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Advertisement Claim Substantiation in India: Need for Legislative Intervention

Tina K Stephen[1] Arun Sasi[2*],

[1]Assistant Professor, XLRI, Jamshedpur, India. Mail ID- tina@xlri.ac.in

[2*]Assistant Professor, XIM University Bhubaneswar, India. Mail ID- arunsasi@xim.edu.in.

Abstract:
One of the major hurdles in tackling deceptive advertisements in India is the legislative ambiguity regarding advertisement claim substantiation. Many legislations like the Consumer Protection Act 2019 and the Trademarks Act, 1999 have addressed various aspects of deceptive advertisements but has not envisaged claim substantiation process. Some sector specific legislations like the Food Safety and Standards (Advertising and Claims) Regulations, 2018 has provided a few guidelines for advertisement claim substantiation but lacks sufficient clarity and hence the consumer as well as the competitors often finds it challenging to substantiate the advertisement claim. This article critically analyses the legislative framework of advertisement claim substantiation in India and suggest a regulatory roadmap.

Keywords: Deceptive advertisements, Claim substantiation regulation, Burden of proof.

1. Introduction

India is the fastest growing major advertisement market in the world. Between 2017 and 2019, the advertising expenditure of Indian businesses increased from Rupees 61,204 crore to Rupees 82,795 crore. Predictive estimates suggest that in 2020 it would reach Rs. 91,641 crores. This represents an estimated growth of 10.7%, for the calendar year 2020 alone. In recent times there has been a massive proliferation in internet-based advertisements because of access to internet, facilitated by availability of affordable smartphones and cheap data. But the unique case of India is that a substantial percentage of the population which is exposed to these advertisements are illiterates (UNESCO, 2018). In the background of studies which prove that incongruence among illiterate people could demonstrate errors in comprehension (Walker, 1995), it may be deduced that it is difficult for an average Indian viewer to comprehend the technical messages shown to him in an advertisement. There is a risk that either the viewer will not understand the advertisement at all or, even worse, he would understand it wrongly. So, many Indian consumers may be at a loss to decipher the implication of an advertisement if the language of the advertisement is exaggerated, the comparisons are subjective or if the advertisement claims are implicitly false and the content is misleading.

Laws pertaining to deceptive advertisements in India are spread across different legislations prominent among them being the Consumer Protection Act, 2019, Trademarks Act 1999, Cable Television Networks Regulations) Act, 1995 and Cable Television Networks (Amendment) Rules, 2006, The Drugs and Cosmetic Act, 1940, The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954, The Food Safety & Standards Act, 2006, Food Safety and Standards (Advertising And Claims) Regulations, 2018 and many more.

Except for few sectoral regulations like Food Safety and Standards (Advertising and Claims) Regulations, 2018 which provides for claim substantiation procedure for food claims, none of the other regulations have provided for a general framework for claim substantiation. India's principle self-regulatory organization for advertisements, the Advertisement Standards Council of India (ASCI) also does not provide for a comprehensive claim substantiation procedure.

2. Advertisement claims

No one uniform claim substantiation process can be applicable to cover all types of claims. Hence, any research in this area should begin with an analysis of the different types of claims. Generally, advertisement claims may be categorized as data claims, direct and implied claims, objective and subjective claims, puffed claims etc. Claims can also be specific in nature such as health claims, cosmetic claims, environmental claims, market share claims, superiority claims, claims in the nature of testimonials and so on.

Data claims are those where the advertiser makes a claim based on certain scientific test or data or some kind of scientific effort that can be undertaken. Direct deceptive advertisement claims refer to a manufacturer's deliberate use of misleading or blatantly untrue statements to promote the product. Implied claims, on the other hand, are those that are not expressly stated but which convey the claim indirectly or by inference. Implicit advertising allows consumers to draw their own conclusions thus leaving scope for ambiguity. There is no doubt that be it omission of vital information or ambiguity in the information presented or exaggerations capable of misleading the consumer, it would tantamount to deceptive advertising (*Rohit Vaswani v. Era Landmarks (India)* Ltd, 2011).

Claims can also be classified as subjective and objective. Objective claims eliminate subjective or personal perspectives and are purely based on facts. An objective claim– for example, 'the most fuel-efficient sedan in India'- can be scientifically ratified, but it is difficult to substantiate a claim that a car is 'the most attractive in its class'. While an objective claim is supported by evidence, a subjective claim cannot be substantiated in the same manner.

