

Advertising: A Legal and Intellectual Property Perspective



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Abstract

Advertising, like any other profession, is governed by a code of ethics which is majorly self regulating and by various laws and enactments. In this paper, the realm of laws, in which industry operates and the professional code of ethics for advertising is discussed. The study of law is two folds viz various laws and acts especially enacted for advertising and the mass media laws that affect advertising, besides the law relating to intellectual property rights that indirectly concerns the field of advertising.

Keywords: Advertising, Copyright, Trademark, Geographical Indication, Ascii, Ipr, Mrtp

Introduction

"Advertising is paid non personal communication from an identified sponsor using mass media to persuade or influence an audience."¹

The world of advertising is today is very exciting one. Advertising fascinates most people. It flirts with their lives, seduces them and leaves them with wonderful images and dreams. Dreams that to be fulfilled, make people work harder and harder, earn more to spend more and more². The advertising industry, although a few centuries old, has grown by leaps and bounds since industrial revolution, but the growth has been more profound in the 20th century and continues to be so. Advertising has become a race for creating a unique, cutting-edge, and tantalizing way of passing on relevant information to customers so as to facilitate and positively influence their buying decisions³. According to recent estimates, the total spend on advertising in India is estimated at 17,690 crores⁴. It has evolved from its very simplistic form of being an advertising "agent" to a complex integrated marketing communications outfit⁵. The processes and structures are fairly evolved and it has moved from an unscientific activity to one that is research based and scientific⁶. The features of the artistic work make it complicated to label the components of advertising work and to put them in a specific context in the framework of laws and regulations. While the laws determine both the broad framework within which the industry is allowed to operate and the content of its output, ethics is generally governed by the professional code of ethics and the personal grooming of an advertising practitioner.

Countries in the west and the USA have stringent laws governing the practice of advertising. In the Indian context, the provisions of the law imposing limitations on message/content in the mass media apply mutatis mutandis to advertising. Infact, most of the provisions governing the print medium are applicable to advertising as well, with such modifications as the context may require⁷.

Aim of the Study

Advertisements are common targets of law suits. Today it is difficult for an advertiser to run an advertising agency without understanding the legal framework. This article deals with legal and intellectual property (IP) issues in the creative process of advertising. The aim of the study is to analyse the existing legal and intellectual property framework dealing with advertising.

Advertising and Freedom of Speech and Expression

Since advertising is means of commercial communication. Freedom of speech and expression needs to be discussed. Article 19(1) (a), Constitution of India confers rights related to freedom of speech and expression, "(1) All citizen shall have right (a)To freedom of speech and expression."

While this freedom is granted for public speaking, radio, television and press, the constitution has imposed certain restrictions.

Article 19 (2), permits the states to impose reasonable restrictions "in the interest of the sovereignty and integrity of India, the security of the

state, friendly relation with the foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

In **Hamdard Dawakhana vs Union of India**⁸ the Supreme Court was faced with the question as to whether the **Drug and Magic Remedies Act**, which put restrictions on the advertisements of drugs in certain cases and prohibited advertisements of drugs having magic qualities for curing diseases, was valid as it curbed the freedom of speech and expression of a person by imposing restrictions on advertisements. The Supreme Court held that, an advertisement is no doubt a form of speech and expression but every advertisement is not a matter dealing with the expression of ideas and hence advertisement of a commercial nature cannot fall within the concept of Article 19(1)(a).

However, in **Tata Press Ltd. Vs Mahanagar Telephone Nigam Ltd**⁹, a three judge bench of the Supreme Court differed from the view expressed in the Dawakhana case and concluded that commercial speech cannot be denied as right to a person that person was a businessman and ‘commercial advertisement’ was definitely a part of Article 19(1) (a) as it aimed at the dissemination of information regarding the product. The Court, however, made it clear that the government could regulate commercial advertisements, which are deceptive, unfair, misleading and untruthful.

Ethical Code: Advertising Standard Council of India (ASCI)

The critics of advertising would dismiss any discussion on advertising in one sentence by saying that advertising and ethics didn’t go together. Self regulation refers to the advertising industry voluntarily regulating itself without intervention from external bodies or the law. A non-governmental self regulating council, registered as a not-for-profit making company under section 25 of the Indian companies act, 1956. ASCI has a goal to maintain and enhance public confidence in advertisement ASCI is sponsored and governed by firms of substantial repute, advertisers, media advertisement agencies and other professional/ ancillary services connected with advertising practice. The purpose of this code, is not to obstruct the sale of products but to regulate the content of the advertisement products which are offensive in opinion of some people.

