

SUBMITTED COPY

The Liability Of Marketers And Advertising Agencies In Misleading Advertisements:

A comparative study of UK , Indian and Pakistani
laws

Aziz Ahmad

298 –FSL/LLMCL/F10

LL.M Corporate Law

Introduction

1:(Meaning) Advertising is a communication tool used by the marketers for persuading the potential buyers to purchase certain product or service. It plays a pivotal role in achieving the financial and commercial objectives of the concerned companies. The role of advertising is also vital in the cutthroat competitive environment and the mushroom branding in the prevailing business activities and commercial enterprises. The challenges of our age demand a bit more of the marketers towards informing, educating and facilitating the customer as how to have a timely access to certain product or a service in a novel and innovative way. The marketers are therefore devising ways to make their advertisements more effective.

Advertisements are a form of communication used to persuade an audience or reader to take some action with respect to products, services or ideas. Advertising messages are usually paid for by sponsors and viewed via various media; including print, electronic, websites and even messages by cell phones.

2:(History) Modern advertising developed with the rise in productions in the late nineteenth and early twentieth centuries. In 2010, spending on advertising was estimated at more than \$300 billion in the United States and \$500 billion worldwide.

The history of modern Advertising traces back to 1806, where it was made in respect of a traditional recipe called “*kinestian*”.

Egyptians used papyrus¹ for sales messages as wall posters. Wall or rock painting for commercial advertising is another manifestation of an ancient advertising form, which is still in field in many areas of Asia, Africa, and South America.

As the towns and cities of the middle ages began to grow, and the general populace was not capable to read, various signs and relevant diagrams to denote persons of different occupations as cobbler, miller, tailor and blacksmith etc; for instance a boot for cobbler, a horse shoe for a groom (horse-keeper), a diamond for goldsmith, a hammer for blacksmith and a spinning jenny for a weaver. The emergence of education, considerable growth of literacy and invention of printing machines, developed advertising mechanism and expanded it to include handbills.

In the 17th century, advertisements started to appear in weekly newspapers in England. In June, 1836, French newspaper “*La Presse*” was the first to include paid advertising in its pages, which resulted in the rebate of its price, in extension of its readership, and in increase of its profitability. Taking the benefit of the occasion, other newspapers followed the suit.

In the early 1920s, for the first time, radio stations were established by Radio Equipment Manufacturers and Retailers which offered programs in order to sell more radios to listeners. This practice was carried over to Television in the late 1940s and early 1950s. The late 1980s saw the introduction of cable TV where the consumer began to tune in for the advertisements, rather than for a TV program.

When the use of ads became popular amongst the manufacturers,

¹ Papyrus means a piece of paper made of papyrus plant i.e. a plant grows in water, having thick stems.

then excess in advertising caused the people taking less interest and giving nominal attention to these advertisements, and thus interest of people the interest of in reading advertisements was adversely affected.² The advertisers had to bring innovations in their advertisements; which resulted in legal issues in ads, because, off and on, their advertisements went ultra-vires of the relevant rules. In this connection the very first case which came for adjudication was “Carbolic Smoke Ball”³, wherein the owner advertisers were held liable for the payment of the money to the plaintiff, which was promised by them to be given to the consumer, in case of any wrong information in their advertisement. Since then and up to the proclamation of the Prohibition of Smoking in Enclosed Places and Protection of Non-smokers Health Ordinance, 2002⁴, which puts complete ban on advertising of cigarette on any type of media, the advertisements were developed and the relevant rules and regulations, therefore, witnessed so many amendments. Now several enactments are available on the subject. In this work we will focus on the false and misleading advertisements. A false advertisement is defined as “an advertisement, other than labeling, which misleads in a material respect. No hard and fast rules are available for misleading characteristic of advertisements, however, the following statements have been held to be misleading:

- “False oral or written representations,
- Price claims in equivocal terms,
- Sale of unsafe products or services without adequate disclosure, and

² Richard A. Lanham, *The Economics of Attention* 11,12,233 (2006)

³ [1893] 1 QB 256

⁴Section 07 of Prohibition of Smoking in Enclosed Places and Protection of Non-smokers Health Ordinance, 2002

- Failure to disclose information on pyramid schemes.

