

SHOULD ENDORSERS BE HELD RESPONSIBLE FOR CLAIMS IN ADVERTISING?

Relevant for: Developmental Issues | Topic: Rights Issues - Consumer Rights in India

Hollywood actor Pierce Brosnan claimed that pan masala manufacturer Pan Bahar had violated his contract by falsely presenting him as a brand ambassador for its entire product line. Photo: Special Arrangement

On June 9, 2022, the Central Consumer Protection Authority (CCPA) notified guidelines for [‘Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022’](#). The guidelines, brought in with immediate effect, are [applicable to all forms of advertisements](#). While the Consumer Protection Act of 2019 does have a provision on misleading advertisements, the CCPA can impose a penalty of up to 10 lakh on manufacturers, advertisers and endorsers for misleading advertisements and a penalty of up to 50 lakh for subsequent contraventions. It can also prohibit the endorser of a misleading advertisement from making any endorsement for up to one year; for subsequent contravention, prohibition can extend up to three years. In a conversation moderated by **Sonam Saigal, Anushree Rauta** and **Akashneel Dasgupta** discuss the need for the new guidelines and how they overlap with the ‘Code for Self-Regulation in Advertising’, which was adopted by the Advertising Standards Council of India (ASCI). Edited excerpts:

Anushree Rauta: In this country people worship certain celebrities. It’s a cinema and cricket-loving nation. A lot of brands these days have either actors or cricketers as brand endorsers. It adds to the credibility of the brand. It’s the trust which people repose in some of the celebrities [that they] pass on to the image of the brand. [Having such brand endorsers] impacts the buyers’ purchasing decisions because of the celebrity’s authority and/or relationship with the audience.

Akashneel Dasgupta: There are all kinds of reasons for hiring a celebrity. Certain brand endorsements happen because of the right reasons, where there is a fit with the brand, a communication objective or even a business objective to solve. When a celebrity comes in, he/she brings in the trust or credibility that is needed. But often the endorsement is also for the wrong reasons, as there is nothing new to say. In mature categories, which have high penetration, established brands that have little to differentiate [among them] and have almost reached a parity stage, celebrities are used as identifiers. Sometimes it’s lazy marketing. When you don’t have an idea, you just take a face, sit back and believe that this is going to do the job.

Anushree Rauta: Endorsers are service providers. They do have responsibilities given the kind of impact they have on the audience. But at the end of the day, it’s not solely on them. They wouldn’t have the technical knowledge to verify the products. Even though the ASCI guidelines provide something similar in terms of the due diligence exercise to be carried out by the celebrities, these guidelines are now an obligation for them. The guidelines require the celebrities to reflect their genuine or current opinion, to disclose any connection which they have with the brand... This will increase instances where brand endorsers may need to take some technical advice, they may need to avail of services like those of the ASCI, which provide a team of dedicated technical experts to verify whether the endorsements are substantiated or not [by the claims they make]. I think with these guidelines there will be an increase in transparency and more responsible advertising.

Akashneel Dasgupta: There are celebrities who do their due diligence and are careful before they endorse a product or a brand. Then there are those who are uninterested in what the brand

is, or what the product is, and it's just about the money they're making from the endorsement. These guidelines are good, but in the real world it is going to make only so much of a difference because the penalty on the brand ambassadors is so [little], it doesn't really matter to them.

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Anushree Rauta: Before the Consumer Protection Act came into place, there was a provision which had contemplated imprisonment as an option for a misleading advertisement. But I think the legislature rightly deleted that and imposed only a fine. The quantum of the fine is debatable. For any subsequent offences, there is also a penalty in terms of the celebrity not being able to endorse for a certain period, which is also loss of reputation, and which is good.

Akashneel Dasgupta: For a celebrity, there is a talent management team, a legal team. There are so many people who do their due diligence, so that conscious decisions are taken to endorse or not endorse a product or a brand. But celebrities get away easily in case of a misleading ad with a public apology. So, a 10 lakh penalty is nothing if they had a deal of 4 crore. It should have been far more because I don't think a monetary penalty is going to solve the issue here. There have to be some other yardsticks of accountability, or punishment. Damage to their reputation and prohibiting them from endorsements for a period is the punishment that works for them.

