

## Controls on advertising that misleads consumers

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According to advertising pioneer David Ogilvy, consumers make their purchase decisions based on the content and not the form of advertising. This is still true today.

Ads create consumer awareness and with smart marketing enable a consumer to take an informed decision as to the product or brand he or she wishes to purchase. They cajole consumers about one product being better than the other and, with the increased popularity of ads in India, in many instances they have been used to mislead the consumer.

In March, the Consumer Affairs Ministry expressed serious concern about misleading advertisements, which had snowballed in number, and announced that the Department of Consumer Affairs would partner with the Advertising Standards Council of India (ASCI) to look into the matter.

### Legal framework

The ASCI, a self-regulatory voluntary organization established in 1985, which regulates advertising content, prescribes a Code for Self-regulation in Advertising, in order to ensure an honest advertising platform along with fair competition within the market. The kinds of ads barred as per ASCI guidelines include those that are criminally intended; violent; ridicule a caste, creed, race, or nationality; disturb relations with foreign nations; promote restricted goods directly or indirectly; and/or contain foul language or words. The code applies to ads read, heard and viewed in India, including those made or distributed abroad, as long as they are for consumer viewing or displayed to a substantial number of consumers in India.

Instances have occurred where ads deviate from their objective. Stressing the motive behind such ads, the Supreme Court in *Awdhesh Singh*

*Bhadoria v Union of India and Ors* (2013) held that an advertisement is a form of speech, but its character has to reflect the objective of promotion. No advertisement could misuse the confidence of consumers or abuse their lack of experience or knowledge because selling products commercially by making fabricated claims or pious appeals would gravely hamper the society.

### Intellectual property aspect

An advertisement may showcase a registered trademark or a copyrighted image, so the aspect of intellectual property comes into picture. An infringement will occur if an advertisement involves derogatory remarks against a rival product, dilutes a rival trademark and portrays it in disparaging manner, uses a copyrighted work without authorization, etc.

An advertisement which uses trademarks to advertise products should not dilute, reduce or blur the mark in any way. *Delhi High Court, in ITC Ltd v Philip Morris Products SA and Others* (2010), held that the need to establish a “link” or “linkage” or “mental association” of the offending mark with that of the plaintiff or claimant is essential for securing relief in any claim for dilution. The dilution theory presumes some kind of “mental association” in the reasonable buyer’s mind between the two parties and the mark. Any illegitimate use of a mark by a competitor so as to profit from the trademark’s goodwill and reputation results in “dilution” of mark.

### Permitted types of ads

Comparative advertising is the mention of a particular product or brand in another brand’s or rival’s ad for the purpose of showing that one has the better product. Section 30(1) of the Trade

Marks Act, 1999, provides that use of another’s registered trademark is an honest practice when it does not take unfair advantage and is not detrimental to the distinctive character or repute of the mark. Going by this, if an ad maligns the rival’s product in the eyes of consumers or shows it to be inferior, then it is disparagement, curtailed by the act.

*Delhi High Court, in Reckitt Benckiser v Hindustan Unilever* (2008), observed that a trader is entitled to boast about its product for the purpose of promotion only, irrespective of the validity of the boast, and can further compare the benefits of its goods to the goods of others, but the competitors’ goods cannot be mentioned in a disparaging manner.

Surrogate advertising comes to the rescue of products and services which cannot be advertised in India, such as tobacco and alcohol. The main intention of surrogate advertising is essentially to sponsor, display or promote the brand rather than the product, i.e. a different product using an already established brand name is endorsed thereby impacting brand recollection. Products such as soft drinks, music CDs, packaged water, etc., advertised by liquor and tobacco brands are blatant advertising of products for which advertising is prohibited done insidiously.

Advertising can be a powerful business stratagem and it is essential that companies monitor the content of their advertisements and warrant their legality. Further, advertisers need to avoid tainting their name and maintain a harmonized balance between their ads and IP laws, the ASCI code and consumer laws to head off possible legal battles and secure the future of their brands and trademarks.

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