly misleading, even though the labels themselves are not[50].

[48] *Pizza Hut, Inc*. v. *Papa John's Int'l, Inc*., 227 F.3d 489 (5th Cir. 2000)

[49] 138 F.2d 388 (9th Cir. 1943)

[50] *Kenny* v. *Gillett*, 17 A. 499 (Md. 1889)

(iii) Literally False Claims

The FTC defines false advertising as "a means of advertisement other than labelling, which is misleading in a material respect; and in determining whether an advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."[51]

(iv) Literally True but Misleading Claims

Unlike literally false statements, the standard for literally true but misleading claims requires a challenger to show that the advertisement has in fact misled or deceived consumers. Challengers will often rely on consumer surveys to show either consumer deception or lack thereof. This additional burden of proof was explained by the court in *American Council of Certified Podiatric Physicians and Surgeons* v. *American Board of Podiatric Surgery*[52]:

> Where statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception. A plaintiff relying upon statements that are literally true yet misleading cannot obtain relief

[51] Lee Wilson, *The Advertising Law Guide: A Friendly Desktop Reference for Advertising Professionals*, Allworth Press, New York (1st edn., 2000), p.25.

[52] 185 F.3d 606, 614 (6th Cir. 1999)

> by arguing how consumers could react; it must show how consumers actually do react.[53]

An illustrative case is *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks Inc*[54]. Finding that Sandoz had failed to establish that an advertisement for Vick's paediatric formula was misleading to consumers, absent any consumer survey evidence, the Third Circuit explained that "where the advertisements are not literally false, plaintiff bears the burden of proving actual deception by a preponderance of the evidence." The court reasoned that the "effect of the advertisement on the consumer is the critical determination, and it must be demonstrated by a Lanham Act plaintiff regardless of whether the claim is facially ambiguous." [55] Thus, without evidence of actual consumer misinterpretation, the claim for literally true but misleading statements could not be upheld.

(v) Images can be False or Misleading

Sometimes a false or misleading message may be communicated, either explicitly or implicitly, by images used in advertisements. In a case cited earlier[56], the Second Circuit had held that a television advertisement was false as the juice which was originally pasteurized and prepared through a process of heating and sometimes freezing prior to packaging, was visually represented as being made by squeezing oranges and pouring freshly-squeezed juice directly into the carton. But the Fourth Circuit held that "it was neither literally false, nor literally false by necessary implication."

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53 *Id.* at p.610.

54 902 F.2d 222 (3rd Cir. 1990)

55 *Id.* at p. 228-229.

56 *Supra* n.46.

Where an advertisement carried an illustration of mature crabgrass and was directly placed above the phrase "prevents crabgrass up to 4 weeks after germination". It was contended that if the image and the text are taken together then it would mislead the consumers by creating an impression that the product can actually kill already-existing mature crabgrass. It was held that this inference was unlikely and unsupported[57].

But in another case[58] the Second Circuit held a certain internet image depicting a competitor's extremely bad television reception as exaggerated and inaccurate. It further held that no reasonable consumer would believe it to be real and so, in context, constituted mere puffery.

3.2.3.1*Substantiation of claims*

FTC Policy Statement Regarding Advertising Substantiation dated 11th March 1983 established that advertisers could no longer make statements without a "reasonable basis" for their claims and that all claim substantiation must occur prior to the advertisement and cannot later be established through post-advertisement testing[59].

Advertisers should have a "reasonable basis" for any product claim that he makes. This claim could be made through an objective assertion regarding the product or service so advertised. Reference should be made to a certain level of support for the claim so made about the product or service. In making this "reasonable basis" determination, the FTC evaluates six factors: "(1) the product involved; (2) the type of claim made; (3) the benefits of a truthful claim; (4) the ease

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57 *The Scotts Company* v. *United Industries Corporation*, 315 F.3d 264 (4th Cir., 2002)

58 *Time Warner* v. *DirecTV*, 497 F.3d 144 (2nd Cir. 2007)

59 Federal Trade Commission, "FTC Policy Statement Regarding Advertising Substantiation", available at http://www.ftc.gov/bcp/guides/ad3subst.htm (accessed on 12-03-2014)

of developing substantiation; (5) the consequences to the consumer of a false claim; and (6) the amount of substantiation which experts in the field consider reasonable[60].

The highest level of proof is necessary when an advertisement, either explicitly or implicitly, claims to be supported by testing or scientific research, or indicates any specific level of support. Claims, sometimes called "establishment claims," require the advertiser to show the same level of substantiation as presented in the advertisement. The presence of statements such as "tests prove," "studies show," "clinically proven," "laboratory tested" or other similar statements are usually a strong indication that a claim is an establishment claim.

3.2.3.1 *Legal remedy*

The most common legal remedy includes the issue of cease and desist orders. Here the advertiser is prevented from publishing similar deceptive advertisements in the future. This kind of remedy is generally given at the end of a trial which may generally take around one year. In cases where the FTC is convinced through evidence that there has been a knowing dishonesty, it can order consumer refunds. Corrective advertising is another remedy which is given in cases of deceptive advertising both by the FTC as well as the courts under the Lanham Act. FTC also resorts to information disclosure by the advertiser as a remedy[61].

Thus the FTC and the Lanham Act along with the self –regulatory mechanism in the U.S. has a very robust system to tackle deceptive advertising. The applicability and interpretation of the provisions by the FTC and the courts have led to more clarity on the do's and don'ts in advertising.

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[60] William H. *et al.*, "Advertising Basics", available at http://www.kilpatricktownsend.com/~/media/Files/articles/LPearsonAdvertisingBasics.ashx (accessed on 12-02-2014)

[61] *Supra* n.42.

3.3 United Kingdom

UK has the credit of being the first European country to introduce competition legislations after the Second World War[62]. In the UK advertising regulatory system is a mixture of self-regulation for non-broadcast advertising and co-regulation for broadcast advertising. Having said that it would not be wrong to say that UK depends highly on self-regulation to control advertising. The Advertising Standards Authority[63] is the major self-regulator in the UK and is considered to be the world's largest and the best financed self-regulator. Government of UK supports the ASA and two third of its Council is from outside the industry.

3.3.1 Fair Trading Act and the Office of Fair Trading

The Office of Fair Trading[64], was formed under the Fair Trading Act, 1973. It is yet another body which played a very important role in the enforcement of laws which dealt with misleading advertisements till its dissolution in 2014. In the case of Control of Misleading Advertisements Regulations, 1988 it was the responsibility of the OFT, or Ofcom where the advertisements were broadcast, to take up complaints regarding misleading advertisements. The OFT always preferred that a case should either be referred to the ASA or where a criminal offence was involved, should be referred to the local trading standards department. But the OFT would take action only in cases where the advertisement actually deceives or could prospectively

[62] Michelle Cini, "The Europeanization of British Competition Policy", in I. Bache and A. Jordan (eds.), *Britain in Europe and Europe in Britain: The Europeanization of British Politics?*, Palgrave Macmillan, UK (2006), p. 217.

[63] Hereinafter referred to as ASA.

[64] Hereinafter referred to as OFT. The OFT was a government department of the United Kingdom, and was formed by the Fair Trading Act, 1973. The OFT was primarily concerned with the enforcement of consumer protection laws and competition law. Its goal was to maintain competition among fair dealing businesses and to protect consumers from unfair market practises. The Enterprise Act, 2002 brought about a change in its role and powers.

deceive a consumer or is likely to affect the economic behaviour of the consumer or it injures the competitor of the trader who has come out with the advertisement[65].

The OFT had conducted a number of investigations against big companies in the field of banking, supermarkets, bus operators etc. But these investigations have been criticised as extremely time consuming as it takes atleast one year by the OFT and another couple of years by the Competition Commission to complete the process. Thus later the OFT and the Competition Commission were merged into a single authority namely the Competition and Markets Authority[66]. There was also a general feeling that there has been some amount of duplication between the OFT and the Competition Commission because of which the merger was a welcome move[67]. Thus the OFT and the Competition Commission was merged into a single body namely the Competition and Markets Authority on October 1, 2013 and the same became fully functional since April 1, 2014. Among others the CMA has been vested with the powers to enforce consumer protection legislations which are concerned with addressing practices which are detrimental to consumers freedom of choice[68].

3.3.2 Communications Act and the Office of Communication

The Office of Communications otherwise known as Ofcom, formed in 2003, is another government-approved regulatory and competition authority for the broadcasting, telecommunications and postal industries of the United Kingdom. It was called the 'super-regulator' as it replaced several existing regulators such as the

65 Alan Paul Dobson and Robert Stokes, *Commercial Law*, Sweet & Maxwell, London (2012), p.314.

66 Hereinafter referred to as CMA.

67 Julia Kollewe, "Office of Fair Trading and Competition Commission to Merge", available at https://www.theguardian.com/business/2010/oct/14/office-of-fair-trading-competition-commission- to-merge (accessed on 27-04-2014)

68 Competition and Markets Authority, available at https://www.gov.uk/government/organisations/competition-and-markets-authority/about (accessed on 02-08-2014)

Broadcasting Standards Commission, the Independent Television Commission, the Office of Telecommunications, the Radio Authority, and the Radio communications Agency. The body which was created by the Communications Act 2003, had the responsibility to monitor media channels which were converging through digital transmission[69]. It has powers across television, radio, telecommunications and wireless communications. In November 2004 control of the regulation of broadcast advertising, formerly undertaken by state bodies, was handed over to the ASA. This move was made by Ofcom with the support of the parliament. Ofcom contracted-out responsibility for broadcast (television and radio) advertising thus creating a single regulator for advertising[70]. But Ofcom still has the final say on issues related to teleshopping, sponsorship, amount and scheduling of advertisements etc. and it is Ofcom that is ultimately responsible for all advertisements that appear on radio and television[71].

Advertising in the UK is mainly controlled through codes of practice. The ASA enforces the UK Code of Broadcast Advertising[72] which applies to television and radio broadcasting[73]. In the case of advertisements in the non-broadcast media, the Advertising Standards Authority oversees and acts to ensure compliance with the British Code of Advertising, Sales Promotion and Direct Marketing.

ASA works on specific claims submitted to it. It also takes *suo motu* action in case of misleading, harmful or offensive advertisements, sales promotions and direct

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69 "Queen Announces Media Shake-up", BBC News, 20 June, 2001, available at http://news.bbc.co.uk/2/hi/entertainment/1398580.stm (accessed on 22-07-14)

70 Advertising Standards Authority, "History of ASA", available at http://asa.org.uk/About-ASA/Our-history.aspx (accessed on 22-07-14)

71 Helen Powell, *et.al.*, *The Advertising Handbook*, Routledge, London (3rd edn., 2009), p.80.

72 Hereinafter referred to as BCAP Code.

73 Barbara Sundberg Baudot, *International Advertising Handbook*, Lexington Books, Toronto (1st edn., 1989), pp.116-126.

marketing. If an advertisement is seen to be in violation of the UK advertising Codes the ASA can ask the same to be withdrawn or amended. In case of broadcast advertisements, the broadcaster has the responsibility to withdraw or change an advertisement. In the broadcast license issued to the broadcaster it is stated as a condition that the broadcaster has to abide by the ASA ruling. In case the broadcasters still runs the advertisement then the ASA can refer the case to Ofcom which can either impose a fine or in the worst case cancel the license issued to the broadcaster[74]. In 2012 alone 31,298 complaints were submitted to the ASA. Subsequently 3,700 advertisements were either changed or withdrawn.

The sanctions for the non-broadcast advertising are coordinated through Committees of Advertising Practice[75] which writes and maintains the UK Advertising Codes, and which is administered by the Advertising Standards Authority. The members of CAP include trade associations representing advertisers, agencies and media. There are several CAP sanctions, which can be employed in different circumstances. If the advertising industry is not enforcing its code of practice the Office of Fair Trading[76] has additional powers to prevent the continued display or publication of the advertisement, by applying to the High Court for an injunction. In most cases the OFT will ask advertisers to change or remove the deceptive advertisement.

Advertisements have been regulated in the U.K. at the behest of several governments, especially the Labour ones. As in many other jurisdictions, in the UK too, there are many laws which govern advertising. The advertising industry play's an active role in these legislations so as to ensure that it is practical as well as workable. Many of these legislations refer to very specific trades or businesses for

[74] *Supra* n.15.

[75] Hereinafter referred to as CAP.

[76] Hereinafter referred to as OFT.

example the Poisons Act,1972, the Fertilisers and Feeding Stuffs Act, 1926, Fabrics (Misdescription) Act,1913, etc.[77]

There are many target legislations such as the one aimed for the protection of children against irresponsible advertisements. Ofcom was later approached by the then Secretary of State for Culture, Media and Sport to consider regulation which would restrict food and drink related advertisement targeted towards children. This was in the background of growing obesity levels in children. Ofcom immediately advised changes to the existing advertising rules. Statutory restriction were introduced to television advertising three years later on the finding of Ofcom[78]. Thus now Office of Communications in the UK is concentrating more towards restricting the scheduling of television advertisement to children. These restrictions are related to advertisement of food and drinks which are high in fat, sugar or salt and are as follows;

1. Advertisements should not be shown in or around programs specifically made for children (which includes pre-school children).

2. Advertisements should not be shown in or around programs of particular appeal to children under 16.

3. These restrictions will apply equally to program sponsorship by these products.

The CAP Code and the BCAP which are enforced by the Advertising Standards Authority have elaborate provisions on advertising to children. The CAP Code clarifies that while publishing an advertisement, it is important to consider the age and experience of the audience and the context in which the advertisements are

[77] Frank Jefkins, *Advertising*, Prentice Hall, England (4th edn., 2000), p.304.

[78] World Health Organisation, "Protecting Children from the Harmful Effects of Food and Drink Marketing", available at http://www.who.int/features/2014/uk-food-drink-marketing/en/ (accessed on 07-11-2014)

delivered.[79] Section 5 of the CAP Code which deals with advertising for children addresses issues such as harm caused to children due to advertisement, exploiting the

[79] Section 5 of the CAP Code provides that -

5.1 Marketing communications addressed to, targeted directly at or featuring children must contain nothing that is likely to result in their physical, mental or moral harm:

5.1.1 Children must not be encouraged to enter strange places or talk to strangers.

5.1.2 Children must not be shown in hazardous situations or behaving dangerously except to promote safety. Children must not be shown unattended in street scenes unless they are old enough to take responsibility for their own safety.

5.1.3 Children must not be shown using or in close proximity to dangerous substances or equipment without direct adult supervision.

5.1.4 Children must not be encouraged to copy practices that might be unsafe for a child.

5.1.5 Distance selling marketers must take care when using youth media not to promote products that are unsuitable for children.

5.2 Marketing communications addressed to, targeted directly at or featuring children must not exploit their credulity, loyalty, vulnerability or lack of experience:

5.2.1 Children must not be made to feel inferior or unpopular for not buying the advertised product.

5.2.2 Children must not be made to feel that they are lacking in courage, duty or loyalty if they do not buy or do not encourage others to buy a product.

5.2.3 It must be made easy for children to judge the size, characteristics and performance of advertised products and to distinguish between real-life situations and fantasy.

5.2.4 adult permission must be obtained before children are committed to buying complex or costly products.

5.3 Marketing communications addressed to or targeted directly at children:

5.3.1 Must not exaggerate what is attainable by an ordinary child using the product being marketed.

5.3.2 Must not exploit children's susceptibility to charitable appeals and must explain the extent to which their participation will help in any charity-linked promotions.

5.4 Marketing communications addressed to or targeted directly at children:

5.4.1 Must not actively encourage children to make a nuisance of themselves to parents or others and must not undermine parental authority.

5.4.2 Must not include a direct exhortation to children to buy an advertised product or persuade their parents or other adults to buy an advertised product for them.

credulity of children and exerting undue pressure on them, undermining parental authority and direct exhortation to children to buy an advertised product and specifics of promotions directed towards children. According to the BCAP Code a child is someone who is below the age of 16 and there are detailed rules for advertisements meant for children of the given age under Section 5 of the Code[80].

5.5 Marketing communications that contain a direct exhortation to buy a product via a direct-response mechanism must not be directly targeted at children. Direct-response mechanisms are those that allow consumers to place orders without face-to-face contact with the marketer.

5.6 Promotions addressed to or targeted directly at children:

5.6.1 Must make clear that adult permission is required if a prize or an incentive might cause conflict between a child's desire and a parent's, or other adult's, authority.

5.6.2 Must contain a prominent closing date if applicable.

5.6.3 Must not exaggerate the value of a prize or the chances of winning it.

5.7 Promotions that require a purchase to participate and include a direct exhortation to make a purchase must not be addressed to or targeted at children. See Section 8: Sales Promotions.

[80] Section 5 of the BCAP Code provides that,

5.1 Advertisements that are suitable for older children but could distress younger children must be sensitively scheduled.

5.2 Advertisements must not condone, encourage or unreasonably feature behaviour that could be dangerous for children to emulate. Advertisements must not implicitly or explicitly discredit established safety guidelines. Advertisements must not condone, encourage or feature children going off alone or with strangers.

This rule is not intended to prevent advertisements that inform children about dangers or risks associated with potentially harmful behaviour.

5.3 Advertisements must not condone or encourage practices that are detrimental to children's health.

5.4 Advertisements must not condone or encourage bullying.

5.5 Advertisements must not portray or represent children in a sexual way.

5.6 Advertisements must not imply that children are likely to be ridiculed, inferior to others, less popular, disloyal or have let someone down if they or their family do not use a product or service.

5.7 Advertisements must not take advantage of children's inexperience, credulity or sense of loyalty. Advertisements for products or services of interest to children must not be likely to

Other important legislations which deal with advertising include, the Trade Descriptions Act ,1968 which was enacted with a view of protecting the general public from being mislead by the manufacturer. The Act prevented the manufacturers from giving any kind of false description regarding their goods. The self-regulatory authority namely the Advertising Standards Authority jointly with the local trading standards body enforces the provisions of this Act. The ASA in turn works either on its own or with the help of the Ofcom. This law states that the retailer must not;

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mislead; for example, by exaggerating the features of a product or service in a way that could lead to children having unrealistic expectations of that product or service.

5.8 Child actors may feature in advertisements but care must be taken to ensure that those advertisements neither mislead nor exploit children's inexperience, credulity or sense of loyalty.

5.9 Advertisements must not include a direct exhortation to children to buy or hire a product or service or to persuade their parents, guardians or other persons to buy or hire a product or service for them.

5.10 Advertisements that promote a product or service and invite consumers to buy that product or service via a direct response mechanism must not be targeted directly at children. Direct-response mechanisms are those that allow consumers to place orders without face-to-face contact with the supplier.

5.11 If it includes a price, an advertisement for a children's product or service must not use qualifiers such as "only" or "just" to make the price seem less expensive.

5.12 Television only Advertisements for a toy, game or comparable children's product must include a statement of its price or, if it is not possible to include a precise price, an approximate price, if that product costs 30 or more.

5.13 Advertisements for promotions targeted directly at children:

5.13.1 must include all significant qualifying conditions

5.13.2 must make clear if adult permission is required for children to enter. Advertisements for competitions targeted directly at children are acceptable only if the skill required is relevant to the age of likely participants and if the values of the prizes and the chances of winning are not exaggerated.

5.14 Promotions that require a purchase to participate and include a direct exhortation to make a purchase must not be targeted directly at children.

1. supply any kind of misleading information,

2. make any false statement or false description about any product or service that it so offers,

3. claim that a product is being sold at half the price unless the same product has been sold at full price atleast 28 days before the given offer,

4. must not make any false comparison between any present and past price.

Under the Act the application of false description was made an offence with strict liability. In such a case it has to be shown that the false description was actually applied and that the same was false. Later in 2005 the EU passed the Unfair Commercial Practices Directive[81] regarding regulation of unfair business practice, and in pursuance of this the Consumer Protection from Unfair Trading Regulations, 2008 was drafted by the UK. Trade Descriptions Act, 1968 though is still in force, many of its provisions stand repealed by the above mentioned Regulations. The Consumer Protection Act,1987 was yet another legislation that prohibited dissemination of false information by the manufacturer. Giving a misleading price indication was made a criminal offence under Part 3 of the Act[82]. Consumer Protection from Unfair Trading Regulations 2008 repealed part III of this Act.

Thus it can be gathered that many of the laws in UK are derived from the EU Directives. For this we can take the example of Television Without Frontiers Directive[83] which gave a basic framework for the broadcasting of both televisions as well as radio advertisements. Again in, 1988 UK saw the enactment of the Control of Misleading Advertisements Regulations. This legislation implemented the EU

[81] 2005/29/EC.

[82] Offence under part III of the Act has been described.

[83] 89/552/EC.

Directive on misleading and comparative advertising[84]. The Regulation, unlike the Indian legislations which are either specific to consumers as in the case of Consumer Protection Act or are specific to the businesses, as in the case of the Trade Marks Act, is designed to protect both the traders as well as the consumers from advertisements which mislead the viewer as well as advertisements which make unacceptable comparisons. The Act implemented all the major provisions as given under the EC Directive.

3.3.3 Consumer Protection from Unfair Trading Regulations, 2008

Later UK introduced the Consumer Protection from Unfair Trading Regulations, 2008[85]. It is the main instrument which regulates deceptive advertising in United Kingdom[86]. The Regulation was made in order to implement the EC Unfair Commercial Practices Directive[87], 2005 which required member states to take active steps against business-to-consumer unfair practises. The purpose of the UCPD was the development of the European market based on principles of fair business practises. This would also bring greater consumer confidence across borders. The Consumer Protection from Unfair Trading Regulation, 2008 replaced many consumer protection legislations for example the offences contained in the Trade Descriptions Act, 1968 was repealed and a new set of broader criminal offences were introduced. Here the traders may not engage in misleading or aggressive practices which would be likely to cause "the average consumer to take a transactional decision he would not have taken otherwise".

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84 EC Directive on Misleading Advertising, 84/450/EC.

85 The Regulations were introduced in 2008 to implement the Unfair Commercial Practices Directive, 2005. They replaced 23 previous enactments.

86 The Law Commission (England and Wales), "Consumer Redress for Misleading and aggressive Practices", available at http://lawcommission.justice.gov.uk/docs/lc332_consumer_redress.pdf (accessed on 3-5-14)

87 Hereinafter referred to as UCPD.

Under the Regulation commercial practice is unfair if;

(a) it contravenes the requirements of professional diligence; and

(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product. Further, a commercial practice is also considered unfair if—

(i) it is a misleading action under the provisions of regulation 5;

(ii) it is a misleading omission under the provisions of regulation 6;

(iii) it is aggressive under the provisions of regulation 7; or

(iv) a blacklist of examples of 31 practices which are always unfair[88];

(v) it is a practice which is contrary to the requirements of professional diligence.[89]

From the above it can be noted that the Regulation brought forth a list of unfair commercial practices which were prohibited. These prohibitions also include specific misleading and aggressive practices. A blacklist was created where 31 practices[90] were deemed to be unfair in all given circumstances[91]. Under the

88 Schedule 1 of the Unfair Trading Regulations, 2008.

89 Regulation 3(3) of the Unfair Trading Regulations, 2008.

90 The Black list includes-

- "Bait advertising" - advertising products at a specified price without disclosing that the trader has reasonable grounds to believe he may not be able to supply them or their equivalent at that price for a reasonable period or in reasonable quantities.
- Falsely stating a product will only be available (or available on certain terms) for a very limited time to persuade the consumer to make an immediate decision.
- Passing on materially inaccurate market information to persuade the consumer to buy on less favourable terms than normal market conditions.

Regulation a commercial practice is unfair if it is not professionally diligent, and it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer. Here in order to be covered by the Act it has been stated that the given act should not only be against the requirement of professional diligence but should also be such that it distorts the economic behaviour of the consumer. Thus the existence of both the elements is necessary.

The Regulation also requires proof of *mens rea*, which means that the trader should 'knowingly or recklessly engage in a commercial practise' which has been prohibited. In case the particular action is blatantly unfair or unprofessional then, it would be deemed that the act has been done knowingly or recklessly[92]. Under Regulation 17 the trader can take the defence that the commission of the offence was due to;

1. a mistake,
2. reliance on information supplied to him by another person,
3. the act or default of another person,
4. an accident, or
5. another cause beyond his control[93].

- Using "advertorials" (editorial comment to promote a product) without making it clear that the trader has paid for the promotion.
- Including in an advertisement a direct encouragement to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.

91 "Consumer Protection from Unfair Trading Regulations", available at http://www.out-law.com/page-9050 (accessed on 06-09-2013)

92 Department of Business Enterprise and Regulatory Reform, "Consumer Protection from Unfair Trading", available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf (accessed on 13-02-2013)

93 Regulation 17 of the Unfair Trading Regulations, 2008.

The regulation further states that the trader shall not be liable if he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or by any person under his control. The Regulation 18 also has provision for the defence of innocent publication of an advertisement[94]. So under this defence the person will have to prove that he is a person who publishes advertisements or arranges for the same, and that the advertisement that he so received has been published in the normal course of business and that he did not whatsoever suspect the material to be of such a character which could violate the Regulation.