Claims can also be in the form of puffery, where the advertisement claim is exaggerated. Puffery, which does not denigrate another product, is generally not actionable in India. But when an advertiser states that his products are good and the competitor's products are bad, even if it is puffery, it would lead to defamation for which damages can be claimed (*Reckitt & Coleman of India Ltd v. Kiwi TTK Ltd.,* 1996). Some state High Courts have deviated from this well-established position. For example, the Madras High Court, in the case of *Colgate-Palmolive (India)* v. *Anchor Health & Beauty Care* (2008)., held that deception in any form, including puffery, would be actionable as there is a risk of deception

Another form of claim is comparative advertisements. It is permissible if it can be substantiated as honest comparison. (*Pepsi Co., Inc. and Ors.* v. *Hindustan Coca Cola Ltd. and Anr,* 2003). But a comparative advertisement becomes actionable when untrue or derogatory claims are published regarding the competitors' products.

3. Advertisement claims substantiation.

"Design and implement each aspect of the (advertisement) research as if you, yourself, will have to defend it in court. There is a distinct possibility that someday you might." (Zoler, 1983)

Ideally, whenever an advertisement is published, the advertiser should provide data to substantiate the claim, in the absence of which, the advertisement should be removed or amended.

In India there is substantial ambiguity pertaining to advertisement claim substantiation process which has in turn frustrated the efforts taken to effectively curtail deceptive advertisement. There is no uniformity in the claim substantiation process followed by different judicial and quasi-judicial forums in India such as the Consumer Forums, civil courts, the principle self-regulatory organization for advertisements namely the Advertisement Standards Council of India (ASCI) etc. The complexities which are unique to advertisement claims with regards to different types of advertisement claims, different types of evidence to substantiate these claims, standard of substantiation, burden of proof etc., require that a very clear claim substantiation process, specific to the advertisement claim in hand should be envisioned. Some of the important elements pertaining to claim substantiation has been discussed below.

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4. Burden of proof during claim substantiation - A legislative perspective

There are different regulations and theories regarding burden of proof. Based on the type of claim, the burden of proof could rest on either party. In India, the rules regarding burden of proof in deceptive advertisement cases are yet to be conclusively formulated.

The general rule of burden of proof as envisaged under Section 101 of the Indian Evidence Act (1872) is that "*whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist".* But the Act under Section 106 also states that when a fact is within the knowledge of a person, the burden of proving that fact is upon him. So, going by the Evidence Act, it may be deduced that the burden of proof should be on the advertisers as they possess substantial evidence, having conducted relevant tests relating to a claim. On the basis of this assumption, the court can expedite the substantiation process.

Under the Indian Consumer Protection Act 2019, the responsibility of proving the cause of action is on the complainant who under the Act is the consumer. If complainants are unable to prove the cause of action for which they are seeking compensation, the complaint may be rejected. Consumers are required to file their evidence through an affidavit in support of their claim. This shows that the burden of proof rests squarely on the consumer. This sequence of presenting evidence is seen in several consumer courts despite the fact that Section 47 of the Act in its proviso states that "*where a defense is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defense shall lie on the person raising such defense."* This section specifically states that the burden of proof would be on the defendant or advertiser. But in reality, the plaintiff is asked to begin the case and show prima facie evidence for the cause of complaint.

Section 38 (1)(c) of the Consumer Protection Act 2019 further states that in cases where a complaint is regarding a manufacturing defect in a product, the Consumer Forum may collect a sample of the product from the complainant and refer it for analysis or tests with a view to finding out the authenticity of the complaint. This Section is verbatim of Section 13(1) (c) of the Consumer Protection Act, 1986 which the 2019 Act repealed and replaced. The Section was seldom followed in spirit. Lack of proper understanding of this section had also led to misguided processes that have not been envisaged in the Act. While interpreting this section, it has been observed that the court had often imputed the responsibility to produce evidence on the complainant. For example, in the case of *M/S Nirmitee Biotech* v. *Shri Anandrao Jnamdev Pati(2005),* the complainant had purchased from the opponent Company, Shrimant, 3000 tissue culture plants for Rs.30,000 to be cultivated under expert guidance. Within a year, the complainant, dissatisfied with their growth, approached the Consumer Forum for compensation. The State Consumer Forum directed the complainant to produce expert evidence regarding the seeds in question.