Fundamental Principles

To attain the aim of fair advertising practices for the ultimate interest of the consumer the following guidelines¹⁰ of the self regulated code were drafted by the people in professions and industries or connected or are affected with advertisement.

1. To ensure the truthfulness and honesty of representations and claims made by the advertisements and to safeguard against misleading advertisements.
2. To ensure that advertisements are not offensive to generally accepted standards of public decency.
3. To safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large.

4. To ensure that advertisements observe fairness in competition so that the consumer’s need to be informed on choices in the market-place and the canons of generally accepted competitive behaviour in business are both served.

Though the code is self regulating but its acceptability in judiciary can be adjudged from this fact that whenever there is conflict, the code’s rules forms the basis of the judgement and is applicable to advertisers, advertising agencies and media.

Standards of Conduct

In the era of globalisation advertising is the way by which seller generates the interest of the consumer in his product. The success of advertising depends on public confidence. Hence no practice should be permitted which tends to impair this confidence. The standards laid down here should be taken as minimum standards of acceptability which would be liable to be reviewed from time to time in relation to the prevailing norm of consumers’ susceptibilities.

1. To ensure the truthfulness and honesty of representations and claims made by the advertisements and to safeguard against misleading advertisements¹¹
2. To ensure that advertisements are not offensive to generally accepted standards of public decency. Advertisements should contain nothing indecent, vulgar or repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence.¹²
3. To safeguard against the indiscriminate use of advertising in situations or of the promotion of products which are regarded as hazardous or harmful to society or to individuals, particularly minors, to a degree or of a type which is unacceptable to society at large¹³.
4. To ensure that advertisements observe fairness in competition such that the consumer’s need to be informed on choice in the market-place and the canons of generally accepted competitive behaviour in business are both served¹⁴.

In the absence of well defined laws on advertising, this code on advertising plays a major role in self regulating the mechanism involved in advertising. The code is not in competition with law but to complement the law.

Advertising and Statutory Provisions Monopolies and Restrictive Trade Practices (MRTP) Act, 1969

MRTP Act served the dual purpose of preventing monopolistic and restrictive trade practices and secondly unfair trade practices. MRTP Act played a vital role in controlling unfair advertising methods including false advertising claims, false endorsement of products, deceptive packaging, dishonest promotions or marketing. The Act deals with 5 major Unfair Trade Practices¹⁵.

1. Any misleading, false, and wrong representation either in writing (i.e. in advertisements, warranty, guarantee etc.) or oral (at the time of sale) actual or intended, even if actual injury or loss is not caused to the consumer/buyer constitutes as unfair trade practices.
2. Sales, where there is element of deception.

3. All business promotion schemes announcing 'free gifts', 'contests', etc. where any element of deception is involved.
4. Violation of laws existing for protection of consumers.
5. Manipulating sales with a view to raising prices.

However, MRTP Act was later repealed and replaced by Competition Act, 2002. Nonetheless, the later was not burdened with the subject of unfair trade practices, which was given effect under Consumer Protection Act, 1986.

Consumer Protection Act, 1986

The Consumer Protection Act 1986 allows a consumer, consumer association, the central government or a state government to take up a case of unfair trade practice¹⁶ before a consumer forum. Therefore, advertisers should ensure that an advertisement does not dilute its brand value and that they have cogent facts to back up their claims. It is important to mention that act covers 'Unfair Trade Practices' which was earlier the realm of MRTP Act.