The power to enforce the Regulation has been vested with the Trading Standards Services, the Office of Fair Trading OFT and in Northern Ireland, the Department of Enterprise, Trade and Investment using the "most appropriate means". In cases where such unfair practises are carried on these appropriate means range from the informal regulatory (or self-regulatory) procedures to a civil action for an enforcement order against such practises, or in extreme cases it may also lead to criminal proceedings[95].

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[94] Regulation 18, of Unfair Trading Regulations, 2008 - Innocent publication of advertisement defence

(1) In any proceedings against a person for an offence under regulation 9, 10, 11 or 12 committed by the publication of an advertisement it shall be a defence for a person to prove that—

(a) he is a person whose business it is to publish or to arrange for the publication of advertisements;

(b) he received the advertisement for publication in the ordinary course of business; and

(c) he did not know and had no reason to suspect that its publication would amount to an offence under the regulation to which the proceedings relate.

(2) In paragraph (1) "advertisement" includes a catalogue, a circular and a price list.

[95] Mel Kenny, *et.al.*, *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, Cambridge University Press, New York (1st edn., 2010), p.350.

In 2008 another regulation namely, Business Protection from Misleading Marketing Regulations was enacted. While the Consumer Protection from Unfair Trading Regulations[96], 2008 was formulated with a view to protect the consumer, Business Protection from Misleading Marketing Regulations[97], 2008 was drafted with a view to protect business. But both the Regulations dealt with unscrupulous advertising and marketing practices and introduced criminal penalties for such acts. Comparative advertising was not prohibited, but the same was allowed only in very specific circumstances. The regulation has by-and-large retained the criteria previously given under the Control of Misleading Advertisements Regulations, 1988 for a satisfactory comparative advertisement. The Regulation also goes one step ahead and states that the given comparative advertisement should not be misleading in any way nor should it omit any important information as provided under the CPR[98]. In order to ensure whether a particular comparative advertisement is permitted or not the Office of Fair Trading has provided a ten-point compliance checklist[99].

These Regulations as stated above apply to (1) businesses that advertise goods or services to other businesses; and (2) businesses which make comparisons that identify a competitor or competitor's product in their advertisements. The CPRs and BPRs can be enforced by Office of Fair Trading and Trading Standards which are the enforcing authorities. The powers of the OFT has now been transferred to the Competition and Markets Authority. Thus the enforcement of these Regulations can be done by private parties. Penalties can be extended to officers of a company and

96 Hereinafter referred to as CPR.

97 Hereinafter referred to as BPR.

98 Nicholas Ryder, *et.al*., *Commercial Law: Principles and Policy*, Cambridge University Press, UK (1st edn., 2012), pp.399-400.

99 Office of Fair Trading, "Business to Business Promotions and Comparative Advertisements", available at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/business_leaflets/general/oft1056.pdf (accessed on 21-02-2014)

include fines of up to £5,000 and prison terms of up to 2 years in respect of both CPR and BPR offences. Thus it can be said that the Regulations have been built in such a way that the CPRs and the BPRs aim at protecting the consumers and traders respectively from unfair trading and provide improved enforcement.

3.3.4 Pre-clearance for TV and Radio Advertising

Most of the television and radio advertisements go through a pre-clearance phase before they are broadcast in the UK. In case of a deceptive advertisement the Broadcasters are directly answerable to Ofcom, which is their licensing authority. While the license is issued to the broadcasters a condition is added stating that the broadcasters must take reasonable steps to ensure that the advertisement they broadcast are compliant with the UK Code of Broadcast Advertising. It may be noted that in U.K., the ultimate responsibility lies with the broadcaster for showing deceptive advertisements on their channels. In order to be compliant with the UK Code of Broadcast Advertising, the broadcasters have established and funded two pre-clearance centres which are:

(i) Clearcast for television commercials

(ii) The Radio Advertising Clearance Centre (RACC) for radio ads[100].

Clearcast is a specialist company which is involved in the approval of television advertisements. It is owned and funded by seven leading commercial broadcasters, ITV, Good Morning Britain, Channel Four, Channel 5, Sky, and Turner[101]. It was established on 1st of January 2008 and took over the responsibilities of the Broadcast Advertising Clearance Centre. As stated earlier its main aim is to

[100] *Supra* n. 71.

[101] Ardi Kolah, *Guru in a Bottle: Essential Law for Marketers,* Kogan Page Ltd., Great Britain *(*2nd edn., 2013*),* pp.188-189.

ensure that the advertisements adhere to the UK Code of Broadcast Advertising namely the BCAP Code. All advertisements intended for broadcast on analogue and digital terrestrial, cable and satellite channels owned by ITV, Good Morning Britain, Channel Four, Channel 5, Sky and Turner, must be submitted to Clearcast for approval. A preproduction script of the television commercial is submitted by the advertising agencies to Clearcast. Anyhow it is a mere approval body and has nothing to do with complaints regarding television advertisements.

In one instance approval was sought by Diomed Direct Ltd. from Clearcast for the TV advertisement of its product Prevasore Everyday Lip Therapy, a certain medical device. In the proposed advertisement Diomed wished to include a certain claim. Clearcast required Diomed to substantiate that claim. Diomed's argument was that as the product had already received EC certification the same claim should be included in the advertisement and that no further proof or substantiation was required. Clearcast anyhow did not buy this argument and challenged this decision of Clearcast. It was decided that that the decisions made by Clearcast regarding pre-clearance was not subject to judicial review. This was because Clearcast had no statutory foundation as it was a private company. It only assists the broadcasters to carry out its functions and was owned by four large broadcasters in UK[102].

With regards to the preclearance process for radio advertisements, the Radio Advertising Clearance Centre was established. It is commercial radio's advertising clearance body[103]. It is funded by commercial radio stations who pay copy clearance fees and are a part of Radio Centre, the industry's trade association and marketing body. Thus pre-clearance of advertisements is a very important step in the U.K.

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[102] Charles Swan, "Clearcast TV Pre-clearance Decisions not Subject to Judicial Review: Diomed *Direct Ltd* v. *Clearcast Ltd*" available at http://swanturton.com/clearcast-tv-pre-clearance-decisions-not-subject-judicial-review-diomed-direct-ltd-v-clearcast-ltd/ (accessed on 12-10-2016)

[103] Franziska Weber, *The Law and Economics of Enforcing European Consumer Law*, Routledge Publishing, New York (2nd edn., 2016), p.256.

3.4 Sweden

Sweden is a unique example of advertising regulation with extensive industry participating in the state regulatory system. Constant dialogue with the industry representatives has facilitated the creation of a robust regulatory system. From 1957-70 Sweden had a self-regulatory body namely Council on Business Practice.

The Marketing Act was introduced in 1970 and dealt with deceptive means of advertising[104] which also made it a criminal offence[105]. The new guidelines were very similar to the already prevailing one used by the self-regulatory body. The National Board of Consumer Policy and the Consumer Ombudsman were also formed in course of time. Members from the industry were also represented on the Board. The new system also had better means of enforcement as it was backed by the government and thus had become what is called "codes of marketing ethics with teeth"[106].

While the Council on Business Practice was abolished the Marketing Law Consultancy was formed in 1969, shortly before the new marketing law and its related institutions came into effect, in order to help and provide consultancy on how to go about with the governmental regulations which were soon to follow. The lawyers in the Marketing Law Consultancy team keep a close watch on the developments in The National Board of Consumer Policy and the Consumer Ombudsman and advise the businesses accordingly.

An updated Marketing Act was introduced in Sweden in the year 2008 by the Parliament. This Act had two-fold benefits. One was the protection of

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104 Section 2 of the Market Act, 1970.

105 Sections 6-8 of the Market Act,1970.

106 H. Ballinger, "Dynamic Analysis: The Case of Sweden Since 1940 – 1977", in H. B. Thorelli and S.V. Thorelli (eds.), *Consumer Information System and Consumer Policy*, Cambridge, Massachusetts (1977), p. 230.

consumers and the other was to prevent deceptive advertisements reaching the market. Certain marketing practices have been prohibited by the Act, which include misleading advertisements, aggressive and unfair portrayal of competitors, unfair representation of goods and services etc.

3.4.1 The National Board of Consumer Policy: Working and Members

Sweden moved to greater governmental regulation in issues related to economic affairs in the 1970's. The National Board of Consumer Policy was formed during this period in the year 1972. The operating plan of the governments National Board for Consumer Policy reflected its purpose as it stated that, "the purpose of the consumer policy is to support the consumer and improve their position in the market place… the starting point of this work is that the individual consumer occupies a weak position compared to producers, distributers and marketers. The consumer needs active support from the society to get his/her interest considered in the marketplace."[107]

Thus the government is of the view that the consumers were a weak section and needed protection[108]. The National Board of Consumer Policy has now merged into one from what previously were three separate agencies for labeling, product testing and consumer information. The Board has also been charged with powers to investigate products and markets especially the kind of information that is disseminated to a consumer. It also has a Public Complaints Office where consumers can complain regarding faulty products. The National Board of Consumer Policies accept complaints from individual consumers, regional and local authorities, businesses, and associations. But problems are also detected

[107] Johny K. Johansson, "The Theory and Practice of Swedish Consumer Policy", available at https://archive.org/stream/theorypracticeof136joha/theorypracticeof136joha_djvu.txtSwedish (accessed on 23-03-2013); National Board for Consumer Policy, Stockholm, June 26, 1973. p.1

[108] David A. Aaker and George S. Day, *Consumerism*, Simon & Schuster, New York (1982), p.63.

through the Board's advertising monitoring activity. Majority of the complaints are filed by individual consumers. Once a complaint is received the Board first tries to determine if the case in hand comes within the jurisdiction of the Consumer Ombudsman. When a complaint is filed or when the Board comes across an advertisement that violates the codes, it immediately talks to the advertisers. Most of the time the issue is resolved at this level. In case it is not, then it is referred to the concerned Ombudsman. If the case is not settled even by the Ombudsman, then it is referred to the Market Court. Most of the cases are resolved at the lower level. Only very few cases reach the Market Court.

The Governing Council of National Board of Consumer Policy has significant representation from the business community. As this allows the industry to have a say in the legislations, it put to rest their fears and apprehensions as they are convinced that they can now work from the inside. The chairman of the Board is also the Director General of the Consumer Ombudsman. The other members include representatives of consumers, businesses, political parties, local authorities, staff of the Board in an advisory capacity and Director General of the National Food Administration. Outside members are appointed by the ministry of finance from the names suggested by the business bodies and consumer organisations.

3.4.2 Regulation Followed by National Board of Consumer Policy

The National Board of Consumer Policies and the Consumer Ombudsman also developed standards which were in line with the principles of good commercial behavior as followed by the erstwhile Council of Business Practice which was again in turn taken from International Chamber of Commerce Code. Guidelines were developed for the implementation of the law. It was the responsibility of the Board, the Consumer Ombudsman, and the Market Court to implement the Code. The new system which came out as more superior, was able to attract more consumer

complaints. Being a government body it could handle many more complaints and was thus considered more efficient. As the system by-and-large worked on the same principles as was adopted and accepted by the industry they were to a large extent non-controversial[109]. The Board was the primary governmental body to take care of consumer interest in the market place. The Board was later merged with the Consumer Ombudsman in 1976 as their roles overlapped. The Director General and the Chairman of the Board is now the Consumer Ombudsman.

3.4.3 The Consumer Ombudsman

The Consumer Ombudsman, which was created as an advertising watchdog, took office on the 1st of January, 1971[110]. Now there are different Ombudsman for different categories of advertising such as alcohol, children's advertisements etc. The Market Act which created the Ombudsman system in 1971 stated that, "for questions concerning marketing practices there shall be a Consumer Ombudsman". The Act also states that an Ombudsman should be a person with legal training. His position is that of a civil servant with fixed term. It also takes up the duty of receiving complaints from the aggrieved consumers. It keenly tries to improve the industry standards by constantly working on the guidelines negotiated with the relevant industries. He mainly handles cases which come under the Marketing Act, 1970. It intervenes in cases related to misleading advertising and marketing, unfair contract terms incorrect price information and dangerous products[111].

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[109] Ulf Bernitz and John Draper, *Consumer Protection in Sweden: Legislation, Institutions and Practice*, Institute of Intellectual property and Market Law Publication, Stockholm (1981), pp. 290-297.

[110] Section 11 of the Market Act, 1970.

[111] "The Consumer Ombudsman", *available at:* https://translate.google.co.in/translate?hl=en&sl=sv&u=http://www.konsumentverket.se/Om-oss/Konsumentombudsmannen/&prev=search (accessed on 07-10-2015)

Having been formed under the Market Act, 1970 a substantial part of its duties include bringing cases against businesses that violate the fair marketing practices. The case can either be based on a complaint by a consumer or can be taken-up on its own motion. It generally tries to settle the dispute through negotiation between the advertiser and the consumer. In case no amicable settlement is arrived at, only then the matter is referred to the Market Act, 1970. It also sometimes can represent a consumer in court against the unfair advertising practice of a company[112]. The Ombudsman takes up only those cases which have a larger consumer interest involved. It refuses to take cases which are very specific and thus can be handled by the Public Complaints Board[113]. Based on the gravity of the violation the Consumer Ombudsman can seek three types of reliefs. These include an injunction, a court decision ordering information disclosure or a specific penalty for "market disturbance" of up to 10% of the infringer's annual turn-over.

3.4.4 Market court

The Market Court is the highest court of appeal regarding competition issues and cases under the Market Act, 1970 in Sweden. Cases which could not been decided by the Consumer Ombudsman is taken to the Market Court. Thus where the Consumer Ombudsman is unhappy with the violating firm, and in case it feels that the case in hand is an important one then the case can be referred to the Market Court for a clear decision[114]. In the Market Court, decision making representatives are selected from among the consumers, industry and an independent expert groups. It also has a chairman and a vice-chairman with a judicial background. This level of

[112] *Supra* n.1 at p.313.

[113] Ulf Bernitz, *Consumer Protection: Aims, Methods, and Trends in Swedish Consumer Law*, Scandinavian Studies in Law, (1976), pp.32-34.

[114] *Supra* n. 108, p. 66.

outside participation in the market court was seen as a very encouraging move by the industry as well the consumers.

Both the Consumer Court as well as the Ombudsman follow the Marketing Act of 1970 as updated and revised in 2008. The International Chamber of Commerce's Advertising and Marketing Communication Practice (Consolidated ICC Code)[115] is also used as a measure for good advertisement practices. The Marketing Act is also by and large in compliance with the European Advertising Standards Alliance guidelines.

The Market Court can give remedies in the form of injunctions and fines, and in case where the advertisement results in serious harm to the general public. Where a fine has been imposed and the advertiser refuses to pay the fine, in such cases jail term can also be awarded. The penalties may be levied against the advertiser, the advertising agency, or the broadcaster. The consumer ombudsman handles the majority of consumer complaints according to statutory guidelines.

The advertising regulation in Sweden can be understood as quite unique. One of the features of the system is consensus among most of the stakeholders. This consensus has been achieved by allowing the business representatives, consumers and broadcasters to be part of the system. Thus all the stakeholders get a say not only in the enforcement but also during the drafting of the regulation. Thus these different bodies together have to a large extent created a good system.

Advertising is an industry where the standards constantly change and thus the regulations also should be such which can adapt to these fast changing standards. Strict regulations would be a problem in this regard. Allowing all the stakeholders to participate in the decision making process is a good way of avoiding conflict while

[115] The International Code of Commerce's Code on Advertising and Marketing Communication Practice was drafted in 1937. It has served as a model code for many self-regulatory organisations.

going ahead. This has been the goal of the Swedish regulatory system which it seems to have achieved to a large extent.

3.5 Conclusion

In India, as in other jurisdictions, we have both legislative and self-regulatory mechanisms to address issues related to deceptive advertising. The law pertaining to advertising has been scattered over many legislations. To add to the confusion, we also do not have a state regulator like the FTC which can take decisions impartially and more importantly, powerfully. ASCI which is the self-regulatory body in India though an efficient self-regulator, lacks the teeth to take action against the wrong doer. In such cases the parties have to again take the regular route of approaching the court which can be highly time consuming.

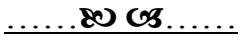
Both in the U.S. and in the U.K. we can note that advertising is regulated in a three pronged way. One is self-regulation, second state regulation and the third is competitor lawsuit which is a recognised method. In Sweden there is a unique system of governmental regulation with adequate outside participation, such as person from the industry, consumer groups etc.

In the U.S. even though self-regulation through bodies like National Advertising Division is considered important, there is also the equally strong presence of state agencies. In the U.S., FTC plays a very important role in the regulation of advertisements. It has the power to handle advertising related cases administratively or can approach the federal district court.

In U.K. self-regulation through the ASA is extensively used. But unlike India the self-regulatory body is supported by the government and the basis of its authority is the British Code of Advertising Practices. In cases where inspite of giving a warning the broadcaster continues with a certain objectionable advertisement, then the ASA can

refer the case to Ofcom. Ofcom will now either impose a fine or in the worst case cancel the license issued to the broadcaster. As Ofcom has contracted-out its responsibility for broadcast (television and radio) advertising, we can see that there is close co-operation between the state and the self-regulatory authority. This is something which is absent in India. U.K. also has a strong pre-clearance system for television and radio advertising. This practise is also alien to India. Preclearance of advertisements to some extend can ensure that unfair and deceptive advertisement do not reach the market. But its adaptability to the India would be a challenge considering the huge size of the Indian advertising industry. The urban rural divide also creates certain unique challenges in India from the perspective of advertising regulation.

When we compare the regulatory systems in India, U.S. and U.K., we realise that the system in India is insufficient and ineffective. The cases are decided by the courts on a very subjective level due to the lack of appropriate legislations. There is also no harmony between the statutory and the self-regulatory system. In order to understand the Indian advertising regulations and its lacunas it is important to have an in-depth analysis of the self-regulatory system which is gaining prominence. We also need to probe into its efficacy in dealing with the increasing advertising disputes in India. The issues related to self-regulation have been dealt with in the coming chapters.



Chapter 4

DECEPTIVE ADVERTISING CLAIM SUBSTANTIATION PRACTICES

Chapter 4

DECEPTIVE ADVERTISING: CLAIM SUBSTANTIATION PRACTICES

4.1 Introduction

The process of substantiation is the most arduous aspect of any advertisement claim. The complexities which is unique to advertisement claims with regards to different types of advertisement claims, different types of evidence to substantiate these advertisements, burden of proof etc., require that a very clear claim substantiation process, specific to the advertisement claim in hand should be envisioned for an effective mitigating strategy against deceptive advertisement. In India there is substantial ambiguity pertaining to advertisement claim substantiation process which has in turn frustrated the efforts taken to effectively curtail deceptive advertisement.

This chapter critically analyses the claim substantiation process followed by different judicial and quasi-judicial forums in India such as the MRTP Commission, Consumer Forums and the civil courts. It also analyses the issues related to burden of proof, different types of claims, different types of evidence etc.

The chapter is pivotal to the research as claim substantiation is at the heart of deceptive advertisement claims. Different kinds of claims have been studied in-order to understand the ways in which these claims are made by the advertisers. The liability of persons to prove an advertisement claim is also studied. Burden of proof in the claim substantiation process is to some extent ambiguous as the courts often

require the complainant to produce evidence. The rule and relevance of reversal of burden of proof in the advertisement context has also been studied. This has been discussed through the relevant cases in this regard. The chapter also studies the procedure followed by courts regarding claim substantiation. The courts have admitted different kinds of evidence such as laboratory test, expert reports, sales figures, research article etc. In this chapter the research aims at understanding if there is a uniform practise/pattern when such evidence is adduced, and to give suggestions in this regard.

The chapter also briefly looks into the claim substantiation procedure followed in different jurisdictions such as the Federal Trade Commission's[1] Policy Statement Regarding Advertising Substantiation, 1984 in the US. An attempt has been made to highlight the benefits of predictability in the claim substantiation process of advertisements.

4.2 Burden of Proof in Case of Deceptive Advertising

Burden of proof is an extremely relevant concept in the advertising law context. The rule of thumb pertaining to burden of proof is that i.e., a person who makes a complaint shall be liable to prove the deficiency in the product or service[2]. This rule cannot blindly be made applicable in deceptive advertisement claims. In case the law and the courts turn to the complainant to disprove a certain advertisement claim, then the companies would feel free to publish any deceptive advertisement. Especially in cases where the tests are highly technical and expensive, there is no way that the evidence can be adduced by the complainant where the complainant is a consumer. Some advertisement claims require expensive scientific

1 Hereinafter referred to as FTC.

2 *Ishwar Rawat* v. *Haryana Urban Development Authority and Ors.*, III (2008) C.P.J. 351 (N.C.)

or extrinsic evidences. In the light of these conundrums, burden of proof has to be analysed in detail.

4.2.1 Burden of Proof Under the Indian Evidence Act, Trade Marks Act, MRTP Act and the Consumer Protection Act

Section 101 of the Indian Evidence Act, 1872 envisages that the person who brings a particular claim should prove it[3]. This same principle can be found under the Trademark Act, 1999 and the erstwhile Monopolies and Restrictive Trade Practices Act, 1969.

While discussing the aspect of burden of proof in the context of infringement of trade mark under the trademark law, the Supreme Court in the case, *Kaviraj Pandit Durga Dutt Sharma* v. *Navratna Pharmaceutical Laboratories*[4] observed that the burden is on the plaintiff to prove that his trademark has been infringed by the defendant. It further held that once the fact that the defendant is infringing his trademark is established by the plaintiff, the onus shifts on to the defendant to negate the claim. The burden to prove his case remains with the plaintiff.

Further in *Dabur India Limited* v. *M/S Colortek Meghalaya Private Ltd.* [5] it can be noted that the plaintiff was required to produce evidence. Here the plaintiff filed a case against the defendant's product Good Night Naturals, which is a

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[3] Section 101 of the Indian Evidence Act, 1872 -

Burden of proof:

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[4] (1965) 1 S.C.R. 737.

[5] 2010 (44) P.T.C. 254 (Del.)

mosquito repellent cream. The plaintiff claimed that the same contained an ingredient known as 'Oil of Citronella', which is a pesticide used as an animal or insect repellent. The plaintiff produced evidence which seemed to suggest that the defendant's product causes allergy and rashes. Similarly, the plaintiff was also made to produce evidence supporting his claim of a superior product. The plaintiff submitted at least two laboratory reports which suggested that the plaintiff's product is safe for human use.

Next, Section 2(1)(r)(vii) of the Consumer Protection Act, 1986 provides that where an advertiser gives to the public any warranty or guarantee regarding the performance, efficacy or length of life of a product or of any goods and where such a warranty or guarantee is not based on adequate or proper test thereof, it would constitute an unfair trade practice[6]. Even though this provision regarding burden of proof has been incorporated in the Consumer Protection Act in principle and the company has been made liable to prove a claim, on practical terms, the burden of proof still rest with the complainant. The statutory backing of the burden of proof stems from Section 13(1)(c) of the Consumer Protection Act, 1986[7], which provides

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6 Section 2 (1) (r) of the Consumer Protection Act, 1986:

"unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:

(1) the practice of making any statement, whether orally or in writing or by visible representation which;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof.

7 Section 13(1)(c) of the Consumer Protection Act, 1986 states that:

where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District

that where the complainant alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory should make an analysis or test. This effectively transfers the burden to the complainant to provide a sample to the District Forum to test the veracity of the complaint. The courts in a plethora of cases have taken this rule a step forward and also imputed the responsibility on the complainant to produce evidence including expert evidence.

For example in the case of *M/S Nirmitee Biotech* v. *Shri Anandrao Jnamdev Patil*[8], the complainant, had purchased from the opponent Company, Shrimant variety tissue culture banana plant. He had purchased 3000 tissue culture plants for Rs.30,000 and had cultivated them in his field under expert guidance. Within a period of one year the complainant noticed that the plants of the Banana had not grown properly and thus the complainant approached the Consumer Forum for compensation. The State Consumer Forum observed that it was the duty of the complainant to produce evidence from the expert pertaining to the seeds bought by him from the respondents.

In *M/S Emami Ltd.* v. *Nikhil Jain*[9] the complainant bought an Emami product, namely Fair and Handsome, produced and sold by the Opposite Party. An advertisement published by the company starring renowned movie actor Shahrukh Khan promised that the cream provides fairness in just three weeks. The complainant used the said product according to the directions on the packaging but his skin tone

Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum;

8 Order dated 16/03/2009 in Case No. 167/2005 by the District Forum, Kolhapur.

9 Order dated 31/10/2015 in Case No. 53/2013 by the District Forum, Delhi.

saw no change. Thus the complainant approached the court against the deceptive advertisement published by the Opposite Party. The court asked the plaintiff to produce evidence to prove his claim that the Emami product Fair and Handsome was ineffective and that their advertisement was deceptive. The court stated that the complainant had not produced any expert evidence except his own affidavit by stating that he had used the cream and no effect had come on him. The District Consumer Forum also stated that no evidence was filed before it by the complainant about the condition of his skin prior and subsequent to the use of the said product. Where the Complainant was not able to produce such evidence the District Consumer Forum refused to give the Complainant any remedy.

