



MISLEADING ADVERTISEMENTS AND CONSUMER WELFARE

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“Caveat Emptor” is Latin for “let the buyer beware.” A doctrine that often places on buyers the burden to reasonably examine the property before purchase and take responsibility for its condition. This is especially applicable to items that are not covered under a strict warranty.”¹

The essence of free speech is the ability to think and speak freely and to obtain information from others through publications and public discourse without fear of retribution, restriction, or repression by the government. Advertising is a form of communication for marketing and is used to encourage or persuade an audience (viewers, readers, or listeners; sometimes a specific group) to continue or take some new action. Most commonly, the desired result is to drive consumer behavior with respect to a commercial offering, although political and ideological advertising is also common. “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.” Advertisement takes the same attributes as the object it seeks to promote or bring to the notice of the public to be used by it. Multiple examples can be provided which would show that advertisement dealing with trade and business has a relation with the item i.e. “business or trade” and not with “freedom of speech”.²

¹https://www.law.cornell.edu/wex/caveat_emptor

²John W. Rast v. Van Deman & Lewis Company



Advertisements vs. Right to Know-

The right to information (right to know) is another facet of freedom of speech. The right to know, to receive and to impart information has been recognized within the right to freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have access to telecasting for the purpose. In *State of Uttar Pradesh v. Raj Narain*,³ it was observed that “The people of this country have a right to know every public act by their public functionaries. The right to know is derived from the concept of freedom of speech.” Through advertisements, not only is the right to know assured but it is directly proportional to the advertiser's freedom of speech and expression. Advertisements maintain competition in the market and help in educating the public.

The influence of advertisements on consumer choice is undeniable. It's this fact that makes it imperative that advertisements be fair and truthful along with the information that a buyer must receive. Misleading and false advertisements are not just unethical; they distort competition and of course, consumer choice. False and misleading advertisements in fact violate several basic rights of consumers: the right to information, the right to choice, the right to be protected against unsafe goods and services as well as unfair trade practices. Since advertisements are basically meant to promote a product or a service, one does see some exaggeration in the way they extol the virtues of the product. But when it goes beyond that and deliberately utters a falsehood or tries to misrepresent facts thereby misleading the consumer, then it becomes objectionable⁴

Today, a new era of advertising has evolved, which is both cost-effective as well as efficient at the global level. Online advertising is the fastest-growing medium of advertising that has proven its effectiveness and stability in the advertising world. In a developing economy like India, advertising has a profound impact on how people understand life, the world, and themselves, especially with regard to their values, choices, and behavior. Advertising is considered to be the cornerstone of our socio-economic system and may be viewed as the lifeline of free media, paying costs and making media widely accessible. Advertising agencies perform deep research before they create and feature the advertisement for the targeted audience. A few social media platforms like Facebook, Instagram WhatsApp, etc. dominate the advertising market and offer an opportunity for advertisers to pass on the message to people, and market their products.

Recently, with the Parliamentary Standing Committee recommending strict punitive action against eminent personalities for promoting brands with misleading advertisements, industry experts feel that it is not fair to blame celebrities alone for this. The Parliamentary Committee on Consumer Affairs, in its recommendations on the Consumer Protection Bill, 2015, has called for

³ 1975 AIR 865, 1975 SCR(3)333

⁴<https://consumeraffairs.nic.in/sites/default/files/file-uploads/misleading-advertisements>



a jail term of up to five years and a fine of up to Rs 50 lakh in such cases. There are a number of issues that have been plaguing the marketing scene with regard to misleading advertisements. One such issue is advertisements made to children. These advertisements are created in such a manner that they target individuals who do not have the capability of differentiating fact from fiction hence it can be argued that those advertisements are actually misleading.

What is misleading advertising?

