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A Cross National Variation Analysis of the Advertising Laws

G.S.S. NEEHARIKA¹

ABSTRACT

Advertisements are a form of publicity done by various companies for promoting the sale of their products in the market. This practice is being followed since a long time. It is done either through print or through advertisements in digital form in radio, televisions, social media etc.

H.G. Wells once famously said that advertising was legalized lying. This reflects the dilemma on advertising and its effect on consumers. In an environment of zealous competition in the foreground of a market economy, advertisements often tend to exaggerate and misrepresent facts which ultimately affect impressionable minds. That is precisely what all legal systems must seek to address. Several countries have enacted comprehensive laws that govern and control advertising. Many countries in Europe restrict domestic advertising that target children below a certain age. In the UK, the Advertising Standards Authority lays down the standards for advertising in all kinds of media while all outdoor advertising is done with permission from the local town planning authorities. As for the US, the Federal Trade Commission is the relevant and the ultimate authority on the subject although local governments are allowed to enact their own regulations in this regard. In India, the field of advertising is subject to a multiplicity of laws in the absence of a comprehensive statutory mechanism that would lay down ground rules in clear terms for advertising in the country.

This article helps to know various laws and rules around the world. Also lets us know how the regulations are in place around the globe.

I. INTRODUCTION

Leo Burnett, the creative genius behind generation defining ideas like “Tony the Tiger” and “The Marlboro Man” was once quoted saying:

“Advertising is the ability to sense, interpret .to put the very heart throbs of a business into type, paper, and ink.”

¹ Author is a student at ICFAI Law School, Hyderabad, India.

Advertisements have long played a crucial role in shaping up businesses and their importance has only risen with the advent of the digital era. With the global market becoming increasingly competitive, the consumers have become more vulnerable to the dangers of predatory and misleading advertisements tactics than ever before. On the other hand, with respect to businesses, monetary investments into advertising and associated risks pertaining to goodwill have increased exponentially over the years making it crucial for them to safeguard their own interests.

Therefore, it is indisputable that the advertising sector has become a high-stakes field which merits a comprehensive and well-defined regulatory system to ensure that the interests of the all the relevant stakeholders are represented and cared for.²

There are various laws in place to govern the advertisements across the globe, as it is still evolving only few countries around the world have specific laws in place. Sometimes even if there are laws in place they aren't stringent enough or not much cared for by the regulatory authorities. The regulatory authorities are instituted by the governments to control and regulate the advertisements according to the changing standards that are acceptable to the society.

As the advertisements are quite influential as they promote their products be it goods or services in the market, the market participants may sometimes misuse their power of representation controlling which is more important than giving it a blind eye for which the laws must necessarily be in place.

For the purpose of limiting the article, only three countries advertising regime have been included.

Various kinds of advertising:

1. Comparative advertising – which compares the advertised brand with another brand of the same product;³
2. Competitive advertising – which contains little information about the advertised product and is used only to help a producer maintain a share of the market for that products;
3. Information advertising – which gives the information about the suitability and quality of the product;

²Namrata Bhagwatula, Advertising Laws in India: What the present is – What the future needs to be, GAME CHANGER LAW ADVISORS, (Feb.20, 2021, 09:30 PM), <https://gamechangerlaw.com/advertising-laws-in-india-what-the-present-is-what-the-future-needs-to-be/> t.

³ 2 Madhavi Goradia Divan, Facets Of Media Law 360-370(2d ed. 2013).

4. Ambush advertising – where an official sponsor for an event is outdone by a rival , typically through the sponsorship of the individual stars ;
5. Political advertising – to garner votes of the political candidate or party ;
6. Tele- marketing – where the business is solicited from the potential consumers over the telephone.

Common advertising techniques include:

1. Puffery – this practice refers to advertising or other sales representations that use superlatives or exaggerations to market a product.
2. Testimonials- a testimonial is a statement given by a celebrity often claiming superiority of the product.
3. Free gifts, discounts and contests- sometimes advertisements offer the prizes, offer prizes, free gifts or heavy discounts.
4. Misrepresentation- The consumer is often allured into buying the product by active misrepresentation.⁴

Issues in Advertising:

Deceptive Advertising- As advertisements aim to influence or persuade customers into buying products that they promote, many a times advertisements illegally use false statements and misrepresentations about their products in violation of customers' right to know exactly what they are purchasing.

Misleading Prices- Companies often hide or fudge prices of products/ services advertised in order to attract a larger customer base. The prices they advertise often do not disclose additional charges and the overall cost to the customer. Such advertisements are commonly found in the airlines, mobile telephony⁵

Industry and memberships for clubs. A common case of such misleading pricing is the 'end-of-season sales' when the prices of products are often knocked down and advertised in the media in order to push up sales. But what such advertisements don't disclose is that such knocked down/ discounted prices are actually pushed up before providing the discount so that the profit margin of the seller on such products remains intact.

⁴ 2 Madhavi Goradia Divan , Facets of Media Law 370-371(2d ed. 2013).

⁵Advertising Laws in India: An Overview, LAW TEACHER , (Feb. 20, 2021 ,09:30 PM), <https://www.lawteacher.net/free-law-essays/commercial-law/advertising-laws-in-india-law-essays.php>.

Failure to maintain standards- At times companies/ sellers/ service providers cleverly bypass established standards applicable to the products by adopting a different standard which provides a sense of enhanced efficacy of the goods/ services in the mind of the customer. This also provides unfair advantages to the seller over its competitors. Such advertisements are often seen in advertisements that compare the products advertised against the products of other leading brands.

Labeling issues- Labeling on products can also be misleading. They may, at times, misrepresent or obfuscate the actual weight of the packets or adopt a different standard of measurement contrary to the generally accepted standards. The packaging of products may also use exotic high sounding words such as “organic”, “eco-friendly”, “natural”, “mild” etc. without a proper explanation of the terms and such terms may even be used for products that have nothing to do with such concepts.

Surrogate Advertisements- Whenever the advertisements for certain products like tobacco or liquor which have adverse effect on health and are restricted or banned, the manufacturers tend to launch new products with similar brand names. A blitzkrieg of advertisements is launched in the media for such new products with an aim to reinforce or sustain the banned products/ advertisements⁶.

II. VARIATION ANALYSIS OF ADVERTISING LAWS ACROSS THE WORLD

(A) INDIA

Advertising are at heart of commercial speech, which the Supreme Court has held is a part of Freedom of speech and Expression , Fundamental Right under article 19(1)(a) of the Constitution of India. Advertising is one of the means of mass communication along with other means of publicity ,sales promotion and public relations indeed without its services in communicating with public, many industrial and business firms would be forced to shut up, their employers would be thrown out of the work and on economy would collapse definition advertising. It presents the most persuasive possible selling at the lowest cost which means it is actually a promotional message and a selling idea.

While there are several legislative provisions, there is no uniform code of law that deals and covers all aspect of advertising. The industry has so far resisted attempts to create a uniform advertisement code or single regulator. India like several other jurisdictions, prefer Self regulations laws for advertisements. Self -regulation Laws refer to the standard and code that

⁶ Advertising Laws in India: An Overview, LAW TEACHER , (Feb. 20, 2021 ,09:30 PM), <https://www.lawteacher.net/free-law-essays/commercial-law/advertising-laws-in-india-law-essays.php>.

provide guidelines for the ethical and professional conduct in advertising. These codes have been laid down by various authorities such as – Advertising Standard Councils of India. (ASCI), Advertising Agencies Association of India (AAAI), Indian Newspaper Society (INS) Doordarshan which are adopted to guide Advertisers, Advertising Agencies, Public Sector, publication and Media.

The ASCI while is a self-regulatory body, The Reserve Bank of India (RBI), The Securities and Exchange Commission of India (SEBI), and the Insurance Regulatory Development Authority of India (IRDA) regulate advertisement in their respective sectors. State- owned broadcasters Doordarshan and All India Radio (AIR) is under the control of Parser Bharti (government owned public broadcasting agency) formulated under this act. The Department of Consumer Affairs also maintains an online portal where consumers can post their grievances against misleading advertisements.⁷

1. Role of the Advertising Standards Council of India (ASCI)

ASCI are a voluntary self-regulatory council established in 1985 to promote responsible advertising and to enhance public confidence in advertisements. The council's objectives are:

1. To ensure the truthfulness and honesty of representations and claims made by 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 regarded as hazardous to society or to individuals.
4. To ensure that advertisements observe fairness in competition so as to inform the consumer on choices in the marketplace while observing the canons of generally accepted competitive behavior in business

ASCI consists of a Board of Governors and a Consumer Complaints Council. The Board of Governors comprises four members from each of the four sections connected with the advertising industry:

1. Advertisers
2. Advertising Agencies

⁷ Priyanka Deb , Advertising Laws in India, LEGAL DESIRE, (Feb 20, 2021, 09:35 PM.), <https://legaldesire.com/advertising-laws-in-india/>.