Thus the present burden of proof system is difficult from the point of the complainant as the cases prove that the complainants very often fail to produce such evidence. This happens due to lack of resources and expertise at the part of the complainant to produce evidence which supports his complaint. This inability on the part of the complainant acts to his detriment because when he is unable to produce evidence, court refuses to grant him any remedy.

4.2.2 Reversal of Burden of Proof

A common man who brings a complaint against a deceptive advertisement will not have the resources or expertise to prove a technical advertisement claim. He will only have his personal experiences to prove his claim. The procedure whereby the consumer is required to produce evidence is detrimental to his interest. A reading of the Consumer Protection Act creates the impression that it has reversed the burden of proof and imposed it on the advertiser to prove any claim he makes in an advertisement. But this is not followed in spirit as has been noted above and the courts still require the complainant to adduce evidence. Under the Consumer Protection Act this is a difficult situation as the consumer most often is incapable of doing so.

For example, in the case of *Sanjay Rastogi* v. *M/S Arsh Enterprises & Another*[10] the complainant purchased a three wheeler from M/s Arsh Enterprises, Dehradun, the first Opposite Party. The manufacturers of the vehicle were M/s Piaggio Vehicles Pvt Ltd. The brochure published by the manufacturers showed that the vehicle had superior engine which allowed the vehicle to be plied on hilly roads with load. The Complainant soon discovered that the vehicle did not have the given features as given in the advertisement and thus approached the District Forum. To check the efficiency of the vehicle the same was directed to be tested at the Automotive Research Association of India. The Automotive Research Association informed the complainant that it was not authorised by the Central Government to test used vehicles and was meant for testing of new vehicles alone. The complainant did not know of any other similar testing facility. Thus the consumer was not able to produce any evidence supporting his complaint and because of this the District Forum dismissed the consumer complaint.

The principle of reversal of burden of proof, that is the requirement that the advertiser should substantiate the claim, is easier and expeditious because the advertiser is presumed to publish an advertisement after the product has been sufficiently tested. This principle in the US is called the "Prior Substantiation Doctrine" where the Federal Trade Commission in a deceptive advertisements case requires the advertiser to submit the test and other relevant reports[11]. This evidence which substantiates the advertisers claim in an advertisement is required to be submitted without delay as it is presumed that the advertiser has collected his evidence prior to the publication of his claim. Thus in this backdrop the reversal of burden of proof would be an effective and easier way out.

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[10] Order dated 29/03/2011 in Case No. 216/2008 by the State Commission, Uttarakhand.

[11] Wally Snyder, *Ethics in Advertising: Making the Case for Doing the Right Thing*, Routledge, New York (1st edn., 2017), p.25.

4.3 Different Types of Advertisement Claims

Advertisers use different kinds of methods to influence the consumers. These varied methods culminate in different types of claims in an advertisement. A uniform claim substantiation process is not adequate for these different kinds of advertisement claims. For this reason, any research in the claim substantiation process should start with an analysis of the different types of claims. These advertisement claims can be categorised as follows;

4.3.1 Explicit/Direct and Implied/Indirect Deceptive Claims

Direct deceptive advertisements are easy to understand and do not require much explanation. For example, the Supreme Court considered a case in which an advertisement was issued by the Buddhist Mission Dental Collage and Hospital inviting applications for its BDS course[12]. The advertisement claimed that the college is affiliated to the Magadh University, Bodhgaya and is recognised by the Dental Council of India. This claim was false and the National Commission directed the refund of the fees with interest and also a compensation of Rs.20,000.

Implied claim on the other hand is said to be made when marketers make claims in advertising or on product labels that are literally true but are misleading. It is one where though explicitly right, the claim impliedly makes a deceptive claim. In most implied advertisements a material fact or facts will be omitted. This is an implied deceptive advertisement claim. For example, if an advertisement has claimed that "Moonfeast Oats Biscuits" contains oats, then the impression that is created in the mind of the consumer is that the said biscuits are made of oats whereas the truth would be that it contains only 16% oats and the rest is white flour. This is an

[12] *Buddhist Mission Dental Collage and Hospital* v. *Bhupesh Khurana*, (2004) 4 S.C.C. 473.

example where certain facts are explicitly stated whereas certain other important facts are omitted. This leads to implied deception in an advertisement.

Another example which can be cited is where a financial consultancy firm advertised that "free credit reports" are provided to customers who visit their website. But what was not disclosed was that when a customer signed – up to receive this report his name would also be registered in the company's credit monitoring service which was chargeable. Here there is implied deception as the customer would avail the service under the impression that it is completely free, whereas the company has other means to make the customer pay.

Thus it has been very clearly held in *Bonn Nutrients Pvt. Ltd.* v. *Jagpal Singh Dara*[13], that even an implied falsity in an advertisement claim will be considered as a deceptive advertisement. There is no doubt that omission of vital information or ambiguity in the information presented or exaggerations capable of misleading or confusing the consumer, would tantamount to deceptive advertisement[14].

4.3.2 Subjective/Objective Claims

Advertisement claims that express a subjective opinion need not be substantiated by the advertisers. Only when such claims are materially misleading, is there a need to substantiate it. The same rule is applicable when there is an obvious exaggeration, also referred to as puffery, and claims which an average consumer would most likely not believe. For example, an objective fact can said to be one where an advertisement claims that a given car is 'the most fuel efficient sedan in India'. This claim can be proved through scientific tests. But on the contrary where an advertisement claims a car to be the most attractive in its class, it becomes

[13] IV (2005) C.P.J. 108 (N.C.)

[14] *Rohit Vaswani* v. *Era Landmarks (India) Ltd.*, Order dated 3/4/2013 in Case No. 52/2011 by the State Commission, Delhi.

difficult to substantiate it, as it is a subjective claim which might differ based on a person's perception of attractiveness. Thus it can be stated that where there is an objective claim in an advertisement, the same needs to be supported by evidence irrespective of whether it is an implied or an explicit claim. Whereas subjective claims need not be proved in the same manner.

4.3.3 Puffed Claims vis-à-vis Comparative Advertisement

Puffery is as an exaggerated claim which is generally not actionable. Rules regarding puffery have been laid down as early as in *Reckitt & Coleman of India Ltd* v. *Kiwi TTK Ltd.*[15] which are as follows:

a. An advertisement can declare that the advertised goods are the best in the world, this can be done inspite of the fact that the statement is false.

b. An advertisement can generally state that the advertised goods are better than the rivals, this can be done inspite of the fact that the statement is false.

c. An advertisement can compare the advertised goods with that of the competitors and point out the superiority of his products.

d. An advertisement cannot, while stating that the advertised goods are better than those of a competitor, state that the competitor's products are bad, as this would be defamation.

e. In a case of defamation, damages can be claimed. The court can also grant an injunction against repetition of the defamatory action.

In the case *Pepsi Co., Inc. and Ors.* v. *Hindustan Coca Cola Ltd. and Anr*[16]., the court while elucidating on the concept of comparative advertisement clarified that

[15] 63 (1996) D.L.T. 29 (Del.)

a comparative advertisement becomes actionable when certain untrue statements are published regarding the competitors' products. Such statements will be out of the ambit of "puffery". Thus no denigration of the rival's product is allowed in the garb of comparative advertisements.

A decision with a different dimension was seen in the case of *Colgate-Palmolive (India)* v. *Anchor Health & Beauty Care*[17]. In this case the Madras High Court was of the opinion that deception in any form would not be allowed, even if it is puffery. The court clarified that if companies make exaggerated claims about its products/ services, there is a risk of the consumer getting deceived as he sometimes might not be able to understand that the claim made in the advertisement is actually a puffed claim. The court further held that if the companies are restrained from publishing such advertisements, the consumers stand to gain.

4.4 Claim Substantiation

As explained above, advertisement claims can be of different types and therefore the means through which such claims are substantiated will also vary. The evidence used to substantiate these claims could include;

1. internal evidences like sales figures, internally generated company documents etc,

2. scientific evidences like laboratory test, research studies etc. and

3. extrinsic evidences like expert testimony, expert committees, consumer surveys, research article etc.

[16] 2003 (27) P.T.C. 305 (Del.)

[17] (2008) 7 M.L.J. 1119.

There are no clear guidelines on the appropriateness of evidences required in each of these types of advertisement claims, and the adequacy and standard of evidences required in each case. In India cases related to deceptive advertisements are decided by the judicial forum on a case to case basis. This has affected the predictability in the outcome of the disputes. Neither the consumer nor the company is sure regarding the standard of evidence that is acceptable during claim substantiation. Thus each type of evidence needs to be analysed to see if a common guideline can be formulated regarding the same.

4.4.1 Appraisal of Scientific Evidence

The kind and standard of scientific evidence required to prove a claim is highly ambiguous in India. These standards differ based on products and service claims on which it is applied. In certain cases some international guidelines like the Codex Alimentarius[18] for international food standards are relied on. For example, in the case of *Marico Limited* v. *Adani Wilmar Ltd.*[19] the court relied on the Codex Guidelines for Use of Nutrition and Health Claims[20] observing that health claims must be based on the standards envisaged in the Guidelines. But without a legislative backing this observation would be hard to enforce.

Some statutory bodies provide specific standards for scientific evidences for certain specific categories of products. For example, the Madras High court in the

[18] The Codex Alimentarius is created by the Codex Alimentarius Commission. This Commission was formed in 1961 by the United Nation's Food and Agriculture Organisation. It is a compilation of globally recognised standards, guidelines, practices, and other similar recommendations relating to food safety, production, and foods in general.

[19] CS (OS) 246/2013, available at https://indiankanoon.org/doc/181249515/ (accessed on 15-12016)

[20] Food and Agriculture Organization of the United Nations, "Guidelines for Use of Nutrition and Health Claims" available at file:///C:/Users/USER/Downloads/CXG_023e.pdf (accessed on 15-10-2015)

Good Knight case[21] considered the tests conducted on biological efficacy of Good Knight Liquid Vaporizers. The tests were conducted based on Malaysian standards as there were no specific standards in India. But the court stated that Central Insecticides Board[22] approved protocol based on the World Health Organisation's Guidelines had to be followed for testing the bio efficacy of the product[23]. Apart from these sectoral specifications, there are no general guidelines for standards of scientific evidences.

4.4.2 Expert Opinion

Expert opinion is one of the most pivotal and widely used extrinsic evidence. In most cases it is found that where ever there is a scientific claim involved, expert evidence is called forth. In *Hindustan Unilever Limited* v. *Colgate Palmolive*[24] the MRTP Commission had appointed an expert body in order to decide on the superiority claim of the toothpaste. In the given case the appellant had published an advertisement in the print, visual, and boarding media, claiming that its toothpaste "New Pepsodent" was "102 % better than the leading toothpaste". The Commission in the give case found that the parties had adduced evidence both from India and abroad. A highly scientific approach was thus required to analyse the truthfulness of the claims. The Commission refrained from giving any opinion on the evidence that was presented before it by both the parties. An independent body was set-up by the Commission to evaluate and analyse the claims and evidence. The experts in the

[21] O.A.Nos.316 to 320 of 2012, available at https://indiankanoon.org/doc/182177605/ (accessed on 23-09-2017)

[22] Central Insecticides Board is constituted as per Section 4 of the Insecticides Act, 1968 to advise the Central Government and State Governments on technical matters arising out of administration of the Act.

[23] Subsequently Central Insecticides Board changed the guidelines in 2013. Bioefficacy data to be generated from Indian Council of Medical Research / Ministry of Health and Family Welfare institutes from multicenter (minimum 3) for three years/ seasons as per their Protocols

[24] A.I.R. 1998 S.C. 526.

independent body were to be appointed by both the parties to the dispute and the third one was to be appointed by the court. The expenses of such appointment were to be borne by both the parties.

4.4.3 Market Study

In a plethora of cases market study reports were admitted as evidence by the courts. For example, in the case of *Horlicks Ltd. & Anr.* v. *Heinz India (P) Ltd*.[25] the reports related to market share of two competing products, Complan and Horlicks, was adduced by Horlicks Ltd. These reports were admitted by the court as evidence to check their popularity in the market. Similarly in the case of *Hindustan Unilever Limited* v. *Colgate Palmolive*,[26] the MRTP Commission had also admitted evidence filed by Colgate showing that there was a reduction of 5% of its sales in August 1997 and 8% in September 1997 which the company alleged was due to the deceptive advertising campaign of Hindustan Unilever Limited. Thus market study reports are also presented before courts as evidence.

4.4.4 Research Articles

In *Marico Limited* v. *Adani Wilmar Ltd.*[27] the defendants in order to substantiate its claims submitted a research article presented at an international conference on the given subject under dispute. These documents were admitted by the court as evidence to prove the claim in question. But in the case of *Win Medicare Ltd.* v. *Reckitt Benckiser India Limited,*[28] the Commission rejected an article as

[25] 164 (2009) D.L.T. 539.

[26] 1998 A.I.R. S.C. 526.

[27] *Supra* n.19.

[28] 2002 (24) P.T.C. 686 (MRTP)

evidence because one of the authors was associated with the defendant company Reckitt Benckiser India Limited.

As stated before there is no set standard according to which the evidence is being admitted by the court. That is the reason why it would not be an over statement to say that the courts are taking evidence in a haphazard manner which would affect the quality of decisions made by the court.

4.5 International Perspective

Different jurisdictions have different set of rules and standards for claim substantiation[29]. Out of all jurisdictions, the Federal Trade Commission[30] of the United States has the most efficient and clear rules on claim substantiation. These standards which have been developed over a period of time goes a long way in controlling deceptive advertisements in the country.

4.5.1 Standard of Substantiation

From the early 1970s the FTC started requiring that advertisers should have a reasonable basis for factual claims before disseminating them. Currently the Commission's 1984 Policy Statement on Advertising Substantiation provides detailed guidance to advertisers[31]. The policy requires the advertiser to have a "reasonable basis" for any product claim that makes "objective assertions about the item or service advertised," but does not provide "an express or implied reference to a

[29] European Advertising Standards Alliance, is not a self-regulatory body *per se* but helps self-regulatory organisations in Europe in the implementation of advertising related best practises. It was set up in 1992 and now has a network of 54 national self-regulatory bodies dealing with advertising. It published the EASA Best Practice Recommendation on Claims Substantiation in 2012 which is widely used by self-regulatory bodies in Europe for claim substantiation.

[30] Hereinafter referred to as FTC.

[31] Federal Trade Commission, "FTC Policy Statement Regarding Advertising Substantiation", available at https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation (accessed on 27 - 05 - 2016)

certain level of support." In making this "reasonable basis" determination, the FTC evaluates six factors;

1) the product involved;

2) the type of claim made;

3) the benefits of a truthful claim;

4) the ease of developing substantiation;

5) the consequences to the consumer of a false claim; and

6) the amount of substantiation which experts in the field consider reasonable[32].

The highest level of proof is necessary when an advertisement, either explicitly or implicitly, claims to be supported by testing or scientific research, or indicates any specific level of scientific support. These claims, sometimes called "establishment claims," require the advertiser to show the same level of substantiation as presented in the advertisement. With establishment claims, false advertising can be shown by demonstrating that the tests on which the statement relies are "not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited". So in case of establishment claims the challenger is required to provide the lowest standard of proof which means that it only needs to be proved that the claims made by the advertiser are not supported by the test as the test mentioned in the advertisement has failed. Even in case of endorsements the advertiser should be able to prove that the

[32] Federal Trade Commission, "Dietary Supplements: An Advertising Guide for Industry", available at https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry (accessed on 06 -01-2017)

facts presented through the endorsement can be verified[33]. The challenger under the US Lanham Act should prove that a particular advertisement is wrong even when the test as mentioned in the advertisement can be easily negated[34].

In the European Union, through the Misleading Advertising Directive, 1984[35] the Union directed its member states to authorise its courts and regulators to ask for evidence from advertisers to prove the advertisement claims. And in cases where such evidence cannot be adduced the advertisement shall be considered as a deceptive advertisement[36]. The given provision has been carried forward into Article 12 of the Unfair Commercial Practices Directive, 2005[37].

Different countries in Europe follow different substantiation rules. In countries such as Denmark, Finland, Great Britain, Poland, and Sweden the thumb rule is for the advertiser to prove the advertisement claim that he has made. The

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33 Federal Trade Commission, "Guides Concerning the Use of Endorsements and Testimonials in Advertising", available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf (accessed on 22-08-2017)

34 Ross D. Petty and R. J. Kopp, "Advertising Challenges: A Strategic Framework and Current Review", Vol.35(2), Journal of Advertising Research, 1995, pp. 41-55.

35 Council Directive 84/450/EEC of 10 September, 1984.

36 Ross D. Petty, "Advertising Law in the United States and European Union", Vol.16(1), Journal of Public Policy and Marketing, 1997, pp. 2-13, at p.8.

37 Directive 2005/29/EC.

Article 12 of the Unfair Commercial Practices Directive, 2005 - Courts and administrative authorities: Substantiation of claims states that:

Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:

(a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and

(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority

principle of reversal of burden of proof is followed in countries such as Netherlands, Latvia, Austria etc. in cases of comparative claims. This is also done in Germany where the claim is such that the complainant will not be able to adduce suitable evidence. In some jurisdictions the burden of proof is reversed when necessary. This is done in countries like Spain and Hungary. But there are certain jurisdictions which do not reverse the burden of proof one of them being Greece. In other jurisdictions such as Luxembourg the advertiser is allowed to be involved in the collection of evidence though the burden of proof is not reversed.

Belgium reverses the burden of proof only after a warning notice from the Economic Ministry, and Luxembourg does not reverse the burden but the advertiser may participate in the gathering of evidence. Greece also does not reverse the burden of proof[38]. In non-European countries such as New Zealand, it is the advertiser who has to adduce evidence to prove the advertisement claim[39].

4.5.1.1 *Health Claim Standard*

For claims relating to health and safety, as well as many claims regarding product efficacy, the FTC has defined the reasonable basis requirement as competent and reliable scientific evidence. The Commission has defined this standard in the following manner:

> Tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally

[38] Frauke Henning-Bodewig, *Unfair Competition Law: EU and Member States*, Kluwer Law International, The Netherlands (1st edn., 2006), p. 154.

[39] Steven Lysonski, *et.al.*, "The New Zealand Fair Trading Act of 1986: Deceptive Advertising", Vol.26, The Journal of Consumer Affair, 1992, pp.177-199, at p. 185.

> accepted in the profession to yield accurate and reliable results.[40]

The FTC also gives great weight to accepted norms in the relevant fields of research and consults with experts from a wide variety of disciplines. It has also certain accepted tests which it uses for the claim substantiation process. The randomized, double-blind, placebo-controlled clinical trial[41] has become the standard for health claims substantiation, because for many types of health claims, this test is the only methodology that experts in the field accept as yielding accurate and reliable results[42]. Accordingly, the Commission has challenged some claims under the competent and reliable scientific evidence standard based on allegations that no reliable controlled clinical trials were conducted.

In the case of *Iovate*[43] and *Nestle*[44] the court define, competent and reliable scientific evidence as the following for certain types of claims;

> At least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and

40 *Schering Corp.,* 118 F.T.C. 1030 (1994) (Consent Order), at p. 1128.

41 In double blinded placebo-controlled clinical trials there would be two groups one which is subjected to the specific clinical process to be tested and the other group which is subjected to a simulated process like the clinical process. The reason for having the latter group is to factor in effects which is extraneous to the effect of the clinical process to be tested. Neither the subjects or the researchers would know which is the group which is really tested and which is in simulation

42 *FTC* v. *QT, Inc.,* 512 F.3d 858 (7th Cir. 2008).

43 *FTC* v. *Iovate Health Sciences USA, Inc.,* Case No. 10-CV-587, at p. 7

44 *Nestlé Health Care Nutrition, Inc.,* 092 F.T.C. 3087 (2010) (Consent Order)

> reliable scientific evidence, are sufficient to substantiate that the representation is true.[45]

4.5.1.2 *Testing*

Many advertisements explicitly or implicitly claim that some sort of testing verifies the accuracy of the advertising statements. The FTC requires that advertisers should have a reasonable basis to substantiate any factual claim made in AN advertisement. The FTC's 1984 Policy Statement Regarding Advertising Substantiation[46] explains that, in many instances the advertisers tries to convey to the consumer that his product or service has tremendous consumer support. Whenever such claims are made the Commission states that the advertiser should be ready to make at least that level of substantiation as stated by them in the advertisement if not more. So in an advertisement where the company makes both express claims and implied claims, the company should be ready to substantiate those claims which have been actually communicated to the consumer[47].

There is also literature available which asserts that "promises of proof" is one common type of implied claim addressed by advertising regulators in the United States. Advertisements might suggest tests to substantiate claims by stating a precise fact or figure that would likely be derived from testing, providing an explanation of how a product works, or even use of statements that might appear to be puffing, for example, an advertisement which states “a remarkable breakthrough”. Tests offered as substantiation must be consistent with what is promised in the advertisement, must

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45 *Id.* at p. 4.

46 *Supra* n.31.

47 Federal Trade Commission, “FTC Policy Statement Regarding Advertising Substantiation”, available athttps://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation (accessed on 11-10-2016)

be performed independently unless the advertisement discloses otherwise, and must conform to scientific norms.[48]

Substantiation of advertisements through tests is regulated by different countries through specific regulations. But most countries mandate that these test results should be based on current scientific standards, based on products that are currently available in the market. Many regulations also require that the limitations of the test should be clearly stated in the results[49].

Internationally different countries follow different rules/guidelines for testing. Greece[50] broadly prohibits the use of scientific concepts, terms, texts, research results, and so on in advertising messages if they are insufficient to support the claims made in the advertising. Canada explicitly requires that tests be done before the advertising is disseminated. Finland and France require that tests be performed by independent organisations and Finland also requires that tests cover all relevant characteristics of the product. In Germany tests are typically done by independent consumer organisations, but in the Netherlands and the United States such organisations use copyright law to prevent results of such tests from being used in advertising. Switzerland requires permission of the testing organisation to use the test, Norway requires disclosure of the testing institute's name, and Ireland and Great Britain require the testing organization to accept the advertisement's description as

[48] Petty, R.D. and R.J. Kopp, "Advertising Challenges: A Strategic Framework and Current Review', Vol.35(2), Journal of Advertising Research, 1995, pp. 41–54 at p. 47.

[49] Hong Cheng, *The Handbook of International Advertising Research*, John Wiley & Sons, Virginia (2014), p.109.

[50] *Supra* n.36.

accurate. For blanket superiority claims, Canada and Mexico require that every available product be included in the testing[51].

4.5.1.3 *Endorsements*

Often advertisements come in the form of endorsements or testimonials by third parties, who might be famous personalities, or a professional like a doctor or a typical consumer who claims to have used the product. In the internet era the practice has become quite widespread to pass off an advertisement as a genuine endorsement.

In 2009 the FTC issued revised guides to cover such testimonials and endorsements[52]. As per the revised guidelines. If the endorser is an expert, his expertise should be relevant to the product[53] and if he is a consumer he should be a genuine consumer[54] and any such testimonial or endorsement should be substantiated with adequate scientific proof[55]. If any material connection exists between the seller and such endorser that should be disclosed[56]. In US in some cases celebrities have been found liable for their endorsements[57].

Similarly, the French law provides that endorsement and testimonials by expert should be by an expert who has an expertise in the area and should comply with the terms of such endorsements. French courts have found that selected publication of favourable consumer feedback when majority of the feedback is

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51 Mary Story and Simone French, "Food Advertising and Marketing Directed at Children and Adolescents in the US", Vol.1(3), International Journal of Behavioral Nutrition and Physical Activity, 2004, pp.1 -17, at p.4.

52 *Supra* n.33.

53 *Supra* n.33. at § 255.3.

54 *Supra* n.33. at § 255.2.

55 *Supra* n.33. at § 255.1.

56 *Supra* n.33. at § 255.5.

57 *Supra* n.34.

against the product is deception. Similarly, in Greece the expert should have relevant expertise and he should have given his consent [58]. Hong Kong[59] and China[60] have regulations regarding the use of testimonials for medical products.

4.6 Conclusion

The burden of proof as envisaged in Section 101 of the Evidence Act, 1872 places the responsibility on the consumer to prove the claim raised by him. This burden of proof rule in India is not suitable for advertisement claims. If the consumer must prove falsity, then the advertisers will make such deceptive claims with impunity. In other cases, proof about a technical claim might require expensive and time-consuming scientific tests. If government regulators have to pay for testing to prove an advertisement false, that process burdens taxpayers and delays regulation.