Advertisement and publicity by means of television, radio, or any other electronic medium, newspapers, banners, posters, handbills, writing on the walls, etc., which distorts the nature, characteristics, quality, or geographical origin of any goods, services, or commercial activity. Providing information for the purpose of misleading consumers is defined as misleading advertising. Broadly, one can classify false and misleading advertisements into two groups:

- First, it puts all those advertisements that peddle health cures and drugs of questionable efficacy and health gadgets of unknown value.
- Secondly it includes in this group, nutrition-related false claims, particularly those targeting children, senior citizens, and those with certain health problems such as diabetes.

This group of advertisements is the most dangerous, as they can have severe repercussions on the health of the consumer. For example, you'll be a good mother by feeding your children this particular product or such product will make your sore leg dance, an advertisement for a detergent says that it can remove grease in just one wash, an advertisement for a face cream claims that it removes dark spots on the face and even prevents them from coming back. Either the manufacturer should be able to prove this or else, it is a deceptive advertisement, or else, it is an incorrect statement or a false advertisement. Practically these products do not have any such features, which they highlight in advertisements. Some ads like weight loss products, acne reduction products, and painkiller balms are made in that way to create a placebo effect. ASCI (Advertisement Standardization Council of India) a self-regulatory body of the advertising industry, received many complaints against misleading ads and has recently fined Patanjali for the same. Even reducing crucial information about the product to minute letters at the bottom of the advertisement could be termed as an unfair trade practice, particularly if such information is not intelligible to the consumer.



The principles, as stated in the case of *Reckitt & Coleman of India Ltd v Kiwi TTKLtd*⁵, are as follows:

1. An advertisement can declare that the advertised goods are the best in the world, even though this declaration is untrue;
2. An advertisement can state that the advertised goods are better than those of competitors, even if this statement is untrue;
3. An advertisement can compare the advertised goods with those of competitors;
4. 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;⁶

Freedom to speak freely, without limitation or regulation is termed as the Freedom of Speech. Freedom of Expression implies not only the freedom to speak but also to distribute and access information through various media modes. In the advertising and media industry, a self-regulatory guideline of code and conduct is a self-imposed discipline, whose primary objective is to monitor and prescribe the advertising standards for public interest. This system complements government legislation and regulations as well. As the categories of sensitive advertisers are constantly increasing, consumer groups, governments, and regulators have become more cautious about taking lively interest. Monitoring and voluntary self-regulations in advertising, allow reasonable freedom of speech and expression. The members of the Communication Council should be aware of the importance of self-regulation.

Right To Advertisement from Legal Perspective-

There cannot be honest and economical marketing for the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech" and when examined from another angle, the public at large has a right to receive the "Commercial speech". Article (19) (1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read, and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through the advertisements. An advertisement giving information regarding a life-saving drug may be of much more importance to the general public than to the advertiser who may be having purely a trade consideration.

An advertisement is no doubt a form of speech but the object for the promotion of which it is employed reflects its true character. It assumes the attributes and elements of the activity under

⁵(63 (1996) DLT 29)

⁶ legalservicesindia.com/article/1317/Advertisement-and-Freedom-of-Speech-and-Expression.html



Article 19(1), which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement that has an element of trade or commerce, it no longer falls within the concept of freedom of speech for the object is not the propagation of ideas ' social, political or economic, or furtherance of literature or human thought, but as in the present case, the commendation of the efficacy, value and importance in the treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business.

It was asserted in *Hamdard Dawakhana (WAKF) Lal Kuan, Delhi and Another v Union of India*,⁷ that an advertisement is no doubt a form of speech but the object for the promotion of which it is employed reflects its true character. It assumes the attributes and elements of the activity under Art. 19(1), seeks to aid by bringing it to the notice of the public.

It allows us to freely express our ideas and thoughts through any medium such as print, visual, and voice. One can use any communication medium of visual representation such as signs, pictures, or movies. Freedom of speech would amount to nothing if it were not possible to propagate the ideas. Thus, the freedom of publication is also covered under freedom of speech. Freedom of speech serves four purposes:

- a) It allows an individual to attain self-fulfillment.
- b) It assists in the discovery of truth.
- c) It strengthens the capacity of a person to make decisions.
- d) It facilitates a balance between stability and social change.