3. Media (owners of press, television, radio etc.)
4. Related sectors (e.g. outdoor agencies, PR, market researchers, ad producers, business schools)

2. The ASCI Code: Self-Regulation of Advertising

To regulate advertisement in India, ASCI has adopted a Code for Self-Regulation in Advertising ("ASCI Code"), which applies to all involved in the commissioning, creation, placement, or publishing of advertisements. This ASCI Code applies to advertisements read, heard, or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to a significant number of consumers in India.

Though non-statutory, the ASCI Code is recognized under various Indian laws in addition to being adopted by advertising-industry bodies. Notably, the ASCI Code provides that it is not in competition with any law, its rules, or the machinery through which they are enforced, thus the ASCI Code is designed only to complement legal controls under such laws and not to usurp or replace them.⁸

(B) Laws in India:

Statutory Regulation of Advertising Complementing the ASCI Code is Indian laws governing specific media, specific populations, and specific goods and services. The most significant of these laws are listed here.

Laws Governing Media

- The Press Council Act 1978
- Cable Television Network Rules, 1994
- Code for Commercial Advertising on Doordarshan and All India Radio
- Electronic Media Monitoring Centre (EMMC)
- Norms for Journalist Conduct issued by the Press Council of India
- Code of Conduct of the News Broadcasters Association Laws Protecting Society and the Consumer
- Emblems and Names (Prevention of Improper Use) Act, 1950

⁸ **Hemant Goyal & Jitender Jain**, Advertising Law In India - Part 1, MONDAQ, (Feb. 20, 2021, 09:45 PM), [https://www.mondaq.com/india/advertising-marketing-branding/192384/advertising-law-in-india--part-1#:~:text=At%20present%20in%20India%2C%20there,Council%20of%20India%20\(ASCI\),](https://www.mondaq.com/india/advertising-marketing-branding/192384/advertising-law-in-india--part-1#:~:text=At%20present%20in%20India%2C%20there,Council%20of%20India%20(ASCI),)

- Young Persons (Harmful Publications) Act, 1956
- Companies Act, 1956
- Standards of Weight & Measures Act, 1976
- Indecent Representation of Women (Prohibition) Act, 1986
- Consumer Protection Act, 1986
- Laws related to intellectual property rights Industry-Specific Laws
- The Drugs and Cosmetic Act, 1940⁹
- The Transplantation of Human Organs Act, 1994
- The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954
- The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- Advocates Act, 1961
- Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992
- Securities and Exchange Board of India Act, 1992
- The Prize Chits and Money Circulation Schemes (Banning) Act, 1978
- Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003
- Public Gambling Act, 1867, the Lotteries (Regulation) Act, 1998 and the Prize Competitions Act, 1955
- Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002
- The Food Safety and Standards Act, 2006

Products and Services Banned From Advertising

Firearms, Weapons, and Ammunition Sale and purchase of such items require a license from government authorities. Therefore, advertisements related to such products are not permissible in India under the Arms Act, 1959.

⁹ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

Human Organs the Transplantation of Human Organs Act, 1994 provides for the regulation of removal, storage, and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs.¹⁰

This law prohibits any advertising inviting persons to supply, or offering to supply, any human organ for payment.

Infant Milk Food (Formula) Advertising forbidden in order to encourage natural feeding of infants.

Legal Services the Bar Council of India Rules formulated under the Advocates Act, 1961 prohibit advertisement by Indian advocates and their firms. These rules were enacted and enforced to curb the false advertisement of lawyers to gain publicity to attract clients.

Magical Remedies the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954 prohibits advertisement of magical remedies of diseases and disorders.

Services for Prenatal Determination of Sex the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 prohibits advertisements relating to prenatal determination of sex

Physicians Under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, issued under the Indian Medical Council Act, 1956, physicians are not allowed to advertise their services in any form or manner of advertising through any mode, as soliciting of patients directly or indirectly, by a physician, by a group of physicians, or by institutions or organizations is unethical. (A physician refers to a doctor with a qualification of MBBS or MBBS with a postgraduate degree/diploma or with an equivalent qualification in any medical discipline.) However, medical practitioners are allowed to make a formal announcement in press regarding the following:

- On starting practice
- On change of type of practice
- On changing address
- On temporary absence from duty
- On resumption of another practice¹¹

¹⁰ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

¹¹ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

- On succeeding to another practice

Public declaration of charges Prize Chits and Money Circulation Schemes the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 prohibits advertisements relating to prize chit and money circulation schemes. A prize chit is defined as follows: Any transaction or arrangement under which a person collects monies by way of contributions or subscriptions or by sale of units, certificates, or other instruments or in any other manner or as membership fees or admission fees or service charges to or in respect of any savings, mutual benefit, thrift, or any other scheme or arrangement by whatever name called, and utilizes the monies so collected inter alia for a specified number of subscribers as determined by lot, draw, or in any other manner, prizes or gifts in cash or in kind.

Tobacco Products the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (“Tobacco Prohibition Act”) prohibits all direct and indirect advertising of tobacco products in all media.

Regulations Related to Product and Service Advertising Alcohol The Cable Television Network Rules, 1994, the Advertising Codes of Doordarshan and the All India Radio, and Norms for Journalist Conduct issued by the Press Council of India prohibit any advertisement directly or indirectly promoting the production, sale, or consumption of cigarettes, tobacco products, wine, liquor, or other intoxicants. However, some states allow advertising through billboards, signboards, and such media, but subject to many restrictions. Also, the ASCI Code prohibits use of minors for advertising alcohol products.

Advertisement by Companies to Shareholders, Etc. The Companies Act, 1956 stipulates that no deposits from the general public should be accepted by public companies (other than non-banking financial companies) without issuing advertisement following the prescribed norms. The law also specifies various provisions relating to advertisement by Indian companies.

Food As per the Food Safety & Standards Act, 2006, no advertisement relating to the standard, quality, quantity or grade-composition, and no representation concerning the need for, or the usefulness of any food can be made which is misleading or deceiving or which contravenes the provisions of this law or¹² rules and regulations made there under. Nutritional Claims Nutritional claims by the advertiser for selling a product undergo a keen check by the Food Safety and Standards Authority of India, which is the country’s food regulator under the

¹² Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

provisions of the Food Safety & Standards Act, 2006. This regulatory body prohibits any kind of false nutritional claims made by the companies and prohibits them from broadcasting on television. Infant Milk Food (Formula) the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 prohibits the advertising of infant milk substitutes or feeding bottles.

Gaming -The federal structure in the Constitution of India explicitly gives the states the right to legislate upon “gambling and betting.” The Public Gambling Act, 1867 prohibits gambling activities in India. However, the law permits games of mere skill. In April, 2011, the Information Technology Act, 2000 was also amended to ban Internet gambling and online betting websites. The Lotteries (Regulation) Act, 1998 gives power to the concerned State government to hold lotteries subject to prescribed conditions. Under section 294-A of the Indian Penal Code, advertisements of a lottery unless it is in accordance with the Lotteries (Regulation) Act shall be punishable. The Prize Competitions Act, 1955 controls and regulates prize competitions in certain parts of India and prohibits the advertisement of unauthorized prize competitions. Of note, though unrelated to advertising, the Indian government’s Foreign Direct Investment Policy does not permit foreign investment in “Lottery Business including government /private lottery, online lotteries, gambling and betting, including casinos, etc.”

Medical Devices-The authority principally responsible for regulating medical devices in India is the Central Drugs Standard Control Organization (“CDSCO”) under the provisions of the Drugs & Cosmetics Act, 1940. CDSCO’s functions include regulating the medical devices industry by approving the import, manufacture, and sale of medical devices in India. Medical Services An institution run by a physician for a particular purpose such as a maternity home, nursing home, private hospital, rehabilitation centre or any type of training institution, etc., may be advertised in the lay press, but such advertisements should not contain anything more than the name of the institution, type of patients admitted, type of training and other facilities offered and the fees. Nonprofit Fundraising- any funding for public nonprofit activities requires registration with the concerned state government. Also¹³, fundraising from foreign entities requires prior approval of the Indian government under the provisions of the Foreign Contribution Regulations Act, 2010.