Further, in *M/S Emami Ltd.* v. *Nikhil Jain (2015)* the consumer bought a fairness cream namely Emami 'Fair and Handsome'. An advertisement published by the company starring renowned movie actor, Shahrukh Khan, promised a lighter skin tone in just three weeks. The consumer observing no change in skin tone despite following the directions on its usage, approached the court against the advertisement claim. The court directed him to produce evidence to prove that the cream was ineffective. The court refused him compensation as he was unable to file evidence of change in skin condition before and after application and also because the consumer had not produced any expert evidence except his own affidavit. This rule of burden of proof does not favour consumers who are unable to provide the requisite evidence due to lack of resources and expertise.

The principle remedy against deceptive advertisement for a competitor is under the Trademarks Act,1999. The Trademarks Act also envisages that the plaintiff should prove his case. In *Dabur India Limited* v. *M/S Colortek Meghalaya Private Ltd (2010),* the plaintiff/competitor filed a case against the defendant's product Good Night Naturals, which is a mosquito repellent cream. The plaintiff company claimed that the same contained an ingredient known as 'Oil of Citronella', which is a pesticide used as an animal or insect repellent and which is hazardous for human use. Here the plaintiff had to produce evidence to prove his complaint and to disprove the claim made by the advertiser.

Thus, the rule of thumb pertaining to burden of proof is that the complainant is liable to disprove the advertisement claim (*Ishwar Rawat* v. *Haryana Urban Development Authority and Ors.*,2008). This results in the companies feeling free to indulge in deceptive advertising claims, especially in cases where the tests are highly technical and expensive.

4.1 Reversal of Burden of Proof

The Indian Evidence Act 1872, The Trademarks Act 1999, etc. imposes the responsibility to prove that a certain claim is false or deceptive upon the complainant. A common man who brings a complaint against a deceptive advertisement will not have the resources or the expertise to prove a technical claim. He will only have his personal experiences as evidence. In many jurisdictions the burden of proof is reversed i.e. the responsibility of proving the advertisement claim is on the advertiser. For example, the "Prior Substantiation Doctrine" followed by the U.S. Federal Trade Commission (FTC), requires the advertiser to substantiate the claim assuming that the product was advertised only after sufficient testing. Once a complaint is raised the advertiser has to produce the relevant evidence supporting the advertisement.

The burden of proof rule in different countries of Europe is also noteworthy. In Denmark, Finland, Great Britain, Poland, and Sweden, advertisers have to prove their claim. For comparative claims, Netherlands, Latvia and Austria follow the principle of reversal of burden of proof. In Germany, this holds true for cases where the complainant will not be able to adduce suitable evidence. In jurisdictions like those of Spain and Hungary, the burden of proof is reversed when necessary. In non-European countries such as New Zealand, it is the advertiser who has to adduce evidence to prove the advertisement claim (Steven Lysonski, 1992).

In India, a reading of the Consumer Protection Act , 2019 creates the impression that it has reversed the burden of proof and imposed it on the advertiser to prove any claim he makes. But this is not followed in spirit as has been noted above and the courts still require consumer to adduce evidence.

For example, in the case of *Sanjay Rastogi* v. *M/S Arsh Enterprises & Another (2008)*, the complainant purchased a three-wheeler from M/s Arsh Enterprises. The manufacturer of the vehicle, M/s Piaggio Vehicles Pvt Ltd., advertised in its brochure that the vehicle had a superior engine by virtue of which, it could ply on hilly roads with load. The complainant soon discovered that the vehicle did not have the stated features and thus approached the District Consumer Forum. To check the efficiency of the vehicle, it was sent for testing to the Automotive Research Association of India- a body, which the complainant was later informed, was authorized by the Central Government to test only new vehicles. Unable to find any other testing facility, the consumer could not produce any evidence supporting his complaint which was consequently dismissed.

A step in the right direction is taken under the Food Safety and Standards (Advertising and Claims) Regulations, 2018 where Section 12(iv) states that the food business operator or marketer shall seek prior approval from the Food Authority with scientific information or materials to substantiate different types of claims. So, the burden of proof is on the advertiser with regards to the type of claims mentioned under the statute.

5. Parameters of claim substantiation: A comparative analysis

Advertisement claims can be of different types and therefore the evidentiary requirement through which such claims are substantiated also vary. The evidence would include:

1. internal evidence like sales figures, internally generated company documents, etc.
2. scientific evidence like laboratory tests, research studies, etc.
3. extrinsic evidence like expert testimony, expert opinion, consumer surveys, research article, etc.