Anushree Rauta: Section 21 (power of Central Authority to issue directions and penalties against false or misleading advertisements) of the Act states no endorser will be liable to a penalty if they have exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by them. With the guidelines, they are obliged to do their due diligence, and to make the disclosure of their new material connection with the brand. Now, it's come as a statutory obligation. Whether these guidelines were required to be there or not is questionable. In my view, the ASCI guidelines were already in place; maybe additional onus has been put now. It will have to be seen whether there is any reduction in misleading advertisements or not, following this new set of guidelines.

Akashneel Dasgupta: It is difficult to define what's misleading. A lot of things are in the grey area in advertising. It is a little hard to believe that the brand ambassador is not aware of what a brand stands for. For example, some products may claim they make your child stronger, or taller, or provide vitamin C, but how do you prove that... A lot of things are intangibles in advertising. If the product does live up to the claim, to what extent nobody can say, because almost 80% of advertising lies in the grey area regarding claims. So, it's very difficult for a celebrity to verify claims because sometimes even the clients can't verify those claims. So, maybe the guidelines will help in that aspect.

Anushree Rauta: There are various aspects to it. As far as technical information is concerned, they would not be equipped to do it on their own, so it will be something which they will have to outsource. They would require the brand to submit certain reports and get them verified, or they would go to the ASCI which has its own team of experts to carry out these exercises. The second is in terms of the experience with the products and goods. I don't know how this will pan out, because not all celebrities may be comfortable using the products they are endorsing. Nowadays, there is a liability perspective; I'm sure the brands would require them to give an undertaking that they have utilised the products and they affirm what they are endorsing. Celebrities will have to be more vigilant and responsible while endorsing products and services.

Anushree Rauta: It depends on the kind of products or services being endorsed. If the celebrity has a good legal representation, they will definitely add clauses in the representations and warranties and the indemnification which are taken to ensure that whatever statements they are

made to say are verified and there is no false statement which the brand is asking the celebrity to make. It also depends on the bargaining power. There are certain creative controls that certain celebrities would want to take. Sometimes the celebrities may want to get the storyboard verified at the scripting level itself. So, the clauses are typically there in all brand endorsement agreements, where representations and warranties are taken from the brands and any indemnification for any claims they mentioned.

Akashneel Dasgupta: Most celebrities these days have these clauses inserted because they are handled by a security management agency. So they ensure that the clauses of no responsibility are there.

Anushree Rauta: A misleading advertisement is defined under the statute (Section 2). To put it in simple words, in an advertisement there should be no false description made of any product or service, no false guarantee given, and it shouldn't constitute what is called an unfair trade practice. During COVID-19, there were a lot of false and misleading advertisements. I am sure the number 12,000 is hugely attributed to the COVID-19 time.

Akashneel Dasgupta: There's no way to determine whether a claim is misleading or not. You can't really determine or measure whether a certain cement gives more life than the other. Of course, there has to be proof, but then if it's in the grey zone, you really can't prove it. From the number of misleading [advertising] complaints received by the Ministry, I'm sure only a few would be genuine. In our country, we see people and brands being trolled. A lot of it is also exaggerated. The number 12,000 has to be taken with a pinch of salt. Not all of them are genuine. But yes, there are many genuine complaints. Most of the promises are intangibles and lie in that grey area. There are always two ways of looking at it. If promises are not delivered, that's misleading.

Akashneel Dasgupta: Absolutely. They should be held responsible and there shouldn't just be a monetary punishment for that.

Anushree Rauta: The Act already provides for sufficient penalty. Of course, celebrities need to take some responsibility. They cannot shrug off responsibility.

Anushree Rauta is an advocate and partner heading Media and Entertainment at the ANM Global; Akashneel Dasgupta is chief creative officer at Network Advertising

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