



November 10, 2020

ADVERTISERS AND ENDORSERS

UNDER THE CONSUMER PROTECTION
ACT, 2019

argus
partners
SOLICITORS AND ADVOCATES

MUMBAI | DELHI | BENGALURU | KOLKATA | AHMEDABAD

The Consumer Protection Act, 2019 (**CPA**) which has recently been brought into force, includes express provisions detailing the liabilities of, inter alia advertisers and endorsers. While a complaint could always be filed against a trader or a service provider (trader includes a manufacturer), advertisers and endorsers may also now incur liability for a misleading advertisement.

An “endorser” is not defined under CPA, however, Section 2(18) of CPA defines “endorsement”, in relation to an advertisement, as (i) any message, verbal statement, demonstration; or (ii) depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or (iii) depiction of the name or seal of any institution or organisation, which makes the consumer believe that it reflects the opinion, finding or experience of the person making such endorsement.

Interestingly, CPA defines an “advertisement”, as “any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents.”

In other words, all endorsements are advertisements, but all advertisements are not endorsements.

Advertisers and Endorsers – Common Understanding

An endorser is usually a celebrity (could be organizations too) who opines that a product or service is good and worthy of purchase. The endorser is typically not the manufacturer or seller of the product. An advertiser is often the seller of a product or provider of a service or even a brand, since such a person has an incentive in promoting the product or service, and could also be the manufacturer of the product.

Liability of Advertisers and Endorsers

In relation to any product or service, an advertisement is misleading if it: (i) falsely describes such product or service; (ii) gives a false guarantee to mislead the consumers as to the nature, substance, quantity or quality of a product or service; (iii) conveys an express or implied representation which would constitute an unfair trade practice; or (iv) deliberately conceals important information.

Section 21 of CPA deals with the power of the Central Consumer Protection Authority (**CCPA**) to issue directions and penalties against false or misleading advertisements. Section 21(1) places endorsers or par with advertisers, traders, manufacturers and publishers. It states that where the CCPA is satisfied after an investigation that any advertisement is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights, it may issue directions to the concerned trader or manufacturer or endorser or advertiser or publisher to discontinue such advertisement or to modify the same in such manner and within such time as may be specified in that order. While it is unlikely that an endorser would be in a position to modify or discontinue an advertisement, the CCPA has the discretion and freedom to pass such an order on an endorser if it is necessary to do so.

Section 21(2) applies only to manufacturers and endorsers and does not cover advertisers. However, since a manufacturer may be the advertiser, the advertiser may also be covered by Section 21(2) which provides that in addition to any order passed under Section 21(1) the Central Authority may also impose a fine of up to ten lakh rupees on any manufacturer or endorser in respect of any false or misleading advertisement. Any subsequent offence attracts a penalty extending up to fifty lakhs rupees.

Sections 21(3) and (5) apply only to endorsers. The CCPA may under Section 21(3) prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service for a period of up to one year. In case of any repeat offence by an endorser, the prohibit on endorsement may extend to three years. Section 21(5) states that no endorser shall be liable to a penalty under sub-sections (2) and (3) if he has exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him.

Section 16 of CPA also empowers the District Collector to inquire into or investigate complaints which have been referred to them by the CCPA or Commissioner of a regional office regarding the violation of rights of consumers as a class regarding unfair trade practices, the violation of consumer rights, and false or misleading advertisements. It is unclear whether misleading advertisements would include endorsements as well.

Distinction between Endorsement and Acting in an Advertisement

Section 2(18) of CPA states that an “endorsement” should cause the consumer to believe that the endorsement reflects the opinion, finding or experience of the person making such endorsement. Therefore, it would be a valid defence for an actor accused of being the endorser in a misleading advertisement to state that s/he is not an endorser for the purposes of Section 2(18) of CPA.

In the U.S, the Federal Trade Commission makes a distinction between ‘paid actors’ and ‘endorsers’. Not all paid actors can be said to be ‘endorsing’ a particular product/brand. A paid actor can be equated with any other model who acts as a spokesperson for a brand. An Endorser goes an extra step to confirm that they personally believe in the brand and vouch for it.¹

There is no distinction between endorsers and brand ambassadors in CPA.

The following could be grounds for an actor to deflect a charge under Section 21 read with Section 2(18) of CPA:

- In the advertisement, the actor was playing the role of a person very different from the actor’s persona in real life; or
- The advertisement depicted a situation which was so unrealistic, such as perfectly washed clothes or teeth gleaming so brightly, that it cannot be considered in any seriousness to be considered to be the opinion of the actor; or
- Appropriate disclaimers preceded or succeeded the advertisement.

Impact of Prohibiting an Endorser under CPA

Section 21(3) allows the CCPA to prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service of up to one year. It is very common for celebrities to endorse products and services of various manufacturers and service providers at the same time. Let’s assume that Mr. XYZ, a famous movie actor has endorsed, inter alia, a motor car and an air-conditioner. The advertisement for the motor car claims that it provides a mileage of fifteen kilometres per litre, though in reality it only runs for ten kilometres for each litre of petrol. CCPA decides that the advertisement for the motor car is misleading and causes it to be withdrawn and imposes a fine of ten lakh rupees on the manufacturer of the motor car. CCPA also finds that Mr. XYZ, as the endorser of the motor car, did not exercise due diligence to verify whether the motor car delivered the promised mileage, something that could have been done easily and passes an

¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising by the Federal Trade Commission, United States - <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>

order prohibiting him from making an endorsement of any other product or service for a period of up to one year.