There are no clear guidelines on the appropriateness, adequacy, and standard of evidence required in different types of advertisement claims. In India, cases related to advertisement claims are decided by the judicial forum on a case-to-case basis. The pattern of results has affected the predictability in the outcome of the disputes. A general lack of trust prevails as the process has not been standardized. We can compare this to the U.S Federal Trade Commission's (FTC) Claim Substantiation Regulation launched in 1971 which covers both print and electronic. The substantiation guidelines are as given below:

a. The advertiser should know the claim substantiation regulations of the FTC. In case of factual claims, the same should be corroborated with scientific evidence. It is best to produce evidence from neutral sources as these might substantially reduce the risk of a lawsuit.

b. Where claims are based on certain tests, the advertiser should ensure that these tests are scientific, objective, unbiased and conducted by experts.

c. The claims should be made keeping in mind an average consumer and the advertisement result should be achievable by a normal person under normal circumstances.

d. In case of price comparisons, such prices should be comparable. For example, if the prices are of two products belonging to a similar but different category, or if they are sold in different territories, then such price comparisons can be skewed. (Kenneth and Donald, 2005).

The program aimed at providing information to both consumers and competitors to help them make informed choices. Puffery or exaggerated claims fall out of the ambit of substantiation under this program (Dorothy, 1980). The programme followed the "reasonable basis" rule for claims, which was evaluated based on six factors:

- product involved
- type of claim made
- benefits of a truthful claim
- ease of developing substantiation
- consequences to the consumer of a false claim
- amount of substantiation which experts in the field consider reasonable

The highest level of proof is necessary when an advertisement claims to be supported by scientific evidence. These claims, sometimes called "establishment claims", require the advertiser to show the same level of substantiation as presented in the advertisement. False advertising can be shown by demonstrating that the tests on which the statement relies are "not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited"(*Castrol, Inc. v. Quaker State Corporation, Quaker State Oil Refining corporation, and Grey Advertising. 1992*). The challenger needs to provide the lowest standard of proof for establishment claims, implying that the claims made by the advertiser are not supported by the test. Even in case of endorsements, the advertiser should be able to prove that the facts presented through the endorsement can be verified.

In Europe, deceptive advertising is regulated primarily by the Misleading Advertising Directive, 1984 and the Unfair Commercial Practices Directive, 2005 among others. Moreover, there have been different regulations which look into deceptive advertising and claim substantiation. The European self-regulatory body namely the European Advertising Standards Alliance (EASA) has conceptualized very specific guidelines published as Best Practices on Claims Substantiation to promote responsible advertising through effective self-regulation. It is an attempt to put forth the rules on which claim substantiation can be standardized.

EASA clarifies that claims which are objective in nature need to necessarily be based on hard facts, eliminating subjective perspectives. But subjective claims, including puffed claims need not be substantiated. The guideline divides advertisement claims into four broad categories- market claims, scientific claims, testimonials and comparative claims. For each category of claim, there is a set of evidences that may be used for substantiation.

5.1 Appraisal of Scientific Evidence

Substantiation of advertisements through scientific evidence is regulated differently by different countries. But most countries mandate that these test results should be based on current scientific standards and on products that are available in the market. Many countries also require that the limitations of the test should be clearly stated in the results (Cheng, 2014). Greece disallows the use of test results in advertisement claims if they cannot be sufficiently substantiated (Bodewig 2006). Tests to be performed by independent organizations is a prerequisite in Finland and France. Disclosure of the testing institute's name is a requirement in Norway. In Switzerland, test results cannot be used without appropriate authorization from the testing organization. It is also mandated that the given test should not be selective and should cover all the relevant characteristics of the product. Canada requires the relevant tests to be completed before the advertisement is published. In Canada and Mexico, in case of superiority claims, it is absolutely necessary that every product in the category should be included. In Germany, independent consumer organizations conduct such tests. But such test results are banned from being advertised in Netherlands and the United States. Ireland and England insist the description in an advertisement needs to be corroborated by the organization where the test was conducted, thus ensuring greater authenticity (Story and French 2004).

Regarding scientific evidence, many advertisements explicitly or implicitly claim that certain tests verify the accuracy of the advertising claim. The FTC's 1984 Policy Statement regarding Advertising Substantiation explains the scientific evidence rule and states that the advertiser should be ready to give minimal proof of what has been communicated to the consumer in the advertisement (Cheng, 2014).