In India, there are no standards for the substantiation of claims. All that can be seen are the specific regulations in specific sectors such as claims with regards to health and nutrition based products[61] or regulations under the Insecticide Act, 1968 for products such as mosquito repellent's etc. [62] Otherwise there is no general standard rule for claim substantiation. This is a major lacuna in the Indian advertising regulation arena. When compared with other jurisdiction, for example in the U.S., the FTC has put in place elaborate claim substantiation procedures. This lack of

[58] Peter W. Schotthöfer and James R. Maxeiner, *Advertising Law in Europe and North America*, Kluwer Law International, The Netherlands (1999), p.471.

[59] Gerard Prendergast, *et. al.*, "A Hong Kong Study of Advertising Credibility", available at http://repository.hkbu.edu.hk/cgi/viewcontent.cgi?article=1000&context=mkt_ja (accessed on 20-11-2016)

[60] Zhihong Gao, "Controlling Deceptive Advertising in China: An Overview", Vol.27(2), Journal of Public Policy and Marketing, 2008, pp. 165-177, at p.170.

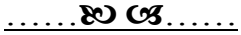
[61] *Supra* n.20.

[62] Section 9 of the Insecticide Act, 1968.

predictability in the substantiation process when it comes to India is seen as a major drawback[63].

In India there is no uniformity in the kinds of tests required to prove an advertisement claim ie, whether scientific test needs to be done or not. In case if scientific test is done, what is the standard of the scientific test required? There is alo no clarity on the type of scientific test required and who is the authority to do the test. Scientific test sometimes require certain protocol which needs to be clarified. There is also no clarity on the evidentiary value of testimonials.

There is a requirement for a holistic statutory framework for claim substantiation without which the effected party, may it be a consumer or a company, will lack the predictability and uniformity in the outcome of advertisement claims related disputes.



[63] The Indian Consumer Protection Bill, 2015 imposes liability on the endorses against deceptive advertisements but does not provide any clarity on the claim substantiation process regarding endorsements.

See also, Section 41B of the proposed Consumer Protection Bill, 2015 which makes every person who is involved in publishing of the advertisement liable for Unfair Trade Practices if it is found deceptive.

Chapter 5

SELF-REGULATION OF ADVERTISING: INTERNATIONAL PERSPECTIVE

Chapter 5

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5. 1 Introduction

Advertising is the best means of informing a consumer regarding the quality, range and nature of products. It is also an excellent means of reaching out to them regarding the company's latest innovations. But in order to achieve this goal it is important that consumer trust in these advertisements are maintained. This can be done only when the advertisements maintain a certain standard of honesty, decency and truthfulness[1]. If this is not ensured it will gradually affect advertising as a whole. Thus proper regulation of advertisements is in the larger interest of the industry. The industry can be regulated in two ways, that is through governmental regulation and through self-regulation.

When the advertising industry namely the advertisers, advertising agency, the media etc., make advertisements which comply with a set of rules created by the industry, relating to the advertisement's legality, decency, honesty, truthfulness and general ethical standards, we can say that the industry is self-regulated. This regulation is generally put down as a code for the stakeholders to follow[2]. Thus self-regulation in simple terms means that, rather than the government, the industry

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1 C.L. Tyagi and Arun Kumar, *Advertising Management*, Atlantic Publishers and Distributors, New Delhi (2004), pp.82-85.

2 European Advertising Standards Alliance, "What is Self-regulation?", available at http://www.easa-alliance.org/page.aspx/190 (accessed on 21-02-2015)

professionals directly regulate themselves[3]. In the words of the former U.S. Assistant Secretary of Commerce Larry Irving[4], self-regulation comes into the picture when the industry feels that there is a need to regulate itself due to various reasons. These reasons can be the enforcement of better ethical standards in advertising, to increase consumer trust in advertisements, to address a certain demand etc. [5]

If the advertising industry responsibly regulates itself, then the consumer trust in advertisements can be maintained. Companies will also benefit from self-regulation as it will lead to controlling unethical advertisements such as falsely disparaging a competitor's product or service. So it can be said that a good self-regulatory system will benefit both the consumer as well as the industry as a whole. Moreover, an efficient self-regulatory system can also help the state machinery in controlling and combating deceptive advertisements. Thus the burden of regulating the advertising industry can be shared by a self-regulatory body if its functions are carried out efficiently[6].

Self-regulatory organisations[7] typically are seen to have a more proactive role than a reactive one. This means that they are more interested in controlling the future behavior of any organisation, rather than trying to correct a mistake that has already been committed and thus set a precedent through it. In the UK the role of the self-regulator is considered to be by and large effective as it has helped in bringing down

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[3] Robert Corn-Revere, "Self-Regulation and Public Interest", in Charles M. Firestone, Amy Korzick Garmer (eds.), *Digital Broadcasting and the Public Interest: Reports and Papers of the Aspen Institute Communications and Society Program*, Aspen Institute Publication, Washington (1998), p.63.

[4] Larry Irvin was the United States Secretary of Commerce in the government of President Bill Clinton during the year 1993-1999. He is presently the president and chief operating officer of the Irving Information Group. The company is into the business of telecommunication and information technology, strategic planning and consulting.

[5] Larry Irving, "Introduction to Privacy and Self-regulation in the Information Age", available at http://www.ntia.doc.gov/reports/privacy/privacy_rpt.htm (accessed on 21-09-2015)

[6] Archie B. Carroll and Ann K. Buchholtz, *Business and Society: Ethics, Sustainability, and Stakeholder Management*, Cengage Learning, USA (2009), p.418.

[7] Hereinafter referred to as SRO.

the number of false and misleading advertisements due to better understanding and acceptance of the industry standards[8]. There has also been an apprehension that the increasing number of regulations would in turn increase the number of advertisements with puffed claims thus reducing the number of advertisements with genuine informative content[9]. This is because of the obvious reason that puffed claims are usually allowed as they are considered to be mere exaggerations. One challenge today is to make the advertiser and others involved in the process of making an advertisement, aware about the current standards and regulations regarding advertising[10]. This is one area that is open to further research. Every regulatory system, may it be governmental or self-regulatory, requires the achievement of certain basic goals such as,

(i) development of appropriate advertising codes/regulations,

(ii) proper publicity of these codes/regulations,

(iii) informing advertisers regarding the grey areas in these regulations,

(iv) pre or post monitoring of advertisements for checking compliance with the norms,

(v) handling complaints from competitors as well as consumers, and

(vi) imposition of punishments for violation of norms, including the publicity of wrongdoings and wrongdoers.

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8 J.J. Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison*, Quorum Books, Westport (1st edn.,1988), p.275.

9 T.T. Jones and J.F. Pickering, *Self-Regulation in Advertising: A Review*, Advertising Association Press, London, (1985), p.67.

10 J. J. Boddewyn, "Advertising Self-Regulation: True Purpose and Limits", Vol.18(2), Journal of Advertising, 1989, pp.19-27, at p.20.

This chapter studies the self-regulatory mechanism in mainly two jurisdictions namely United Kingdom and United States of America. In order to understand the efficacy of these self-regulatory bodies certain parameter have been selected. The analysis of these bodies is thus made on these parameters. These parameters include sources of funding of self-regulatory organisations and general monitoring of advertisements by these bodies, members who are part of and who run these self-regulatory organisations, general working of these bodies, codes created by these bodies, interactions of the self-regulatory body with state agencies, complaints system, publicity and its reach to all the stakeholders of the advertising industry including consumers etc. The self-regulatory mechanisms of other jurisdictions have been studied on these parameters in this chapter. These self-regulatory organisations are comparatively analysed with the Indian self-regulatory body namely the Advertising Standards Council of India in the next chapter.

5.2 Self-regulatory System in the United Kingdom

In UK the self-regulatory system is spearheaded by the independent regulator called Advertising Standards Authority[11] which has regulatory powers across all media. The history of ASA dates back to 1961 when the UK Advertising Association comprising of advertisers, advertising agencies and the media, decided that there should be proper regulation of advertising so that the trust of the consumers can be maintained. Some scholars have also suggested that a strong self-regulatory system became inevitable as there was mounting fear that the advertising industry would be brought under statutory control like in the U.S. where the Federal Trade Commission regulates the industry[12]. Thus the Committee of Advertising Practice[13] was formed and CAP

[11] Hereinafter referred to as ASA.

[12] Adrian Mackay**,** *Practice of Advertising*, Routledge Publication, New York (5th edn., 2004), p.332.

[13] Hereinafter referred to as CAP.

produced its first edition of the British Code of Advertising Practice[14]. In 1962 the ASA was incorporated under the Companies Act, 1948 to administer the CAP Code. It was meant to adjudicate upon the complaints regarding violation of the British Code of Advertising Practice. But then, the regulatory powers of ASA was limited to non-broadcast media alone. The broadcast media was subject to statutory control. Later when commercial radio was launched in 1973, it was also controlled by a legislation.

In 1962 the Molony Committee [15] in its official report on Consumer Protection, rejected the need for an American-style Federal Trade Commission to regulate advertising by statute and stated that the problems related to advertisements can be controlled through voluntary controls. However this can be conclusively decided only once the system starts functioning. The complete independence of the authority will have a pivotal role to play in this case[16].

The ASA rulings did not have the force of law. But as the industry had decided to abide by it, the decisions were largely followed and the banned advertisements were immediately withdrawn[17]. Since 1988 the ASA has legal backing from the Office of Fair Trading[18]. In case the advertiser continuously refuses to co-operate with the ASA, then the case can be referred to the OFT for legal action.

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14 Hereinafter referred to as BCAP.

15 In July, 1959, a Committee was set up by the British Board of Trade under Mr. Justice Molony to review the working of the then existing legislation relating to merchandise marks and certification trademarks and to consider and report what changes in the law and what other measures, if any, were desirable for further protection of the consuming public.

16 Mr. Justice Molony, *Final Report of the Committee on Consumer Protection*, British Board of Trade, 1962, available at http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1963.tb00699.x/pdf (accessed on 25-10-2015)

17 Chris Hackley and Rungpaka Amy Hackley, *Advertising and Promotion*, Sage Publication, Great Britain (2015), p.256.

18 Herein after referred to as OFT.

OFT was established in UK in the year 1973 as a not-for-profit and non-ministerial government body. Its role was that of an economic regulator which looked into consumer protection and competition law related issues.

Later, the Office of Communications[19] also stepped in with legal action for the broadcast media in case the rulings of the ASA are violated[20].

It was only in 2004 that the ASA was also given the responsibility of regulating television and radio advertisements. After more than forty years of successful self-regulation of non-broadcast advertisements, the ASA-CAP system assumed responsibility for television and radio advertisements. This was done at the behest of the newly formed Ofcom which decided to contract out the responsibility for broadcast (television and radio) advertising to the ASA system in a co-regulatory[21] partnership. In order to carry out this new responsibility successfully, a new industry committee, the Broadcast Committee of Advertising Practice[22], was created to write and maintain the Broadcast Advertising Codes.

It is important for the ASA, and as to that matter for any self-regulatory organisation, to work efficiently. The sword of statutory regulation, which can replace self-regulation, always hangs above their heads. There are certain criteria which has been set in-order to find out whether a self-regulatory organisation is working efficiently. If we use these variables against SRO's in different jurisdictions and comparatively try to analyse them, we will be able to find out the efficacy of these SRO's. The variables which have been identified are given below, beginning with its use and application in UK.

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19 Herein after referred to as Ofcom.

Ofcom is the government-approved regulatory and competition authority for the broadcasting, telecommunications and postal industries of the United Kingdom.

20 Franziska Weber, *The Law and Economics of Enforcing European Consumer Law*, Routledge Publishing, New York (2nd edn., 2016), p.256.

21 If the State and the private regulators co-operate in joint institutions, this is called "co-regulation". If this type of self-regulation is structured by the State but the State is not involved the appropriate term is "regulated self-regulation".

Office of Communication, "Ofcom's Decision on the Future Regulation of Broadcast Advertising", available at https://www.ofcom.org.uk/__data/assets/pdf_file/0018/51309/regofbroadadv .pdf (accessed on 15-02-2016)

22 Hereinafter referred to as BCAP.

5.2.1 Working of ASA and its Members

ASA is by and large independent of the advertising industry, which makes it a credible agency in the eyes of the consumers. Including the Chairman, two-thirds of the 13 member ASA Council[23] are independent and are not connected to the industry in any manner. The remaining members have a recent or current knowledge of the advertising or media sectors[24]. ASA's senior management team, which is its executive decision-making body, is also constituted of persons independent of the advertising industry.

ASA has the responsibility of enforcing the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing written by the Committee of Advertising Practice and UK Code of Broadcast Advertising written by the Broadcast Committee of Advertising Practice.[25] The Committee of Advertising Practice is a self-regulatory body with absolutely no statutory powers. But the members of the body, which includes a wide range of bodies involved in advertising including advertising associations, media persons etc. , agree to abide by the CAP Code and not to publish advertisements contravening the same[26].

5.2.2 ASA and State Agencies

The broadcast media in UK is regulated by the ASA along with Ofcom. It was only in November 2004 that Ofcom delegated its responsibility to monitor broadcast

[23] ASA Council is the body which adjudicates on the formally investigated complaints. An investigation is conducted by the ASA staff regarding the complaint before it is taken up by the Council. In case the claim requires substantiation, the advertiser is required to do so by submitting evidence. Then the adjudication process begins.

[24] Advertising Standards Authority, "ASA Council", available at https://www.asa.org.uk/About-ASA/Our-team/ASA-Council.aspx (accessed on 26-04-15)

[25] Advertising Standards Authority, "About ASA Regulation", available at https://www.asa.org.uk/About-ASA/About-regulation.aspx (accessed on 26-12-2015)

[26] Peter W. Schotthöfer and James R. Maxeiner, *Advertising Law in Europe and North America*, Kluwer Law International, The Netherlands (1999), p.471.

advertisement to ASA[27]. The broadcasters have to abide by the UK Code of Broadcast Advertising. But in case an advertisement violates the Code the responsibility to withdraw, change or reschedule a commercial advertisement lies with the broadcaster. While the broadcast license is issued to the broadcasters under the Broadcasting Act it is clearly mentioned that the broadcasters are obliged to enforce the ASA rulings. This needs to be strictly followed, and in case it is violated then the ASA can make a reference to Ofcom which can either levy a fine or in extreme situations also cancel their license.

One of the major risks involved in self-regulation is that the Ofcom keeps a very close watch on the working of the self –regulatory system. In case Ofcom is of the opinion that the working of the self-regulatory system is not satisfactory, it can immediately recommend for a legislation[28]. Also, even though ASA has the powers to interpret the UK Code of Broadcast Advertising, still the decisions of the ASA are subject to judicial review[29].

5.2.3 Publicity

To improve the quality of advertisements it is very important that certain tasks are performed. Among these tasks, publicising the standards of advertising is a very important one. Publicity of a self-regulatory body increases its visibility. When consumers are sensitised about the self-regulatory body it facilitates them to approach it more freely in case of a grievance.

In 1974 the then Minister for Consumer Protection, Ms. Shirley Williams criticised the ASA for not being sufficiently well-known. This she said had largely hampered its effectives in terms of handling deceptive advertisements. In 1974 the

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[27] Kevin Barron, *Health Committee Alcohol First Report of Session 2009–10*, The House of Commons, Health Committee, 2009, available at https://publications.parliament.uk/pa/cm200910/cmselect/cmhealth/151/151i.pdf (accessed on 12-10-2015)

[28] *Supra* n.10.

[29] *R* v. *Committee of Advertising Practice*, (1991) C.O.D. 43.

Advertising Standards Board of Finance[30] was established in order to provide sufficient funding to ASA through a levy of 0.1% on advertising space costs. This levy provided adequate funds to ASA to promote itself. Since then ASA has been involved in extensively publicising its policies so that the consumers are informed about it and can approach it in case of a grievance. The ASA promotion activities are done through seminars, speeches, advertisements, leaflets, briefing notes, articles in magazines, journals and newspapers and videos targeted at consumers and educational institutions[31].

ASA also reaches out to the general public through its website which is extremely informative with details of its Annual Report on a regular basis and its latest adjudications on a weekly basis. All these measures are meant to reach out to the general public regarding the ASA. It also publishes what is called the Standards of Service which explains what a consumer, advertiser or competitor can expect when it comes to ASA with a complaint[32]. Over and above all these, the ASA also conducts a Customer Satisfaction Survey in order to find out whether the working of the ASA is satisfactory or not[33]. All these measures in turn help in making the self-regulatory system more predictable. This is essential because unlike a government body, consumers might be apprehensive about a self-regulatory body as they presume that an adjudication is being done by the same people against whom they are filing a complaint. This being the perception, greater transparency would be required in the system. Adequate publicity of the body and its regulations will help in doing away with these fears and will encourage people to approach it.

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30 Hereinafter referred to as ASBOF.

31 Lord Campbell and Zahd Yaqub, *The European Handbook of Advertising Law*, Routledge Cavendish Publishing Ltd., London (1999), p.508.

32 *Supra* n. 8, at p.334.

33 Advertising Standards Alliance, "ASA and CAP Annual Report", available at https://www.asa.org.uk/AboutASA/~/media/Files/ASA/Annual%20reports/AR%202013%20Online%20version_v3_FINAL.ashx (accessed on 12-12-2014)

5.2.4 Funding

The strength of a self-regulatory system also highly depends on the amount of funding that it has. A self-regulatory body marred with lack of funds would definitely be weak in the enforcement of its code as it will find it difficult to fight big companies which come out with deceptive advertisements. As stated earlier in 1974, the former Minister for Consumer Protection Ms. Shirley Williams speaking at an Advertising Association conference criticised the self- regulatory system for not tackling misleading advertising and for not publicising itself. There was also a threat by the then Prime Minister Mr. Harold Wilson to bring in legislation for the regulation of advertising in the UK[34]. In response to this the industry set up the Advertising Standards Board of Finance. The aim of the ASBOF was to provide sufficient and secure funding to the ASA by collecting a voluntary levy. Here the advertiser pays a levy of £1 per £1,000 on display advertising in press, magazines, cinema, outdoor, and since August 2004, on internet advertising[35]. In 2004 when broadcast media was also brought under ASA the Broadcast Advertising Standards Board of Finance[36] was formed. Typically the levy was decided to be 0.1% on display advertising costs[37]. According to this system the Advertising agencies or media owners collect this levy from the advertiser and hand it over to BASBOF. The BASBOF would in turn pass on the money to ASA, and the latter will have no information regarding who exactly has contributed these funds. This arm's length arrangement thus helps in maintaining the ASA's independence.

ASA also generates income from seminars and premium industry advice services that it provides. But it receives no funds from the government.

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34 *Supra* n. 8, at p.332.

35 Advertising Standards Board of Finance, "History of ASBOF", available at http://www. asbof.co.uk/history/ (accessed on 15-03-2015)

36 Hereinafter referred to as BASBOF.

37 For example, 0.1% of the cost of placing a television advertisement.

5.2.5 Pre-clearance

The system of pre-clearance of advertisements in the UK is seen as a very effective method in stopping deceptive and offensive advertisements from reaching the public. For this purpose, the broadcasters have established and funded two pre-clearance centers namely Clearcast for television commercials and Radiocentre for radio advertisements. Clearcast which pre-approves most British television advertising took over from the Broadcast Advertising Clearance Centre[38] in 2008 and checks advertisements for their compliance with the BCAP code. It can request substantiations in situations where claims are made in an advertisement. The Radiocentre is the clearance body for UK's commercial radio industry's advertising. It also checks advertisements for their compliance with the BCAP code. This system of pre-clearance of advertisements has also helped the self-regulatory system of UK. Though it has been claimed that pre-clearance system is effective there still are some advertisements that slip-out through the net[39].

For example, the Cadbury's chewing gum advertisements. This advertisement was cleared for transmission. The first advertisement shows a black "dub poet" speaking in rhyme with a strong Caribbean accent in what looks like a comedy club. The series of four TV and one cinema advertisement encourages viewers to try the new Trident chewing gum and take part in a "gum revolution". The ASA received 519 complaints against this advertisement mainly stating that these advertisements had an offensive and racist undertone as it stereotypes and ridicules the black or

[38] Broadcast Advertising Clearance Centre was set up in 1993 by the broadcaster for examining and approving commercials before they were transmitted. It is funded by the British Commercial Television Channels and its services are free for the advertisers and the advertising agency. The pre-transmission examination and clearance of television advertisements was a condition under the license given to the broadcasters. In the backdrop of this, BACC has special relevance.

[39] Helen Powell, *et. al.*, *The Advertising Handbook*, Routledge Publication, New York (2009), p. 80.

Caribbean people and their culture[40]. Accepting the claims ASA banned the advertisements.

Thus when we look at the British system it can concluded that the self-regulatory system has been by-and-large successful. There is close association between the governmental and the self-regulatory system. This has in turn strengthened the self-regulatory system and has made it more effective. A system of proper funding has equipped the ASA to take up cases and pursue it successfully against violators. The pre-clearance process has also in general helped the stopping of misleading advertisements from reaching the market. The remedies such as adverse publicity about the advertiser, refusal of advertising space and removal of trade incentives has resulted in better compliance with ASA[41]. Thus when we look at the self-regulatory system in UK it can be said that the system is to a large extend successful. The Indian self-regulatory system has many things to learn from the ASA, which will be dealt in the next chapter.

5.3 Self-regulatory System in the United States

In the U.S. advertising is governed by the Federal laws, the State laws, the local laws and then the self-regulatory codes. Among the federal statutes, the Federal Trade Commission Act, 1914 and the Lanham Act,1940 are the two statutes which principally govern advertising. At the national level self-regulation plays a very important role which gathered momentum from the 1960's onwards. The need for self-regulation was felt since the 1960's and 1970's when consumerism and advertisements increased considerably and the proper regulation of advertising became inevitable. This period also saw the US Congress passing more than twenty-five legislations directly affecting advertising. "The advertising industry was split on

[40] Mark Sweney, "Trident Gum Ad Spat Out", The Guardian, March 28, 2007, available at http://www.theguardian.com/media/2007/mar/28/advertising.uknews, (accessed on 27-08-2015)

[41] Debra Harker, "Achieving Acceptable Advertising: An Analysis of Advertising Regulation in Five Countries", Vol.15(2), International Marketing Review, 1998, pp.101-118, at p.109.

what to do about the growing pressure from both consumers and the Government."[42] Thus the National Advertising Review Council[43] was formed in 1971 by the American Advertising Federation[44], the American Association of Advertising Agencies, the Association of National Advertisers and the Council of Better Business Bureaus. It has been renamed as the Advertising Self-Regulatory Council[45] in 2012. The name change in 2012 symbolises a clear message about the mission and purpose of the ASRC[46]. The ASRC has its investigative, enforcement and appellate units which includes the National Advertising Division[47], the Children's Advertising Review Unit[48], the Electronic Retailing Self-Regulation Program, the Online Interest-Based Accountability Program and the National Advertising Review Board[49]. The NAD is one of the most important arms of the ASRC.

5.3.1 The National Advertising Division

The National Advertising Division monitors, evaluates, investigates and also does initial discussions with advertisers on complaints regarding the truth and accuracy of advertisements against which complaints have been made. NAD is involved only with national advertisements[50] and does not look into local

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42 G. Miracle and T. Nevett, "A Comparative History of Advertising Self-Regulation in the UK and the US", Vol.22(4), European Journal of Marketing, 1993, pp. 7-23, p.21.

43 Hereinafter referred to as NARC.

44 Hereinafter referred to as AAF.

45 Hereinafter referred to as ASRC.

46 Maureen Morrison, "NARC Nixed; Name Changed to Advertising Self-Regulatory Council", The Advertisement Age, 23 April, 2012, available at adage.com/print/234288 (accessed on 23-09-15)

47 Hereinafter referred to as NAD.

48 Hereinafter referred to as CARU.

49 Herein after referred to as NARB.

50 The term "national advertising" refers to a paid commercial message, in any medium, with an intention to induce the viewer to buy it by convincing him regarding the usefulness of the product or service. This message is published nationally or to a substantial number of persons in the United States.

advertisements. One of the main aims of the NAD is to raise public confidence in the credibility of advertising. The Advertising Industry's Process of Self-Regulation, Policies and Procedures by the Advertising Self-Regulatory Council, provides the course of NAD's review proceedings. It provides a detailed procedure to be followed by the challengers and advertisers.