The below mentioned activities relating to advertisement and promotions have been included:

1. Making false or misleading representations about the standard, quality, quantity, grade, composition, model, etc of the product¹⁷.
2. Represents rebuilt, renovated, reconditioned and old goods as new goods¹⁸.
3. Make false claims for sponsorships, approval, characteristics, accessories, uses or benefits regarding goods which they do not have¹⁹.
4. Makes a false or misleading claim concerning the need for, or usefulness of any goods or services²⁰.
5. Gives guarantee or warrantee not based on proper or adequate tests and without actual intention to perform them²¹.
6. Publishes advertisements regarding sale of products which are not actually offered for sale or supply at a mentioned bargain price, offer period, quantity, etc²².
7. Misrepresents public regarding the price of the product²³.
8. Misrepresents public regarding the offer of the gifts, prizes, etc., or creating an impression that something is being given or offered for free whereas it is fully or partly covered by the amount charged in transaction as a whole²⁴.
9. Conducts any contest, lottery, game of chance or skill, for the purpose of the promoting the product²⁵.
10. Withhold the final result of game of chance or skill from the participants where the same has to be communicated to the participants within reasonable time or requires to be published in same newspaper where the scheme was originally published²⁶.
11. Gives false or misleading facts disparaging the products of the another person²⁷.

Drug and Magic Remedies (Objectionable Advertisement) Act, 1954

The Act has been enacted to control the advertisements of drugs in certain cases and to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. The act

clearly specifies that unless prescribed by registered medical practitioner or after consultation with Drugs and Cosmetics Act, 1940, no advertiser shall publish any advertisement referring to any drug that is used for miscarriage in woman, maintenance or improvement of sexual capacity, correction of menstrual disorder and the diagnosis, cure, mitigation, treatment or prevention of any disease.

The Emblems and Names Act, (Prevention of Improper use), 1950

This is an Act to prevent improper use of emblems and names for professional and purposes. This Act puts prohibition on use or colourable imitation of any names and emblems specified in the schedule for any trade, business, calling or profession, or in the title of any patent, or in any trademark or design²⁸. These include:

1. The Indian national flag.
2. The name, emblem or official seal of the government of India or any state, or any other insignia or coat of arms used by any such government or by a department of any such government; and
3. Pictorial representations of Mahatma Gandhi, Pandit Jawaharlal Nehru or the prime minister. The use of any such names or emblems is strictly prohibited and a violation is punishable by a fine of upto Rs.500.

Indian Penal Code (IPC), 1860

Advertisers are allowed to operate within set legal boundaries. Violation of these boundaries can lead to penalties. IPC prohibits or set certain guidelines for the advertising as mentioned below:

1. Prohibits dissemination of any obscene matter²⁹.
2. IPC prohibits the publication of matters pertaining to unauthorised lotteries.
3. Prohibits publication of appeals using national symbols for furthering the prospects of a candidate at election.

Legislative Protection for Relevant Intellectual Property Rights

Intellectual property rights (IP) and their safeguards have gained focus, especially after the internet united the world with boundless knowledge that transcended artificial boundaries. Intellectual property is protected to acknowledge the creative/innovative work done by people in their area of competence. The most important question that arises is that is advertising an intellectual activity? Critics of advertising reject this claim, alleging it to be clever and cunning discipline that makes people buy products that they do not need. On the other hand advertising moves minds and market. The most essential function of advertising agencies can be summarized as creating and selling ideas. Consequently, in the advertising work, creativity stands in the forefront and the creative works of the agencies are mostly related with intellectual property. Therefore, throughout the advertising work, some problems are possible to arise within the context of intellectual property rights. Some of them may be related with the definition and context of intellectual work in the legislation, and some may be related with the ownership and claim of the work. The features of the artistic work make it complicated to label the components of advertising work and to put them in a

specific context in the framework of laws and regulation.

	Advertising elements	Protection
Creative content	Written material, photographs, art, graphic, music and video	Copyright
Slogan and sounds	Slogan and sounds in the advertising	Trademark or copyright
Signs	Business names, logos, product names, domain names	Trademark
Geographical indications	Sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin	Laws against unfair competition, consumer protection laws, laws for the protection of certification marks.
Graphical symbols, screen displays, graphic user interfaces and web pages	Computer generated products	Industrial design law and copyrights
Software	Digital advertisements	Patents and copyrights
Databases	Consumer profiles	Copyrights
Packaging	Distinctive packaging of the product	Trademark and industrial design
Identity	Name, photograph, voice or signature	Publicity or privacy rights
Unfair advertising methods	False advertising claims, false endorsement of products, deceptive packaging, dishonest promotions or marketing	Unfair competition laws

Source: WIPO

Copyright Protection

Copyright is defined as an exclusive right granted to owner, devoid of others to do or authorize others to do some act in respect of literary³⁰, dramatic³¹, musical³², artistic works³³ including cinematograph film³⁴ or sound recordings³⁵.