The kind and standard of scientific evidence required to prove a claim is ambiguous in India. The standard differs based on products, an exception being food-related claims, where the regulations like Food Safety And Standards (Advertising And Claims) Regulations, 2018, Food Safety and Standards (Health Supplements, Nutraceuticals, Food for Special Dietary Use, Food for Special Medical Purpose, Functional Food and Novel Food) Regulations, 2016 and international guidelines like the *Codex Alimentarius* for international food standards (FAO, 2013) are relied on (*Marico Limited v. Adani Wilmar Ltd.* (2013).

In certain cases the Indian courts have also relied on regulatory standards of foreign jurisdictions for appraisal of scientific evidence. For example, the Madras High court, in the *Good Knight case* (2012), relied on the Malaysian Standards for Efficacy Test in the absence of specific standards in India. But the court stated that the Central Insecticides Board approved protocol based on the World Health Organization's Guidelines had to be followed for testing the bio-efficacy of the product. Apart from these sectoral specifications, there are no general guidelines for appraisal of scientific evidence in India, leaving much to be desired as far as Indian policies are concerned.

Courts usually accept the validity of the scientific evidence as it is when presented by the parties because there are no set standards to verify the same. Lack of substantiation guidelines make the process arduous and subjective. Proper laboratory facilities are a very important part of the institutional framework for claim substantiation. One such laboratory in India is the Central Drugs Laboratory, Kolkata, the National Statutory Laboratory of the Government of India for quality control of drugs and cosmetics under the Drugs and Cosmetics Act and Rules, 1940. But most other laboratories in India are understaffed and in poor condition with limited infrastructural support. Five laboratories established under the Food Safety and Standards Act, 2006 are as good as non-functional.

5.2 Expert Opinion

Expert opinion is one of the most widely used extrinsic type of evidence, especially where a scientific claim is involved.

The Indian Supreme Court has highlighted the relevance of expert opinion in the case of *State of H.P.* v. *Jai Lal and Ors (1999).*, stating that the court can ask for an expert opinion on issues related to science, art, handwriting, finger impressions and foreign law to name a few, but is under no compulsion to abide by it.

A case in point is that of *Hindustan Unilever Limited* v. *Colgate Palmolive* (1998). The appellant had published an advertisement claiming that its toothpaste, “New Pepsodent” was “102 % better than the leading toothpaste”. The expert body appointed by the MRTP Commission to prove or disprove this superiority claim found that the parties had adduced evidence from India and abroad. An independent body, comprising experts representing each of the two parties as well as the court was then set-up by the Commission to evaluate the claims and the evidence. This highlights the absence of standard guidelines on the use of expert opinion in India. There is also ambiguity on whose opinion is acceptable and admissible as an expert. Till clear guidelines are laid down, issues regarding expert opinion will continue to be subjectively decided by the judges.

5.3 Market Study

Advertisers make claims to project their market share by way of consumer preference and consumer acceptance. Such claims should be supported by verifiable, authentic market research because Indian courts have admitted market study reports as evidence in several cases. For example, in the case of *Horlicks Ltd. & Anr.* v. *Heinz India (P) Ltd*. (2009) reports related to the market share of two competing health drinks, Complan and Horlicks, were produced by Horlicks Ltd. Similarly, in the case of *Hindustan Unilever Limited* v. *Colgate Palmolive(1998)*, the MRTP Commission constituted under The Monopolies And Restrictive Trade Practices Act (MRTP), 1969 admitted evidence filed by Colgate showing that there was a reduction of 5% in sales in August 1997 and 8% in September 1997, which the company alleged was due to deceptive advertising by Hindustan Unilever Limited. There are no regulations in India to look into the methodology adopted to arrive at these figures.

5.4 Research Articles

Research articles are used by an advertiser to prove the authenticity of his claim based on pre-existing scholarly research. Though Indian courts have used them as evidence, there are no guidelines on their admissibility and use in court. In the case of *Marico Limited* v. *Adani Wilmar Ltd.(2013)* the defendant, in order to substantiate its claims, submitted a research article presented at an international conference on the subject under dispute. But in the case of *Win Medicare Ltd.* v. *Reckitt Benckiser India Limited,(2002)* the MRTP Commission rejected an article as evidence because one of the authors was associated with the defendant company, Reckitt Benckiser India Limited. Lack of proper guidelines for use of research articles during claim substantiation becomes misleading as the articles might be of varying quality or be sponsored, creating bias, etc. Therefore, caution is advised while using them in the substantiation process.