Thesis statement

- To know what makes an advertisements misleading?
- To work out the liabilities of misleading advertiser?
- To identify the liabilities of advertising agency in order to curb misleading attitudes?
- How far the existing laws and regulations protect a consumer from misleading and false ads?
- Exploring the laws which protect a consumer in UK and India, but have not been enacted in Pakistan?
- What amendments should be made in consumer protection laws, for effectively tackling misleading ads?
- What amendments should be introduced to media laws for the prevention of misleading ads?

Objectives of the Study

- 1) This study aims to compare the laws on misleading ads; and to find out the liabilities of advertiser and advertising agency in misleading ads.
- 2) The objective of the research is to examine how are the laws in Pakistan on misleading ads not sufficient to protect a listener of ads, and to protect a consumer.
- 3) To explore that what laws should be enacted for better results?
- 4) To examine the current laws and know the room for improvement in these laws.

Significance of the Study

- This study will help all the three; the marketers to introduce their products according to the local law; the media to know its liabilities, and the consumers to their rights.
- This will also help the civil society to have an idea that how can the laws be improved in this regard.

Methodology

The methodology used in this study will be comparative. Pakistani law regime will be compared with UK and Indian regimes. However; in the chapter in which Pakistani laws will be discussed; will have somewhat critical analysis of Pak laws as well.

In the study first chapter will aim to define ads, elaborate history of ads, its importance. In this chapter, we will define misleading ads and its elements. Second chapter will be dedicated to UK laws and regulations regarding misleading and false ads; it will include discussion over “invitation to treat” under the Contract Act, consumer protection laws in respect of ads. Chapter three will again discuss these issues, but under Indian regime. While chapter four will explore the existing Pak laws on the issue, need of consolidating these laws and enactment of new laws. In last chapter recommendations will be given.

Limitations

- In this study the comparison is made of Pak laws only with UK laws and Indian laws, the first being wherefrom our legal system was inherited, and the second because of the same legal and social norms.
- The part related to Pakistan will have some critical analysis as well, as the improvement of Pak laws is our main objective.
- The work will be limited only to commercial ads, and will not discuss political or any other non-commercial ads.
- The work will only focus on those rules and regulations which have force of law, and will not entertain any non-binding rule.

Literature review

In Pakistan the prior work on ads is either from the perspective of media laws or from the perspective of social environment. The work mainly revolves around the media laws, regulations of ads, or ads & local social norms. Most of the work is devoted to the social problems that are created from the ads of west-oriented ideas; such works do also touch of religious teachings, moral norm and ethical grounds. Some other works do study ads regulations, but their main subject is media laws. These both types differ from our work for three reasons: 1) the work is not comparative, 2) it does not study misleading ads, and 3) Its approach to the issue is not law pertaining.

There are some works which deal with ads laws and regulations, but it's dominated by the study of self adopted regulations, which do not have any legal force. Some other comparative

studies, however focus on ads regulations from legal point of view, but it's do not specifically deal with the topic which we are going to study I.e. misleading ads.

So, therefore, we can say that this very work is somewhat different from the prior works and will be able to import the comparative studies on misleading ads regulations. It will be not only helpful for the consumers and audience of the ads but for the corporations as well, which have the ultimate liabilities for their claims and announcements in their ads.

1: "A Hand guide to UK ads and sales law" by Reed Smith has provided a detailed scheme of UK laws on ads. The book has referred to all laws, codes and regulations that are in force in UK today. it also discusses the enforcing authority i.e. Advertising Standard authority (ASA) , the codes promulgated by it. The book contains one chapter on misleading ads, while one chapter is specified for "general code of practice for traders on price indication. The breach of the last code may make the advertiser liable to fine for false ads.

2: In "Business Law" by Keenan and Riches chapter 12 contains "criminal liability in business". The criminal liability is imposed on traders for misdiscription of goods and for misleading price indication. This work is very important for our proposed study.

3: Bowes Egan, in his book "Trade Deceptions: Prosecution, Enforcement" has discussed the English approach to the controle of false advertising.

3: "Regulation on TV Ads." A paper presented by Simon P. Anderson university of Virginia (Aug: 2005) enlightens us for the liability of the trader and the broadcaster in case of a misleading ads. The relevant law holds both of them responsible.

