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# **LIABILITY REGIME FOR INFLUENCER AND CELEBRITY ADVERTISING IN THE DIGITAL AGE**

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## **ABSTRACT**

Celebrity and influencer liability in the digital age in India is a relatively new avenue for Indian legal jurisprudence to develop. This paper shall outline the various sources of liability and the potential protection which can be provided to avoid said liability. The scope of this paper is limited to examining the Advertising Standards Council of India (ASCI) along with the Consumer Protection Act, 2019 (COPRA) and will outline the liability that arises out of these laws and guidelines along with the various precedents set by case law while also examining the prevalence and significance of contractual terms.

## Codified Law and Guidelines

### Advertising Standards Council of India's Code and Guidelines

ASCI is a voluntary self-regulation company registered under Section 25 of the Companies Act of 1956 which makes it a not-for-profit company<sup>1</sup>. Upon the enactment of the new Act, the Section 25 companies are deemed to be registered under Section 8<sup>2</sup>. ASCI has been established by the International Council of Ad Self-Regulation (ICAS). ASCI formulated its code offering protection to consumers against false advertising across various platforms. The sponsors and members of ASCI are of considerable repute and are advertisers, or advertising agencies from various industries. It must be emphasised that ASCI is not a government body or a statutory authority.

ASCI was established in 1985 when it also released its Code for Self-Regulation in Advertising. The ASCI Code aims to ensure that advertisements are legal, decent, honest and truthful, and not hazardous or harmful while observing fairness in competition.<sup>3</sup> Despite being introduced only in 1985, the Code has been revised several times to keep up with the changes in advertising and the market itself. ASCI is seen to work with several regulatory authorities such as the Ministry of Information and Broadcasting (MIB) and the Food Safety and Standards Authority of India (FSSAI)<sup>4</sup>.

Any provisions laid down by ASCI are meant to apply only to members and not non-members of ASCI. The membership is attached with several incentives and benefits such as consolidated compliances, diligence services and industry connections. ASCI also provides a quick and convenient grievance redressal mechanism, the Consumer Complaints Council (CCC), for its members to replace the costly and time-consuming legal system. If any form of penalty is provided that affects the rights or the trade of a non-member even in an indirect

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<sup>1</sup> Indian Companies Act § 25 (1956); Indian Companies Act § 8 (2013).

<sup>2</sup> Ltd, M.E. (2023) *Understanding the difference between Section 8 and Section 25 companies*, Marg ERP Blog. Available at: <https://margcompusoft.com/m/difference-between-section-8-and-section-25-company/> (Accessed: 19 June 2024).

<sup>3</sup> ASCI (2024) *The Code for Self-Regulation in Advertising in India*. Available at: [https://www.ascionline.in/wp-content/uploads/2024/04/Code-Book\\_Codes\\_Webready.pdf](https://www.ascionline.in/wp-content/uploads/2024/04/Code-Book_Codes_Webready.pdf) (Accessed: 19 June 2024).

<sup>4</sup> ASCI (2024) *History & Key Milestones - Advertising Standards Council Of India – ASCI*. Available at: <https://www.ascionline.in/history-key-milestones/> (Accessed 29 July 2024); ASCI (2024) *The Code for Self-Regulation in Advertising in India*. Available at: [https://www.ascionline.in/wp-content/uploads/2024/04/Code-Book\\_Codes\\_Webready.pdf](https://www.ascionline.in/wp-content/uploads/2024/04/Code-Book_Codes_Webready.pdf) (Accessed: 19 June 2024).

capacity, the same cannot be seen as enforceable<sup>5</sup>.

The main focus of this paper specifically looking at ASCI is to examine the core principles embodied in the ASCI Code and the Guidelines for Celebrities in Advertising, 2017 along with the Guidelines for Influencer Advertising in Digital Media, 2023. The Code aims to ensure that any advertisement is truthful and contains objectively ascertainable facts so that consumers are not misled, the public is not offended, and there is no harm imposed to the general public or to the integrity of maintaining fair market competition. The Code lays down fundamental guiding principles to encapsulate the same.

Despite the Consumer Protection Act legally requiring celebrities to do their due diligence before they endorse an advertisement, in 97% of cases processed by ASCI featuring celebrities, they failed to provide any evidence of the same. ASCI witnessed a massive rise in the number of complaints featuring celebrities in the year 2022-23. 503 advertisements featuring celebrities were processed as opposed to 55 advertisements the previous year<sup>6</sup>.