The immediate impact of such orders would be that the manufacturer of the air-conditioner endorsed by Mr. XYZ would have to withdraw the advertisements featuring him.

Therefore, it is vital for manufacturers and traders, when entering into a contract with an endorser, to consider the possibility of the endorser incurring the wrath of the Central Authority on account of misleading advertisements involving some other product or service and suffering a blanket prohibition on all endorsements. Every endorsement contract should provide for milestone payments and suitable indemnities and refunds by the endorser in such a scenario, especially since an endorser shall not incur any liability unless the endorser fails to exercise due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him.

Can an Endorser Delegate the Duty to Exercise Due Diligence?

Section 21(5) states that no endorser shall be liable to a penalty under sub-sections (2) and (3) if he has exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him/her. If an endorser contractually agrees with the manufacturer or seller that the manufacturer or seller shall exercise the aforesaid due diligence and represent to the endorser that the claims made in the advertisement regarding the product or service being endorsed by the endorser are true and accurate, would the endorser have discharged his obligation under the CCPA? Would it be a sufficient defence for an endorser accused of an offence under Section 21 to claim that the endorser relied on a confirmation provided by the manufacturer or seller or advertiser regarding the veracity of the claims made in the advertisement regarding the product or service being endorsed by the endorser?

The Ministry of Consumer Affairs has recently released the CCPA (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Draft Guidelines, 2020 inviting objections to the same. The draft guidelines, inter alia, detail the necessary due diligence to be followed for endorsement of advertisements. These guidelines state that any endorser who obtains advertising advice from an advertising self-regulatory organisation or a legal opinion from an independent legal practitioner regarding the honesty of statements in the endorsement and its compliance with the law may be considered to have carried out due diligence for the purposes of his/her liability under CPA. However, the guidelines clarify that no such advice or opinion may be considered adequate if it is otherwise found that the endorser had knowledge that the endorsement would be false, misleading or deceptive, or that its falsity or misleading or deceptive nature was apparent given the circumstances.

Liability for Endorsers Prior to CPA

The Consumer Protection Act, 1986 (**CPA 1986**) did not define an endorser or an endorsement and did not expressly provide for any form of liability or punishments for endorsers. However, in the case of *Nikhil Jain v. M/s. Emami Ltd.*, Shah Rukh Khan, a well-known actor who endorsed Emami fair and handsome cream, was dragged into proceedings under CPA 1986. It was claimed in the complaint that the advertisement claimed the cream would provide fairness in just three weeks, which was an unfair trade practice.

The District Forum held that the advertisements amounted to an unfair trade practice. On appeal, the State Commission, Delhi set aside the order of the District Forum and remanded the matter to the District Forum. The complainant then sought that Shah Rukh Khan, as the brand ambassador of the fairness cream, be examined as a witness. The District Forum dismissed the complainant's

request to examine Shah Rukh Khan. The matter however continues to be pending for final disposal.

Similarly, in another case of misleading advertisement, Shah Rukh Khan has also been directed by the Calcutta High Court to file an affidavit to explain his relationship with the Indian Institute of Planning and Management (**IIPM**), pursuant to a complaint filed by a group of students who claimed that they were misled by his promotion and endorsement of IIPM.

There have been many criminal complaints filed against endorsers. Amitabh Bachchan, Madhuri Dixit and Preity Zinta have had an FIR be registered against them for endorsing Maggi instant noodles in allegedly 'misleading' advertisements. Actor Genelia D'Souza who was the brand ambassador for M/s Anjaniputra Infrastructure Private Limited has had an FIR filed against her and was also hauled up before a magistrate's court in Hyderabad when M/s Anjaniputra Infrastructure Private Limited defaulted in its obligations to its customers.

It may be expected that since CPA has specific provisions dealing with endorsers' liability and their defences, the possibility of endorsers being harassed through the filing of police complaints against them, will be lesser from now on.

This paper has been written by Vinod Joseph (Partner), Suchita Ambadipudi (Partner), Yamini Harish (Associate) and Sheetal Srikanth (Associate).

DISCLAIMER

This document is merely intended as an update and is merely for informational purposes. This document should not be construed as a legal opinion. No person should rely on the contents of this document without first obtaining advice from a qualified professional person. This document is contributed on the understanding that the Firm, its employees and consultants are not responsible for the results of any actions taken on the basis of information in this document, or for any error in or omission from this document. Further, the Firm, its employees and consultants, expressly disclaim all and any liability and responsibility to any person who reads this document in respect of anything, and of the consequences of anything, done or omitted to be done by such person in reliance, whether wholly or partially, upon the whole or any part of the content of this document. Without limiting the generality of the above, no author, consultant or the Firm shall have any responsibility for any act or omission of any other author, consultant or the Firm. This document does not and is not intended to constitute solicitation, invitation, advertisement or inducement of any sort whatsoever from us or any of our members to solicit any work, in any manner, whether directly or indirectly.

You can send us your comments at:
argusknowledgecentre@argus-p.com

Mumbai | Delhi | Bengaluru | Kolkata | Ahmedabad

www.argus-p.com