4: Ronald I. Cohen is very specific on misleading ads. In his article “comparative false ads regulation: a beginning” (McGill university). He has compared legal systems of US, UK and Canada on misleading ads. This book makes our proposed study easy, by giving us the idea of how to compare different regimes on the misleading ads.

5: Another comparative work is of Simon P. Anderson. He has compared UK laws on TV ads with other EU countries laws.

6: “Attention must be paid: commercial speech, ads, and challenge of regulations” by Rebecca Tushnet explains the need of regulating ads and the problems therein.

7: Pancachilli Das in his article “A conceptual review of ads regulationcase studies in the Indian scenario” has discussed ads regulation of India the light of decided cases. Some the cases relate to misleading ads as well.

8: Carbolic smoke ball case is very important case of contract act. VD Mahajan in his commentary on the Contract Act has covered that when and how a mere puff becomes an offer. The discussion is relevant to our topic in the sense that here also arises a liability out of the ads, especially out of misleading ads.

9: Viashali Kuthra Billa has ;in his book: “Ads ethics and law”; discusses 1) ads, 2)ads ethics, 3)ads regulations ,laws and codes, 4) Ads standards of India in the light of case law. The book covers all those laws which regulate ads and misleading ads in one way or other. The work has concentrated on misleading ads up to great extent.

10: The Security and Exchange Board of India is Indian regulator of the securities market. It enforces securities and exchange related laws. Sc.10 of the prohibition of fraudulent and unfair

trade practices 1995 prohibits even very slight wrong statement made in any security related ads. The board has heard a case under the given Sc that shows that how much care should be taken in any security related ads.

11: Akhilashwar Pathak in his article “comparative ads in India” (March: 2005) urges on the need of regulations for the protection of consumer amid the comparative ads.

12: Pushpa Girimaji (New Delhi: 2006) has an explanatory work on misleading ads under the title of “misleading ads and consumer”. It is consist of 1) Elements of misleading ads, 2) types of it, 3) self regulation on the matter, and 4) laws, regulations and codes regarding the issue. This work is very helpful in understanding the Indian scheme of regulating the misleading ads.

13: In Pakistan misleading ads regulation is somewhat new area of study. As long as the regulations on the matter itself are almost in the first decade of its promulgation, therefore we do not found any comprehensive study on the issue. Though some academic work is there, but still we need an exhaustive one.

In Pakistan we have some non-binding codes for ads, but this is not our area of concern, as we will cover only binding laws and regulations. The Pakistan electronic media regulatory authority issued Code of conduct (COC 2002), which regulates TV ads only. It only intends to regulate contents of TV ads, which may cover misleading ads as well, but it does not specifically address the issue.

14: Burhanuudin Hassan has criticized the contents and time length of TV ads on social and public policy grounds, but again it does not address our topic specifically.

15: The Competition Commission of Pakistan the misleading ads from its own angle. The decided cases of the commission are very helpful to understand a vast area of Pak ads regulations. The commission has fined Habib Bank, UBL, Askari bank and My Bank for misleading ads regarding higher returns on deposits.

16: Muhammad Sarwar khan in his book “consumer laws in Pakistan” has covered different laws of Pak that regulates ads and ifso facto the misleading ads as well.

17: Yaser Ahmad menani and Salma Mirza in their article “Consumer prefer drug side effect information” (Karachi. Feb: 2011) have a detailed discourse on the contents which shall be included in an ad regarding drug, which has reported side effects. The advertiser will be held liable if such information are not provided in any ads. Here concealment of side effect falls under misleading ads.

18: Sohail kamran (EJBO, 2010) has discussed ads regarding “skin fairness cream”, and has collected data which shows the negative effect of such ads on the society and the negative effect of some of the advertised creams on the consumers. He has rightly urged for regulating such ads.

19:One of our seniors Mr. M. Sajjad (199-FSL/LLMCL/F08) has worked on advertisements under the topic “Towards regulating the culturally sensitive advertisements”. My topic differs from his topic on the ground that he has covered culturally sensitive ads, while my thesis will cover misleading ads.

20: Another Senior Students Mr. Kamran Arshad 200-FSL/LLMCL/F08 has selected the topic “Consumer Rights Protection Against the Deceptive Advertising Practices in

Pakistan". This research is ongoing now-a-days, but this work is limited to the study of Pakistani laws only.

This work is different from our work in two ways;

- 1)it is descriptive, and not comparative, as ours is; and
- 2) it covers only Pakistani regime.