Nutritional Supplements- These are regulated under the Food Safety and Standards Act, 2006, under the same terms as for food. Occult (“Psychic”) Services These services are not legally

¹³ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

recognized in India and are not permissible under the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954. Packaged Goods, Etc.

The Standards of Weight & Measures Act, 1976 prohibits issuing advertisements otherwise than in accordance with the provisions of this law.

Pharmaceuticals Prescription-only drugs are those medicines those are listed in Schedules H and X of the Drug and Cosmetics Rules, 1945. The phrase over-the-counter (OTC) has no legal recognition in India. All the drugs not included in the list of “prescription-only drugs” are considered to be non-prescription drugs (or OTC drugs). The Drugs and Cosmetics Act, 1940 prohibits advertisements for any drug or cosmetic from using reports of tests or analysis of the Central Drugs Laboratory or by a government analyst. This act also requires advertisement of certain medicines to be made in a prescribed manner.

Political Advertising- the Representation of the People (Amendment) Act, 1996 has the following provisions .Political advertisements are prohibited for a period of forty-eight hours ending with the hours fixed for conclusion of polling for any elections in a given polling area. The law stipulates that during this time, a person shall not display to the public any election matter by means of cinematography, television, or other similar apparatus. Use of displaying posters, signboards, and similar means for political advertisement in any public place must be strictly in accordance with the relevant provisions of the local laws .Equitable opportunity to all political parties and candidates are to have access to public advertisement space for election-related advertisements during the election period Use of private premises for political advertisement may be made only with the voluntary permission of the occupant .Prohibition of any and all advertisements is at the cost of the public exchequer regarding achievements of the political party/ruling government ¹⁴

The statute provides for a penalty of imprisonment and/or fine for anyone, including advertisers, who contravenes these provisions.

Products Related to Sexuality Advertisements related to sexuality are allowed with the provision that there should not be any indecent representation of women under the Indecent Representation of Women (Prohibition) Act 1986. Products must comply with the Drugs and Cosmetic Act 1940 and other certification rules under the Cable Television Network Rules 1994.

¹⁴ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

Professionals such as Chartered Accountants, Company Secretaries, and Cost Accountants These professionals are prohibited from soliciting clients or professional work by advertisement. However, they may issue advertisements about their firm or the services of their firm, through any mode of transmission, showing the following details:

- Names of partners
- Address and website, telephone, mobile, e-mail, fax number
- Year of establishment
- Additional recognized qualifications
- Languages spoken by the partner(s)
- Honors or awards in the field of teaching, research, authorship, and so on, conferred by nationally accredited institutions
- Details of networking through own office or through formal association in other places within and outside India
- Number and name of employees of the firm and their qualifications and other particulars, willingness (or unwillingness) to accept work, either generally or in particular areas of practice
- Display of a passport-size photograph of firm members¹⁵
- Particulars of services
- Names of clients and services provided

Religion- under the Cable Television Networks Rules 1994, the Advertising Codes of Doordarshan & All India Radio and Norms for Journalist Conduct issued by the Press Council of India, advertisement based on religion or to hurt religious sentiments are not allowed. Also, such advertisement may be punishable under the Indian Penal Code 1860.

Securities -The Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 issued under section 30 of the Securities and Exchange Board of India Act, 1992 prohibits fraudulent or unfair trade in securities. These regulations further provide that dealing in securities shall be deemed to be a

¹⁵ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

fraudulent or an unfair trade practice if it involves an advertisement that is misleading or contains distorted information and which may influence the decision of the investors.

Sex (Adult) Services Advertisement pertaining to sexual services is illegal in India.

Tobacco Products Advertising prohibited.

Toys -There is no specific restriction on the advertisement of toys provided advertisements are in compliance with other applicable laws.

Regulations Related to Advertising Methodology Advertising to Children The Young Persons (Harmful Publications) Act, 1956 prohibits advertisements relating to any harmful publication, i.e., any publication that tends to corrupt a young person (person under the age of 18 years) by inciting or encouraging him or her to commit offenses or acts of violence or cruelty or in any other manner whatsoever. According to the ASCI Code, advertisements addressed to minors shall not contain anything, whether in illustration or otherwise, which might result in their physical, mental, or moral harm or which exploits their vulnerability. For example, advertisements may not: ¹⁶

- Encourage minors to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels or the like
- Feature dangerous or hazardous acts which are likely to encourage minors to emulate such acts in a manner which could cause harm or injury
- Show minors using or playing with matches or any flammable or explosive substance; or playing with or using sharp knives, guns, or mechanical or electrical appliances, the careless use of which could lead to their suffering cuts, burns, shocks, or other injury
- Feature minors in promoting tobacco or alcohol-based products
- Feature personalities from the field of sports, music, or cinema for products which, by law, either require a health warning in their advertising or cannot be purchased by minors.

Celebrity Endorsements -No current restrictions

Comparative Advertising- The provisions pertaining to comparative representation were part of “Unfair Trade Practice” under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). After repeal of the MRTP Act, the provisions relating to unfair trade practices

¹⁶ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

were inserted in the Consumer Protection Act, 1986. However, a business entity cannot claim relief against unfair comparative advertising under the Consumer Protection Act, as a business entity is not a consumer. This can be taken up only by consumer associations, the central government, or state governments, and it does not provide protection to the business entity equal to the protection under the MRTP Act. Thus, under the existing law, a manufacturer whose goods are disparaged has no standing to seek a remedy. Presently, in the absence of any specific legislation regulating comparative advertising, disputes are decided by various courts on the basis of the facts in each case. However, ASCI Code (which is made part of the Cable Television Network Rules, 1994 as well) permits advertisement containing comparisons including those where a competitor is named in the interests of vigorous competition and public enlightenment, provided: ¹⁷

- It is clear which aspects of the advertiser's product are being compared with which aspects of the competitor's product
- The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case
- The comparisons are factual, accurate and capable of substantiation
- There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared
- The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication Presently, ASCI is actively taking action against any advertisements making unsubstantiated claims, exaggeration, unfair denigration in violation of the ASCI Code.

Contests -The Public Gambling Act, 1867 prohibits gambling activities in India. However, the law permits games of mere skill.

Deceptive, Misleading, or False Advertising Deceptive or misleading advertisements are restricted under various legislation including the Consumer Protection Act, 1986; the Cable Television Network Rules, 1994; the Norms for Journalist Conduct issued by the Press Council of India Act, and the ASCI Code.

¹⁷ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

Disguised Ads and Advertorials- the Norms for Journalist Conduct issued by the Press Council of India, the Cable Television Network Rules, 1994, and the Advertising Code of Doordarshan require that advertisements must be clearly distinguishable from news content and programs.

Free Gifts/Samples the Consumer Protection Act 1986, Section 2(3) (a) states that the following constitute unfair trade practice:¹⁸

- The offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole
- The conduct of any contest, lottery, or game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use, or supply of any product or any business interest.

The Norms for Journalist Conduct issued by the Press Council of India has stated that journalists should not accept gifts including those given by the advertisement agencies for publication of material relating to their clients or otherwise.

Limits to Free Speech Article 19(1) (a) of the Constitution of India protect the right to freedom of speech and expression, which is also extended to advertisements. However, like any other right, this freedom is also subject to reasonable restrictions imposed by Article 19(2) of the Constitution of India.

Furthermore, the ASCI Code states that no advertisement shall be permitted which:

- Derides any race, caste, color, creed, or nationality
- Tends to incite people to crime or to promote disorder and violence or intolerance
- Presents criminality as desirable or directly or indirectly encourages people, particularly minors, to emulate it or conveys the modus operandi of any crime
- Adversely affects friendly relations with a foreign state.

Another restriction is dictated by the Emblems and Names (Prevention of Improper Use) Act, 1950.

Length of Commercial, Volume, and Similar Restrictions -The Telecom Regulatory Authority of India has issued the Standard of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012, which regulates the duration of broadcasting an

¹⁸ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

advertisement and the length of the commercial. The main features of these regulations are as follows:¹⁹

- Advertisements exceeding 12 minutes in a clock hour; any shortfall of advertisement duration in any clock hour shall not be carried over by any broadcaster in any broadcast of its program
- The time gap between end of one advertisement session and the commencement of next advertisement session shall not be less than 15 minutes (30 minutes in case of a movie). However, this restriction is not applicable to live broadcast of a sporting event.

