Regulating Advertisements in India

Introduction

Advertising is an important and legitimate means for a seller to awaken interest in his products. Advertising industry in India is on the expansion spree for the last few years and has become a serious and big business growing at considerable rate. However, the growth of this industry is affected by the prevalent malpractices carried out by advertisers in order to lure the consumers and sustaining an edge over the competitors.

Advertising, often described as commercial speech, enjoys its protection under Article 19(1) (a) of the Indian Constitution. As a facet of the right to information, it facilitates the dissemination of information about the sellers and their products. However, the manner of facilitation is subject to a number of statutory provisions. This bulletin attempts to give an overview of the various regulations and their efficacy in monitoring the practices prevalent in the advertisement world.

1.0 Statutory Regulations and Regulator

Under the Indian legal regime, Cable Television Networks (Regulation) Act, 1955 (“Act”), the Press Council of India Act, 1978 (“PCIA”), and Cable Television Networks (Amendment) Rules, 2006 (“Rules”) - among others - are the principal legislations which control the content of advertisements to ensure that they should not offend morality, decency and religious susceptibilities of the consumers. Some of the prominent, prohibitory legal provisions that regulate advertising are:

- Obscene publication or advertisement of a lottery under the Indian Penal Code.¹
- Harmful publication² under the Young Persons (Harmful Publications) Act, 1956.
- The indecent representation of women under the Indecent Representation of Women (Prohibition) Act, 1986.
- Use of report of test or analysis for advertising any drug or cosmetic under the Drugs and Cosmetics Act, 1940.
- Advertisement of magical remedies of diseases and disorders under the Drugs and Magical Remedies (Objectionable Advertisements), Act, 1954.

¹ Section 292(2)(d) and section 294-A of the Indian Penal Code.
² Under section 3, 4, 6 and 7 and harmful publication is defined as a publication portraying the commission of commission of offences, acts of violence or cruelty or incidents of a repulsive or horrible nature in such a manner as would tend to corrupt a young person.
Any political advertisement forty hours prior to polling time under the Representation of People Act, 1951.

For long, advertisements were regulated by the courts, government, tribunals, or police that depended upon the nature of each case. Additionally, absence of a single comprehensive legislation created a lot of confusion in terms of a proper code to follow by the industry and the authority to regulate or guide the pattern of advertising. In 1985, the Advertising Standards Council of India ("ASCI"), a non statutory tribunal, was established that created a self regulatory mechanism of ensuring ethical advertising practices. ASCI entertained and disposed off complaints based on its Code of Advertising Practice ("ASCI Code"). On certain occasions, however, the ASCI orders were set aside by courts as ASCI being a voluntary association was considered usurping the jurisdiction of courts when it passed orders against non-members.

Gradually, the ASCI Code received huge recognition from the advertising industry. The warnings issued by ASCI to the advertisers against the misleading advertisements were gradually being accepted by the advertisers and the advertisements were actually stopped being aired or were modified significantly to comply with the prescribed ASCI Code.

Nonetheless, the ever increasing role of ASCI in regulating advertising practices in India was felt by the government too and in August 2006, the ASCI Code was made compulsory for TV advertisements. The Rules were also amended as follows "No advertisement which violates the Code for Self-Regulation in Advertising, as adopted by the ASCI, Mumbai for public exhibition in India, from time to time, shall be carried in the cable service." This move has provided a binding effect on the ASCI Code.

2.0 ASCI Code

The ASCI Code aims to protect the legitimate interests of the consumers by regulating patently false, misleading, and objectionable advertisements broadcast on television, radio, and internet by advertisers, media, and advertising agencies.

The key objectives of ASCI code is to ensure that advertisements must -

- Make truthful and honest representations and claims which is essential to prohibit misleading advertisements;
- Not be offensive to public decency or morality;
- Not promote products which are hazardous or harmful to society or to individuals, particularly minors; and
- Observe fairness in competition keeping in mind consumer’s interests.

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3 As has been held in these cases- Century Plyboards (India) Ltd v ASCI (suit 3677/1999) and Emami Ltd v ASCI (CS No 127/2000).
4 Vide a notification in the Gazette of India, Extraordinary (Part II- section 3(i)) dated August 2, 2006 issued by the Government of India.
Regardless of the medium, advertisements must be truthful and all descriptions, claims, and comparisons which relate to objectively ascertainable facts should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called upon by ASCI. For example, products cannot be described as “free” where there is any direct cost to the consumer other than the actual cost of any delivery, freight, or postage. Where such costs are payable by the consumer, a clear statement that this is the case shall be made in the advertisement. The advertisers are generally issued warnings to stop airing the advertisements which violate the existing ASCI Code.