'Literary work' includes all those works which are in written form including computer software programs and databases.

'Dramatic work' includes geographical notations and other works of music.

'Artistic work' includes the diagrams, maps, paintings, sculpture, drawings, architectural work, models of sculptures, building designs, etc.

'Cinematographic films' includes visual recordings, video films, etc.

'Sound recordings' includes all form of recording of sounds.

Thus protection for various facets of advertisement can be procured under the same IP head. Creative content, such as written material, photographs, art, graphics, the layout of an advertisement, music, videos, advertisement slogans, sounds, software for digital advertisement and website design may be protected by copyright provided they have the element of originality.

Any person knowingly infringes or abets the infringement of copyright shall be punishable with imprisonment of term which shall not be less than six months and extend up to three years with fine not less than fifty thousand rupees and can extend up to two lakh rupees³⁶.

Trademark Protection

Trademark or mark is any word, phrase, symbol, design, sound, smell, colour, product configuration, letters, numbers or combination of the above adopted and used by a company to identify its product or services of others.³⁷ A trademark means a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods some person

having the right as proprietor to use that mark³⁸. The two main objectives of the act is to protect the individual's interest and secondly protection of interest of the society.

The essential contents of Advertising: slogans, sounds, distinctive packaging, business names, logos, product names, names and other signs may be protected by trademark.

Any person knowingly infringes the trademark shall be punishable with imprisonment of term which shall not be less than six months and extend up to three years with fine not less than fifty thousand rupees and can extend up to two lakh rupees³⁹.

Industrial Design Protection

According to Industrial Council of Societies of Industrial Design (ICSID) "Design is a Creative activity whose aim is to establish the multifaceted qualities of object, processes, service or their system in the whole life cycles, therefore, design is the central factor of innovative humanization of technological and the crucial factor of cultural and economic exchange." Therefore 'design' means only feature of shape, configuration, pattern, ornament, composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal or principle of construction or anything which is in substance a mere mechanical device⁴⁰. Distinctive packaging, like the shape of a bottle or container may be protected by industrial design.

Geographical Indication

Geographical indications of goods (Registration and Protection) Act, 1999 provides for the registration and better protection of geographical indications relating to goods. Geographical Indication in relation to the goods means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or

manufactured in the territory of the country, or a region of the locality in that territory, where a given quality, reputation, or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality as the case may be⁴¹.

Any advertiser⁴² found guilty of misrepresenting the facts about the origin of goods shall be punished with imprisonment for a term which shall not be less than six months and can extend up to three years and a fine which shall not be less than fifty thousand rupees and can extend up to two lakh rupees⁴³.

Conclusion

As it is, it is difficult to keep the content of an advertisement true to facts, given the natural human tendency to exaggerate the benefits of a product or service beyond mere puffery. It is easy to cross the thin line demarcating mere puffery from a misleading, deceptive or plainly false advertisement. Therefore, creating a risk-free winning advertisement often becomes as challenging as creating a risk-free winning product or service. Advertising as a business strategy is a powerful tool for enhancing, maintaining and developing brand equity. Therefore, it is imperative for companies to protect the content of an advertisement and to ensure that it is in line with the applicable laws. A number of laws and enactments have been specifically framed for the protection of consumer and society was discussed in this paper. Laws and ethics are intertwined, especially when it comes to misleading, deceptive or obscene advertisements.⁴⁴ Regulation of advertising comes from self regulation as well as from state regulatory agencies. For many years, advertising industry has been following self regulatory measure and limited the control of government. The rapid growth of the internet as marketing tool has created a new area of concern for the regulators. The same consumer protections laws are applied to commercial activities in other media apply to commercial advertising online as well, which poses a real challenge. With globalization of markets, the redressed mechanism system is going to be in sharp focus. The intellectual property rights scenario is very encouraging in India as one has seen an upsurge in awareness, recognition, understanding, and appreciation of various issues related to these rights, both at the individual and institutional levels. Some more interpretations and debates are bound to occur in the sphere of IPR.

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