Rights of Privacy -The Electronic Media Monitoring Centre of the Ministry of Information and Broadcasting, Government of India, has made self-regulatory guidelines applicable to the broadcasting service provider wherein, to protect the privacy of an individual, it is stipulated that no program (including advertisement) should invade an individual's personal or private affairs or privacy unless there is an identifiable larger public interest.

Product Demonstrations- No current restrictions Regional Public and/or Community Standards Under various legislation, including the Cable Television Network Rules, 1994;

Norms for Journalist Conduct issued by the Press Council of India Act, and the ASCI Code, no advertisement to hurt community or any section of society is allowed. Also, such advertisements are punishable under the Indian Penal Code 1860.

Rebates- No current restrictions Sex in Advertising the Indian Penal Code 1860 prohibit obscene publications. Further, the Indecent Representation of Women (Prohibition) Act, 1986 prohibits indecent representations of women.

Sponsorships Products- which are banned from advertising may not be used to provide any kind of sponsorship. Also, misleading representation of sponsorship is an unfair trade practice under the Consumer Protection Act, 1986.

Subliminal Advertising- While there is no laws defining subliminal advertising or to restrict such practice, misleading advertisements are banned and restricted.²⁰

Surrogate Advertising -The ASCI Code provides that advertisements of products whose advertising is prohibited or restricted by law or by the ASCI Code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is

¹⁹ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

²⁰ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

not prohibited or restricted by law or by ASCI Code. To determine if there is an indirect advertisement of prohibited products due attention shall be given to the following:

- Visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner.
- The advertisement must not make any direct or indirect reference to the prohibited or restricted products.
- The advertisement must not create any nuances or phrases promoting prohibited products.
- The advertisement must not use particular colors and layout or presentations associated with prohibited or restricted products.
- The advertisement must not use situations typical for promotion of prohibited or restricted products when advertising the other products.

The Cable Television Networks Rules, 1994- also impose similar restrictions to curb surrogate advertising.

Sweepstakes Offers -No current restrictions. However, any offer to deceive consumers is banned from advertising, and proper legal action will be taken against the responsible parties.

Testimonials -Any testimonial must be true, failing which appropriate actions can be taken by ASCI and under the Consumer Protection Act 1986.

Tie-In Offers No specific restrictions ²¹

Use of a Public Person's Image or Name No advertisement should be in violation of the Emblems and Names (Prevention of Improper Use) Act, 1950, which prohibits the improper use of names or pictorial representation of certain famous persons for commercial use. Accordingly, names or images of Mahatma Gandhi, Jawaharlal Nehru, Indira Gandhi, Shivaji Maharaj or the Prime Minister of India or the words “Gandhi,” “Nehru” or “Shivaji” may not be used in advertisements.

Use of Children in Advertising -No current restrictions, but other applicable laws need to be followed.

Use of Foreign Language in Advertising No current restrictions, but other applicable laws need to be followed.

²¹ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

Use of Models as Doctors, Nurses, Lawyers, or other Professionals- There are no restrictions on the use of models as doctors, nurses, or lawyers; however, there should be no misleading or controversial advertisement.

Violence in Advertising -The Cable Television Network Rules, 1994, Norms for Journalist Conduct issued by the Press Council of India Act, Advertising Code of Doordarshan, and the ASCI Code prohibit any violence in advertisements. Regulations Related to Media Channels Billboard Advertising Outdoor advertisement through billboards is regulated by jurisdictional municipal corporations. The content of the advertisement should, however, be in accordance with the ASCI Code and other applicable laws.

Digital Media Advertising Online advertisement and website content including social media sites such as Face book and Twitter must comply with a range of marketing, consumer, privacy, and contract laws. Online advertisers should comply with ASCI, the Indian Penal Code, the Information Technology Act, 2000 and other applicable laws. For this purpose, the Information Technology Act was amended in 2011.

Direct Mail Advertising- Currently, no regulation exists specific to direct mail advertising. However, any such advertisement has to be in compliance with the ASCI Code and other applicable laws.²²

Email Advertising (Spam) currently, no regulation exists specific to direct mail advertising. However, any such advertisement has to be in compliance with the ASCI Code and other applicable laws.

Newspaper and Periodical Advertising- the Press Council of India constituted under the Press Council of India Act 1978 has issued Norms for Journalist Conduct, a reference guide for the press. These norms include advertising norms similar to provisions in the ASCI Code and prohibit, inter alia, advertisements that are vulgar; advertisements promoting cigarettes, tobacco products, wine, liquor, and other intoxicants; advertisements hurting religious or communal sentiments; or any advertisement prohibited by any other law. Also, ASCI have approached the Press Council of India to incorporate the ASCI Code into its regulations. Radio and Doordarsan Advertising the Code for Commercial Advertising on Doordarshan and All India Radio: All advertisement on Doordarshan and All India Radio (“AIR”) should conform to the code issued by Director General of each Doordarshan and AIR respectively. These codes

²² Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

have also mandated compliance to the ASCI Code and in general prohibit any advertisement containing the following:

- Criticism of friendly countries
- Attack on religions or communities
- Obscenity
- Defamation
- Incitement to violence or anything against maintenance of law and order
- Contempt of court
- Aspersions against the integrity of the president and judiciary
- Anything compromising the integrity of the nation
- Criticism by name of any person.²³

Television Advertising -The advertising code issued under the Cable Television Network Rules, 1994 require advertising carried on the cable service to conform to the laws of the country and not to offend morality, decency, or religious sensibilities of the subscribers. The rules make the ASCI Code compulsory for television and state that no advertisement which violates the ASCI Code shall be carried on the cable service. Under the rules, no advertisement shall be permitted though cable services which

- Derides any race, caste, color, creed, or nationality
- Is against any provision of the Constitution of India
- Tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way
- Presents criminality as desirable
- Exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or a State dignitary
- In its depiction of women, violates the constitutional guarantees to all citizens. In particular, no advertisement shall be permitted which projects a derogatory image of women

²³ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

- Exploits social evils like dowry, child marriage
- Promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants. However a product that uses a brand name or logo which is also used for cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants, may be advertised subject to prescribed conditions.
- Promotes infant milk substitutes, feeding bottles, or infant food (defined as any food which is represented as compliment to mother's milk to meet the growing nutrition needs of the infant after the age of four months) ²⁴
- Be wholly or mainly of a religious or political nature or be directed towards any religious or political end
- Contain references which hurt religious sentiments
- Endanger the safety of children or creates in them any interest in unhealthy practices or shows them begging or in an undignified or indecent manner
- Promote goods or services that suffer from any defect or deficiency as mentioned in the Consumer Protection Act, 1986
- Contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or super-natural property or quality which is difficult to prove
- The picture and the audible matter of the advertisement shall not be excessively "loud"
- Contain indecent, vulgar, suggestive, repulsive or offensive themes
- All advertisement should be clearly distinguishable from the program and should not in any manner interfere with the program, use of lower part of screen to carry captions, static or moving alongside the program
- No program shall carry advertisements exceeding 12 minutes per hour, which may include up to 10 minutes per hour of commercial advertisements, and up to two minutes per hour of a channel's self promotional programs.

News Broadcasters Association Regulations- the News Broadcasters Association (NBA) represents the private television news and current affairs broadcasters in India. NBA presently

²⁴ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

has 20 leading news and current affairs broadcasters (comprising 45 news and current affairs channels) as its members²⁵.

According to the News Broadcasting Standards Regulations issued by NBA, (NBA Regulations), any broadcast (which includes advertisement) should be in compliance with NBA's code of conduct. The code has a procedure for complaints against a broadcaster who is in breach inter alia of the following:

- Depiction of violence or intimidation against women and children
- Nudity
- Endangering national security
- Refraining from advocating or encouraging superstition and occultism Regulatory Agencies Indian Broadcasting Foundation and Broadcasting Content Complaints Council (BCCC)²⁶

3. Commercial speech as fundamental right:

History of the advertising can be sketched from the *Hamdard dawakhana V. Union of India*²⁷ case, where the provisions of the drugs and magical remedies (Objectionable Advertisements) Act, 1954 were challenged; its objective was to prevent self medication and advertisements that offend morality and decency. The Supreme Court held that although the advertisement was a form of speech it ceased to fall within the scope of the concept of the free speech when it took the form of the commercial advertisement seeking to promote trade or commerce.²⁸

The Supreme court in the, *Sakal Papers (P) limited V. Union of India*²⁹, held that the curtailment of the advertisements would be hit by the article 19(1) (a), since it would have a direct impact on the circulation of the newspapers.³⁰

The Supreme court in the *Indian Express Newspapers(Bombay) (p) Ltd. V. Union of India*³¹, held that the all commercial advertisements cannot be denied the protection of the article 19(1)(a) merely because they are issued by the businessmen.³²

²⁵ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

²⁶ Hemant Goyal, India: Advertising and Marketing Advertising Law, GLOBAL JURIX , (Feb. 20, 2021, 10:00 PM), <http://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf> .