5.5 Laboratory Facilities for Claim Substantiation

Proper laboratory facilities are a very important part of the institutional framework for claim substantiation. There are many laboratories established across the country for different purposes, for example the Central Drugs Laboratory, Kolkata, is the National Statutory Laboratory of the Government of India for quality control of drugs and cosmetics under the Drugs and Cosmetics Act and Rules, 1940. These laboratories are in a very bad state as most of these laboratories are under staffed. Many have not yet become fully operational and many of them still do not have the proper infrastructural support for conducting any testing. Under the Food Safety and Standards Act, 2006, 5 laboratories were set up in different parts of India. These facilities today are anything but functional.

5.6 Endorsement and Testimonials

Endorsement and testimonials are yet another category of claims where countries often create detailed guidelines. These guidelines often regulate expert testimonials, customer testimonials and celebrity

testimonial or endorsement. For instance, the French law provides that endorsement and testimonials by experts should be from their expertise and should comply with the terms of such endorsements. French courts support that publication of selectively favourable consumer feedback when majority of the feedback is against the product, is deception. Similarly, in Greece, experts should have relevant expertise and should give their consent (Peter W. Schotthöfer and James R. Maxeiner 1999). Hong Kong (Gerard Prendergast) and China (Gao, 2008) have specific regulations regarding the use of testimonials for medical products.
In 2009, the U.S. FTC issued revised guidelines for testimonials and endorsements which stated that if the endorser is an expert, his expertise should be relevant to the product and if he is a consumer, he should be a genuine consumer and any such testimonial or endorsement should be substantiated with adequate proof. If any material connection exists between the seller and endorser, that should be disclosed. Celebrity liability for untrue claims and endorsements is still an area of concern where there is a wide disparity in country wise legislations.

6. Conclusion: Comparative Analysis and Recommended Changes for India

An exponential increase in advertisements in India has led to proportionate increase in deception and disputes relating to the same. Ambiguity in claim substantiation process has led to inconsistent outcomes in dispute resolution. It is critical to analyse the best practices in other countries to improve on Indias claim substantiation process.
In any claim substantiation process, categorizing the claim and attaching them with a specific set of substantiation requirements, is pivotal. **Table 1** is an illustrative representation of a proposed substantiation guideline. It includes a set of provisions dealing with burden of proof, standard of substantiation, different kinds of claims and tests required to prove these claims. A few of these proposed points have been discussed below.

6.1 Burden of Proof

Any claim substantiation regulation should begin by clearly defining as to who has the burden to prove or disprove a claim. The present rule of burden of proof in India is detrimental to the consumer as well as to the competitor as the burden is placed on them to substantiate their complaint. It is suggested that the Indian regulation for claim substantiation may use the principle of reversal of burden of proof, wherein the advertiser should substantiate the claim. This is easier and expeditious because the advertiser is presumed to have published an advertisement only after the product has been sufficiently tested. The principle of “Prior Substantiation Doctrine” would be most suitable in the Indian context. If the burden to prove falsity remains on the complainant, then the advertisers will make such deceptive claims with impunity. In other cases, a technical claim might require expensive and time-consuming scientific tests which is difficult for a complainant to adduce.

6.2 Standards for the substantiation of claims

Compared with other jurisdictions like the United States where the FTC has instituted elaborate claim substantiation procedures, there are no standards for substantiation of claims in India. Rules regarding the;

a. amount of substantiation which experts in the field consider reasonable,
b. the consequences to the consumer of a false claim,
c. the ease of developing a claim substantiation,
d. explaining the benefits of a truthful claim etc.,

should be explained. These guidelines serve as a benchmark for advertisers who publish an advertisement, the consumers who challenge an advertisement and the court which decides on such cases. Formulating procedures in India along similar lines would address the drawbacks associated with the lack of predictability in the country’s substantiation process.

6.3 Scientific Tests

In any claim substantiation regulation, a very critical aspect is clarifying the test requirement for the different types of claims. It is critical to have uniformity in the tests required to prove an advertisement claim. As of now, there is lack of clarity on very basic questions such as when and what kind of scientific tests need to be done, the authority and protocol required to conduct them and the standards required for the same.

The important categories of scientific claims and corresponding tests include:

6.3.1 Health Claims

A very specific category of scientific claim for which special evidence standards are often prescribed by countries is the health claim category. For example, in the US, FTC has defined the reasonable basis requirement as competent and reliable scientific evidence such claims. The Commission has defined this standard in the following manner:

"Tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." (Schering Corp,1994)

The FTC also gives weightage to accepted norms in relevant fields of research, and consults with experts from a wide variety of disciplines. It has also certain accepted tests which it uses for the claim substantiation process. For many types of health claims, the randomized, double-blind, placebo-controlled clinical trial has been standardized as this test is the only methodology that experts in the field accept as yielding accurate and reliable results (FTC v. QT, Inc, 2008). Accordingly, the Commission has challenged some claims under the competent and reliable scientific evidence standard based on allegations that no reliable controlled clinical trials were conducted.