This right is not only about communicating your ideas to others but also about being able to publish and propagate other people's views as well. Thus, freedom of speech and expression is linked to the people's right to know. Freedom of speech and expression is a broad term and encompasses several things Freedom of speech is guaranteed not only by the constitution or statutes of various states but also by various international conventions like the Universal Declaration of Human Rights, the European Convention on Human Rights, and fundamental freedoms, International Covenant on Civil and Political Rights, etc. These declarations expressly talk about the protection of freedom of speech and expression.

In *Reliance Petrochemicals Ltd v. Indian Express*,⁸ it has been observed by the bench deciding the case that “We must remember that people at large have a right to know in order to be able to take part in participatory development in the industrial life and democracy. Right to know is a

⁷SCR 1960 (2) 671

⁸1989 AIR 190, 1988 SCR Supl. (3) 212



basic right which citizens of a free country aspire in the broader horizon of the right to live in this age on our land under Art. 21 of the Constitution.”

Advertising is a form of communication for marketing and is used to encourage or persuade the audience. It is nonetheless the dissemination of information regarding the product advertised and the public at large benefits from the information made available through the advertisement. In a democratic economy, the free flow of commercial information is indispensable. There cannot be honest and economical marketing for the public at large without being educated by the information disseminated through advertisements.

It is necessary to maintain and preserve freedom of speech and expression in a democracy, so it is necessary to place some restrictions on this freedom for the maintenance of social order because no freedom can be absolute or completely unrestricted. Accordingly, under Article 19(2) of the Constitution of India, the State may make a law imposing “reasonable restrictions” on the exercise of the right to freedom of speech and expression “in the interest of” the public on the following grounds:

- a) Security of State
- b) Friendly relations with foreign states
- c) Public Order
- d) Decency or morality
- e) Contempt of Court
- f) Defamation
- g) Incitement to an offense on the Sovereignty and integrity of India.

However, advertisers often view these rules and regulations as violating their right to freedom of speech. Some ads, in particular, were considered derogatory and banned by the government, such as:-

- A deodorant advertisement that showed a man accompanied by scantily clad women was banned by the government after several complaints were received from viewers about the advertisement being offensive to family viewers.
- A soft drink advertisement that showed a child bringing the drink to the Indian cricket players was banned after complaints from child labor activists.



- Advertisements of two underwear ads were banned due to vulgarity and indecency. Objectionable content in ads is usually a reason for taking it off channels.

As stated previously, no right can be absolute and without restrictions, or else they might not act in the best interest of the public. Advertisement has been considered as an act of communication or expressing one's views but the said right may be exploited by the advertisers if not guarded. Restrictions on advertisements might be imposed when the advertiser indulges in the following acts, for it is necessary for the government/the appropriate authorities to intervene if such advertisements are detrimental to the interests of the public at large:

1. Deception- exists when an advertisement is introduced into the perceptual process of the audience in such a way that the output of that perceptual process differs from the reality of the situation. It includes a misrepresentation, omission, or practice that is likely to mislead. These may include the following:
 - Violates Consumers' Right to Information: Use of untrue paid testimonials to convince buyers, quoting misleading prices, and disparaging a rival product in a misleading manner are some examples of deception. Advertisers of anti-aging creams, complexion-improving creams, weight loss programs, anti-dandruff shampoos, and manufacturers of vitamins or dietary supplements are usually guilty of making exaggerated product claims. Some of the examples of advertisements in this category are: "A fairness cream is advertised with the claim that its user will get a fair complexion within a month" is deceptive in nature as it deceives/misleads the public into believing such facts that might not take place.
 - Violates Consumers' Right to Safety - When an advertisement for cooking oil says that using the said oil frees the user from heart problems, and then such an advertisement is misrepresenting the facts. Companies advertise products highlighting health cures drugs of questionable efficacy and health gadgets of unknown value.
 - Violates Consumers' Right to Choice - When material facts, which are likely to influence buying decisions, are not disclosed the advertisement becomes deceptive. In several advertisements it is stated that 'conditions apply' but these conditions are not stated. Not disclosing material facts amounts to deception. For example, the recent print ad for Videocon mentions a 1-ton split-AC available for Rs. 15,990/, a very attractive offer. But there is a small asterisk that mentions three things in small fonts, such as "Conditions apply", and "Prices valid in Delhi and NCR under exchange only".