²⁷ *Hamdard Dawakhana V. Union of India* ,A.I.R 1960 S.C. 554(India).

²⁸ 2 MADHAVI GORADIA DIVAN , FACETS OF MEDIA LAW 371(2d ed. 2013).

²⁹ *Sakal Papers (P) Limited v. Union of India* , A.I.R 1962 S.C. 305(India).

³⁰ 2 MADHAVI GORADIA DIVAN , FACETS OF MEDIA LAW 372(2d ed. 2013).

³¹ *Indian Express Newspapers (Bombay) (P) Ltd. Union of India* , A.I.R 1986 S.C. 515(India).

³² 2 MADHAVI GORADIA DIVAN , FACETS OF MEDIA LAW 372(2d ed. 2013).

But the Supreme Court's ruling in the *Tata Press Ltd. V. MTNL*³³, included the commercial speech or the advertising under the Article 19(1) (a) of the constitution. The case where the MTNL and the union of India filed a suit for a declaration that they alone had the right to publish the list of telephone subscribers under the rule 458 of the Indian telegraph rules, 1951 and seek for the injunction restraining the Tata press from publishing its yellow pages, a buyer's guide comprising advertisements given by the business persons, traders and professionals. The court held that the Tata's yellow pages was not a list of telephone subscribers but a buyers' guide comprising of the advertisements and that the government was not entitled to monopoly in respect of such information which was in nature of the commercial speech and therefore protected under the article 19(1)(a).³⁴

The Supreme Court reiterated the importance of the advertising in the *Hindustan times v. state of U.P*³⁵; in this case the Supreme Court struck down the order of the state government of Uttar Pradesh under the article 162 of the constitution. The court held that the advertisements in the newspapers play an important role in generating revenue and have a direct nexus with the circulation of the newspaper.³⁶

(B) UNITED STATES OF AMERICA

There are numerous federal laws governing advertising in the United States, many enforced by the Federal Trade Commission (FTC). There are general statutes prohibiting deceptive practices, as well as statutes governing specific marketing practices. Some key examples are:

- the FTC Act, which prohibits 'unfair or deceptive acts or practices';
- the Lanham Act, which is the federal false advertising statute; and
- The Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Consumer Financial Protection Bureau (CFPB) has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.³⁷

State and local law:

Each state also regulates advertising, both with general consumer protection statutes (many modeled on the FTC Act), as well as with statutes regulating specific practices (such as the

³³ *Tata Press Ltd V. MTNL*, A.I.R 1995 S.C. 2438(India).

³⁴ 2 MADHAVI GORADIA DIVAN , FACETS OF MEDIA LAW 371(2d ed. 2013).

³⁵ *Hindustan Times v. State of U.P*, A.I.R 2003 S.C. 250(India).

³⁶ 2 MADHAVI GORADIA DIVAN , FACETS OF MEDIA LAW 374(2d ed. 2013).

³⁷ Swati Sharma and Safir R Anand, Advertising and Marketing in India, LEXOLOGY, (Feb. 20, 2021, 10:10 PM). <https://www.lexology.com/library/detail.aspx?g=9fd41625-bced-4bcb-9d3c-96dabf86b673>.

administration of sweepstakes and contests). Some counties and municipalities also have consumer protection laws. These laws run the spectrum from general prohibitions on deception to specific requirements related to pricing and other retail practices. Some examples include:

- New York: the General Business Law in New York provides that ‘deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful’. New York law also prohibits ‘false advertising in the conduct of any business, trade or commerce or in the furnishing of any service’;
- California: the Business and Professions Code in California provides that it is unlawful to make any statement that ‘is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading’ -*Williams v Gerber Products Co*³⁸, and *Kwikset Corp v Superior Court*³⁹; and
- New York City: New York City prohibits ‘any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts’ (NYC Administrative Code, section 20-700). The New York Court of Appeals has interpreted the statute to give New York City broad authority to go after a wide range of deceptive practices -*Polonetsky v Better Homes Depot Inc*⁴⁰, and *Karlin v IVF America Inc*^{41, 42}

1. Regulatory bodies

Numerous regulatory bodies have authority over advertising and marketing. Among them are the following:

- the FTC is primarily responsible for enforcing the nation’s federal consumer protection laws, including the FTC Act, which prohibits ‘unfair or deceptive acts or practices’ (see 15 USC section 45); and
- State attorneys general and local district attorneys also have jurisdiction to enforce state and local consumer protection laws.

In addition, there are regulatory agencies charged with responsibility over specific industries and their advertising and marketing practices:

³⁸*Williams v Gerber Products Co*, 523 F3d 934 (Ninth Circuit 2008)

³⁹ *Kwikset Corp v Superior Court*, 51 Cal 4th 310 (2011)

⁴⁰ *Polonetsky v Better Homes Depot Inc*, 735 NYS 2d 479 (2001)

⁴¹ *Karlin v IVF America Inc* 690 NYS 2d 495 (1999)

⁴² Swati Sharma and Safir R Anand, Advertising and Marketing in India, LEXOLOGY, (Feb. 20, 2021, 10:10 PM), <https://www.lexology.com/library/detail.aspx?g=9fd41625-bced-4bcb-9d3c-96dabf86b673>

- the US Food and Drug Administration (FDA) is charged with regulating prescription drug and biomedical advertising (see, for example, 21 CFR 312.7(a));
- the CFPB has authority to implement and enforce federal consumer financial law for ‘non-bank’ financial companies (see, for example, 12 USC section 5491);
- the Department of Transportation has jurisdiction to regulate airline advertising (see, for example, 49 USC section 41712);
- the Securities Exchange Commission has control over the false advertising of securities (see, for example, Securities Act of 1933 and Securities Exchange Act of 1934);
- the Financial Industries Regulatory Authority (FINRA) has a variety of rules and guidelines affecting advertising by its members (see, for example, FINRA Rule 2210); and
- The Federal Alcohol Administration regulates unfair competition, including false advertising, in connection with the interstate sale of alcoholic beverages (see, for example, 27 USCA sections 205(e), (f)).⁴³

Regulators in the United States have been particularly focused in recent months on disclosures by influencers and other endorsers of their connection with an advertiser. The FTC and the states have been actively pursuing measures and cases that require marketers to sufficiently disclose any material connection between the advertiser and the endorser speaking on their behalf. Other areas of concern are claims about native advertising (e.g., adverts designed to mimic the look and feel of editorial content), ‘Made in the USA’ claims, environmental benefits, health and nutrition, the sufficiency of digital disclosures on small screens and mobile devices, and privacy.

Temporary restraining orders prohibiting publication of advertising pending a preliminary injunction hearing are possible, but they are rarely granted. First Amendment concerns and the need for evidence of the meaning actually communicated are grounds for waiting for a hearing. However, where advertising makes a claim that is found to be literally false, a court may issue a temporary order prohibiting publication pending a hearing. Within a week to 10 days of a section 43(a) action, it should be possible to have a hearing - usually devoted to the interpretation of the advertising and the adequacy of the substantiation. Irreparable injury is presumed if likelihood of success on the merits of a false advertising claim is established by a direct competitor. In most cases the ruling on a preliminary injunction has been dispositive.

⁴³ Swati Sharma and Safir R Anand, Advertising and Marketing in India, LEXOLOGY, (Feb. 20, 2021, 10:10 PM), <https://www.lexology.com/library/detail.aspx?g=9fd41625-bced-4bcb-9d3c-96dabf86b673>

Frequently, the parties consent to one hearing, combining the preliminary injunction hearing with the trial. Altering the advertising that has been preliminarily enjoined is usually less expensive than continuing the litigation. Permanent injunctions are granted without proof of lost sales.