A complaint may be submitted to the NAD by any person or legal entity regarding national advertisements, irrespective of whether it is addressed to consumers, professionals or to business entities. This complaint can be made by competitors, from referrals, from local Better Business Bureaus and from consumers. NAD can also initiate a proceeding on its own as part of its monitoring responsibility pursuant to Section 2.1(B) of the Advertising Industry's Process of Voluntary Self-Regulation[51]. The main source of complaints is from the NAD monitoring service and also from advertisements challenged by competitors. It can be regarding product performance claims, superiority claims against competitive products and scientific and technical claims. The advertisement against which a complaint has been given may either be published on broadcast or cable television, in radio, magazines and newspapers, on the Internet or commercial on-line services, or provided directly to home or office. Policy and procedures for NAD are established by the Advertising Self-Regulatory Council. The NAD consists mainly of attorneys who have worked in the advertising law domain. The NAD decides around 150 cases a year and publishes these decisions. There is also an appeal provision that is provided whereby a person who is not happy with the decision of the NAD may take an appeal to the National Advertising Review Board.

[51] Advertising Self-Regulatory Council, "The Advertising Industry's Process of Voluntary Self-Regulation: Policies and Procedures", available at http://www.asrcreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Final-02-01-16.pdf (accessed on 27-03-2017)

5.3.2 Members and Funding

The ASRC's eleven member Board of Directors is composed of representatives of the American Advertising Federation, Inc., American Association of Advertising Agencies, the Association of National Advertisers, Inc., Council of Better Business Bureaus[52], Direct Marketing Association, Electronic Retailing Association and Interactive Advertising Bureau.

ASRC programs are funded through a variety of sources in which membership fees to the CBBB make up a substantial portion. The remainder is provided through the support of industry associations, the direct support of children's advertisers and child-directed media and revenue from the sale of products and services. Over and above this, filing fees for cases and subscription cost for archives also generates money. The shortage of funds is seen as a major problem with the ASRC. This is because the payment is completely on voluntary basis from the industry and the advertisers.

5.3.3 Interaction with State Agencies

The interactions with state agencies provide a good support mechanism for a self-regulatory organisation, especially on issues related to enforcement of its decisions. In cases where a complaint is upheld by the NAD, the remedies that can be provided include a request for the modification or withdrawal of the unacceptable advertisement[53]. As the decisions of the NAD does not have a binding effect, enforcement of its decisions sometimes is a problem. In some cases, the advertisers do not respond to the NAD when a complaint is filed. It also happens that sometimes they do not submit a timely response. But where the advertiser has made efforts to comply with an NAD decision but still the problems exist then the NAD works with

[52] Hereinafter referred to as CBBB.

[53] Eric J. Zano, "Review of Eight Years of NARB Casework: Guidelines and Parameters of Deceptive", Vol.9(4), Journal of Advertising, 1980, pp. 20-42.

the advertiser to sort out the issues. In the worst scenario after a decision is rendered by the NAD the advertiser may refuse to comply with the decision. In such instances of non-compliance the case can be referred by the NAD to the Federal Trade Commission[54] for action. This is where the state interacts with the self-regulatory system in the US.

For example, the NAD recently referred Mead Johnson Nutritionals' advertisements for Enfamil Lipil infant formula to the Federal Trade Commission[55]. The NAD initially recommended that the advertiser should clearly prove that Enfamil Lipil is not shown to be better than Similac Advance with respect to mental and/or visual development. It was also recommended that it should either discontinue its comparative advertisement with Similac Advance products or modify it by removing the comparison with the competitor's product. Three compliance reviews related to same or similar advertising claims was handled by the NAD between June 2008 and February 2009, and found that the Enfamil Lipil advertising did not comply with the NAD's prior decision. Pursuant to section 4.1.B. of the NARC Policies and Procedures, the case was finally referred to the FTC for further review[56]. This is how the state intervention happens when NAD for some reason is not able to enforce its decision.

The FTC in its Policy Statement Regarding Advertising Substantiation has stated that it works closely with self-regulatory organisations especially in cases where its codes and policies effect the FTC's law enforcement initiatives. The FTC also most of the time agrees with the decisions and findings of the SRO. But the

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54 Hereinafter referred to as FTC.

55 Advertising Self-Regulatory Council, "Following Third Compliance Review, NAD Refers Advertising for 'Enfamil' Infant Formula to FTC", available at http://www.asrcreviews.org/following-third-compliance-review-nad-refers-advertising-for-%E2%80%98enfamil%E2%80%99-infant-formula-to-ftc/ (accessed on 09-03-2015)

56 Kenneth Hein, "Enfamil Lipil's Ad Claims Reported to FTC", available at http://www.adweek.com /news/advertising-branding/enfamil-lipils-ad-claims-reported-ftc-105341 (accessed on 06-01-2014); NAD Press Release, "Following Third Compliance Review, NAD Refers Advertising for 'Enfamil' Infant Formula to FTC", available at http://www.asrcreviews. org/following-third-compliance-review-nad-refers-advertising-for-%E2%80%98enfamil%E2%80%99-infant-formula-to-ftc/ (accessed on 06-01-2014)

Commission further states that, only because an SRO authorises the publication of an advertisement would not mean that the company is protected from an action by the FTC. The same is applicable vice-versa where the FTC states that only because an SRO has found an advertisement objectionable, the FTC will not automatically take action against the company. The Commission takes all its decisions independently but at the same time maintains a close relationship with the SRO's to benefit from their expertise and findings[57].

Many companies prefer to approach the NAD as opposed to the FTC, as the latter mainly entertains cases which has issues related to consumer interest. A case which merely deals with disputes among competitors are generally not entertained. This is mainly because the FTC uses Section 5 of the FTC Act which states that in-order to successfully prove that an advertisement is deceptive, it must be established that the advertisement at issue:

i. contains a material representation, omission, or practice,

ii. that is likely to mislead consumers acting reasonably under the circumstances,

iii. to the consumers' detriment.

To successfully prove that an advertisement is unfair, the FTC must establish that:

(i) an act or practice is likely to cause substantial injury to consumers;

(ii) the injury is not reasonably avoidable by consumers; and

(iii) the injury is not outweighed by countervailing benefits to consumers or competition produced by the practice[58].

[57] Federal Trade Commission, "Policy Statement Regarding Advertising Substantiation – 1984", available at https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation (accessed on 22-01-2015)

[58] Section 5(a) of the Federal Trade Commission Act, 1914. 15 USC §45.

As from the above given instances it becomes clear that the challenger/competitor might find it difficult to prove how the consumer has actually been misled and how a certain detriment has been caused to the consumer. This is because the competitor is trying to protect his interest which would be purely commercial in nature and the FTC as a body is more interested in protecting commercial rights vis-à-vis the consumer's right.

The advertising industry very closely watches the cases decided by the NAD[59]. The rate of compliance with the NAD decisions, as stated by the NAD, is at around 95%[60]. Anyhow NAD cannot force any party to participate in the process as the parties need to do it voluntarily. The process is completely independent and not related to the state mechanisms. Because of this many scholars have also observed that the ASRC and the remedies that it provides are quite ineffective to tackle the problems related to advertising. It was observed that the general level of compliance with these decisions also came down during the 1990's[61] . Also, in case one of the parties approaches the court, the court is not bound to take into consideration any of the evidence that has been presented before the NAD.

5.3.4 Precedential Value of Decisions

The cases decided by the ASRC are published in a report once a month. The format of the case includes details regarding (1) the basis for the inquiry; (2) the challenger's contentions; (3) the advertiser's position; (4) the NAD's decision; and (5)

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59 Sheldon H. Klein and Halle B. Markus, "United States: Is the NAD the Right Forum for You? Arguing Advertising Disputes Before the National Advertising Division of the Council of Better Business Bureaus" Mondaq, April 26, 2010, available at http://www.mondaq.com/unitedstates/x/95780/advertising+marketing+branding/Is+The+NAD+The+Right+Forum+For+You+Arguing+Advertising+Disputes+Before+The+National+Advertising+Division+Of+The+Council+Of+Better+Business+Bureaus (accessed on 23-09-2014)

60 Annie M. Ugurlayan, "Advertising Self-Regulation: A Review of Cosmetic Claims and Natural/Organic Claims", in Nava Dayan and Lambros Kromidas (eds.), *Formulating, Packaging, and Marketing of Natural Cosmetic Products*, John Wiley and Sons, New Jersey (2011), p.111.

61 R.D. Petty and R.J. Kopp, "Advertising Challenges: A Strategic Framework and Current Review", Vol.35(2), Journal of Advertising Research, (1995), pp. 41- 55, at p. 50.

the advertiser's statement. These cases decided by the NAD do not have any precedential value, but as the cases are now being published more elaborately and in a given format, they have managed to create an advertising jurisprudence of its own[62]. This was possible also because of the fact that the panel which decides the NAD cases are all lawyers, thus the reasoning given in the case along with the arguments of the parties are well recorded. Presently the practice is that when the parties to a dispute present their cases they refer to the previously decided cases of the NAD and how certain general principles of advertising law has been interpreted in those cases. Thus indirectly a precedential system is created. Otherwise the general rule is that the ASRC decisions do not have a precedential value.

Thus the ASRC has many benefits as some scholars feel that self-regulation by the Advertising Self-Regulatory Council is very effective[63]. But on the other hand others feel that though the system is very good, it lacks effectiveness as it cannot enforce its own decision in the absence of the party's willingness to do so.

5.4 Other Jurisdictions

5.4.1 Sweden

Sweden is considered as a good example for advertising regulation because it is a blend of both regulatory as well as self-regulatory systems. The development of the Swedish system has seen considerable dialogue with relevant business entities rather than strict legislative drafting. Being a constitutional monarchy it develops most of its legislations through consensus rather than conflict[64]. From 1957-70 Sweden had a nationwide self-regulatory body called Council on Business Practice. Swedish industrial and commercial organisations set up this body, though later on

62 *Ibid.*

63 *Supra* n. 53.

64 Mary Alice Shaver and Soontae An, *The Global Advertising Regulation Handbook,* Routledge, New York (2015), p.100.

consumer representatives also became members. A set of guidelines were developed by the body based on its experience in applying the Code of Advertising Practice of the International Chamber of Commerce. But the Council on Business Practice also suffered from the same problem of lack of enforceability of its decisions when it came to violators.

From the 1970's onwards an elaborate governmental regulatory system for consumer protection was put in place. The introduction of the Marketing Act of 1970 was an important milestone as it prohibited deceptive means of advertising[65] and which also made it a criminal offence[66]. The new governmental regulatory system was very similar to the self-regulatory system as the new guidelines were by and large similar to the already prevailing one used by the self-regulatory body. The National Board of Consumer Policy and the Consumer Ombudsman were also formed in course of time. As the industry was represented in the Board, the industry stakeholders were also happy as they could now participate in the regulatory process and could present their concerns. Thus a consensus model was build which was agreeable to all. The new system also had better means of enforcement as it was backed by the government and had become what is called "codes of marketing ethics with teeth"[67].

Sweden also has self-regulatory organisations for specific sectors such as the Swedish Advertising Ombudsman, Council on Marketing Ethics etc. The Advertising Ombudsman was founded in 2009 on the initiative of the Swedish Advertising Association and the Confederation of Swedish Enterprise. It handles issues regarding gender discrimination, ethical advertisements such as deceptive advertisements etc. and a complaint can be filed by any member of the public. It receives somewhere

65 Section 2 of the Marketing Act, 1970.

66 Sections 6-8 of the Marketing Act,1970.

67 H. Ballinger , "Dynamic Analysis: The Case of Sweden Since 1940 – 1977", in H. B. Thorelli and S.V. Thorelli (eds.), *Consumer Information System and Consumer Policy*, Cambridge, Massachusetts (1977), p. 230.

between 500 and 1000 complaints in a year. Advertisers, advertising agencies and media fund the body on a voluntary basis through an annual fee. This fee which is based on a company's annual media funding can be made by any company. It also has a dispute settlement system called RO Jury. It receives around 1000 complaints a year out of which approximately 230-260 decisions are made[68]. When this is compared with the figures of state agencies say for example the complaints received by the Consumer Ombudsman, it is around 16,000 for the year 2015. The number of complaints received by the Board for Consumer Complaints is around 12,000[69].

5.4.2 Europe

Other than the above given jurisdictions there are certain self-regulatory bodies in other jurisdictions which look into advertising. For example, in the Europe Union the European Advertising Standards Alliance[70] plays an important role for self-regulation. The EASA itself is not a self-regulator but is a non-profit organisation formed to encourage self-regulation and promote ethical standards in commercial communications in Europe. It also aims at solving cross-border complaints as quickly as possible[71]. These standards are promoted for example via EASA's Advertising Self-Regulatory Charter and EASA's Best Practice Recommendations. The EASA was created in 1992 in response to a challenge made by Sir Leon Brittan, the then EU Competition Commissioner, who stated that it would be very difficult to deal with advertising issues in a single market without detailed legislations[72].

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68 Swedish Advertising Ombudsman, "FAQ about Reklamombudsmannen", available at http://reklamombudsmannen.o rg/eng/faq (accessed on 15th of April 2016)

69 *Consumer Reports 2015*, National Board of Consumer Disputes, 2015, available at http://www. government.se/government-agencies/national-board-for-consumer-disputes/ (accessed on 15-10-2015)

70 Hereinafter referred to as EASA.

71 Barbara Mueller, *Dynamics of International Advertising: Theoretical and Practical Perspectives*, Peter Lang Publishing, New York (2nd edn., 2011), p.313.

72 Justin Greenwood, *Inside the EU Business Associations*, Palgrave Macmillan, New York (1st edn., 2002), p.55.

Self-regulatory organisations and associations representing the advertising industry in Europe and a few other countries are part of the EASA. Presently the EASA has 38 self-regulatory bodies as its members out of which twenty-seven are from twenty-five European countries and the remaining eleven are from non-European countries. These members are represented on a 50/50 basis[73].

EASA's primary duty is to promote responsible advertising and for this it provides detailed guidance with regards to advertising in a single market which would be beneficial for both the business and consumers alike. As stated earlier it is also an agency which deals with advertising related to cross-border consumer complaints. EASA does not directly deal with any dispute, but only has the role of passing the complaints from one regulatory body to another regulatory body. Majority of these complaints are either regarding misleading information or offensive content of an advertisement[74]. To give an example, a complaint was filed by a U.K. consumer against a Netherlands company for fraudulently declaring that he was the winner through direct mailing. This complaint was forwarded to the Dutch authorities by EASA, who found the advertisement to be in violation of the advertising Code of Netherlands and necessary corrective measures were taken[75].

EASA is by and large a European association, but it has set up an International Council to deliberate on and respond to global advertising issues. Different countries have different systems to address advertising issues. Each country has its own mechanism of self-regulation, co-regulation or statutory regulation. The EASA tries to bring these self-regulatory organisations together. Advertising self-regulation in the EU has been categorized into mainly three models by the EASA. The first among these is self-regulation, within a strong legislative framework. There

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[73] European Advertising Standards Alliance , "Members of EASA", available at http://www.easa-alliance.org/members (accessed on 07-07-2016)

[74] August Horvath, *et.al., Consumer Protection Law Developments*, American Bar Association Publication, Chicago (2009), p.767.

[75] *Ibid.*

are two sub-types to this model. The first one is where the legislations itself has scope for self-regulation and this is seen in jurisdictions such as UK, Spain, Ireland etc. In the second sub-type legislative regulations control advertising but self-regulation has effectively complemented legislation.

The second type is where elaborate legislation has largely restricted the scope of self-regulation. This again has two sub-types. The first is countries where advertising comes within the ambit of unfair competition law. Here there exists strict legislative control on advertising. The next sub-type is countries where there exist Market Court, the Consumer Ombudsman and other statutory bodies which take care of market regulation and consumer protection.

And the third one is where countries have no established mechanism of self-regulation. Here the self-regulatory bodies are still in the process of deciding on how the regulatory and the self-regulatory bodies should go together.

5.4.2.1 *Cross Border Complaints and EASA*

The Cross-Border Complaints system was established in 1992, immediately after the EASA was set-up and is widely used even now. According to this agreement in case a cross-border complaint is filed by a person it will be handled by the self-regulatory organization of the EASA member state in the same manner as it would handle a national complaint[76]. There are basically two types of Cross-Border complaints. One, where a person makes a complaint in one country about an advertisement which he viewed in that country, but was brought into this country through media from another country. To give an example, a French consumer who views an advertisement broadcasted from the UK wishes to complain about the content of that advertisement in France. In the second instance it can happen when a person travelling to another country sees an advertisement there and then sends a

[76] Fabrizio Cafaggi, "Does Private Regulation Foster European Legal Integration" in Kai Purnhagen and Peter Rott (eds.), *Varieties of European Economic Law*, Springer, Switzerland (2014), p.266.

complaint to the self-regulatory organisation in the country where he or she normally stays. In such instance the complaint would be forwarded to the self-regulatory organisation of the country where the advertisement has been viewed. Or the complaint can also be sent directly to the EASA who would then send it to the appropriate body. The EASA coordinates these kinds of cross border complaints and is also involved in the information exchange as part of this.

5.4.2.2 *Actions Against Violators*

Remedies provided by self-regulatory organisations vary and include monetary sanctions and suspension or expulsion of members for non-compliance. In cross border cases that demonstrate illegal/criminal practices it may be necessary to issue a "Euro Ad Alert". This alerts interested parties to the advertisers activities and it is sent to the Alliance members, the advertising professionals, consumer organisations and the European commission [77].

5.5 Conclusion

This chapter has analysed the international practices of self-regulatory organisations. A comparative study of the US, UK and Swedish positions reveal that self-regulation is a good system of regulating the advertising industry. Among the three systems, UK system of co-regulation, where both the governmental as well as self-regulatory systems co-exists, is considered most appropriate. This is so because self-regulation is more adaptable to the dynamic advertising industry. There is close association between the governmental and the self-regulatory system. State interventions at the right junctures, suitable codes and regulations, adequate funding mechanisms, set systems of pre-clearance and remedies such as adverse publicity about the advertiser, refusal of advertising space and removal of trade incentives has resulted in better compliance with the self-regulator in the UK. Having said that, it is also true that the state machinery namely Ofcom keeps a very close watch on the

[77] Sanjay S. Kaptan, *Advertising Regulation*, Sarup and Sons, New Delhi (1st edn., 2003), p.55.

working of the self –regulatory system. Further even though ASA has the powers to interpret the UK Code of Broadcast Advertising, still the decisions of the ASA are subject to judicial review.

The US system of self-regulation is also good but it is opined by some scholars that it lacks effectiveness as it cannot enforce its own decision in the absence of the advertiser's willingness to do so. The state agencies such as the FTC play's a more important role as compared to the self-regulator.

The Swedish system of Ombudsman is also considered effective as it is based on consensus between the stake holders. This consensus has been achieved by allowing the business representatives, consumers and broadcaster to be part of the system. All the stakeholders get a say not only in the enforcement but also during the drafting of the regulation. Thus these different bodies together have to a large extent created a good system. But as India is much bigger geographically, it would be difficult to replicate this system here as the number of advertisements and the complaints arising from it are far higher than in Sweden.

Thus it can be said that in many countries such as UK, self-regulation is very effective, while in others a co-regulatory structure is more suitable. A country's self-regulatory structure is by-and-large decided by its national legislations. In countries like Sweden, Denmark etc. public enforcement by Ombudsman prevails. In UK, France, Spain etc. self-regulation is successful, and statutory regulation has been successful in countries like Germany and Austria.

The next chapter analyses in detail the principle Indian self-regulatory organisation namely ASCI. It also makes a detailed study of the Indian self-regulatory body vis-à-vis self-regulatory bodies of other jurisdictions.

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Chapter 6

SELF-REGULATION OF ADVERTISING IN INDIA

Chapter 6

SELF-REGULATION OF ADVERTISING IN INDIA

6. 1 Introduction

Self-regulation is one of the best means of maintaining ethical standards in advertising without the fear of state sanctions. It provides flexibility in the regulatory mechanism where customised regulations can be drafted which suit the changing demands in the advertising industry. It is also an effective system of addressing consumer grievances related to advertising.

Self-regulation at the first instance seems to be self-contradicting because if the regulation of an industry is considered necessary, then how can the responsibility be given to the same person/body from where the problem emanates[1]. Nevertheless, self-regulation is often seen as a very effective method to regulate the advertising industry. In jurisdictions like UK, scholars have hailed the effectiveness of self-regulation *vis-à-vis* that of governmental regulation. Views regarding the efficacy of self-regulation are quite divided. While some list out the benefits of the system others are quite quick to point out its challenges[2].

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1 Barry M. Mitnick, *The Political Economy of Regulation*, Columbia University Press, New York (2nd edn., 1982), p.15.

2 Angela J. Campbell, "Self-Regulation and the Media", Vol.51(3), Federal Communications Law Journal, 1999, pp. 712-772, at p.717.

There is no doubt that governmental bodies have lesser expertise on advertising related issues as compared to the advertising professionals. Thus the regulations that are drafted by self-regulatory bodies would be more efficient in the backdrop of the first-hand knowledge that it is prepared with[3]. It is also felt that in cases when the industry itself drafts the regulations it is easier for the self-regulator to change or amend it according to the changing circumstances in the industry or can have tailor made regulations that are drafted with the help of industry experts[4]. As these regulations are drafted by their industry peers and not by an outsider it is generally perceived to be more reasonable and is seen as having greater incentive for compliance[5]. For the government, self-regulation can be seen as a much easier process as the burden of creation of the regulation along with its compliance is now shifted to another agency, needless to say along with the expenditure incurred in the process[6].

According to E.H. Hondius, "self-regulation is a form of 'soft law' precisely because: (1) it has only 'asking power' rather than subpoena powers in dealing with offenders, and (2) it relies almost entirely on peer pressure (including that of the media) and on the publicity of its decisions, rather than on harsh penalties of the judicial type. Advertising self-regulation cannot, therefore, be the sole arbiter of norms and sanctions, but can only complement other societal-control mechanisms in a "user-friendly and practitioner-based regulatory manner."[7]

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3 Douglas C. Michael, "Federal Agency Use of Audited Self-Regulation as a Regulatory Technique", 47 Admin. L. Rev., 1995, pp. 171 – 186, at p.181.

4 *Ibid.*

5 Peter P. Swire, "Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information, in Privacy and Self-Regulation in the Information Age by the U.S. Department of Commerce.", available at http://papers.ssrn.com/sol3/papers.cfm? abstract_ id=11472 (accessed on 15-06-14)

6 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York (1992), p.114.

7 E.H. Hondius, "Non-legislative Means of Consumer Protection: The Dutch Perspective", Vol.7, Journal of Consumer Policy, 1984, pp. 137- 156, at p.140.

Scholars who do not support the system of self-regulation put forth the argument that, though the industry has better expertise, it will, in all probability apply it for its own benefit and not for the benefit of the public at large, unlike governmental laws and regulations which takes larger public interest into account[8]. The ability of self-regulatory bodies to impose sanctions is often seen to be quite unsatisfactory. The most they do in many instances of violation is to ask the advertiser to change or withdraw the advertisement or to expel the company from a particular association to which they belong. These are often insufficient and ineffective remedies against misleading advertisements[9]. Self-regulation also has challenges in terms of consumers and competitors lacking the will or the means to fight a case against big business houses[10]. The extreme argument however is that, in cases where there are certain players in the market and there is a certain agreement between them it may be considered as an anti-competitive practice under the competition law. Thus, these kinds of agreements which are in the form of a regulation can also be broadly interpreted as anti-competitive practice as there is agreement between the parties[11]. This argument however is too far fledged and seems to be unacceptable.

In the earlier chapter a comparative analysis has been made between three different jurisdictions with diverse self-regulatory systems. UK's self-regulatory system, Advertising Standards Authority[12] is considered by and large an effective

[8] Donald I. Baker and W. Todd Miller, "Privacy, Antitrust and the National Information Infrastructure: Is Self-Regulation of Telecommunications-Related Personal Information a Workable Tool?", available at https://www.ntia.doc.gov/page/chapter-2-antitrust-considerations (accessed on 11-012-15)

[9] Mark E. Budnitz, "Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate", Vol.49, S.C. L. Rev.,1998, pp. 847- 885, at p.874.

[10] J. J. Boddewyn, "Advertising Self-Regulation: Private Government and Agent of Public Policy", Vol. 4, Journal of Public Policy & Marketing, 1985, pp. 129-141, at p. 133.

[11] Joseph Kattan and Carl Shapiro, "Privacy, Self-Regulation, and Antitrust", available at http://www.ntia.doc.gov/reports/privacy/privacy_rpt.htm (accessed on 13-10-2016)

[12] Hereinafter referred to as ASA.

one. US also has a self-regulatory system, but governmental regulatory system through the Federal Trade Commission is quite strong and thus the dependency on the self-regulatory system is not as high as in the UK.

This chapter studies the Indian self-regulatory system namely the Advertising Standards Council of India[13]. Set-up in 1985, ASCI is a non-profit organisation consisting of the three main constituents of the advertising industry namely the advertisers, advertising agencies and the media[14]. It is the principle self-regulatory body for the Indian advertising industry. ASCI works on its Code for Self-Regulation of Advertising Content, 1985, created by it for the regulation of advertising and this Code is quite similar to the Code of UK Advertising Standards Authority. Some of the primary goals of ASCI includes monitoring, administering and promoting standards of advertising practices in India with a view to:

(i) Encouraging truthfulness and honesty in advertisement claims and safeguarding consumers against misleading advertising.

