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The celebrity and the Consumer Protection Act

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ETBrandEquity

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Will celebrities become more responsible? Or will they become more expensive?

The [Consumer Protection Act](#), 2019, an Act of Parliament, received the assent of the President of India last year. But it came into force only last week on Monday 20 July, 2020. This is ‘*an Act to provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto*’.

The Act is of special significance to all marketers, advertising agencies and endorsers (read celebrities) because of its various provisions. [The Indian Institute of Human Brands](#) (IIHB) has put out a special Report, which has been exclusively shared with the Economic Times Brand Equity.

[Download full IIHB Report](#)

The highlights of the Act, briefly are:

1. Establishment of a Central Consumer Protection Authority: The Act will establish a new regulatory authority known as the Central Consumer Protection Authority, which will have wide powers of investigation including the power of search and seizure. The Central Authority has been granted wide powers to take suo-moto actions, recall products, order reimbursement of the price of goods/services and file class-action suits if a consumer complaint affects more than one individual.

2. Establishment of a Central Council, District Consumer Disputes Redressal Commissions, State Consumer Disputes Redressal Commissions and a National Consumer Disputes Redressal Commission: All these multi-level structures are to be created to provide a fully-fledged, and fully resourced, consumer complaints and disputes redressal organization at the Centre, State and District levels.

3. Product Liability: The Act has formally introduced the concept of product liability and brought within its fold not just the product manufacturer and product service provider but the product seller as well.

4. Unfair Contracts: Following international jurisprudence, the Act introduces a unique provision that safeguards consumers against unfair contracts by declaring them to be illegal.

5. Unfair Trade Practices: The Act introduces a broader definition of Unfair Trade Practices, which also includes sharing of personal information given by the consumer in confidence.

6. Penalties for Misleading Advertisement: The Act introduces, for the first time, a definition of 'misleading advertisement'. It covers false description and guarantee of a product or services. It also covers information that was deliberately concealed from the consumer.

7. Celebrity Endorsement: The Act fixes liability on endorsers considering that there have been numerous instances in the recent past where consumers have fallen prey to unfair trade practices under the influence of celebrities acting as brand ambassadors. Going forward, the endorser needs to take the onus, and exercise due diligence, to verify the veracity of the claims made in the advertisement to refute liability claims

8. e-Commerce Transactions Covered: The Act has widened the definition of ‘consumer’. The definition now includes any person who buys any goods, whether through offline or online transactions, electronic means, teleshopping, direct selling or multi-level [marketing](#). The earlier Act did not specifically include e-commerce transactions.

9. e-Filing of Complaints: The New Act provides flexibility to the consumer to file complaints with the jurisdictional consumer forum located at the place of residence or work of the consumer.

10. Provision for Alternate Dispute Resolution: The New Act provides for mediation as an alternate dispute resolution mechanism, making the process of dispute adjudication simpler and quicker.

Interestingly, Section 21 of the CPA which deals with the use of an ‘endorser’ in advertising, has not still been notified to be enforced. So, though part of the Act, this provision is still not an enforceable Law, and therefore gives a breather to clients, agencies and endorsers (read celebrities).

How are endorsers (celebrities) impacted?

The interesting part of the provisions of the CPA are that the endorser:

- Has been made liable for any ‘false or misleading’ advertisement.

- Penalty amounts of INR 10 lakhs (approximately USD 14,000) and one year imprisonment to INR 50 lakhs (approximately USD 70,000) and up to 5 years imprisonment.
- Ban on endorsing any products/services upto 1 year, extendable to 3 years in case of subsequent contravention.

The implications for the endorser (celebrity) of the above provisions are:

- Need for increased due-diligence before a celebrity takes on an endorsement(product details/product quality/quality compliance), going forward. Ignorance will no longer be an excuse.
- Celebrities will need to make higher indemnity provisions in the endorsement contracts so as to mitigate any future liability.
- This may necessarily lead to increased prices for celebrity endorsement – higher fees as risks associated with the endorsement have now gone up manifolds.

Are ad agencies going to be impacted too by the new Act?

Section 21 (4) uses the expression “party to the publication” which is really open to interpretation. The most educated assessment is that as the creator of an ad, the advertising agency does become that ‘party’ referred to in the Act.

By that logic would a media agency be considered a party? Would the newspaper or channel be a ‘party’ too? Well, as it stands, till precedents are created through judgments, the broad brush of ‘party’ could affect a lot of entities in the advertising value-chain.