One tactic that has met with mixed results is to pull the offending advertising and submit revised material to the court. In order to recover damages, a plaintiff must establish actual consumer confusion or deception or establish that the defendant's actions were intentionally deceptive, giving rise to a rebuttable presumption of consumer confusion. The court may treble actual damages and award attorneys' fees under sections 35 and 36 of the Lanham Act. A competitor's damages may include the profits obtained during the time that the false advertising was in use, as well as an amount equal to the cost of the advertising campaign in order to permit advertising to correct the misimpression. Such damages may only be available where the advertising was published willfully and in bad faith.⁴⁴

2. Laws in USA

1. Section 5 of the Federal Trade Commission Act:

You should be aware that the Federal Trade Commission Act provides a comprehensive framework that enables FTC to carry out its law enforcement initiatives. Under Section 5 of the FTC Act (15 U.S.C. Section 45(a) (1), "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful". FTC relies on Section 5 and on other more specific consumer protection laws in carrying out its mission. Advertising a product or service certainly fits under this category. Under Section 5, FTC will find that a representation, omission, or practice is deceptive if it's:

- likely to mislead consumers acting reasonably under the circumstances; and
- Material, that is, likely to affect consumers' conduct or decisions with respect to the product at issue.

In August 1994, Congress amended Section 5 of the FTC Act to provide that an act or practice is unfair if the injury it causes or is likely to cause to consumers is:

- substantial;
- not outweighed by countervailing benefits to consumers or to competition; and

⁴⁴ Swati Sharma and Safir R Anand, Advertising and Marketing in India, LEXOLOGY,(Feb. 20, 2021, 10:10 PM), <https://www.lexology.com/library/detail.aspx?g=9fd41625-bced-4bcb-9d3c-96dabf86b673>

- Not reasonably avoidable by consumers themselves.

The remainder of this article tells you about some of the other more specific consumer protection statutes that nevertheless may affect your advertising and/or marketing.

2. Telemarketing and Consumer Fraud and Abuse Prevention Act

The Telemarketing and Consumer Fraud and Abuse Prevention Act require FTC to promulgate regulations:

- defining and prohibiting deceptive telemarketing acts or practices;⁴⁵
- prohibiting telemarketers from engaging in a pattern of unsolicited telephone calls that a reasonable consumer would consider coercive or an invasion of privacy;
- restricting the hours of the day and night when unsolicited telephone calls may be made to consumers; and
- Requiring disclosure of the nature of the call at the start of an unsolicited call made to sell goods or services.

The law expressly authorizes FTC to include within the rules' coverage entities that "assist or facilitate" deceptive telemarketing practices.

3. Telephone Disclosure and Dispute Resolution Act of 1992

The Telephone Disclosure and Dispute Resolution Act of 1992 requires FTC to promulgate regulations concerning advertising for, operation of, and billing and collection procedures for, pay-per-call or "900 number" telephone services. The regulations must include certain provisions, such as price disclosure requirements, mandatory warnings on services directed to children, and required disclosures in billing statements. The Act also directs FTC to promulgate a regulation extending to pay-per-call services the billing dispute provisions of the Fair Credit Billing Act, 15 U.S.C. Section 1666 et seq.

4. Do-Not-Call Registry Act of 2003

The Do-Not-Call Registry Act of 2003 authorized FTC under section 3(a) (3) (A) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. Section 6102(a) (3) (A), to implement and enforce a do-not-call registry. The Act also ratified the do-not-call registry provision of FTC's Telemarketing Sales Rule, 16 C.F.R. 310.4(b) (1) (iii), which

⁴⁵ John Lichtenberger, 12 Key Advertising Related Laws that You Should Know, LAW PUBLISH, (Feb.20 ,2021, 10:34PM) <https://www.lawpublish.com/12-key-advertising-related-laws-you-should-know.html>.

became effective on March 31, 2003.

5. Do-Not-Call Implementation Act

The Do-Not-Call Implementation Act authorizes FTC to collect fees to implement and enforce a do-not-call registry. The Act allows fees to be collected for fiscal years 2003 through 2007. The Act further requires the Federal Communications Commission (FCC) to issue a compatible do-not-call⁴⁶ registry rule and directs FTC and FCC to submit an annual report on the registry to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation for fiscal years 2003 through 2007.

6. Federal Cigarette Labeling and Advertising Act of 1966

The Federal Cigarette Labeling and Advertising Act of 1966 require FTC to submit annual reports to Congress as to:

- (a) The effectiveness of cigarette labeling,
- (b) Current practices and methods of cigarette advertising and promotion, and
- (c) Recommendations for legislation.

The statute was amended by the Comprehensive Smoking Education Act of 1986 (Pub. L. No. 98-474, 98 Stat. 2200), which establishes the text of four health-related warning labels and requires that cigarette packages and advertisements carry these warnings on a rotating basis.

7. Comprehensive Smokeless Tobacco Health Education Act of 1986

The Comprehensive Smokeless Tobacco Health Education Act of 1986:

Requires manufacturers, packagers, and importers of smokeless tobacco products to place one of three statutorily prescribed health warning labels on product packages and in advertisements, Bars advertising of smokeless tobacco products on radio and TV.

Directs FTC to require that the label warnings be displayed on a rotating basis, and that they be placed conspicuously on smokeless tobacco packages and in advertisements.⁴⁷

8. CAN-SPAM Act

The CAN-SPAM Act establishes requirements for those who send unsolicited commercial email. The Act bans false or misleading header information and prohibits

⁴⁶ John Lichtenberger, 12 Key Advertising Related Laws that You Should Know, LAW PUBLISH, (Feb.20 ,2021, 10:34PM) <https://www.lawpublish.com/12-key-advertising-related-laws-you-should-know.html>.

⁴⁷ John Lichtenberger, 12 Key Advertising Related Laws that You Should Know, LAW PUBLISH, (Feb.20 ,2021, 10:34PM) <https://www.lawpublish.com/12-key-advertising-related-laws-you-should-know.html>.

deceptive subject lines. It also requires that unsolicited commercial email provide recipients with a method for opting out of receiving such email and must be identified as an advertisement. In addition to enforcing the statute, FTC must issue rules involving the required labeling of sexually explicit commercial email and the criteria for determining the primary purpose of a commercial email. The Act also instructs FTC to report to Congress on the feasibility of a National Do-Not-E-Mail Registry, as well as requiring reports on the labeling of all unsolicited commercial email, the creation of a "bounty system" to promote enforcement of the law, and the effectiveness and enforcement of the statute.

9. Wool Products Labeling Act

Under the Wool Products Labeling Act, the manufacture, introduction, sale, transportation, distribution, or importation of misbranded wool is a violation of the FTC Act. The Act was amended, by the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, Section 301-307, 98 Stat. 1585, 1603, to require that:

- wool product labels indicate the country in which the product was processed or manufactured, and
- Mail order promotional materials clearly and conspicuously state whether a wool product was processed or manufactured in the United States or was imported.

10. Textile Fiber Products Identification Act

The Textile Fiber Products Identification Act deals with mandatory content disclosure in the labeling, invoicing, and advertising of textile fiber products. Under the Act, misbranding is unlawful, as is falsely or deceptively invoicing or advertising textile fiber products. The Act also directs the ⁴⁸ Commission to establish a generic name for each man-made fiber that does not as yet have such a name.

The statute was amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. No. 98-417) to require (1) that any textile fiber product processed or manufactured in the United States be so identified, and (2) that mail order promotional materials clearly and conspicuously indicate whether a textile fiber product was processed or manufactured in the United States or was imported.

11. Fair Packaging and Labeling Act

The Fair Packaging and Labeling Act directs FTC to issue regulations requiring that

⁴⁸ John Lichtenberger, 12 Key Advertising Related Laws that You Should Know, LAW PUBLISH, (Feb.20 ,2021, 10:34PM) <https://www.lawpublish.com/12-key-advertising-related-laws-you-should-know.html>.

all consumer commodities other than food, drugs, therapeutic devices, and cosmetics be labeled to disclose net contents, identity of commodity, and name and place of business of the product's manufacturer, packer, or distributor. The Act authorizes additional regulations where necessary to prevent consumer deception (or to facilitate value comparisons) with respect to descriptions of ingredients, slack fill of packages, use of "cents-off" or lower price labeling, or characterization of package sizes.

