New Guidelines to Curb Misleading Advertisements in India

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Advertisements have served as one of the most widely used methods to promote products, services, brands, campaigns, events, achievements and businesses, among others. With emerging technologies and changing customer preferences, especially in a pandemic-hit world, businesses constantly leverage advertising and marketing opportunities to connect with their customers in innovative ways. Consequently, the competitive pressure to successful sales and turnovers, led to resorting to advertising techniques that deceived or could potentially deceive the target consumers.

For the first time in India, the consumer rights were statutorily protected against false or misleading advertisements with the enactment of the Consumer Protection Act, 2019 (CPA) by the Ministry of Consumer Affairs, Food & Public Distribution. The CPA recognized making false or misleading advertisements as unfair trade practices, and prescribed punishments and penalties thereof. To regulate such matters, the CPA established the Central Consumer Protection Authority (CCPA), which can issue directions and impose penalties against false or misleading advertisements and unfair trade practices.

In June 2022, to protect consumer rights against wider advertising issues, the CCPA notified the Guidelines on Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (the "Guidelines") with immediate enforcement.

Prior to the Guidelines, advertisements and endorsements were governed under the CPA, and the below sector-specific legislations:

1. The Drugs and Cosmetics Act, 1940 – *prescribes penalty for advertising of test results or analysis made by Central Drugs Laboratory or Government Analyst*;
2. The Copyright Act, 1957 – *protects certain advertised literary or dramatic works as non-infringing acts, and provides remedies against groundless threat of legal proceedings made through advertisements*;
3. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955 – *controls and prohibits the advertisement of drugs in certain cases and purposes*;
4. The Programme and Advertising Codes under the Cable Television Networks (Regulation) Act, 1995 – *governs advertisements on cable services in India*;

5. The Trade Marks Act, 1995 – *prohibits infringements of registered trademarks by advertisements which take unfair advantage of or are contrary to honest practices in industrial or commercial matters, or are detrimental to the distinctive character and repute of the registered trademark*;
6. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 – *prevents advertisements of cigarettes and other tobacco products in India*; and
7. The Food Safety and Standards Act, 2006 and corresponding rules and regulations – *governs advertising of food articles in India*;

Besides the foregoing legislations, the Indian courts in numerous decisions have held that the advertisement of one's product or service which denigrates or disparages the product or service of another is an actionable claim. The advertisements standards in India have also been outlined by the self-regulated body Advertising Standards Council of India's Code on Self-Regulation. This Code has been relied upon by Indian Courts in several decisions related to claims on unfair trade practices, false or misleading advertisement and product disparagement.

The Guidelines provide added protection to consumer rights with clear and mandatory conditions for valid and non-misleading advertisements, and free claims advertisements. Further, the Guidelines recognize and allow bait advertisement on fulfilling prescribed conditions, as well as provide mandatory requirements for disclaimers in advertisements, advertisement endorsements, and disclosure of connection between endorser and trader. Besides, the Guidelines prohibit surrogate advertising, and prescribe restrictions on free claims advertisements and advertisements targeted towards children. The duties of manufacturers, service providers, advertisers and advertising agencies are outlined in detail under the Guidelines.

The salient features of the Guidelines are as follows:

- ***Scope:*** The Guidelines is applicable to all advertisements (regardless of form, format and medium), and to all manufacturers, service providers, traders, advertising agencies and endorsers associated with the advertisements. This brings both private and public advertisements and associated entities under the ambit of the Guidelines.
- ***Non-misleading and valid advertisements (Clause 4, Guidelines):*** The following qualify as valid and non-misleading advertisements:

    1. Contain truthful and honest representation;
    2. Non-misleading consumers through exaggeration of the product or service's accuracy, scientific validity, practical usefulness, capability or performance;
    3. Do not present consumers' legal rights as the offer's distinctive feature;
    4. In case there are specific informed or scientific opinion in the advertisement claims, it should not suggest the advertisement to contain universally-accepted claims;

5. In case of failure to purchase the advertised goods or services, it must not mislead the consumers or their families of the nature or extent of risk to their personal security;
6. Non-misleading consumers about the unsubstantiated claims, which are merely based on publications;
7. Comply with applicable sector-specific laws, rule and regulations.