(ii) Encouraging non-offensive advertisements which follow generally accepted norms and standards of public decency.

(iii) Ensure safeguards against advertisements which promote products or services, which are generally regarded as hazardous to society or to individuals or which are unacceptable to society as a whole.

(iv) Ensure fair competition in advertisements and follow the canons of generally accepted competitive behavior.

(v) Ensure that a code of advertising is adopted, implemented, administered, publicized and modified from time to time.

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[13] Hereinafter referred as ASCI.

[14] S. H. H. Kazmi and Satish K Batra, *Advertising and Sales Promotion*, Excel Book Publication, New Delhi (2008), p.79.

(vi) Establish a machinery in the form of the Consumer Complaints Councils[15] to examine complaints against advertisements which violate the Code of Advertising practices[16].

The ability of the system to be a good substitute to the governmental regulation would be a difficult goal to achieve. This is mainly because of the fact that the enforceability of its decisions is still a challenge. Though companies do follow the code and enforce the decisions voluntarily, still in cases where the company refuses to enforce a decision, compliance would be a challenge. In cases where the complainant is looking for quick remedies such as injunction, even then approaching ASCI might be futile. In such cases the person has to approach the court.

6.2 ASCI and its Association with State Agencies

ASCI has also been associated with the government in-order to ensure that businesses maintain a certain standard in advertising. This would help the self-regulator to act more effectively. It is closely associated with the Ministry of Information and Broadcasting as the ASCI Code is incorporated in the Cable TV Networks Rules since 2006[17]. This has resulted in a requirement for television channels to comply with ASCI's rules and regulations when broadcasting advertisements, and follow the rulings of the Consumer Complaints Council[18].

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15 Hereinafter referred to as the CCC.

16 Advertising Standards Council of India, "Goals of ASCI", available at http://www.ascionline.org/index.php/asci-goals.html (accessed on 12-12-2013)

17 R.7(9) of the Cable Television Networks Rules, 1994, states that - No advertisement which violates the Code for self-regulation in advertising, as adopted by the Advertising Standard Council of India (ASCI), Mumbai for public exhibition in India, from time to time, shall be carried in the cable service.

18 Viveat Susan Pinto, "Ad Regulator Takes a Big Leap", available at http://www.business-standard.com/article/management/ad-regulator-takes-a-big-leap114110601285_1.html (accessed on 23-03-2014)

In spite of all these efforts ASCI was perceived to be an 'industry body' and not really an independent regulator. This was reflected in a 2011 speech of Mr. K.V. Thomas, the then minister for food, at a conference held by ASCI on the topic "Strengthening Self-Regulation of Advertising Content". He said that the self-regulatory system was not performing as per expectations. Expressing his apprehensions, he stated that he was doubtful whether self-regulation would work or not and whether it is presently working efficiently in India. He further stated that would it suffice to strengthen the self-regulatory system and would that effectively take care of the present problems that consumers face due to deceitful advertisements. His main concern was the protection of consumers due to deceptive advertisements. He suggested that an inter-ministerial committee should be formed to study the scenario and that there should be an independent regulator to monitor advertisements for at-least certain critical segments such as health care[19].

The advertising industry immediately responded to the government's idea of setting up a "parallel administrative authority" by discussing this issue and later released a white paper titled, 'Self-Regulation in Advertising in India-A Critical Evaluation'. It discussed in detail how setting up a "parallel administrative authority" would be a futile exercise and what was required was to strengthen the already existing self-regulatory mechanism. The white paper also suggested ways and means of achieving this goal. For this it stated that co-regulation of advertising by ASCI as well as other state agencies such as the Department of Consumer Affairs, Ministry of Information and Broadcasting, Food Safety and Standards Authority of India[20] etc. would be required. And this can be done without granting any punitive powers to

[19] "Thomas Expresses Doubt Over Self-regulation in Ad Industry", Live Mint, November 17, 2011, available at http://www.livemint.com/Politics/dfFCvcGl3at6ifoj6bdpMJ/Thomas-expresses-doubt-over-selfregulation-in-ad-industry.html (accessed on 02-04-2014)

[20] Hereinafter referred to as FSSAI.

ASCI. Only when the Consumer Complaints Council[21] fails to enforce its decision, should the case be referred to the concerned regulatory authority. As there have also been criticism regarding delay in the decision making process by ASCI, it was suggested that there should be a provision for 'suspension pending investigation' till the final decision is arrived at by the CCC. It would be applicable for those advertisements which are highly objectionable and where there is prima facie proof regarding such an allegation. The white paper also suggests the making of membership to ASCI mandatory for all industry players. Further, it was suggested that the ASCI Code should be integrated with other statutes so that the system would become more effective. It was also felt that there was need to expand the ASCI Code to the social and digital media.

In 2013 ASCI introduced the National Advertising Monitoring Service[22] with the aim to monitor television as well as the print advertisements for deceptive content. NAMS through it arrangement with TAM monitors around 45,000 print advertisements and about 1,500 TV advertisements on a monthly basis[23].

ASCI also joined hands with the Department of Consumer Affairs for curbing misleading advertisements and unfair trade practices. The Department launched a web portal by the name Grievances Against Misleading Advertisements[24] for the purpose of processing consumer complaints. For this a three tier system was introduced with ASCI at the bottom of the pyramid. At this level ASCI will accept complaints and will process it applying the ASCI Code and procedures. In case of non-compliance with ASCI's decision, the case moves to the second level which is a

[21] Hereinafter referred to as CCC.

[22] Hereinafter referred to as NAMS.

[23] Advertising Standards Council of India, "Frequently Asked Questions", available at https://www.ascionline.org/index.php/faqs.html (accessed on 10-12-2015)

[24] Hereinafter referred to as GAMA.

sub-committee headed by the Joint Secretary of Department of Consumer Affairs and the Inter Ministerial Monitoring Committee. In case it is not successful even at the second level, then the case goes to the third level where the concerned government regulator will take action. Regarding this collaboration ASCI stated that the collaboration will facilitate joint efforts by both the government and ASCI to take action against violators. Six sectors have been identified as priority sectors and this includes, agriculture, food, health, education, housing, financial services and e-commerce [25]. GAMA which was launched in 2015 had received about 1000 complaints within a year. ASCI processed all these complaints, majority of which came from individual consumers as well as few from consumer organizations[26].

As stated earlier, under the Cable TV Networks Rules, 1994 the television channels are required to comply with ASCI's rules and regulations when broadcasting advertisements, and follow the rulings of the Consumer Complaints Council[27]. In case this is not done then ASCI can refer the matter to the concerned authority for banning or modification of the advertisement. For example, in the case of "Zaitoon Tara edible oil" an advertisement was aired on 23rd April 2013, on a certain television channel. The advertisement made the claim that this oil prevents cancer, diabetes, cholesterol, acidity etc. This advertisement was considered to be in violation of Rule 7 (5) of the Advertising Code[28]. The matter was taken up by the Consumer Complaints Council of ASCI and the

[25] "ASCI is now the 'Executive Arm' of the Department of Consumer Affairs", Afaqs, March 19, 2015, available at http://www.afaqs.com/news/story/43626_ASCI-is-now-the-Executive-Arm-of-the-Department-of-Consumer-Affairs (accessed on 03-03-2014)

[26] "ASCI Attends 1,000 Complaints Against Misleading Ads", India Today, March 17, 2016, available at http://indiatoday.intoday.in/story/asci-attends-1000-complaints-against-misleading-ads/1/622778.html (accessed on 20-11-2014)

[27] *Supra* n.17.

[28] R.7(5) of the Programme and Advertising Code prescribed under the Cable Television Network Rules,1994, states that - No advertisement shall contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or super-natural property or quality, which is difficult of being proved.

Council held that the claim "edible oil prevents cancer, diabetics, acidity, cholesterol, etc." was misleading as these claims cannot be substantiated. It was in breach of the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954 and also the ASCI Code for Self-Regulation[29]. The advertiser was asked to comply with the decision of ASCI by 26th September, 2013. By a letter dated 3rd February, 2014 ASCI intimated the Ministry of Information and Broadcasting[30] that the advertiser has not complied with the decision of ASCI. This act of non-compliance violates Rule 7(9) of the Cable TV Network Act which very clearly stated that "no advertisement which violates the Code for self-regulation in advertising, as adopted by the Advertising Standard Council of India (ASCI), Mumbai for public exhibition in India, from time to time, shall be carried in the cable service". In furtherance to ASCI's letter the ministry on 26th June, 2014 intimated all television channels that the given advertisement shall henceforth not be aired on any television channel[31]. But how many cases have actually been referred, and does such reference happen on a regular basis is not clear as there are no available data in this regard. Is it mandatory on the I&B ministry to bring out an order when a reference

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29 ASCI Code for Self-Regulation, 1985.

Provision 1.1 states that –

Advertisements must be truthful. All descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called upon to do so by The Advertising Standards Council of India.

Provision 1.4 states that –

Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions.

Advertisements shall not contain statements or visual presentation which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised or the advertiser or about any other product or advertiser.

30 Hereinafter referred to as the Ministry of I&B.

31 Advisory issued by the Ministry of Information and Broadcasting dated 26th June, 2014, available at http://mib.nic.in/writereaddata/documents/advisory_on_misleading_ad.pdf (accessed on 25-08-2014)

is made or is it at the discretion of the ministry? There is ambiguity regarding these issues also as there is a lack of literature on these topics.

Followed by this, on 21st August, 2014 the Ministry of I&B released an advisory. This advisory was with regards to a complaint made by ASCI on television channels carrying teleshopping advertisements which were against the ASCI Code as well as the Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954. The complaint was tabled before the Ministry of Information and Broadcasting's Inter-Ministerial Committee. It was noted by the Inter-Ministerial Committee that in case a party does not comply with ASCI's decision it would violate Rule 7(9) of the Cable TV Rules, 1994 which provides that advertisements which violate the ASCI Advertising Code should not be carried in the cable service. It was also noted that there was violation of the provisions of the Drug & Magic Remedies (Objectionable Advertisements) Act, 1954 and its rules[32].

This is how the ASCI collaborates with the Ministry of I&B to catch hold of advertisers and publishers who violate the ASCI code as well as other statutory provisions on advertising. This type of co-regulation has to a large extent helped ASCI in enforcing its decisions. But this reference also points to the fact that there are many decisions of ASCI which are not complied with and so the very role of ASCI gets questioned in such a scenario.

[32] Some of the products in the Ministry of I&B's Advisory list which violated the ASCI Code in terms of their advertising and in terms of their advertisers not complying with the ASCI's decision to uphold the complaint are Fairpro (Telemart Shoppi Network Pvt. Ltd), Ayurvedic Roopamri Fairness Cream (WWS SkYshoP P'Ltd), Celebrity Lift (R.T.C.Enterprises), GLO Intense Brightening System (B. Lab), Rashi Ratan Topaz Ring (Quick Telemall Marketing Pvt. Ltd.), Maha Dhan Lakshmi Yantram, Musli Power Xtra (Kunnath Pharmaceuticals), Brain Smart GTM (Teleshopping Pvt Ltd), Bhairavi Sadhana- Devishree Foundation Trust, Shaktivardhan Vaccume Threapy, Sandhi Sudha Oil (Telemart Shopping Network Pvt. Ltd.), Madhu Sanjivani (JMD Teleshopping), Addiction Killer (SK Shopping Pvt Ltd), Easy Slim Tea , Maha Dhan Lakshmi Yantram etc.

There are also proposals for ASCI to join hands with the Food Safety and Standards Authority of India[33] on misleading advertisements. In case a food business operator brings out a misleading advertisement, ASCI can ask the advertiser to take corrective action and in case the same is not done by the advertiser then FSSAI will step-in and appropriate measures can be taken. In this regard Mr. Pawan Agarwal, the FSSAI CEO stated that as ASCI was already monitoring advertisements, it could very well give periodic alerts to FSSAI regarding misleading health and nutritional claims[34]. This collaboration will have special significance in the backdrop of the fact that out of the 90 cases upheld by ASCI in March 2016, 10 were against food and beverage companies[35]. This development happens especially in the backdrop of the already existing arrangement between the Department of Consumer Affairs and ASCI with regards to the complaints handling on the GAMA website.

On 29th June, 2016, FSSAI finally signed a memorandum of understanding with ASCI, whereby ASCI will now report cases of non-compliance of the ASCI decisions related to food and beverage related advertisements to the FSSAI. ASCI General Secretary Ms. Shweta Purandare stated that these advertisements will be thoroughly monitored across different media by ASCI. FSSAI has been given *suo motu* monitoring mandate to ASCI for processing complaints regarding deceptive advertisements in the food and beverages segment [36].

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33 Hereinafter referred to as FSSAI.

34 Meenakshi Verma Ambwani, "FSSAI May Join Hands with Ad Council to Check Misleading Claims by Food Firms", Business Line, May 27, 2016, available at http://www.thehindubusinessline.com/economy/policy/fssai-may-join-hands-with-ad-council-to-check-misleading-claims-by-food-firms/article8656513.ece (accessed on 02-07-2016)

35 *Ibid.*

36 "FSSAI Signs Pact with ASCI to Check Misleading Advertisements", Economic Times, June 29, 2016, available at http://economictimes.indiatimes.com/industry/services/advertising/fssai-signs-pact-with-asci-to-check-misleading-advertisements/articleshow/52959167.cms (accessed on 01-08-2016)

6.3 Members of ASCI

The members of ASCI mainly constitute advertisers, media, advertising agencies and other professional /ancillary services connected with advertising practice. ASCI has 16 members in its Board of Governors, representing the key sectors such as advertisers, advertising agencies, media and allied professions such as market research, consulting, business education etc. It is quite striking to note that the body which works towards the protection of consumers has no representation from any consumer associations on the board. All the board members are from the industry and thus the protection of consumers can be an issue. The Consumer Complaints Council has a total of 28 members where more than half are again from the advertising industry[37].

6.4 Complaints System in ASCI

Though the ASCI Code very clearly states that anyone can approach the CCC with a complaint, still majority of the complainants are found to be companies rather than individuals. In 2013-14, out of a total of 1,937 advertisements which were found objectionable by ASCI, only 785 were made by consumers. These figures can be compared to the complaints received in 2012-13 which were 300 and also to 2011-12 when it was only 176[38].

In August 2015, ASCI launched a mobile application through Whatsapp aiming at encouraging the consumers to come forward with their complaints. Whenever a consumer sees an objectionable advertisement such as a hoarding, a poster or even a video, he can immediately take a picture or copy the link of the video and send it to ASCI. It provides easy means of lodging a complaint. This also

[37] Advertising Standards Council of India, "ASCI- Consumer Complaints Council (CCC) Members", available at http://ascionline.org/ index.php/asci-ccc-members.html (accessed on 23-04-2014)

[38] Advertising Standards Council of India, "Annual Reports", available at https://www.Ascionline .org/index.php/annual-report.html (accessed on 15-10-2015)

provides ASCI with some amount of authentication of the complainant though such authentication is not mandatory to file a complaint and all that is required is that the complaint and the facts mentioned in it should be genuine. This Whatsapp application was launched in March 2016 and contributes to around 12% of the advertisement complaint[39]. Thus due to several proactive steps taken by ASCI the number of consumer complaints received are on the rise.

But there was an already existing problem of delay in the decision making process, which was expected to worsen due to the sudden increase in complaints. In-order to take care of this delay, ASCI has taken certain specific steps. First, it has increased the frequency of the CCC meetings. Earlier while they used to meet once a month, now the same has been increased to four. Now the time taken by ASCI to decide a case is reduced from 30 days to around 12 days on an average. ASCI also introduced the fast track complaint redressal process by which a case can be decided within 7 days as against 12 days. For this ASCI charges an extra fee of about Rs.1.25 lakhs. Also as suggested in the Confederation of Indian Industries white paper on advertising self-regulation, ASCI from March 15 2013, introduced the suspension pending investigation process. So now if there is prima-facie proof that an advertisement would violate the ASCI code, then the advertisement can be suspended till the CCC takes a final decision[40]. The number of complaints that are being upheld has also increased and the ratio of complaints being upheld versus those which are not upheld has increased to 70:30, at present[41]. This has also helped in increasing confidence in the system thus leading to more complaints.

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39 "ASCI to Take Consumer Complaints via WhatsApp", Afaqs!, March 10, 2016, available at http://www.afaqs.com/news/story/47385_ASCI-to-take-consumer-complaints-via-WhatsApp (accessed on 15-04-2016)

40 Advertising Standards Council of India, "Frequently Asked Questions", available at http://ascionline.org/index.php/faqs.html (accessed on 23-04-2016)

41 *Supra* n.38.

6.5 Publicity

It is often opined that ASCI as a body has not reached out to the general public. The publicity activities of the Council leaves much to be desired. Available literature suggest that the awareness campaigns conducted by ASCI is not sufficient because of which consumers and non-members are not aware of the organisation[42]. In order to do away with this problem, ASCI has been engaged in awareness programmes and has launched mass media campaigns, toll free numbers and online mechanisms for making a complaint. It is also regularly reporting the CCC decisions through its Consumer Complaints Council Decisions publication. The Whatsapp complaint system launched by ASCI in 2016 is an attempt to reach out to the consumers and make the whole complaint registration system easier[43]. In 2015 ASCI had successfully also launched a mobile application, ASCIonline[44].

6.6 Monitoring

Inspite of ASCI's continuous efforts to make consumers aware regarding deceptive advertisements, the Consumer Affairs Department, Government of India, held the view that misleading advertisements were on the rise. In order to tackle this issue ASCI launched the National Advertising Monitoring Service. For this ASCI has entered

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[42] Bhumika Raval, "A Study of Advertising Standards Council of India(ASCI) and its Regulatory Role Towards Curbing Unethical Marketing Communication with Specific Reference to the Portrayal of Women by Advertisers", Vol.5(1), International Journal of Scientific Research, 2016, pp.607-608.

[43] The Whatsapp number launched by ASCI is +91 77100 12345.

[44] Writankar Mukherjee, "Advertising Standard Council of India Reaches out to Consumers to Lodge Complaints", The Economic Times, March 10, 2016, available at http://economictimes.indiatimes.com/industry/services/advertising/advertising-standard-council-of-india-reaches-out-to-consumers-to-lodge-complains/articleshow/51344319.cms (accessed on 19-03-2016)

into an arrangement with TAM Media Research Pvt. Ltd.[45] to track and monitor some 10,860 newspaper advertisements and 350 television advertisements per week.

The purpose of such monitoring is to find out if the above given advertisements are in violation of Chapter 1 of the ASCI Code which deals with unsubstantiated, misleading or false claims in the advertisement. These advertisements are then forwarded to ASCI from where ASCI follows its normal adjudication process before the CCC in appropriate cases. Presently ASCI has identified certain specific sectors where instances of misleading advertisements are relatively higher. These sectors include automobiles, banking and financial services, insurance, FMCG, consumer durables, educational institutions, health care products and services, telecom and real estate.

6.7 Funding

ASCI's funding primarily comes through subscription. ASCI presently has 350 members from the industry who contribute to ASCI through subscription fee and this number is growing. There are four different categories namely, advertisers, press/mass media, advertising agencies and other allied professions under which membership registration is done. The subscription amount is charged differently for different categories. It is charged according to the annual advertising expenditure in case of an advertiser, annual turn over in case of press or mass media and annual revenue in case of an advertising agency. For other allied professions also who want to become members, their annual turnover is considered. For each category separate slabs have been created to decide on the subscription fee. The subscription amount is quite low and the maximum subscription fee for an advertiser, who spends Rs. 1000

[45] ASCI has partnered with AdEx India, a division of TAM Media Research Ltd., for the purpose of monitoring advertisements. TAM Media Research Ltd. currently captures advertising data nationally for monitoring purposes for the advertisement sector.

crores or above on advertisements annually, is only Rs.4,29,375 including service tax[46].

Another 20% of ASCI's income comes from fast-track cases, where ASCI charges around 1.25 lakhs per case[47]. This happens in intra industry cases, say for example Hindustan Unilever making a complaint against Proctor and Gamble's advertisement where the case needs to be decided within a period of seven days. ASCI receives some 20-25 intra-industry complaints in a year. It also generates money from conferences and seminars conducted by it. A recently added source of income is the governmental grants under which ASCI received Rupees 10 lakhs in the first slot.

But it is also important to note that recently ASCI has undertaken a large-scale revamping of its organization and has invested close to 30-40 lakh rupees in the entire revamp process[48]. This has in total lead to a 50% increase in its expenditure.

Ms. Sweta Purandare the Secretary Genaral of ASCI has stated that, "We don't want to be the 'Gabbar'[49] of Indian advertising." But on the other side Mr. Ambwani, the earlier Chairman of ASCI says that ASCI should be a body which is "ready to challenge companies irrespective of their size and financial status."[50] The motto of

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46 Advertising Standards Council of India, "ASCI –Scale of Fees", available at http://ascionline.org/images/pdf/appliction_membership _2016-2017_updated.pdf (accessed on 23-04-2014)

47 Advertising Standards Council of India, "ASCI – Membership Advantages", available at http://ascionline.org/index.php/membership-advantages.html (accessed on 29-04-2014)

48 Ashwini Gangal, "Who's Afraid of the New & Improved A.S.C.I.?", Afaqs, August 4, 2015, available at http://www.afaqs.com/news/story/45132_Whos-Afraid-of-the-New--Improved-ASCI (accessed on 05-09-2016)

49 'Gabbar' is the name of Amjad Khan in the famous hindi movie 'Sholay'. The word 'Gabbar' in colloquial terms is used to denote a strong villainous character.

50 *Supra* n.48.

ASCI is "If we don't regulate...someone else will" [51]. Thus ASCI's main motivation is to keep the state agencies at bay. But in-order to do so it is important for ASCI to build both consumer as well as industry confidence and for this it needs to reach out to them. Inviting more consumers to register complaints alone is not going to help. People should first be made aware of the role and functions of ASCI. The second challenge that follows from the first one is that how is a 15 member secretariat of ASCI going to handle these cases and what will happen in case there are backlogs.

There is another major challenge for ASCI, which is reaching out to the rural population. Misleading advertisements are considered to be quite rampant in rural areas. But what exactly ASCI has done in-order to reach out to the rural consumers is not clear. ASCI initiatives are mostly in the metropolitan cities. ASCI now has to make a very clear statement in terms of who they are. Positioning itself rightly is very important for ASCI at this juncture as it is reaching out to the public.

6.8 Self-regulation – A Comparative Analysis

The advertising self-regulatory mechanisms of other jurisdictions as mentioned in the previous chapter will help to understand and comparatively analyse the strengths and weaknesses of the Indian self-regulatory mechanism. A self-regulatory mechanism would be considered successful, if it is approachable not only by the companies but also by the consumers who view/hear these advertisements. This is especially relevant in a context where the self-regulatory system tries to replace statutory regulation/s or regulatory body. This is quite true in the case of ASCI, as it has always suggested that governmental regulation is not the appropriate way of regulating the advertising industry. The body, especially its decision making body, should be such that the consumer has faith in the system when a complaint is filed, as many people tend to perceive ASCI as an 'industry body' formed to protect

[51] Advertising Standards Council of India, "Membership Advantages", available at https://ascionline. org/index.php/membership-advantages.html (accessed on 09-02-2017)

industry interest. For this most self-regulatory systems have outside (non-industry) members, in the body.

The UK self-regulatory body, ASA, is by and large independent. When we take a look at the Chairman, the Advertising Standards Authority[52] Council (the body which adjudicates on the formally investigated complaints) and the senior management team of ASA (which is its executive decision-making body), it can be observed that there is substantial representation from the non-industry group. This enhances the credibility of ASA as far as outsiders such as consumers are concerned.

In the US, the Advertising Self-Regulatory Council[53] has a eleven member Board of Directors which is composed of representatives of the American Advertising Federation, Inc., American Association of Advertising Agencies, Inc., the Association of National Advertisers, Inc., Council of Better Business Bureaus, Inc., Direct Marketing Association, Electronic Retailing Association and Interactive Advertising Bureau. The National Advertising Division is the body which monitors, evaluates, investigates and also does an initial discussion with advertisers on complaints regarding the truth and accuracy of advertisements against which complaints have been made. But this body is constituted only of attorney's who have an experience in advertising law. There is no other outside representation such as persons from the consumer association or any other interested groups.

This can again be compared with the Swedish system, which is very unique when compared to the other systems in the world because of the Consumer Ombudsman system that is prevalent. The decisions making body the Market Court, which is the highest body of appeal as far as marketing related cases are concerned is a government body which comes under the Ministry of Integration and Gender

[52] Hereinafter referred to as ASA.

[53] Hereinafter referred to as ASRC.