We can conclude that the prior studies on the issue have that so for there is no work on the issue which compares Pakistani laws with Indian and UK laws on the issue. Therefore this work is sought to be approved and to be carried out.

Chapters

Chapter 01: INTRODUCTION

1.1 Background of ads.

1.2 History of ads

1.3 Definition of ads

1.4 Types of ads

1.5 Legal issues involved in ads

1.5.1 Ads and contract

1.5.2 Ads and consumer protection

1.5.3 Ads and media laws

1.6 Misleading and false ads

1.6.1 Ads regarding food safety.

1.6.2 Ads regarding price.

1.6.3 Others

1.7 Types of misleading ads

1.8 General elements of misleading and false ads

1.9 Need of regulations of misleading and false ads

1.10 Types of existing regulations

1.11 Conclusion

Chapter 02: UK REGIME

2.1 History and background of ads in UK

2.2 History of ads regulations in UK

2.2.1 The Merchandise Marks Act (1887)

2.3 The laws which are applicable to misleading and false ads

2.3.1 What does constitute misleading and false ads.

2.3.2 The Contract Act and misleading and false ads

2.3.2.1 The general principles of contract and ads

2.3.2.2 Misrepresentation, Fraud and Misleading and false ads

2.3.2.3 Standard form of contract and misleading and false ads

2.3.2.4 The remedies available to the consumers

2.3.3 The Consumer Protection Act (1987)

2.3.3.1 Consumer protection act and misleading and false ads

2.3.3.2 Criminal liability of the advertiser

2.3.3.3 Civil remedies available to the consumers

2.3.4 The Consumer Credit Act 1972

2.3.4.1 What is the essential information to be provided in ads?

2.3.4.2 Civil remedies available to the consumers

2.3.5 Control of misleading ads regulation (1998)

2.3.6 The code of practice for traders on price indication

2.3.7 The consolidated directive on misleading and comparative ads

2.3.8 Sales of Goods Act (1979)

2.3.9 The Banking act (1987) and essential elements of ads

2.3.10 The independent TV Commission Code of Ads

2.3.11 The Radio Advertising and Sponsorship code

2.4 An overall table of the laws

2.5 Conclusion

Chapter 03: INDIAN REGIME

3.1 History of ads in India

3.2 History of ads regulations in India

2.3 The laws which are applicable to misleading and false ads

2.3.1 The constitutional provisions which have effects on ads

2.3.2 What does constitute misleading and false ads?

2.3.3 The Contract Act and misleading and false ads

2.3.3.1 The general principles of contract and ads

2.3.3.2 Misrepresentation, Fraud and Misleading and false ads

2.3.3.3 Standard form of contract and misleading and false ads

2.3.3.4 The remedies available to the consumers

2.3.4 Consumer Protection laws

2.3.4.1 Consumer protection act and misleading and false ads

2.3.4.2 criminal liability of the advertiser

2.3.4.3 Civil remedies available to the consumers

2.3.5 Monopolies and restrictive trade practices (MRTP) Act and misleading and false ads

2.3.6 Indian Regulatory Body for Advertising (ASCI) code of ads

2.3.6.1 Consumer complaint council

2.3.7 Ads of magical remedies of diseases and disorders under Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954.

2.3.8 Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.