The saving grace, however, is the Section 21 (6) provision that “no person shall be liable to such penalty if he proves that he had published or arranged for the publication of such advertisement in the ordinary course of his business”. The ‘ordinary course of business’ is the safety net in some ways in the Act, though all such entities – agencies, media houses, even producers of the ad film – potentially could be in trouble if the transgression is accepted by the various Commissions.

Of course, how such interpretations are eventually handled will really depend on how Commissions at District and State level view the provisions. Similar issues have been noticed in the implementation of the Real Estate Regulatory Authorities (RERA) in different states, many of whom have chosen to take diametrically opposing positions on exactly the same questions of law.

STRAW POLL CONDUCTED BY IIHB:

142 corporates & legal honchos, 4 questions-on-the-phone

76% Agree that endorsers needed to be reined in

82% Believe penalties will not be a deterrent

52% Believe penalties should be double of endorsement fees

88% Believe nothing will change; lawyers will manage

In all of this, what happens to ASCI?

[The Advertising Standards Council of India](#) (ASCI) was established in 1985; it subsequently adopted a Code for Self-Regulation in Advertising. It made a commitment to honest Advertising and to fair competition in the market-place. It said it would stand for the protection of the legitimate interests of consumers and all concerned with Advertising —Advertisers, Media, Advertising Agencies and others who help in the creation or placement of advertisements.

ASCI's one overarching goal over the years has been: to maintain and enhance the public confidence in advertising. ASCI is supposed to ensure that advertisements conform to its Code for Self-Regulation which requires advertisements to be:

-Honest Representations: Truthful and Honest to consumers and competitors.

-Non-offensive to public: Within the bounds of generally accepted standards of public decency and propriety.

-Against Harmful Products/Situations: Not used indiscriminately for the promotion of products, hazardous or harmful to society or to individuals particularly minors, to a degree unacceptable to society at large.

-Fair in Competition: Not derogatory to competition. No plagiarism.

Unfortunately, despite its lofty objectives, ASCI has remained a paper-tiger, upholding many consumer complaints but helpless in enforcing any concrete and timely reliefs.

Views and Opinions from Industry Leaders & Legal Professionals

LAWYERS' OPINION

“The most revolutionary provisions are contained in Chapter III, which envisages the setting up of a Central Consumer Protection Authority, with its in-house machinery to investigate, to safeguard the rights of consumers from unfair trade practices or misleading advertisements. In the present day context, many products and services are endorsed by celebrities, be they from the sports arena or the film world.”

Manmohan Lal (Mac) Sarin, Senior Advocate

“The ability for a consumer to file a complaint where the consumer resides as opposed to where the seller resides are good steps. The strict time limits placed on addressing a complaint is laudable and necessary. All this is pro consumer. The flip side to this will obviously be a huge cost to companies in defending claims, litigation would increase and the ease of doing business will decrease. Another troubling matter could be inconsistent approaches by different benches leading to much dichotomy.”

Sunil Phatarphekar, Advocate

“Catch the celebrity endorser, manufacturer, publisher, or advertiser to curb the menace of misleading advertisements, rampant especially in e-commerce segment. This seems to be the theme of the recent enactment of the consumer protection law of 2019 which requires an endorser to exercise due diligence to verify the veracity of the claims made in the advertisement being endorsed by him.”

Munish Sharma, Partner, Dua Associates

“Governments attempt to hold endorsers accountable. However the quantum of penalties proposed are meager compared to what most high profile endorsers would charge for endorsing a product and may not draw the desired result. Endorsers may insure

themselves against such penalties or take indemnities from the product manufacturer or service provider. Further, an escape window of "due diligence" has been given."

Meet Malhotra, Senior Advocate

BROADCASTER VIEW

"Unfortunately, some opinion leaders have made it an ROI game. They first invest almost a lifetime perfecting their craft. Once they are at the peak of their profession, it is time for returns. The monetisation window and the opportunity is short lived. Hence, pick what you get and mouth the lines that are put in front of you. It is immaterial whether they even use the category, forget the brand. It is often justified with, "They have more at stake, they must be sure of what they asked me to endorse"."

Harit Nagpal, MD & CEO, Tata Sky

AD BOSS' TAKE

"The relationship that fans have with the celebrity is based a lot on trust and faith. The celeb is their ideal. For these reasons, the celeb has a massive influence over their fans. That is why brands pay huge moneys to celebrities to lend credibility and visibility to their claims. It is equally true that endorsing a brand also adds to the credibility and image of the celeb. The relationship between the brand and celebrity is based on a tacit understanding that either will not do anything to damage the reputation of the other."