In case of occasional or unintentional default in fulfilling advertised claims, the advertisement will not be invalidated, if:

1. The claim can be fulfilled by the product's other specimen;
2. The failure to meet quantity is within generally acceptable limits; or
3. The advertiser takes prompt action to fulfill the deficiency.

- ***Bait advertising (Clause 5, Guidelines)*:** The Guidelines recognize bait advertisements as those which advertise goods, product, or service for sale at a low price to attract consumers. Clause 5 of the Guidelines prescribe mandatory conditions for bait advertisements, as discussed below:

  1. Advertisements must not entice consumers to purchase goods or services lacking reasonable prospect of sale.
  2. Adequate supply of goods or services must be ensured by the advertiser to meet the foreseeable demand.
  3. In case of default in meeting the supply of advertised goods or services, the advertiser must provide the reasons for the default, and more specifically, about the limited stock and the advertisement's purpose to assess potential demand, as applicable. Further, consumers must not be misled by omission of any applicable geographic or age-limit restrictions for the advertised goods or services.
  4. In case of unfavourable market conditions, the advertisements must not mislead consumers about such conditions or unavailability of the advertised goods or services, and must not induce the consumers to buy those goods or services at less favourable condition.

- ***Prohibition on surrogate advertising (Clause 6, Guidelines)*:** The Guidelines define surrogate advertisement as "*an advertisement for goods, product or service, whose advertising is otherwise prohibited or restricted by law, by circumventing such prohibition or restriction and portraying it to be an advertisement for other goods, product or service, the advertising of which is not prohibited or restricted by law*". Simply put, surrogate advertising is indirect advertisements of goods or services, that are otherwise prohibited from being advertised under Indian laws. For instance, the advertisements of snacks by a tobacco brand amounts to surrogate advertisement.

The following advertisements are prohibited surrogate advertising under the Guidelines:

1. Advertisements, directly or indirectly, referring to goods or services whose advertising is legally prohibited or restricted; and

2. Advertisements using the brand names, logos, colours, layouts and presentations of goods or services, whose advertising is legally prohibited or restricted.

The Guidelines, however, do not prohibit non-objectionable advertisements by mere usage of brand or company names of goods or services that have prohibited or restricted advertising by law.

- ***Free Claims Advertisements (Clause 7, Guidelines)*:** The Guidelines prescribes specific conditions for compliance in respect of free claims advertisements, briefly elaborated as follows:

1. If the customer is required to pay for the advertised goods or services, the advertisement must not describe the goods or services as "free", "without charge" or similar expressions;
2. The advertisement must specify customer commitments to avail the free offer;
3. The advertisement must not describe the goods or services as free if the customer bears the cost of packing, packaging, handling or administration.
4. No free claims to be advertised where the response cost and price of goods or services are increased, except if the increase resulted from unrelated promotional cost;
5. Goods or services, whose quality has reduced or diminished, cannot be advertised as free;
6. A packaging element, which is included in the package price, cannot be advertised as free;
7. The advertisement must not describe "*satisfaction or your money back*" offers or non-refundable purchase offers as "free trial".

- ***Children Targeted Advertisements (Clause 8, Guidelines)*:**

Considering the vulnerability of children's impressionable minds, the Guidelines lay down detailed prohibitions on children targeted advertisements. Some prohibitions on children targeted advertisements under the Guidelines, include that advertisements:

1. must not encourage or inspire dangerous behaviour;
2. take advantage of children's inexperience, credulity or sense of loyalty;
3. must not exaggerate claims so as to mislead children into bearing unrealistic expectations;
4. must not condone or encourage practices which can detriment children's physical or mental health;
5. must not imply that children be ridiculed or felt inferior if the advertised product or services is not availed;
6. must not use deceiving terms like "just" or "only" for the product or service price, wherein additional cost or charge is included;
7. must not feature children in respect of products that are legally prohibited from advertising;
8. must not feature sports, music or cinema personalities for advertising products requiring a health warning or not available for underage purchase;
9. must not contain health or nutritional claims without adequate and scientific substantiation;
10. must not promote negative body image or imply that the advertised goods or services are

better than natural or traditional food;

The Guidelines also prohibit advertisements of junk foods, including chips, fizzy drinks, and other similar snacks and drinks, while viewing children's programs or on children-exclusive channels. It also prohibits advertisements promoting illogical consumerism or unnecessary goods or services.