For certain types of claims like in the case of FTC v. Iovate Health Sciences USA, Inc. (2013) and Nestlé Health Care Nutrition, Inc. case (2010), the court defines competent and reliable scientific evidence as follows:

"At least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true."

In India no such concrete guidelines are to be found except in certain specific areas. As per Section 4(6) of the Food Safety and Standards (Advertising and Claims) Regulations, 2018 "any claim that a food has certain nutritional or health attributes shall be scientifically substantiated by validated methods of characterizing or quantifying the ingredient or substance that is the basis for the claim."

Standards followed in food advertisements should be extended to all health claims. Special importance needs to be given to qualified health claims as non-compliance of the same can lead to serious health implications for vulnerable consumers who lack the expertise to evaluate the claim. Standardized tests, supplemented by scientific certainty should be listed so that consumers can make informed decisions.

6.3.2 Cosmetic Claims

Claims for cosmetic products, whether explicit or implicit, should be supported by adequate and verifiable evidence. In India, recent trends show a rise in cosmetic advertising. Specific scientific standards should be laid out for each and every kind of cosmetic claim. If consumers file for a deceptive cosmetic claim, they often end up losing the case in the absence of predefined parameters which the advertisers ought to have complied with (*M/S Emami Ltd. v. Nikhil Jain*).

6.3.3 Environmental Claims

Globally, advertisers have resorted to making environmental claims to make the products more appealing to consumers. For example the textile and garments producers use the 'Fully Certified' Organic claim which often is seen positively by the consumers. These are often broad, unqualified claims which are difficult, if not impossible, to substantiate. With an increasing awareness among consumers regarding environmentally friendly products and services, it has been seen that they are also ready to pay more for the same. In this backdrop, it is imminent to have well-set scientifically-verifiable standards for such claims.

6.4 Testimonials and endorsements

Testimonials are extensively used by advertisers, especially those given by experts, celebrities and consumers extolling the virtues of the product. Majority of the advertisements in India are endorsed by celebrities (Jain, 2019.), who are also highly paid for the same. Given the level of adulation for movie stars and cricketers in India, consumers get strongly influenced by their endorsements. Without claim verification guidelines, there is no way to verify if the celebrity has actually used the product or checked the claim’s truthfulness. The Consumer Protection Act, 2019 under Section 21 speaks about celebrity liability in case the advertisement carrying the endorsement is false or misleading. But it is important to note the exception stated in the same provision which mentions that the celebrity will not be liable in case she has exercised due diligence and has verified the varsity of the claims made in the advertisement. This exception can be a detrimental to the consumer and favorable to the celebrity in case where he is able to prove due diligence. Having said this, there are still no provisions for claim substantiation in the new legislation.

In India there are certain advertisements that have been aired for many years. In such cases it is very essential that expert testimonials are regularly updated for changes in the product information and approval of the celebrity.

Testimonials can also be given by subject experts. The claim substantiation guidelines should be verified and based on actual evaluation, examination, or testing of the product. Testimonial guidelines should include provisions to ensure that the experts have relevant subject expertise. An expert who may have a stake or some vested interest in a product that he endorses should disclose the same. Testimonials by consumers may also be made valid only after ensuring its authenticity.

6.5 Claims on Social Media

Advertisement through social media platforms is a very common practice today. But unfortunately, there are no specific regulations or control on this medium of advertising unlike countries like U.S. (FTC, 2002). The FTC Act’s prohibition on “unfair or deceptive acts or practices” encompasses online advertising, marketing, and sales and addresses issues of deceptive advertising on these mediums. In certain unconventional advertising techniques such as blogs and social media, the consumer fails to differentiate the communication as paid or genuine experience sharing of the blogger (FTC, Lord and Taylor case, 2016). In such cases the regulations should specify the disclosure and substantiation requirement for such paid communications categorizing them as advertisements. Regulations specific to internet advertisement should also be comprehensively drafted as here consumers are prone to deception very easily.