2. Bait advertising: It means taking advantage of consumer psychology and depriving consumers of a choice. For example, a consumer is lured into a retail outlet by an advertisement for a low-cost item and then is sold a higher-priced version or is defective. Once the consumer enters the store, he or she is pressured to purchase another more expensive item. On visiting such stores, one finds a handful of outdated products on the discount announced and other better products as 'fresh stock'.

3. Advertising of harmful products: Advertising is not restricted to products that are good for people. According to the law in India, advertisements for cigarettes, liquor, paan masala, and products that are harmful to the public continue to find a place despite the ban imposed by the government on private channels, cable, and through the use of surrogates.

4. Puffery: Very often we hear that advertisements exaggerate the product's qualities. Nowadays 'puffery' i.e., "metaphor of idea" forms the main element in advertising. On the one hand, critics accuse it, while on the other defenders i.e., advertisers and advertising professionals opined it is a helping agent to differentiate their brands from the competitors. Puffery is considered to be an 'opinion' and not 'factual information'. Advertisers claim that consumers are intelligent enough to distinguish between truth and exaggeration. Moreover, they are not blindly going to believe everything as presented in an advertisement.

5. For a better understanding of the above and the relationship between commercial advertisement and freedom of speech and expression, the remarks made by the Hon'ble judge in *Colgate Palmolive (India) Limited v Anchor Health & Beauty Care Private Limited*⁹ might be of utmost relevance. In this case, it was held that false claims by traders about the superiority of their products, either directly or by comparing them against the products of their rivals, were not permissible. Recognizing the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's products, would be to 'de-recognize' the rights of the consumers guaranteed under the Consumer Protection Act 1986."

To permit two rival traders to indulge in puffery, without denigrating each other's products, would benefit both of them, but would leave the consumer helpless. If on the other hand, his rival exposes the falsity of the claim of a trader about the quality and utility value of his product, the consumer stands to benefit from the knowledge derived out of such exposure. After all, in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit.

⁹Case (2008) 7 MLJ 1119



Notably, the court found that permissible advertisements “tend to enlighten the consumer, either by exposing the falsity or misleading nature of the claim made by the trade rival or by presenting a comparison of the merits (or demerits) of their respective products”. Interpreting such advertisements to be in the ‘public good’, the court cited two instances as an exception to this – namely, if an advertisement is motivated by malice, and if it is false. The court held that this sort of advertising would benefit society because competitors are naturally better equipped to expose a rival’s untrue claims.

The court also held that the benefit to society from such exposure would “outweigh the loss of business for the person affected”. This observation was based on the court’s assumption that comparative advertising, even if it did not amount to a disparagement of other goods, could result in consumers being misled.

The Court in *Hamdard Dawakhana (WAKF) LalKuan, Delhi v Union of India* primarily relied on the judgment of the United States Supreme Court in *Valentine v Chrestensen* for the proposition that “purely commercial advertising” is not protected by Article 19(1) (a) of the Constitution. As also in *Bigelow v. Virginia*,¹⁰ the United States Supreme Court reversed the conviction of a Virginia newspaper editor who had been found guilty of publishing an advertisement that offered assistance to women seeking abortion. Abortion was illegal in Virginia in 1971 when the advertisement was published. The Women Pavilion, a New York group, urged women who wanted an abortion to come to New York. Blackmun, J., analyzing earlier judgments of the Court, observed that speech does not lose the protection of the First Amendment merely because it appears in the form of a commercial advertisement.¹¹