12. Fur Products Labeling Act

The Fur Products Labeling Act requires that articles of apparel made of fur be labeled, and that invoices and advertising for furs and fur products specify, among other things, the true English name of the animal from which the fur was taken, and whether the fur is dyed or used. The Act also requires FTC to issue a Fur Product Name Guide.⁴⁹

3. Tracing the history of the advertisement as a right:

Commercial speech” as a constitutional doctrine — initially (and even today) an exception from the First Amendment’s normal rules — was casually suggested by a U.S. Supreme Court opinion in 1942.

Then, in 1976, it was altered substantially when the Court recognized that such a talismanic exemption from the Constitution’s mandates was unsustainable. Later, it was transformed by repeated Court cases that resulted in a solid First Amendment rule that commercial speech that is neither false nor misleading is fully protected speech. By 2001, the doctrine approached maturity when the Court recognized that even tobacco advertising was entitled to significant First Amendment protection.

The concept of commercial speech, as a category of speech without First Amendment protections, was invented almost offhandedly. In the 1942 decision *Valentine v. Chrestensen*⁵⁰, the Supreme Court, without analysis or comment, created the so-called “first commercial speech doctrine,” seemingly exempting such speech from any First Amendment protection.

With *Greater New Orleans Broadcasting*, the Court’s commercial-speech jurisprudence has solidified, into a steadfast First Amendment principle — with the *Central Hudson* test requiring government to justify, with real evidence, any limitations on commercial speech or advertising. But there remained one final hurdle — tobacco, a legal product established by decades of

⁴⁹ John Lichtenberger, 12 Key Advertising Related Laws that You Should Know, LAW PUBLISH, (Feb.20 ,2021, 10:34PM) <https://www.lawpublish.com/12-key-advertising-related-laws-you-should-know.html>.

⁵⁰*Valentine v. Chrestensen*, 316 U.S. 52 (1942).

scientific evidence to be both unhealthy and addictive.

But, in 2001 in *Lorillard Tobacco Co. v. Reilly/Altadis U.S.A. Inc. v. Reilly*,⁵¹ the Court ruled that comprehensive Massachusetts restrictions on tobacco advertising were unconstitutional under the Central Hudson test. While the state insisted that its regulations would deter underage smoking, the Court emphasized that this “theory” was no substitute for evidence showing that the regulations directly and materially advanced the state’s goal.⁵²

In May 2002, the California Supreme Court decided *Kasky v. Nike, Inc.*,⁵³ and sought to broaden the commercial-speech exception in order to penalize Nike for its assertive defense, in newspapers, television and other publications, of the value of “globalization” and for its rebuttal of specific charges made by anti-globalization activists against its overseas suppliers’ labor practices. The plaintiff, Marc Kasky, claimed that First Amendment protections did not apply because Nike’s publications were merely “commercial speech,” and the California court agreed (4-3) with Kasky. The court ruled that, because Nike’s statements in its press releases and letters to influential media entities were designed, at least in part, to protect the company’s profitability, the publications were “commercial speech.”⁵⁴

(C) Canada

Advertising in Canada is primarily regulated at the federal and provincial levels.

1. Regulatory Authorities:

Advertising Standards Canada ("ASC"), the advertising industry's self-regulatory body, maintains the Canadian Code of Advertising Standards (the "ASC Code"), by which advertisers must abide.

These include laws of “general application” that can apply to any advertising claim that is false or misleading (e.g., the general misleading advertising provisions of the federal Competition Act and provincial consumer protection legislation) and legislation governing particular types of advertising, such as anti-spam law (CASL), promotional contests, endorsements and testimonials (e.g., influencer marketing), “ordinary selling price” (OSP) claims and sales, consumer packaging and labeling and performance claims, among many others.

⁵¹ *Lorillard Tobacco Co. v. Reilly/Altadis U.S.A. Inc. v. Reilly*, 533 U.S. 525 (2001).

⁵² *Bruce E. H. Johnson*, Advertising & first amendment overview, FREEDOM FORUM INSTITUTE, (Feb. 20, 2021, 10:35PM), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/advertising-first-amendment-overview/>.

⁵³ *Kasky v. Nike, Inc*, 539 U.S. 654 (2003)

⁵⁴ *Bruce E. H. Johnson*, Advertising & first amendment overview, FREEDOM FORUM INSTITUTE, (Feb. 20, 2021, 10:35PM), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/advertising-first-amendment-overview/>.

In addition to federal and provincial legislation, many sector-specific and profession-specific codes of conduct can apply (e.g., in the context of regulated professions, such as real estate, dentistry, chiropractors, etc.), as well as social media platforms' rules, depending on the type of marketing.⁵⁵

As such, a significant part of advertising law is determining whether a particular type of advertising, such as a performance claim, contest, endorsement/testimonial or marketing in a specific industry (e.g., food, drugs, cosmetics, cannabis or alcohol), is subject to regulatory rules.

2. Laws in Canada:

Given the potential penalties and negative impact on a brand, advertisers and their agencies and counsel should ensure that marketing complies with Canadian laws.

Competition act

Federally, the Competition Act is the primary legislation governing advertising and marketing in Canada, which is enforced by the federal Competition Bureau. The Competition Act contains both general criminal and civil misleading advertising provisions, which prohibit false or misleading representations made to the public to promote a product or any business interest.

The Competition Act also contains many specific provisions that either prohibit or set out specific requirements for particular types of advertising practices. These include sections relating to bait-and-switch advertising, promotional contests, deceptive prize notices, double ticketing, testimonials, electronic advertising, "ordinary selling price" claims and sales, performance claims, multi-level marketing and pyramid selling schemes, sales above advertised prices and telemarketing.

Some of the Competition Bureau's key advertising and marketing enforcement priorities include false and misleading price claims, drip-pricing, misleading influencer marketing, performance claims and ordinary selling price claims.

In general, it is important before conducting a particular type of marketing to review whether any provisions of the Competition Act may apply – for example, to ensure that endorsements/testimonials are not false or misleading and that adequate disclosures are made,⁵⁶

⁵⁵ Steve Szentesi, Canadian Advertising Law, CANADIAN ADVERTISING AND MARKETING LAW, (Feb. 23, 2021 ,10:30PM).<http://www.canadianadvertisinglaw.com/>.

⁵⁶ Steve Szentesi, Canadian Advertising Law, CANADIAN ADVERTISING AND MARKETING LAW, (Feb. 23, 2021 ,10:30PM).<http://www.canadianadvertisinglaw.com/>

that performance claims meet the statutory test of adequate and proper testing, that “ordinary selling price” (OSP) claims meet the legislative test or that the statutory information required to be disclosed for contests or telemarketing is included in marketing materials.

The potential penalties for violating the civil misleading advertising provisions of the Competition Act include Competition Tribunal or court orders to cease the conduct, publish a corrective notice, and pay restitution and administrative monetary penalties of up to \$750,000 for individuals and \$10 million for corporations.

The potential penalties for contravening the criminal misleading advertising sections of the Competition Act include imprisonment, criminal fines and prohibition orders to stop the conduct.

Other laws that can apply to advertising in Canada include federal anti-spam law (CASL), privacy law, intellectual property law and provincial and territorial consumer protection statutes.

Consumer protection legislation

In addition to the federal Competition Act, provincial consumer protection legislation exists across Canada in the provinces and territories (e.g. the Ontario Consumer Protection Act and British Columbia Business Practices and Consumer Protection Act).

Canadian provincial consumer protection rules differ depending on the particular province, but generally include both general misleading advertising rules (i.e., that prohibit false, misleading or deceptive representations about products or services) and rules governing specific industry sectors, such as direct selling, gift cards, auto repairs, fitness clubs and payday loans.

Anti-spam law (casl)

In 2014, Canada’s federal anti-spam law (CASL), which is one of the strictest anti-spam regimes in the world, came into force.⁵⁷

CASL created an opt-in regime for commercial electronic marketing messages (CEMs). In general, CASL requires express or implied consent to send CEMs and also imposes specific identification, unsubscribe and record-keeping obligations on electronic marketers.

The penalties for non-compliance with CASL are potentially severe and include administrative monetary penalties of up to \$1 million for individuals and \$10 million for corporations. The CRTC, which is the main enforcement agency that administers CASL, has also been very active

⁵⁷ Steve Szentesi, Canadian Advertising Law, CANADIAN ADVERTISING AND MARKETING LAW, (Feb. 23, 2021 ,10:30PM),<http://www.canadianadvertisinglaw.com/>

in enforcing CASL since it came into force.