6.6 Market Share

Market share claims are quite common in advertisement. But in such claims often non-identical products are compared leading to confusion. The substantiation guideline may lay down that when a claim of market share is made, both the products should belong to exactly the same category. For example, an antiseptic soap and an antiseptic liquid. Though both the products might look similar to a common consumer, but in reality the products might belong to entirely two different categories. An important issue in market share claims is that the data tends to be outdated. It may also be mandated that the data presented be current. It is suggested that the guidelines may also contain a timeframe for data collection.

6.7 Superiority Claim

Superiority claims through comparative advertising is legal in India and so are exaggerated claims namely puffery. In most cases, such advertisements include superiority claims, either directly or indirectly. When a blanket superiority claim is made by a company, such as the best refrigerator in India, the law should require the company to prove the claim as against atleast a few of its major competitors. In the absence of this requirement, companies will continue to misguide the common consumers who often are carried away by such blanket claims. These superiority claims may be vetted by organizations authorized to collect and compare such relevant data.

Absence of a holistic statutory framework for claim substantiation in India has led to inconsistency, dissimilarity and unpredictability in the outcome of disputes related to advertisement claims. Diversity in claims and the wide spectrum of platforms through which these claims are published, makes deception in this area relatively easier. Except for a few, the absence of claim substantiation guidelines in majority of domains have given the advertiser the freedom to publish all kinds of claims with impunity. Lack of pre-screening of advertisements has further aggravated the situation and false or misleading content is often taken up only in case where it is challenged. With a very high rural population combined with a high rate of illiteracy, India is at an elevated risk of consumer deception through misleading advertisements. This combined with a fast-growing advertising industry, makes it imminent for India to regulate deceptive advertisements and bring clarity in the advertisement regime through laying down rules for claim substantiation. While the new Consumer Protection Act, 2019 had made some attempts to address the issue related to deceptive advertisements but issues related to claim substantiation and its regulation has still not been touched upon. The self-regulatory bodies, such as the Advertising Standards Council of India (ASCI), which has greater flexibility and freedom in regulation, have also not been able to do much in this regard and often decide deceptive claims and substantiation issues on a case-to-case basis. Thus, it is imminent that there should be clear guidelines for claim substantiation may be drafted for a growing Indian advertising industry and which will benefit the consumers and the future advertisers.

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Table 1. Claim categorization and evidence requirement

Sl No	Claim Type	Evidence Required	Example
1.	**Health claim**	a. Experimental Studies b. Consumer perception test c. Research Paper/ Published information	Advertisers should use blind test, control groups and a number which may be statistically significant to prove or disprove a given claim.
2.	**Cosmetic Claim**	a. Lab test • In silico Test • In vitro test • Ex-vivo test • Clinical studies • Instrumental methods • Microbiological Methods b. Sensory evaluations c. Scholarly articles d. Consumer Perception Test	Cosmetic tests should be standardized and should follow accepted protocols. They should be done in a controlled environment. Wherever required clinical tests on humans may be performed.
3.	**Environmental claim**	1.Renewable Energy Claim	Renewable energy claim should be made when the entire manufacturing process is through renewable energy. Other wise such a blanket claim should not be made. Such claims should be made when appropriate certification is obtained where ever needed. Recycled content claims can be made for things that have been recovered during manufacturing from waste stream or post-consumer use.

		2. Recycle Claim 3. Degradable Claim	Where products are made partly from recycled material the same should be clearly mentioned, for example, "Made from 30% recycled material." In cases where a product/package will completely breakdown and return to nature, in such cases alone it can be called as degradable. In case this is not true then the claim needs to be clearly qualified.
4.	**Testimonials**	1.Expert Testimonial 2. Celebrity Testimonial 3.Consumer Testimonial	A person who is sufficiently qualified in the field to be considered an expert. opinion should be based on actual evaluation, examination, or testing of the product. (disclosure should be made regarding the experts connection to the advertised product or if he has been paid, the same may be disclosed) Celebrities honest opinion after use of the product may be taken at reasonable intervals for an ongoing advertisement. Honest opinion after use of the product. (In case the consumer has been paid the same should be disclosed)
5.	**Market share claim**		1.Data collated by authorized/listed agencies. 2.Data to be collected from the relevant segment of the advertised product. 3. Presented data to be current and collected within a specified period of time.
6.	**Superiority claim** (Excluding puffed claims)		1.Relevant test with every product in the category in which superiority is claimed. 2. Test to be conducted by authorized/listed agencies and their names to be disclosed. 3. Superiority claim in the advertisement to be vetted/verified by the concerned testing organization.