- ***Disclaimers (Clause 11, Guidelines)*:**

The Guidelines mandate disclaimers in advertisements to comply with requirements, such as the disclaimers must:

- be in the language of the advertisement,
- use the font of the claim,
- be placed prominently on the packaging and in the claim's panel,
- be displayed in sync with and in same speed as of a voice-over claim,
- be clear, prominent and legible to a normal-sighted person reading the advertisement once, from a reasonable distance and at reasonable speed. However, the Guidelines do not specify what qualify as normal-sightedness, reasonable distance and reasonable speed.

Under the Guidelines, an advertisement disclaimer may clarify claims or resolve ambiguities, without contradicting the material claims, messages, or dictionary meaning of words used in the advertisement. However, the disclaimers must not conceal material information or commercial intent so as to deceive consumers, and must also not attempt to rectify a misleading claim.

The disclaimer's requirements and circumstances substantially correspond to those set forth in the Code of Self-Regulation by the Advertising Standards Council of India.

- ***Duties of Manufacturer, Service Provider, Advertiser and Advertising Agency (Clause 12, Guidelines)*:**

The Guidelines ascribe certain duties to all applicable manufacturers, service providers, advertisers and advertising agencies to ensure that:

- advertisements having descriptions, claims and comparisons based on objectively ascertainable facts can be substantiated;
- advertisements contain indications to source and date of research or assessment of claims, as stated;
- advertisements do not refer to any person, firm or institution, without their prior consent, to confer an unjustified advantage or attract ridicule or disrepute;
- advertisements do not directly or indirectly contain representations which can mislead consumers about the advertised product or the advertiser or others;
- advertisements must not abuse consumer trust or exploit their lack of experience and knowledge.

However, the Guidelines allow advertisements with obvious untruths and exaggerations for the purpose of amusing or attracting consumers and be regarded as hilarious or hyperbolic. Such advertisements must not be understood as making literal or deceptive claims for the advertised goods.

- ***Endorsements*:** The Guidelines prescribes that endorsements must contain genuine and current opinion of the endorser, and be based on their information or experience with the endorsed goods or services. However, the Guidelines prohibits Indian professionals (residing within India and overseas) and foreign professionals (non-citizens of India) from endorsing professions which are legally prohibited from being endorsed in advertisements.
- ***Penalties*:** The Guidelines seek to keep advertisers in check against misleading or false advertising practices. For violation of provisions related to misleading advertisements under the Guidelines, the CCPA can impose a penalty of INR 10 lakhs on manufacturers, advertisers and endorsers. For subsequent violations, the CCPA may impose a penalty extending up to INR 50 lakhs. As per the CPA, the CCPA may also prohibit the endorser of a misleading advertisement from making any endorsements for up to one year, which can extend to 3 years on subsequent non-compliance.

The main aim of the Guidelines is to promote advertising which protect consumer rights, especially the right to be informed, right to choose and right to be safeguarded against potentially unsafe products and services.

As the Guidelines do not address advertisements related to gaming platforms, on June 13, 2022, the Ministry of Information and Broadcasting, had issued an advisory banning advertisement promoting online betting. The Indian government had directed all print, electronic and digital media to refrain from advertising online betting platforms.

While the Guidelines deal with surrogate advertisements, however, there is lack of clarity on what kinds and extents of surrogate advertising are permitted under the Guidelines. Many liquor and tobacco brands have used music festivals, goods and tours as advertising platforms to indirectly drive consumption of their alcoholic and non-alcoholic beverages. Such brands have now sought the Indian government's clarity on whether claims of "responsible drinking" or "don't drink and drive" are permissible in surrogate advertisements.

Nonetheless, the Guidelines give legality to the permissible and non-permissible advertising standards in India. The provisions related to bait advertising, free claims advertising, children targeted advertisements and endorsements definitely are positive leaps towards ensuring protection of consumer rights as well as encouraging genuine advertisements with better consumer awareness and trust.

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View Bio of Madhu Rewari

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