Contests

Promotional contests in Canada are largely governed by the federal Competition Act, Criminal Code and contract law. Other laws can also apply depending on the type of contest, including privacy, anti-spam (CASL) or intellectual property law.

In addition, Quebec has a separate regulatory regime for contests, which means that contest sponsors should ensure that in addition to complying with the rules in common law Canada, that they are also adhering to the specific requirements in Quebec or that they exclude Quebec residents (e.g., filings with the Régie des alcools, des courses et des jeux, translation of rules and payment of the applicable duty depending on the value and allocation of prizes).

Given that running a promotional contest without following Canadian and Quebec-specific laws can result in civil or criminal liability or what is often worse for brands – adverse publicity or negative goodwill – it is important to review proposed contest rules and marketing materials for Canadian legal compliance prior to the launch of a contest.⁵⁸

Running a contest in Canada typically includes the preparation of short rules (i.e., mandatory statutory disclosure for marketing materials), long rules (i.e., the full terms and conditions for the contest), a winner release form, skill-testing question and review of draft creative materials for advertising law compliance before launch.

Industry codes

In addition to federal and provincial advertising laws, some sectors, particularly regulated professions such as real estate, law, dentistry and chiropractors, have industry codes of conduct that include advertising and marketing rules.

While such rules are generally not legislation (unless a regulator has regulatory powers relating to advertising), it can be very important to review industry rules before launching an advertising campaign – especially where there may be professional discipline for violating an industry code or other rules.

Canada also has a national not-for-profit advertising self-regulatory body, Advertising Standards Canada, which has published the Canadian Code of Advertising Standards (the Code). The Code includes rules relating to many types of advertising and marketing practices, including price claims, bait and switch advertising, comparative advertising and

⁵⁸ Steve Szentesi, Canadian Advertising Law, CANADIAN ADVERTISING AND MARKETING LAW, (Feb. 23, 2021, 10:30PM), <http://www.canadianadvertisinglaw.com/>

testimonials. While the Code is only binding on Ad Standards' members, it can be helpful in providing guidance for specific types of advertising and marketing practices. The Code also reflects key areas of advertising law enforcement in Canada.

Social media rules

Most advertising and marketing campaigns now include some (and commonly many) social media sites, which may include Facebook, Twitter, Instagram, Pinterest, TikTok or other social sites. Social media platforms, however, commonly include detailed terms of use, including rules governing their use for advertising and marketing and some specific types of promotions (e.g., contests).

As such, it is prudent for advertisers to review the terms of use for the social platforms to be used for a promotion before launch.⁵⁹

3. Tracing the history of commercial speech as a right :

Recognition of "commercial expression" as falling under the purview of "freedom of expression" and thereby deserving of section 2(b), Charter protection. The source of this controversy relates to the nature of both the Charter's guarantees and of commercial expression. The Charter is the supreme law of Canada and the main source of our constitutionally guaranteed rights and freedoms

In the *Ford v. Quebec (A.G.)*⁶⁰, In finding that commercial expression did have prima facie protection under s. 2(b) of the Charter, the Supreme Court began by stating that the freedoms guaranteed the Charter "should be given a large and liberal interpretation" and that there is "no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter." The Court gave more specific reasons for according commercial speech constitutional protection.

Referring to the *Irwin Toy Ltd. v. Quebec (A. G.)*,⁶¹ the majority decision in begins with an analysis of what constitutes expression under s. 2(b). The Court gave expression a very broad scope and decided that "if the activity conveys or attempts to convey meaning, it has expressive content and prima facie falls within the scope of the guarantee." The only limit the Court put in place is that violence, as form of expression, is not protected by s. 2(b). After deciding that expression is to be defined broadly, the majority restated and summarized the reasons for

⁵⁹ Steve Szentesi, *Canadian Advertising Law, CANADIAN ADVERTISING AND MARKETING LAW*, (Feb. 23, 2021, 10:30PM), <http://www.canadianadvertisinglaw.com/>

⁶⁰ *Ford v. Quebec*, (1988) 2 S.C.R. 712.

⁶¹ *Irwin Toy Ltd. v. Quebec (A. G.)*, [1989] 1 S.C.R. 927.

protecting freedom of expression as set out in Ford.

In *R. v. Keegrstra*,⁶² The court notes the importance of free expression to the search for the truth (scientific, artistic, and political) and the common good, personal fulfillment and the democratic commitment.

III. CONCLUSION

All though there are some specific laws in place, which enable for the institution of the regulatory authorities to control and regulate the advertising in the respective countries. Amongst the nations around the world only a few of them have a special regime for the advertising in the countries. There may be misuse of the non availability of the regulations. The existing regulations must be strict and the right of the commercial speech must be within the bounds of that which provides for this right. The advertising although is a right, it must not be absolute there must be some restrictions levied on it. The nations must work towards making laws for the international marketing and advertising also as the market is global now. It's high time the laws be put into place.

Advertising Expenditure Forecasts, March 2018 as published by Zenith Media predicts that the global advertising expenditure is set to increase by \$77,000,000,000/- (Seventy-Seven Billion United States' Dollars Only) between the years 2017 to 2020 and that India will be the fourth largest contributor to the same.

Further, with the growing influence of internet, mobiles, and digital media; the traditional means of advertising are changing rapidly. Therefore, any legislation pertaining to advertising would have to ensure that it addresses the changing trends advertising and accommodate the needs of the dynamic new-age communication channels. For instance, Indian lawmakers would be wise to take a leaf from the FTC Endorsement Guidelines promulgated by their counterparts in the United States of America to address the newly-found trend of subtle advertisements through Instagram profiles where celebrities suggest that they use certain products.

And while the challenge may seem to be daunting, there are several points of references for the legislators to commence the journey towards comprehensive advertising regulations. For instance, the provisions of the proposed CP Bill seem to address the long-standing question with respect to the liability of an endorser featured in an advertisement. More often than not, most endorsers receive considerable amounts of money in exchange of endorsing a product or

⁶² *R. v. Keegrstra*, [1990] 3 S.C.R. 697.

service.⁶³

It is noteworthy that, these endorsers tend to have an immense hold over public perception, especially when they are well-recognized members of the society and most people not only look up to them, but also tend to take their spoken word as gospel. Therefore, it is a welcome move that the legislators intend to put the onus of due diligence on the endorsers before they endorse a product, so as to ensure that the public isn't intentionally misled by anyone who has influence over them.

Furthermore, as discussed above, the advertising sector finds itself in a unique position where while there is no uniform law on the subject matter, however at the same time, there are 'far too many laws' on each sector therein for the relevant stakeholders to be sufficiently informed.

Thus, we posit that the pressing need from the industry is for the law makers to consolidate these fragmented regulations and implementing agencies into 'one' body of law.

With the ever-growing influence of advertisements in our society and the rapidly changing trends in the industry, the current system of patchwork regulation is no longer sufficient to effectively regulate the advertising sector.

With advertisements ranging from bilged-up billboards to subtle Instagram posts, Consumers are more vulnerable than they ever have been. Traditional issues of advertising such as misleading prices, deceptive representations, and labeling issue etc. have now joined hand with modern day troubles of 'sponsored' movie shots or even paid social media posts.

On the other hands for businesses, the increasing stakes associated with advertisements have made it crucial that they have requisite clarity as to what they can or cannot do. Further, with growing competition, most businesses entities themselves need protection from their contemporaries disparaging their products or otherwise indulging in unfair trade practices.

Consequently, the nation's advertising laws have to stay synchronized with the rhythm of the dynamic and innovative advertising industry. The need for a uniform statutory framework regulating advertisements has become more urgent than it ever was, and the hope remains that the prayers for such codification of advertising laws would soon be answered by the nation's legislature.⁶⁴

⁶³ Namrata Bhagwatula, Advertising Laws in India: What the present is – What the future needs to be, GAME CHANGER LAW ADVISORS, (Feb.20, 2021, 09:30 PM), <https://gamechangerlaw.com/advertising-laws-in-india-what-the-present-is-what-the-future-needs-to-be/>

⁶⁴ Namrata Bhagwatula, Advertising Laws in India: What the present is – What the future needs to be, GAME CHANGER LAW ADVISORS, (Feb.20, 2021, 09:30 PM), <https://gamechangerlaw.com/advertising-laws-in-india-what-the-present-is-what-the-future-needs-to-be/>