Equality. It includes representatives from consumer groups, industry and also an independent expert. It also has a chairman and a vice-chairman with a judicial background. Even though the Market Court is a government body but it has the flavor of a self-regulator because of adequate outside representation. This level of outside participation in the Market Court was seen as a very encouraging move both by the industry as well the consumers.

The Swedish system of consumer ombudsman is also good. But many opine that the consumer Ombudsman system works well in a small homogenous country like Sweden where reaching a consensus would be easy[54]. But this might not work very well in a country like India which is much bigger and quite diverse.

When we compare this with the constitution of ASCI it can noted that the Chairman as well as the entire Board of governance is constituted of representatives from the industry. The Consumer Complaints Council members include persons from the advertising industry, doctors, lawyers, journalists, academicians, consumer activists, etc. The presence of a person's independent from the industry helps in building consumer confidence in the system. But the board of governance is again constituted mainly of people from the industry.

Thus the involvement of all the stakeholders in the advertising self-regulatory systems will go a long way in building trust in the system. Such involvement is possible at two levels. One where not only companies, but the consumers can also easily approach these systems and lodge their complaints. For this it is important that proactive steps are taken to reach out to the consumers not only in the metros' but also in the rural parts. General awareness about the self-regulatory system is also important as in the case of, say for example, the consumer forums. Massive publicity

[54] Fabrizio Cafaggi, "Does Private Regulation Foster European Legal Integration" in Kai Purnhagen and Peter Rott (eds.), *Varieties of European Economic Law*, Springer, Switzerland (2014), p.266.

that has been given to the consumer forums has now made these forums easily recoganisable by an average Indian irrespective of whether he lives in a rural or in an urban area. This should also be made possible in the case ASCI. The second level at which the public should be involved, ofcourse, is in the decision making process as has already been discussed in detail above. Non-industry representation in the decision making process guarantees fairness in the process.

Proper funding also play's a very important role in self-regulatory organisation. The better the funding of a self-regulatory organisation[55], the more efficient it becomes in pursuing cases against companies especially the larger ones. There is a difference between the ASA and the ASRC, as the ASA is funded by the Advertising Standards Board of Finance on the basis of a mandatory levy. This has resulted in substantial funding to the ASA which to some extent guarantees its efficient working[56]. When we compare the funding structure of ASA and ASCI we can find that there is a vast difference. The funding of ASCI is mainly dependent upon member subscription which when compared with other SRO's is quite miniscule. For example, as stated above, the ASA members pays a levy of £1 per £1,000 on display advertising as subscription fee. This draws a good amount for the ASA through the Advertising Standards Board of Finance. Thus it helps the ASA in taking action without fear of finance against any company irrespective of how big the company may be. This is one area which needs to be strengthened in ASCI. Funds are required to pursue cases against companies, for proper publicity of the organisation, attracting good CCC members etc.

Proper interaction between SRO's and state agencies is important to give the required backing to the SRO's. In the UK, the interactions ASA and the state

[55] Hereinafter referred to as SRO.

[56] Frank Jefkins, *Advertising Made Simple*, Heinemann Publishing, Oxford (4th edn., 1990), pp. 58-59.

agencies such as the Office of Communication[57] is very high. At the time of issuing the license to the broadcaster it is very clearly stated that the broadcaster has to abide by the ASA decisions. In case that is not done, action may be taken against the broadcaster by Ofcom. This has helped the ASA in the enforcement of its decisions. The Advertising Standards Council of India, like the ASA, was established, with the objective of ensuring that advertisements were 'legal, decent, honest and truthful.[58] But a fundamental difference between the ASA and the ASCI is in the former's ability in ensuring the enforceability of its regulations. The basis of the same is an agreement that the ASA has entered into with newspapers and journals to not carry any advertisement which would breach the Advertising Code set out by it. In cases where there are people who repeatedly violate the Code, the case can be referred to the Office of Fair Trading which can obtain an injunctive action against company which publishes the false advertisement[59].

But this cannot be said about the US SRO's. In cases where a decision is rendered by the US National Advertising Division[60] and the advertiser refuses to comply with the decision the case can be referred by the NAD to the Federal Trade Commission for action. This is generally where the state interacts with the self-regulatory system. The problem here is that though the case can be referred to the FTC, but the Commission will arrive at its decision independently. Only because the NAD has found someone guilty, it will not make the FTC oblige to the decision of the NAD. The commission will evaluate each and every case again on its merits which may cause a further delay in the entire process.

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57 Hereinafter referred to as Ofcom.

58 Tom Crone, *Law and the Media*, Taylor & Francis, Burlington (3rd edn., 1995), pp. 204-207.

59 Geoffery Robertson and Andrew Nicol, *Media Law*, Penguin Books, U.K. (2002), p.797.

60 Hereinafter referred to as NAD.

ASCI's tie-up with governmental agencies is also increasing as it is now being associated with the Ministry of Information and Broadcasting, the Department of Consumer Affairs and the FSSAI. This will help ASCI in different ways including giving the much required enforceability to its decisions. While ASCI has involved itself in the GAMA portal of the Department of Consumer Affairs, Government of India, it is also true that it has been placed at the lowest tier of the process of accepting and processing complaints. There is a sub-committee headed by the joint secretary of Department of Consumer Affairs to which a case can be appealed and then to the appropriate regulator if required. In such cases it is felt that there is a fear of ASCI losing its identity as a self-regulator, independent of state intervention as it has now indirectly become a part of the state machinery.

6.9 Conclusion

Advertisement regulation is just like any other regulation, but the only difference is that advertising regulations are very scant and scattered as far as India is concerned. Advertising laws should be scrupulously drafted so as to cater to the specific needs of the industry[61]. Self-regulations plays a very important role as through its Codes it can constantly address the changing needs of the industry. As the SRO's mainly comprise of members of the industry, their needs are fully taken into consideration before the Code is drafted. In case these Codes seem to become outdated, they can be immediately changed or amended. Through state interventions the decisions of the SRO's can be given proper enforceability. But to gain and retain consumer confidence is the biggest challenge for any self-regulatory organisation and ASCI is no exception to that.

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[61] Byron Sharp and Yoram Jerry Wind, "Today's Advertising Laws: Will they Survive the Digital Revolution", Vol.49(2), Journal of Advertising Research, 2009, pp. 120-126, at p.122.

Chapter 7

CONCLUSIONS AND SUGGESTIONS

Chapter 7

CONCLUSION AND SUGGESTIONS

7.1 Introduction

Deception in advertisement influences the consumer's economic behaviour and is detrimental to the consumer, competition and public at large. But the regulatory regime against deceptive advertisement is still in its infancy. Even though there are some legislations in place including some sectoral regulations and an active self-regulatory organisation namely the Advertising Standards Council of India[1], it can be concluded that the regulatory regime is inadequate to defeat ingenious deceptive advertisement practices which are in a state of continuous flux.

In the financial year 2012-13 the number of advertisements held to be deceptive and directed to be withdrawn by ASCI were about 187. This figure increased to 203 in the year 2014-15, which further went up to 363 in the year 2015-16[2]. This steady rise in deceptive advertisements call for urgent revamp of the advertising laws and regulations in India. As the advertising trend is dynamic, the regulations should be such that they can adapt to these fast changing advertising techniques[3]. Alongside legal regulations, mechanisms should be created for the self-

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1 Hereinafter referred to as ASCI.

2 Zia Haq, "Misleading Ads on the Rise, Authorities Vow Strict Monitoring", Hindustan Times, May 17, 2016, available at http://www.hindustantimes.com/india/false-advertisements-in-six-key-areas-risking-health-safety-rising/story-d8iZbgsO0jN1T1mdwCS8oK.html (accessed on 23-11-2016)

3 Michael G. Parkinson and L. Marie Parkinson, *Law for Advertising, Broadcasting, Journalism, and Public Relations*, Lawrence Erlbaum Associates Publishers, United States (2006), p.112.

regulatory system to work more effectively. A co-regulatory model, where both the state regulators along with the self-regulators work in co-ordination and co-operation would be best suited for the advertising industry. In a vast and diverse country like India, the need for multiple regulators becomes all the more relevant.

During the period of this research the Consumer Protection Bill, 2015 was tabled in the Lok Sabha by Mr. Ram Vilas Paswan, the Minister of Consumer Affairs, Food and Public Distribution[4]. Though the Bill has addressed some issues related to deceptive advertisements, specific issues related to advertisement claim substantiation guidelines, advertisement monitoring, advertisement endorsements, technology generated issues in advertising such as keyword advertising, advertisements through blogging sites and many more similar issues have not been addressed.

This chapter tries to put forth suggestions in the regulation of advertising in India after identifying the lacunas and loopholes in the existing system. Certain suggestions have been included after a comparative study with other jurisdictions. The relevant provisions of the Consumer Protection Bill, 2015 have been analysed for the purpose of drawing the suggestions. These suggestions have been included keeping in mind their adaptability into the Indian legal and economic system. They deal with both regulatory as well as self-regulatory mechanisms which can effectively combat deceptive advertising in India.

These suggestions have been drafted based on each research question and enumerates how the research has answered these questions and provides suggestions for each of those situations. Apart from the research question based suggestions, few general suggestions have also been provided for improvement of the system.

[4] "New Consumer Protection Bill Could be Next Big Game Changer", The Economic Times, July 29, 2017, available at http://economictimes.indiatimes.com/news/economy/policy/new-consumer-protection-bill-could-be-next-big-game-changer/articleshow/59820484.cms (accessed on 21-08-2017)

7.2 Insufficiency of Regulatory Framework

The study has identified several deficiencies in the present Indian legal and self-regulatory system. These lacunas have made the present regulation of deceptive advertising in India ineffective. The major conclusions and suggestion of this study has been given below.

7.2.1 No Adequate Institutional Framework

For effective implementation of the advertising regulations it is essential that these regulations are adequately supported by an institutional mechanism. As far as advertising is concerned, institutional framework refers to quality assurance mechanisms such as well-equipped laboratories, investigative mechanisms with adequate powers to investigate a deceptive advertisement claim, pre-screening and monitoring mechanism of advertisements and last but not the least, specialised adjudicatory mechanism for deceptive advertisement claims.

7.2.1.1 *Lack of Laboratory Facilities for Claim Substantiation*

Proper laboratory facilities are a very important part of the institutional framework for fighting deceptive advertising. There are many laboratories established across the country for different purposes for example the Central Drugs Laboratory, Kolkata, is the National Statutory Laboratory of the Government of India for quality c ontrol of drugs and cosmetics under the Drugs and Cosmetics Act and Rules, 1940. These laboratories are in a very bad state as most of these laboratories are under staffed. Many have not yet become fully operational and many of them still do not have the proper infrastructural support for conducting any testing[5]. Under the

[5] For the proper working of a laboratory important infrastructural support would include continuous electricity, raw material for testing, machinery/equipment maintenance etc.

Food Safety and Standards Act, 2006 also 5 laboratories were set up in different parts of India. These facilities today are anything but functional.

Suggestion

Urgent measures have to be taken to improve the condition of laboratories. Laboratories are the corner stone of the claim substantiation process. Tests conducted to prove or disprove a deceptive advertisement claim requires well-equipped laboratories with trained staff. Laboratories should be established in every state and it should have all the facilities to undertake testing of different types of products and the claims related to the same. Presently testing facilities are available for very specific categories of goods only, such as food and beverages under the Food Safety and Standards Act, 2006 or drugs under the Drugs and Cosmetics Act and Rules, 1940. These facilities need to be extended to all categories especially those where we find high level of deceptive advertising[6]. Without establishing testing mechanisms for all categories of products uniformly, drafting of regulations alone to address deceptive advertising issues will be ineffective.

7.2.1.2 *Pre-Publication Screening and Monitoring of Advertisements*

There is no effective mechanism for pre-publication screening and monitoring of advertisements in India. The Cable Television Network (Regulations) Act, 1995 envisaged Monitoring Committees. Even though the Committee has content monitoring as one of its duties, the mechanism is largely seen as ineffective. The

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[6] ASCI has published certain categories as high risk categories for advertisement. These include personal care products, health care products, cosmetic products especially fairness creams. There needs to be proper laboratory facilities to check the correctness of such claims.

"Misleading Ads Bane of Healthcare / Personal Care Sectors", available at http://caiindia. org/misleading-ads-bane-of-healthcare-personal-care-sectors/ (accessed on 23-01-2017)

Supra n.2. Other categories which have been identified as high on deceptive advertisements include agriculture, financial services, education, real estate and transport.

duties of these Committees have been very widely stated under the guidelines framed by the Ministry of Information and Broadcasting in 2008[7]. From the present outpour of misleading advertisements, it is quite clear that the Committee is ineffective in dealing with deceptive advertising.

The self-regulatory body ASCI launched the National Advertising Monitoring Service in 2012. For this ASCI has entered into an arrangement with TAM Media Research Ltd. to track and monitor some 10,860 newspaper advertisements and 350 television advertisements per week[8]. Currently it captures advertising data nationally for monitoring purposes for the advertisement sector[9]. The Food Safety and Standards Authority of India has now collaborated with ASCI to monitor food and beverage related advertisements and to provide periodic alerts regarding deceptive advertisements, especially health and nutritional claims.

Pre-clearance is seen as an effective mechanism in preventing deceptive and offensive advertisements from reaching the public. In jurisdictions like the UK, there are pre-clearance centers that have been established at the behest of the broadcasters. These centers are to a large extent able to reduce the number of deceptive advertisements from entering the market.

Suggestion

An effective pre-clearance mechanism should be devised to stop deceptive advertisements from reaching the public. As in other jurisdictions, India can also

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7 Hena Naqvi, *Journalism and Mass Communication*, Upkar Prakashan, Agra (1st edn. 2007), p.301.

8 "ASCI Partners with TAM to Launch National Advertising Monitoring Service", Afaqs, April 18 2012, available at http://www.afaqs.com/news/story/33765_ASCI-partners-with-TAM-to-launch-National-Advertising-Monitoring-Service (accessed on 09-06-2014)

9 Aminah Sheikh, "ASCI, Tam Launch Ad-Monitoring Service", Live Mint, April 17, 2012, available at http://www.livemint.com/Consumer/FvDq3axBhuIilMri2P0lrO/ASCI-TAM-launch-admonitoring-service.html (accessed on 12-11-2014)

have a preclearance mechanism which is at the behest of a group of broadcasters. These pre-clearance mechanisms will be set-up and effectively maintained by the broadcasters only if there is a legislation which contains provisions for specific broadcaster liability for publishing deceptive advertisements. This provision would pressurise the broadcaster to be cautious with the content aired by him. Thus the best mechanism to ensure elimination of deceptive advertisement is to have a pre-clearance mechanism.

Monitoring of deceptive advertisements in a vast jurisdiction like India would be a very difficult task. In such a scenario co-regulation in the monitoring system would be a good way forward. The monitoring under the Food Safety and Standards Act,2006 has been contracted out to ASCI[10]. Here the expertise of ASCI can be used by the government agencies. It is further suggested that as monitoring deceptive advertisements through the lengths and breaths of India would be difficult, it would be more practical to begin the process from the major cities in India. This then can be replicated in other towns and later to the rural parts too as the occurrence of deceptive advertisements are very high in rural areas too[11]. For establishment of pre-clearance mechanisms too, the same should first be introduced in the metropolitan cities and later can be extended to other parts of the country.

7.2.1.3 *Investigative Authorities for Deceptive Claim Investigation*

Investigation into deceptive advertisements is pivotal in initiating actions against advertisers. Most jurisdictions have investigating bodies both from the state as well as from the self-regulator. For example, in the U.S., the self-regulatory body

[10] Food Safety and Standards Authority of India, "Food Safety and Standards Authority of India (FSSAI) Signs MoU with ASCI to Address Misleading Advertisements in the F&B Sector", available at http://old.fssai.gov.in/Portals/0/Pdf/Press_Release_MOU_ASCI_28_06_2016.pdf (accessed on 01-06-2015)

[11] Balram Dogra and Karminder Ghuman, *Rural Marketing*, Tata-McGraw Hill Publishing Company Ltd., New Delhi (2008), p.91.

namely Advertising Self-Regulatory Council, and the Federal Trade Commission, which is a state body, both have powers to investigate a case of deceptive advertising. The formation of such bodies with investigative powers are important to track and prove a deceptive advertising case. The threat of FTC investigation itself sometimes is an effective deterrent for many companies against deceptive advertising. In India, presently we do not have any such body which effectively investigates a deceptive advertisement claim.

The repealed MRTP system had an in-house inquiry and investigation wing namely, the Director General of Investigation and Registration, which undertook the inquiry process *suo motu* or on a complaint made to it. This feature is missing from the Consumer Protection Act, 1986 because when the MRTP Act, 1969 was repealed the substantive provisions related to unfair trade practice went to the Consumer Protection Act, and the Competition Act, 2002 was bestowed with the procedural power to investigate.

Suggestion

For meaningful investigation of a case of deceptive advertisement, it is important to have an investigation body. Presently, whenever an investigation is required under the Consumer Protection Act, an advocate is appointed as a Commissioner to make a spot inspection. An ad-hoc system for investigation of deceptive advertisement claim is ineffective as these claims are often extremely complex. An investigative body for investigation of deceptive advertising is thus proposed. This body rather than working in isolation should work in close co-ordination with the other investigative bodies in respective sectors, such as those constituted under the Food Safety and Standards Act, 2006. This will help in effectively combating deceptive advertisements in India.

The Consumer Protection Bill, 2015 has included a provision under Section 16 for the formation of a Central Consumer Protection Authority which could conduct investigations, either *suo motu* or on a complaint or on a reference made by any Consumer Disputes Redressal Agency. This Bill is still pending before the Parliament. It is suggested that this Bill be passed at the earliest by the parliament. A major deficiency in the law would thus be rectified by doing so.

The investigative mechanism under the Advertising Standards Council of India also leaves much to be desired. It is marred by all the limitations of a self-regulatory body. Because of this reason the formation of an independent investigative body is an urgent requirement.

7.2.2 No Regulatory Clarity on Claim Substantiation Procedure for Consumers

In India it is often found that the courts require the consumer who makes a complaint to disprove the claim made in an advertisement. This is a very inconvenient position for the consumer, especially because the evidence regarding a claim is taken in a very haphazard manner by the courts. This happens because there are no set rules or guidelines for claim substantiation in India.

Another important aspect related to claim substantiation is regarding burden of proof. This is a very important element in the entire claim substantiation process. Legislative clarity with regards to who should produce evidence when an advertisement claim is under challenge, goes a long way in proper substantiation of a claim. Section 101 of The Indian Evidence Act, 1872 places the responsibility on the complainant to prove the claim raised by him. This burden of proof rule in India is not suitable for advertisement claims. If the burden of proving an advertisement claim is on the complainant, then the advertiser especially companies will feel free to publish deceptive material. This is so because an average consumer in most of the

cases will fail to bring technical test reports as evidence as it is expensive and time consuming. Also a normal consumer can never match a company's expertise or resources. On the other hand, if the government regulators have to pay for the tests to prove an advertisement false, that process will in turn burden the taxpayer and will also delay the entire regulation process.

Suggestion

There is a requirement for a holistic statutory framework for claim substantiation without which the consumer as well as the advertiser will lack the predictability and uniformity in the outcome of advertisement claims. The claim substantiation regulations need to be drafted based on different considerations such as; (a) what types of claims should be substantiated; (b) how different types of claims should be substantiated for example, clarity on types of evidences to substantiate claims related to market share, claims based on testimonials, scientific claims etc. It is important that the advertiser should know before dissemination of the advertisement what would be admissible as evidence and what not. It would be ideal if the guidelines have some clarity on this and also the hierarchy of these evidence as to what can be considered as primary and what can be considered as secondary evidence.

As many of the deceptive advertisement cases are consumer generated, these cases go to the consumer court. Lack of clarity in the claim substation process in turn makes the consumer courts ill-equipped to handle technical advertisement claims. It is also found that cases which discuss complex issues related to evidence are referred to the civil court[12]. This again delays the entire process endlessly. These delays stall the curbing of deceptive advertisements and create an ineffective regulatory regime to combat deceptive advertisements.

[12] *V. Kisan Rao* v. *Nikhil Super Speciality Hospital,* 2010 (1) C.P.R. 1 (N.C.)

7.2.3 Lack of Clarity on Technology Based Deceptive Advertisement

7.2.3.1 *Keyword Advertising*

There has been a drastic spike in keyword advertising on the internet. Many a times the consumers are deceived because of keyword advertising[13]. Sometimes the consumers are tricked into believing that certain sites are the most relevant when they make a search. Here when the consumer enters a search word, what he sees on top of the search list is not an automatic search result. These results are manipulated by the search engine company to show the payer company's result first in the search result list. This might not be a genuine reflection of the search results. In such cases companies also sometimes buy a competitor's trademark as a keyword, and show their products in place of the competitors when a certain search is made. In such cases the consumer is actually duped by the search engine provider by giving him a wrong result and tricking him into believing that the product or service which appears first in the search result list is the most popular one in its category.

In India, there is no regulation for keyword advertising even though it has become one of the major sources of deceptive advertising. There has been some keyword advertising suits which have been brought for trademark infringement[14]. Without clear guidelines consumer courts are ill-equipped to deal with keyword related claims from a consumer perspective and it is imminent that these new deceptive techniques are well regulated.

[13] Keyword advertising refers to advertising on the online medium where the advertiser pays the search engine provider for showing his product in the search result list when a certain word is typed. This word can be a generic word. But sometimes these keywords are also trademarks. This is where there are instances of disputes as they amount to unauthorised use.

[14] *Consim Info Pvt. Ltd*. v. *Google India Pvt. Ltd. & Ors.,* MANU/TN/1816/2010, *Super Cassette Industries* v. *MySpace Inc*, 2011 (48) P.T.C. 49 (Del.)

Suggestion

In India there is confusion regarding the legality of keyword advertising. There are no clear cases either allowing or prohibiting keyword advertising. Keyword specific advertisement regulations have to be formulated to stop the consumer from being deceived. The Consumer Protection Bill, 2015 has also not included any provision dealing with keyword advertising even though it directly deceives the consumer by providing him manipulated information. From a legal perspective, what can be said at the most is that a keyword advertisement might put the company at risk of trademark infringement as keyword advertising involves the use of another's trademark for promoting one's own business. But looking at the gravity of the advertising technique it is imminent that India needs to create clear keyword advertising regulations because consumers can be deceived through this nascent technique.

7.2.3.2 *Click Farming, Blogging and Social Media Advertisement*

Advertisers are increasingly using social media platforms like Instagram, Twitter, Facebook and a plethora of other blogging sites. These means are used to advertise their products, many a times, passing them off as independent opinions. It often happens that companies contract with bloggers to make comments regarding a certain product for which they are paid by the company. The innocent viewer often does not know that these opinions through blogs are paid and therefor are a kind of advertisement[15]. For example, in the case of Lord and Taylor, a designer cloth manufacturer, the FTC charged the company for indulging in deceptive advertisement. The company paid some fifty fashion bloggers to post positive comments on their blogs and Instagram accounts regarding the company's new

[15] Federal Trade Commission, "Lord & Taylor Settles FTC Charges - It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 Fashion Influencers", available at https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through (accessed on 08-10-2016)

'Design Lab' collection of dresses. These blogs were published by the bloggers who posted comments and pictures of these products. The posts seemed like genuine personal opinion whereas in realty they were paid by the company. FTC held that such indirect means of advertising was also deception as the viewers of such posts are being deceived regarding the nature of the information posted by such bloggers.

Such instances can be categorised as deceptive advertisements. Well-developed jurisdictions like United States have advanced online advertising regulations to mitigate deception in online platforms[16]. There are also patently deceptive practices like click farming which are used by advertisers to create a perception about the goods through bulk likes often done by persons hired to do the same. In India the consumers who are deceived through such means have no protection of any law.

Suggestion

India should have regulations like United States against deception on social media platforms which has become the major avenue of advertisements today. The FTC Act's prohibition on "unfair or deceptive acts or practices" encompasses online advertising, marketing, and sales and addresses issues of deceptive advertising on these mediums. Whenever a company undertakes advertisements in a medium which is unconventional for example, by means of certain social media or blogging or the like, it is important that the company fully discloses that it is a paid communication. Regulations specific to internet advertisement should also be comprehensively drafted as here consumers are prone to deception very easily.

[16] Federal Trade Commission, "Dotcom Disclosures, 2000", available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf (accessed on 15-10-2016)

Practices which change consumer perception like click farming has to be thoroughly regulated with stringent regulations.