For instance, in a complaint against the TV commercial (“TVC”) of Pond’s Age Miracle Cream, ASCI considered the projection of the product in various medium. The TVC asked a question to its viewers – “Can your cream do this in just 7 days? Take up Pond’s Age Miracle 7 days challenge. If in 7 days you don’t start looking young, then you will get your money back”. The print advertisement made a statement - “Pond’s Age Miracle cream does what no other anti-ageing cream can. It reduces age spots and brings about a visible change in wrinkles in just 7 days. If it doesn’t work, you get your money back”. This became apparent by comparing the two versions that the claim made therein was supported by a clinical test carried out on an “untreated skin” i.e. on consumers who were not using any cream. Therefore, assuming that the tests were relevant, the mere fact of the advertiser targeted at the consumer with a question “Can your cream do this?” assumes consumers currently using some other cream. The ASCI decided that the claim made therein was false, misleading, directly denigrating and discrediting the efficacy of the similar products available in the market place. ASCI issued a warning to Ponds and the ad was stopped and removed from air and print media.

3.0 Recourse for misleading advertisements

Under the ASCI Code, complaints against the advertisements can be made by any person who considers them to be false, misleading, offensive, or unfair. The complaints are evaluated by an independent Consumer Complaints Council (“CCC”) which has 21 members - 12 from general public and 9 from advertising practitioners. There are three types of complaints handeled by ASCI (a) Complaints from the general public including government officials, consumer groups, etc., (b) Suo Motu complaints from the member of the ASCI Board, CCC, or the Secretariat and, (c) Intra industry i.e. complaints from one advertiser against another.

On receipt of a complaint, the Secretariat acknowledges the complaint and requests the advertiser or agency to provide comments in respect of the complaint. The CCC usually decides upon the complaints within a period of 4 to 6 weeks once the party concerned is afforded an opportunity of presenting its case. If the complaint is upheld, then the advertiser and its agency are informed of the CCC decision within 5 working days. The advertiser is given 2 weeks to comply with the CCC decision. Non-compliant advertisements are published in ASCI’s Media quarterly release on an all India basis.

Similar to the ASCI Code, section 6 of the Act prohibits the transmission or re-transmission of any advertisement through a cable service unless they are in conformity with the ASCI Code. Further, Rule 7 of the Rules postulates that any advertisement which derides any race, caste and tends to incite people to crime, cause disorder or are indecent or vulgar
are prohibited under the ASCI Code. Section 16 of the Act prescribes punishment\(^5\) to the advertisers as well. However, the punishments are not usual, but the warnings against the advertisers are issued by the authorized officers for the display of advertisements which violates any of the provisions of the Act and the Rules. For example, warnings were issued to MTV which aired a vulgar advertisement of a product “New Axe Deodorant” directing the channel to run an apology scroll for three days.

Further, the PCIA is guided by “Norms of Journalistic Conduct” in the regulation of advertisements and can hold enquiry into complaints against a newspaper and may warn, admonish or censure the newspaper, journalist, or the editor.

**Conclusion**

At present, there are numerous regulations monitoring the display of obscene and misleading advertisements in India. However, it is not uncommon to see various advertisements which are patently false and misleading promoting dubious products and making unsubstantiated claims. In reality, most of these ads are ignored by the consumers and go unnoticed by the statutory bodies. So, in order to enforce the regulations the need of the hour is whenever an advertisement breaches public confidence, the regulators should take immediate action against the violators. It is crucial that ASCI should be given a binding force for regulating all kind of advertising modes such as print, electronic etc. similar to the existing television advertisements which will prevent the newspapers and advertising agencies from violating the existing law.

The proposed Broadcasting Services Regulation Bill, 2007 is also expected to bring about a major change in the regulatory mechanism of advertising in India with its content code, a scheme of broadcasting content certification and stringent penalties on contravention of its provisions. However, this Bill is also being debated for being arbitrary and completely vesting the command and control of the electronic media with the government.

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\(^5\) The first offence can lead to imprisonment up to two years or a nominal fine up to INR 1,000 (US $ 20) or with both and for subsequent offence the term of imprisonment may be extended to 5 years and fine may extend to INR 5,000 (US $ 100).