Virat Tandon, Group CEO, MullenLowe Lintas Group

"Since celebrities have a significant influence over consumers, they also carry the responsibility of ensuring that the consumers are not misled. The new Act, in some ways, expects the celebrities to do some amount of due diligence before associating with the product, to ensure that it is not harming the interests of the consumers in any way, shape or form. In my view, it is unreasonable to hold celebrities responsible for technical evaluation, legal analysis etc. because that is not their forte."

Ashish Bhasin, CEO APAC and Chairman India, [Dentsu Aegis Network](#)

"Endorsements by celebrities work best when the relationship between a brand offering and the celebrity is symbiotic. As much as the brand offering gets greater cut-through and

‘image’ because of the celebrity endorser, the latter gets more opportunities to be seen and stature being associated with a brand that obviously can afford to spend on marketing itself. Wherever there is a symbiotic relationship, the endorser would naturally be whetting the brand offering thoroughly in the first place and only then tying up with the brand. In such cases, the Act would not even need to come into play and so the endorser will not be impacted. After all he/she did the homework in the first place!”

Sangeetha N., President & NCD, RK Swamy BBDO

“A penalty to a manufacturer for a false claim is fair because by and large it is the manufacturer who decides WHAT to say. But to punish or prohibit an endorser and the advertising agency seems completely unwarranted. Claims are usually vetted by the legal department and the marketing department of a company. The advertising agency or a brand ambassador has neither the expertise nor the wherewithal to validate the authenticity of product claims. If at all, a brand ambassador/endorser only loses credibility, and their personal brand value reduces if found associated with a brand with misleading claims.”

Nandini Dias, CEO, Lodestar UM

“Putting the onus on doing due diligence on endorsers is not right. If it is a celebrity a company may provide whatever he/she asks for to support the brand claim, but what about advertisements that feature upcoming actors/models who do not have that power. The onus on false claim should rest 100% on the manufacturer.”

Arunava Sengupta, Founder Director, Scarecrow M&C Saatchi

“This is a long overdue move, and this law is needed badly. ASCI despite everything has not been the best regulator, and by the time the 'ruling' comes, the campaign is over. Also the whole process that ASCI follows has no relevance for online medium. They hardly take up the cases and even when they do, the judgment is delayed so much that it ceases to be an issue. For the entire communication industry to become responsible, we do need a strong law that defines boundaries.

Naresh Gupta, Managing Partner, Bang in the Middle

GOVERNANCE GUIDE

“The Indian Companies Act, 2013 had already put stakeholders at the centre and in making CSR mandatory, made sure that companies think beyond their bottom-line.

This current Act should not be viewed, as narrowly being in about endorsements. It should be seen more broadly, as a part of a corporate’s responsible behaviour towards customers and communities.”

Amit Tandon, Founder & Managing Director, Institutional Investor Advisory Services (IiAS)

ACADEMICIAN’S CHECK

“The Act is very timely.

Celebrities have been put on notice. They cannot blindly endorse anything and everything. There will have to be caution and restraint in the brand choices they make, and the claims they let advertisers make. The Act will be a guiding beacon on what should be verified and ascertained in communication.”

Prof. Siddhartha Singh, Associate Dean, Indian School of Business

The Last Word

Whether an endorser’s due diligence will ever be sufficient to test the veracity of the claims in an advertisement is a question difficult to answer. This is because though a celebrity may do everything in her/his power, he/she will never be able to actually test the product for its claims in the manner in which specialized government agencies do, or can do. The celebrity can only test the veracity of the claims by going through the necessary legal documents issued by these specialized government agencies, that too those easily accessible. Nevertheless, going forward, the representations made by the endorsers will be carefully planned so as to prevent any legal consequences and we will surely see more transparency in the advertisements.

At the same time, section 21(5) exempts an endorser from the penalty and the ban if the endorser is able to prove that she/he “*has exercised due diligence to verify the veracity of the claims made in the advertisement*”. Needless to say, now the endorsers, willy nilly will conduct ‘due diligence’ to make sure that the advertisement represents the true nature of the product. This will consequently change the way the contracts are entered into between the endorser and the brand and we may see indemnity clauses as standard terms. Additionally, for false or misleading advertisements, the brand (the manufacturer or the service provider) faces provisions of imprisonment – hence it may just be prudent for all not to cross the line on honesty of claims.

Last, will endorsements cost more? Yes, if risks have gone up for the celebrities, they will want to be compensated. Mere indemnities may not be enough. Also, celebrities will have to seriously look at the surrogates ... their very basis is deception and misrepresentation!

Dr. [Sandeep Goyal](#), Chief Mentor, IIHB

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