2.3.9 Sales of Goods Act (1979)

2.3.10 Telecom Regulatory Authority of India

2.3.11 Insurance Regulatory Development Authority

2.3.12 Securities and Exchange Board Regulation on ads 1995

2.3.13 Code of commercial broadcasting, All India Radio

2.3.14 Orders of the Apex Consumer Court pertaining to misleading ads

2.4 An overall table of the rules

2.5 Conclusion

Chapter 04: PAKISTANI REGIME

3.1 History of ads in Pak.

3.2 History of ads regulations in Pak.

2.3 The laws which are applicable to misleading and false ads

2.3.1 The constitutional provisions which have effects on ads

2.3.2 What does constitute misleading and false ads.

2.3.3 The Contract Act and misleading and false ads

2.3.3.1 The general principles of contract and ads

2.3.3.2 Misrepresentation, Fraud and Misleading and false ads

2.3.3.3 Standard form of contract and misleading and false ads

2.3.3.4 The remedies available to the consumers

2.3.4 Consumer Protection laws

2.3.4.1 Consumer protection act and misleading and false ads

2.3.4.2 Criminal liability of the advertiser

2.3.4.3 Civil remedies available to the consumers

2.3.5 CODE OF CONDUCT FOR MEDIA BROADCASTERS/CABLE TV OPERATORS

2.3.5.1 Council of complaints

2.3.6 Pakistan Telecommunication (Reorganization) Act, 1996 and ads

2.3.6.1 Price/ charges of services rules

2.3.6.2 Hidden charges

2.3.6.3 Comparative ads

2.3.7 Sales of Goods Act (1979)

2.4 An overall table of the rules

2.5 critical analyses

(A) Code of conduct

A.1 code of conduct is not clear

A.2 the need of more specific provisions

(B) Council of complaint

B.1 the need of more powerful council of complaint

B.2 the need of awareness of the consumer

B.3 the procedure should be made easy

(C) The need of law like the consumer credit act of UK

(D) The room for improvement in consumer protection laws

2.6 conclusion.

Chapter 05: Recommendations

Bibliography

1) Sean Brirley, The Advertising Handboom, Routledge, 270 madison avenue, New York, 2002

2) John, Lichtenberger, Advertising Compliance Law: Handbook for Marketing Professionals and Their Counsel, Quorum Books, New York. (1986)

3) McKendrick, E. Contract Law. (London: Palgrave Macmillan, 2009) eighth edition

4) Brownsword, R., Smith & Thomas: A Casebook on Contract. (London: Sweet & Maxwell, 2009) 12th edition

- 5) PEMRA (TV/Radio Broadcast Operations) Regulations, 2002.
- 6) Mooij, D.M, Consumer Behavior and Culture, Consequences for Marketing and Advertising, Sage Publications, London, UK. (2004),
- 7)Humayun, A. S. Khan, S. M. and Ali, A. M. (2000), Model Consumer Protection Act (2000),
- 8)Khan, M. S. and Hafeez, A., Consumer Laws in Pakistan, Consumer Rights Commission of Pakistan. (1999),
- 9)Pakistan Electronic Media Regulatory Authority Ordinance, 2002
- 10)CODE OF CONDUCT FOR MEDIA BROADCASTERS/CABLE TV OPERATORS
- 11)Bazalgette, Cary, Evelyne Bevort and Josianne Savino: New Directions: Media Education Worldwide, London/Paris: BFI/Cleml/UNESCO.(2002).
- 12)Kumar, Keval J., Media Education, Communications and Public Policy: An Indian Perspective, Bombay: Himalaya Publishing House,india,1995.
- 13)Jef I. Richards and Ivan L. Preston , Proving and Disproving Materiality of Deceptive Claims. Journal of Public Policy and Marketing.(1992)
- 14) Buffalo Law Review, vol.58, 2010.
- 15) Bowes Egan, Trade Deceptions: Prosecution, Enforcement, and Complaints, L.R.S. London,1970
- 16) Richard A. Lanham, The Economics of Attention, Sweet & Maxwell, London (2006)

Statutes and Codes.

Uk.

- 1The Merchandise Marks Act (1887).

- 2) Unfair Contract Terms Act (1977)
- 3) The Consumer Credit Act (1972).
- 4) Sales of Goods Act (1979).
- 5) Trade Description Act (1968).
- 6) Control of misleading ads regulation (1998).
- 7) The Banking act (1987).
- 8) The independent TV Commission Code of Ads.
- 9) The Radio Advertising and Sponsorship code.
- 10) Code of Practice for the Pharmaceutical Industry. London, Association of the British Pharmaceutical Industry, (1974).

India

- 1) The Contract Act 1872
- 2) Monopolies and restrictive trade practices (MRTP) Act
- 3) Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954.
- 4) Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992
- 5) Sales of Goods Act (1979)

6) Securities and Exchange Board Regulation on ads 1995

7) Code of commercial broadcasting, All India Radio

Pakistan

1) The Contract Act 1872

2) Sales of Goods Act (1979)

3) Pakistan Telecommunication (Reorganization) Act, (1996)

4) PEMRA Ordinance (2002)

5) CODE OF CONDUCT FOR MEDIA BROADCASTERS/CABLE TV OPERATORS(2010)

6) Pakistan Telecommunication (Reorganization) Act, 1996