Other than online advertisements, there are also issues related to indirect advertisements such as product placement[17]. Regulation of product placements are sometimes even more important than television advertisements. This is because different factors pertaining to television advertisement such as timing, duration, content, type of audience etc. can be controlled and regulated every time it is viewed by the consumer. But a product placement becomes a permanent part of a movie or serial. If the viewer decides to buy a CD and watch the movie multiple times, then there is no control over its viewership. This can be of special relevance when product placements are made in movies or serials for kids. Here controlling the content of the advertisement becomes difficult after a period of time. Ofcom's Broadcasting Code in UK contains detailed rules regarding product placements[18]. These rules address issues regarding type of products which can be placed in programmes. It also describes where and in what kind of programmes product placement is allowed, how placed products can be featured etc. In India there are no such specific regulations and creating a law to address this issue is important.

[17] Product placement is a kind of indirect advertisement where a product is placed by the advertiser in a movie or serial or any such medium. Here the consumer sees the character in the movie using a product of the particular brand and the same gets imprinted in his mind.

The problem with product placement is that, most of the time the viewer is not able to understand that it is indirect marketing. It can be perceived that the product is actually a preferred brand of the character who is using it.

Pola B. Gupta and Kenneth R. Lord, "Product Placement in Movies: The Effect of Prominence and Mode on Audience Recall", Vol.20(1), Journal of Current Issues and Research in Advertising,1998, pp. 47-59.

[18] The Ofcom Broadcasting Code, 2017, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf (accessed on 29-12-2017)

7.2.4 Lack of Effective Remedies Against Deceptive Advertisements

7.2.4.1 *Payment of Compensation for Deceptive Advertisement Claims*

Compensation and injunctions are the only tangible remedies available under the Consumer Protection Act, 1986 to deter the unscrupulous advertiser. With no criminal prosecution envisaged in the statute, the compensatory and injunctive relief is insufficient to stop the advertiser from using deception in advertisement in the future.

Suggestion

In many jurisdictions we can find that criminal remedies are put in place to deter companies from publishing deceptive advertisements[19]. Criminal liability should be envisaged in the Indian statute too for punishing deceptive advertisements. Certain deceptive advertisement causes irreparable loss and damage to the consumer. In such cases also the punishment should be commensurate to the injury caused, no matter how strict the punishment might seem to be. Only then the flow of deceptive advertisements can be controlled. Strict provisions are to be inserted in the proposed legislations such as partial or full refund of the money not only to the particular buyer but to all the consumers who bought the product in pursuance to the deceptive advertisement. Such penalties along with effective enforcement is suggested to be included in the proposed new law.

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[19] In Canada deceptive advertisements have been covered under the Competition Act, 1985. Under this Act, the criminal remedies provide for both fine as well as imprisonment which can be one year and can go up to fourteen years.

Section 45(2) of the Competition Act, 1985 – Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

7.2.4.2 *Corrective and Counter Advertisement*

The provision to issue corrective advertisement to neutralize the effect of deceptive advertisement at the cost of the party responsible for issuing such deceptive advertisement is envisaged in Clause 14 (hc) of the Consumer Protection Act, 1986. This provision is hardly used and there is also no regulation pertaining to the quantum of corrective advertisements to be issued.

Suggestion

Corrective advertisement causes damage to the brand of the issuers company. Because of this reason corrective advertisements are often seen to directly effect the sales of a product. These two reasons, that is effecting the brand image of the product and consequently decreasing sales, can be considered a strong measure which can be used based on the gravity of the damage caused by such deceptive advertisement.

A proper guideline pertaining to corrective advertisement should be included in the proposed new legislation. These guidelines may provide for the timing of the corrective advertisement i.e. for how many seconds or minutes the advertisement should be aired, the duration i.e. the number of months or days that it should be aired, and the medium in which it should be aired needs to be clarified. Generally, it is found that corrective advertisements are issued in the same medium in which the deceptive advertisement was published. So in case the deceptive advertisement was published in print medium the corrective advertisement would also be published in print medium and if it was in broadcast then the corrective advertisement should also be in broadcast medium and so on. These specifications are important to do away with any misuse of this remedy. It is suggested that corrective advertisement should be used more often to mitigate the damage done by deceptive advertisements.

Counter advertising should also be envisaged in the law. It makes it mandatory on the media to carry, free of charge, advertising prepared by public

interest groups who rebut claims made by the advertisers. This would give voice to consumer groups and raise awareness regarding deception in advertisement.

7.3 Protection of Competitors Interest from Deceptive Advertisement

7.3.1 Clarity in Claim Substantiation Process for Competitors

In India there are no standards for the substantiation of advertisement claims. All that can be seen are certain regulations in specific sectors such as claims with regards to health and nutrition based products or regulations under the Insecticide Act, 1968 for products such as mosquito repellent's etc. Other than these there are no standard rules for claim substantiation. This is a major lacuna in the Indian advertising regulation arena. When compared with other jurisdictions, for example in the U.S., the Federal Trade Commission [20] has put in place elaborate claim substantiation procedures[21]. This lack of predictability in the substantiation process in India is seen as a major drawback of the Indian advertising regulation.

There is no uniformity in the kind of tests that are required ie., whether scientific test is required to be done, and in case if a scientific test is done, what should be the standard of this test? The type of scientific test required should also be clarified? The person or persons, institutes or laboratories authorised to do the test and the protocol of the test etc. needs to be clarified? Detailed guidelines need to be created in cases of testing and its admissibility. There is also no clarity on the evidentiary value of testimonials.

[20] Hereinafter referred to as FTC.

[21] Federal Trade Commission, "FTC Policy Statement Regarding Advertising Substantiation", available at https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation (accessed on 27 - 05 - 2016)

Suggestion

It is suggested that a new set of guidelines pertaining to claim substantiation should be appended to the proposed legislation for deceptive advertisements. These detailed guidelines are important because the advertiser before dissemination of the advertisement should know what evidence would be admissible in the court in case this advertisement is challenged. It would be ideal if the guidelines have some clarity on the hierarchy of these evidence as to what can be considered as primary and what can be considered as secondary evidence.

These regulations should also specify the time period within which such evidence should be provided. This is based on the legal presumption that the advertiser has collected all the relevant evidence before the advertisement is disseminated. Thus the time to produce evidence should ideally be not more than a couple of days. In cases where the advertiser unduly delays in producing the evidence for claim substantiation, it would not be wrong to presume that proper tests were not conducted or proper evidence was not collected before the given advertisement claim was published. The proposed legislation is required to reflect this aspect.

Often, the evidence which is submitted during a claim substantiation procedure is confidential in nature. This is because the information which is related to a product might even include intellectual property protected subject matter. Because of this reason clarifying the confidentiality requirement of any claim substantiation process is inevitable in a given legislation.

7.3.2 Remedy Against Deceptive Advertisements Available for Competitors

The remedy available for a competitor against deceptive advertisement is limited to trademark infringement, defamation and a few other specified sectoral

remedies. When the MRTP Act, 1969 was repealed in the year 2002, substantive provisions related to unfair trade practices, which was the main statutory remedy against deceptive advertisement was transferred to and incorporated into the Consumer Protection Act, 1986. But the Act does not provide the competitor any remedy to bring a claim of deceptive advertisement as the Act was confined to consumers. The Competition Act, 2002, does not have any provisions for unfair trade practices and hence deceptive advertisements are outside the ambit of the statute. A competitor has a remedy under the Trademark Act, 1999. But this remedy is in pursuance to Section 29(8) of the Act[22]. The major limitation here is that the Act provides for a private right of action, and only a trademark holder can come before the court with a deceptive advertisement case against the advertiser company.

Suggestion

A general remedy like the one envisaged in the Consumer Protection Act,1986 is critical for redressing the competitor's grievances against deceptive advertisement. Thus it is suggested that an exhaustive advertisement law may be framed. This regulation can cover all sectors and need not be specific to any one sector for example advertisements under the Food Safety and Standards Act, 2006 which is specific to the food and beverages sector alone. In this new legislation all the affected parties including consumers, competitors and the general public should have a remedy against deception in advertisements.

[22] Section 29(8) of The Trade Marks Act, 1999 states that -

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

7.3.2.1 *Trademark Act vis-à-vis Deceptive Advertisement*

The trademark law is an important legislation used to counter deception in advertisements. As per the Act, a person can be punished for applying false description if he is not able to prove that he did not have the intent to defraud. The Act which makes false description punishable with both fine as well as imprisonment gives a leeway to the accused by providing certain defences. The onus is on the prosecution to prove that the offence in question has been committed. The grounds of defence for the accused includes, acted without intent to defraud, acted inadvertently or under a mistake, or that he did not have the knowledge about the trademark, acted innocently etc. The defence of lack of intention to commit a fraud can be applied in instances where a person is able to prove that his particular act was not meant to induce a buyer to buy the particular thing which he might have otherwise rejected. This part of the legislation provides a leeway for the wrong doer to get away. Though the court interprets 'intention to defraud' very stringently but the fact that it can be taken up as a defence itself creates a possibility for the accused to take a chance with it.

Deceptive advertisements in the trademark law context are found mostly in cases of comparative advertisements.

Suggestion

Stringent legislation not allowing any exceptions except those available under Section 151 (c)[23], and section 124 (1)[24] of the Trademark Act should be permitted. The availability of the defence of absence of 'intention to defraud' in a deceptive

[23] Section 151(c) of the Trade Marks Act, 1999 provides for protection for servant, against prosecution or punishment, who in good faith acts in obedience to the instructions of such master who is a resident of India.

[24] Section 124(1) of the Trade Marks Act, 1999 provide for stay of proceedings where the validity of registration of the trade mark is questioned,

advertisement case opens a pandora's box and makes it an uphill task for the plaintiff to prove that the defendant intentionally published the deceptive advertisement.

Deceptive advertisement cases under the trademark law are also found to occur in the comparative advertisement context. It is high time that guidelines related to comparative advertisements are laid down clearly. While puffery is generally allowed in India, deceptive advertisement through a puffed advertisement claim should be restricted or atleast regulated. Blatant puffery in advertisements might lead an innocent consumer to believe the claim thus leading to deception. As in Canada and Mexico, it is suggested that legal clarity should be put in place with regards to comparative advertisement. When a blanket superiority claim is made by a company, law should require the company to prove the claim as against atleast a few of its major competitors. In the absence of this requirement, companies will continue to misguide the general public who often are carried away by such blanket claims.

7.4 Suggestions Related to Sufficiency of Self-Regulatory Framework

7.4.1 How to make the ASCI System Structurally Efficient?

7.4.1.1 *Chance of Bias in a Self-Regulatory System*

ASCI no doubt is a self-regulatory body which means that it is run by people from the industry. The members of ASCI including the Chairman, the board of Governors, etc. are all from the industry. ASCI has sixteen members in its Board of Governors, representing the key sectors such as advertisers, advertising agencies, media and allied professions such as market research, consulting, business education etc. but there is no representation from consumer groups or associations on the board. In the

Consumer Complaints Council[25] too majority of the members are from the advertising industry.

This is also important in the backdrop of the fact that the UK self-regulatory body, Advertising Standards Alliance[26], is perceived to be independent because the Chairman, of the ASA Council (the body which adjudicates on the formally investigated complaints) and the senior management team of ASA, has substantial representation from the non-industry group. This enhances the credibility of ASA as far as outsiders such as consumers are concerned. The Consumer Complaints Council members of ASCI include persons from the advertising industry, doctors, lawyers, journalists, academicians, consumer activists, etc. The presence of a person independent from the industry helps in building consumer confidence in the system.

Suggestion

The decision making body of ASCI ie. the Consumer Complaints Council, should be such that the consumer has faith in the system when a complaint is filed as many people tend to perceive ASCI as an 'industry body' formed to protect industry interest. For this most self-regulatory systems in other jurisdictions have outside, non-industry members, in the body. The same is suggested in India for ASCI.

It is also suggested that high level of industry representation in ASCI has effected its independence and is perceived to be an industry body by the consumers. This has been proved by the low level of consumer complaints that has been brought before it.

[25] Hereinafter referred to as the CCC.

[26] Hereinafter referred to as the ASA.

Industrial representation should be reduced and other members like lawyers, journalists, academicians, consumer activists, etc. should be included to check any bias in the self-regulatory system.

7.4.1.2 *Adequacy of Funds to Efficiently Operate as a Self-regulator*

Funding of ASCI primarily happens through member subscription fee. The subscription amount is quite low and the maximum subscription fee for an advertiser, who spends Rs.1000 crores or above on advertisements annually, is only Rs.4,29,375 lakh including service tax. Another 20% of its income comes from fast-track cases, where ASCI charges around 1.25 lakhs per case. As ASCI often has to file cases against top-notch companies, funding becomes very important. These funds are also required to conduct test in certain deceptive advertisement disputes.

The funding system of ASCI can be comparatively analysed with SRO's like ASA in the UK. There the Advertising Standards Board of Finance was established in order to provide sufficient funding to ASA through a levy from companies to a tune of 0.1% on advertising space costs. This levy provided adequate funds to ASA to take up large number of cases and provided all kinds of resources to dispose a deceptive advertisement case. Thus as long as a similar mechanisms are not established in India, the SRO's will continue to remain weak.

Suggestion

The number of cases before ASCI are expected to increase as it has launched campaigns to attract more complaints. In such a scenario ASCI would require more funds. The subscription fee collected from the members would not be sufficient. An ASCI fund can be created to which a small amount should be contributed by the member companies as a percentage of their annual advertising spending. In case a company has no advertising expenditure in a given year, then the company need not make this contribution. The subscription amount can be increased to a certain

percentage of the advertising budget of every member. This would help ASCI with more revenue so that the future expansion of the organisation can be taken care of.

7.4.2 Suggestions Regarding ASCI's Decision Making

7.4.2.1 *Lack of Clarity in the Decision Making Process of ASCI*

In the U.S. the Advertising Self-Regulatory Council follows a set pattern for decision making. The format of the case includes details regarding: (1) the basis for the inquiry; (2) the challenger's contentions; (3) the advertiser's position; (4) the National Advertising Division's[27] decision; and (5) the advertiser's statement. These cases which are decided by the NAD do not have any precedential value, but as the cases are now being published more elaborately and in a given format, they have managed to create an advertising jurisprudence of its own.

This kind of clarity and format is absent in ASCI decisions. These decisions are very brief. The most important element which is the basis for the inquiry is often not revealed and is considered confidential. As this is the manner of enquiry no precedential value can be attached to the decided cases.

Whenever a particular deceptive advertisement claim is made the most important factor is the claim substantiation process. Unlike many other self-regulatory organisations, ASCI does not have a set of rules with regards to claim substantiation. The disputes are being decided on a case-to-case basis by ASCI.

Suggestion

ASCI has a system in place which lays down the procedure from filing of a complaint to final decision by the CCC. But the other finer details with regards to the complaints procedure still have not been put in place. For example, ASCI has still

[27] Hereinafter referred to as NAD.

not published any claim substantiation procedure which a complainant or any company should follow. There also is no clarity on who has the onus to produce evidence during the case before the CCC. ASCI should clarify the manner in which evidence should be produced before the CCC. The kind of evidence that is required to substantiate different kinds of claims is pivotal. ASCI should lay down detailed guidelines for substantiation of (1) scientific evidence, (2) market share claims (3) testimonial etc. It would be wise if ASCI lays down substantiation guidelines for puffed claims also which make direct reference to rival products. Though puffery is a legal exception, when claims such as, 'best in India', are made there must be a system to prove how it is better than at least a few, say the top ten competitors, in the given product segment. This would bring predictability in the claim substantiation process which is pivotal in dealing with deceptive advertisement claims.

7.4.2.2 *Enforceability of the ASCI Decisions*

Enforceability of the decision of a self-regulatory organisation is the biggest challenge. When companies follow the code and enforce the decisions voluntarily, there are no issues. But where the company refuses to enforce an SRO decision, compliance would be a challenge. The ASCI Code has been incorporated in the Cable TV Network Rules since 2006. This has resulted in a requirement for television channels to comply with ASCI's rules and regulations when broadcasting advertisements, and follow the rulings of the Consumer Complaints Council. In cases where the companies refuse to enforce the decisions of the CCC, a reference can be made for its enforcement by ASCI to the Ministry of Information and Broadcasting. In furtherance to such reference there are instances when the Ministry of Information and Broadcasting has intimated the television channels that a certain advertisement may henceforth not be aired on any television.

But it has been noted that not many cases have actually been referred. Thus it cannot be said that such reference happens on a regular basis. Also as it is not mandatory on the part of Ministry of Information and Broadcasting to bring out an order when a reference is made by ASCI. As this power is discretionary, the ministry does not make such reference very often.

Another major drawback is that ASCI does not have any enforcement powers over non-members. So, in case a deceptive advertisement is launched by a non-member there is no remedy.

Suggestion

Enforceability can be ensured by making membership in ASCI mandatory for all the advertisers and businesses who want to advertise. Any non-compliance should result in the cancellation of the membership thereby prohibiting the business or the advertiser to publish any advertisement in any medium thereafter.

7.5 General Suggestions

This chapter has also included certain general suggestions over and above the specific research question based suggestions which have been mentioned above.

7.5.1 No Definitional Clarity for Deceptive Advertisements

None of the Indian statutes provide a comprehensive definition of deceptive advertisement. The principal statutory provisions dealing with deceptive advertisement is provided under Section 2(1)(r) of the Consumer Protection Act, 1986. The various judicial and quasi-judicial fora which considered deceptive advertisement cases have been fraught with the question as to what are the different elements that would constitute deceptive advertisement. A regulatory definition is more onerous than a conceptual definition as it should precisely delineate deceptive

advertisement with all its elements rather than describe the concept. This lack of clarity in the definition has created ambiguity regarding the precise ambit of what constitutes deceptive advertisement.

Definition under Section 2(1) (r) of the Consumer Protection Act, 1986.

Consumer Protection Act, 1986 does not *per se* define deceptive advertisement but brings it under the definition of "unfair trade practice"[28]. The following are the important elements of deceptive advertisement under the Act;

- making any statement, whether orally or in writing or by visible representation which is false about any goods or services;
- or gives to the public any warranty or guarantee about a product or good that is not based on adequate or proper test.

[28] Section 2(1) (r) of the Consumer Protection Act, 1986 -

"unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

The aforementioned definition has only two elements, first being a false statement, and second providing of a warranty or guarantee without adequate tests. The courts have used their fine interpretational skills to add on to widen the scope of deceptive advertisement.

Through various cases, courts have added different elements to the definition of deceptive advertisements in order to explain and widen its ambit. The element of injury caused to the buyer was considered as a key factor to establish deceptive advertisement from as early as 1987[29]. But later in *Society for Civic Rights* v. *Colgate Palmolive (India) Ltd* that position was clarified and it was stated that deception would be established if the given act falls under any one of the five grounds as stated under Section 36A[30] of the Monopolies and Restrictive Trade Practices Act, 1969[31].

In *Kuoni Travels (India) Ltd.* v. *Thomas Cook (India) Ltd.*[32] a new element was added to unfair trade practise namely the use of tricky language while publishing an advertisement. In this case the tour prices of the complainant were compared with the tour prices of the respondent. But the tour prices of the complainant reflected the prices as charged during the vacation season. This was compared with the tour prices of the respondent as charged during off-season, when the tour prices are usually low. Thus the court held that such distorted facts were deceptive advertisements falling within the ambit of unfair trade practice. Even in cases where there is an apprehension that an advertisement has the potential to deceive a consumer, the

[29] *In re Glaxo Laboratories (I) Ltd. and Capsulation Services Ltd.*, UTP Enquiry No. 22/1985 Order dated 20-10-1987.

[30] Section 36A was later carried verbatim into Section 2(1) (r) of the Consumer Protection Act, 1986 and thus the five points mentioned are the same in both the provisions.

[31] Hereinafter referred to as the MRTP Act.

[32] UTP Enquiry Nos. 12,13/2001 Order.

advertisement would be considered deceptive[33]. In *KLM Royal Dutch Airlines* v. *Director General of Investigation and Registration*[34], the court considered the relevance of the failure to disclose a material fact and held that the same would come within the ambit of deceptive advertisement.

The next element which the court discussed was regarding deceptive advertisement and its ability to affect the consumer's economic behaviour. This key element of deceptive advertisement was pointed out by the court in *Vinoo Bhagat* v. *General Motors (India) Limited & Regent Automobiles Limited*[35]where the faith of a consumer in German cars was exploited to sell him a non-German car by way of an advertisement which stated so. Affecting the economic behaviour of a consumer is seen as a very important element as this directly reflects the consequences of a deceptive advertisement.

Apart from the Consumer Protection Act, 1986, the Trademarks Act,1999 also addresses the issues related to deceptive advertising, but that is in the restricted context of trademark infringement as mentioned under Section 29(8). Most of the cases with regards to deceptive advertisement under the trademark law is seen in the context of comparative advertising.

Suggestion

The above given decisions have from time to time introduced new dimensions to the vague definition of deceptive advertisement. Even though these decisions have not given a clear cut definition but they have helped in identifying what constitutes deceptive advertisements. From the above discussed decisions the important elements of deceptive advertisements have been identified as;

[33] *Havells India Ltd* v. *Amritanshu Khaitan & Ors*, 2015 (62) P.T.C. 64 (Del)

[34] (2009) 1 S.C.C. 230.

[35] (2005) 3 C.C.C. 79.

a) A claim that is made explicitly or implicitly and which creates a certain belief,

b) this belief is regarding the characteristic of a particular product or service,

c) this claim is false or unsubstantiated,

d) this claim is such that it would affect the purchasing behaviour of the consumer.

Any advertising legislation should begin with clearly delineating the ambit of deceptive advertisement and bringing definitional clarity which is pivotal to an effective advertising law. The current position of law provides a very vague definition which has led to multiple and diverse interpretations. In the light of the aforementioned decisions a new definition for deceptive advertisement is being proposed in this study. The definition is as given below:

Deceptive advertisement means;

a. any explicit or implicit representation or omission thereof,

b. which creates a certain belief regarding the characteristic of a particular product or service

c. which is false or unsubstantiated and which affects the purchasing behaviour of the consumer, irrespective of whether any actual injury can be proved or not.

It is further suggested that the law dealing with deceptive advertisement should clarify the legal position related to burden of proof. The law should state that the burden of proof is on the party who makes an unsubstantiated claim in an

advertisement and all those who are involved in the publication of such advertisements will be liable for such unsubstantiated claims.

This above given definition brings within its fold all the important constituents of deceptive advertising developed by courts over a period of time. It would be highly recommended if this definition is included in the proposed new legislation.

The legal liability of an advertising agency is something which requires some clarity. Often the company selects an advertising agency and assigns them a certain advertisement requirement. Then the advertising agency creates the advertisement. Many details and intricacies of the advertisement is added by the agency. This presentation of the advertisement can be deceptive by creating a wrong impression regarding the product in the mind of the viewer. Here it should be the responsibility of the agency to ensure that the information in the advertisement is accurate. The present laws do not provide any clarity on the point of agency liability for a deceptive advertisement. There should be provisions to make the agency liable if the information which is published in an advertisement is deceptive. Intent should be irrelevant as it often leads to numerous defences. Mere participation in the publication should be the ground for holding an agency liable.

The Consumer Protection Bill, 2015 has no provision which deals with these issues. It would be difficult to add such specific provisions dealing with liability in the Bill. Thus it is suggested that there is need for a new legislation which specifically addresses issues related to advertising alone.

This above given definition brings within its fold all the important constituents of deceptive advertising developed by courts over a period of time. It would be highly recommended if this definition is included in the proposed new legislation.

7.6 Conclusion

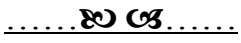
India has a fast growing advertising industry. But the scenario of advertising regulation in India seems very bleak. The research has looked into the existing advertising regulation and studied its lacunae. Certain specific areas have been identified which has made the existing regulatory system ineffective, starting from the absence of a clear definition of deceptive advertisement, as the existing definitions are very vague and inadequate. The regulatory framework in general leaves much to be desired as there is no regulation for claim substantiation. The institutional framework which supports the regulatory framework is also ill-equipped to deal with the nascent techniques of advertisement. There are no proper mechanisms for testing of advertisement claims, for screening and monitoring of advertisements, investigation of deceptive advertisements etc.

The new challenges in the field of deceptive advertisements come from internet advertisements. The different means through which advertisements are done on the internet makes its regulation inevitable. This is also one area in which regulations are outdated and insufficient to protect the consumers and the advertisers. Effective remedies should now be introduced keeping in mind this changed scenario. Legislations which are decades' old are no longer capable to address these issues.

As the research focuses on the advertising industry, the study of the principal self-regulator namely ASCI is inevitable. Though ASCI is now actively collaborating with the state agencies, it needs to work more strongly as an independent body rather than being an industry body.

The study proposes a new legislation for regulating advertisement law which encompasses all the suggestions mentioned above. The existing consumer law only addresses grievances of 'consumers' with regards to deception. The new Consumer Protection Bill, 2015 addresses a few issues but not all. The Trademark Act, 1999

provides a very restricted private right of action. Thus the existing legislations are quite ineffective and it is required that a more comprehensive legislation is drafted keeping in view all the lacunas and suggestions mentioned above.



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