Advertising Regulation in India

The Government of India has not set up a regulatory body in India to regulate advertisements. Depending on the nature of the grievances, the power to regulate advertisements may be exercised by a vast variety of authorities, including the courts, Central and State Governments, tribunals, or police authorities. In addition to these authorities, there is the Press Council of India Act, of 1978 that is also empowered to regulate press advertisements. Its “Norms of Journalistic Conduct” guides the Council in the regulation of advertisements. The Press Council has the power to hold an inquiry into a complaint against a newspaper and if it finds that the newspaper has violated the standards prescribed by the council, it may warn, admonish, or censure the newspaper, the editor, or journalist as the case may be.

¹⁰421 U.S. 804

¹¹<http://www.legalservicesindia.com/article/1317/Advertisement-and-Freedom-of-Speech-and-Expression.html>



India however, does have a self-regulatory body dealing with both online and other forms of advertising. The Advertising Standards Council of India (ASCI) monitors certain standards and fairness in the domain of advertising. It was established in India in 1985. It is a self-regulatory voluntary organization. The role and function of the ASCI is to deal with complaints received from consumers and industry against advertisements that are considered false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition, and in contravention to the advertising code laid down by the ASCI. While safeguarding consumer interests, ASCI also monitors and guides the commercial communications of practitioners in advertising. The aim of the advertisement is to promote sales of products or services by affecting a purchasing decision. Although the benefits of advertising are numerous, it is one aspect of marketing that is subjected to severe criticism. And now there is a new medium for advertisers to explore, the Internet!

While there may be no specific legislation governing online advertising in India, ASCI does recognize online advertising. ASCI's Code of Advertising and existing statutes provide the necessary guidance and arsenal to combat errant advertisers. Finally, guidance may be sought by simply reading the Terms and Conditions of the website the advertiser wants to advertise on. This exercise will avoid any negative repercussions following the release of an online advertisement.¹²

Conclusion-

There is an increased use of advertisements to market products and increase customer penetration. However, the strategy is normally used at the expense of the customers through the propagation of misleading information regarding the products. Essentially, a large percentage of the current advertisements are misleading, leading to ill-informed choices from the customers. Although adverts are free to be innovative, they must not exceed the boundaries of truthfulness. Nonetheless, consumers must be able to decipher the misleading facts in adverts because the companies do not intend to reveal the same. By being a consumer in a world of diverse products and services, it has given us a wide range of choices. A product may be produced by different companies and has the same function, but it is presented to the consumers in different forms. In order to differ from each other, companies use the help of advertising to present their products in a better way than their competitors.

¹²<http://www.legalservicesindia.com/article/1317/Advertisement-and-Freedom-of-Speech-and-Expression.html>



However, advertising the product is becoming more crucial than the product itself. Companies are focusing more on making the brand more popular, rather than actually improving the product that they offer. By turning the advertisement competition into a war between companies, they mislead buyers by hyperbolizing their products' positive features, thus hiding the negative ones. Companies forget about the effect they have on the consumers. Consumers should be aware of the manipulative tricks that advertising uses like subliminal messages and brain seduction in order to not be misled into buying something that they do not really require. By knowing how to manipulate the audience and consumers' brains, companies use tactical methods in order to persuade specific customers to buy specific products or services. Other examples of techniques they use are techniques like puffery which are suggestive claims about a product, using subliminal messages and transferring information indirectly, as well as by targeting a specific group of people, creating a slogan or a mascot, and using sexy models with perfect bodies. Advertising tries to manipulate and persuade consumers into buying the product they are offering.

The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of "commercial speech" may have a much deeper interest in the advertisement than the businessman who is behind the publication. An advertisement giving information regarding a life-saving drug may be of much more importance to the general public than to the advertiser who may be having purely a trade consideration. It is, therefore, held that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the constitution.