The CCC consists of two groups “A” and “B”. Group “A” shall consist of 16 members from professions and activities not related to advertising. Any recommendation or suggestion of the CCC cannot be enforced by ASCI itself but the same can be submitted to the concerned regulatory authority or government department for appropriate action at their consideration. If aggrieved by a decision by the CCC, an independent review council of ASCI can be approached. However, it must be noted that the MIB has been instrumental in providing ASCI with more authority, especially after a notification released in June 2021<sup>7</sup>.

### **The Consumer Protection Act, 2019 and its Guidelines**

The Consumer Protection Act defines misleading advertisements and endorsements in a manner that embodies the same principles as mentioned earlier concerning ASCI’s Code and Guidelines<sup>8</sup>. When examining the language of the law the definition of the same has been worded in an extremely vague and ambiguous way which essentially increases the applicability

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<sup>5</sup> Dish TV India Limited v. Advertising Standards Council of India, SCC OnLine (Del 6715. 2016); Century Plyboards (India) Ltd. v. Advertising Standards Council of India, SCC OnLine Bom 444. (1999).

<sup>6</sup> ASCI (2023) *The Advertising Standards Council of India 37<sup>th</sup> Annual Report 2022-23*. Available at: [https://www.ascionline.in/wp-content/uploads/2023/09/ASCI-Annual-Report-2022-2023\\_Webready.pdf](https://www.ascionline.in/wp-content/uploads/2023/09/ASCI-Annual-Report-2022-2023_Webready.pdf). (Accessed: 19 June 2024).

<sup>7</sup> Cable Television Networks (Amendment) Rules, 2021.

<sup>8</sup> Consumer Protection Act § 2(28), 2(18), 21 (2019).

of the relevant provisions. The all-encompassing characteristic could predict new forms of advertisements and pre-emptively protect consumers. However, the same can also leave the scope of interpretation to be extremely wide increasing the judicial discretion and ultimate scrutiny on advertisers and endorsers. This could affect the overall ease of doing business on both ends.

The key difference between COPRA and ASCI's Code and Guidelines lies in its authority. COPRA is a codified piece of legislation prescribed by the Ministry of Consumer Affairs with a prescribed central authority, the Central Consumer Protection Authority (CCPA). This essentially means that the CCPA has the teeth of enforceability that ASCI lacks as seen in Section 21 of the Act.<sup>9</sup> Section 21 allows CCPA to impose penalties and issue directions concerning the same to a manufacturer or even an endorser. The penalty imposed may extend up to Rs. 10 lakhs along with a prohibition on advertising for a year only for a first-time offence. The only exemption from liability is to prove that the endorser or manufacturer conducted the required due diligence.

It is important to note that an endorser has not been defined in the Act but has only recently been defined in the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022. The only defence to a claim arising from a misleading advertisement is proof of due diligence. However, as previously stated, the expected standard of due diligence has not been expanded upon to any extent.

The redressal mechanism for violating COPRA is quite comprehensive. Most complaints directly reach the CCPA which is the central authority that may also refer the matter to another body including the district collector of the CDRC at the district level<sup>10</sup>. If sent to the district collector, a report is made with recommendations and is then sent back to the CCPA. The issue at hand is that there is no designated central authority for misleading advertising issues. All violations or issues concerning COPRA are handled by the CCPA and CDRC. To allow India to gain a better understanding of advertising law concerning influencer and celebrity liability, there should ideally be a designated statutory authority essentially

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<sup>9</sup> Consumer Protection Act § 21 (2019).

<sup>10</sup> ASCI (2022) *How Do We Handle Advertising Complaints?* - ASCI. Available at: <https://www.ascionline.in/the-work-we-do/how-we-handle-complaints/>. (Accessed: 25 June 2024); ASCI (2022) *The Advertising Standards Council of India Complaints Procedure*. Available at: [https://www.ascionline.in/wp-content/uploads/2022/11/asci\\_complaints\\_procedures.pdf](https://www.ascionline.in/wp-content/uploads/2022/11/asci_complaints_procedures.pdf) (Accessed: 25 June 2024).

performing the same function as ASCI but with the teeth of being a central authority to enforce the recommendations and suggestions of the CCC.

## **Uncodified Law – Judicial Precedents**

### **Pre-COPRA**

Prior to the establishment of the new Consumer Protection Act, of 2019, celebrity liability was mostly criminal in nature. The most relevant case that establishes the same is the Maggi case.<sup>11</sup> As an aftermath of holding Nestle responsible for misleading labelling and a lack of relevant approvals, celebrities who endorsed Maggi were sent legal notices and had FIRs filed against them. The case has been filed under IPC Sections 270 (malignant act likely to spread infection of disease dangerous to life), 273 (sale of noxious food or drink), 276 (sale of drugs as a different drug or preparation) and 420 (dishonesty)<sup>12</sup>. However, with the introduction of COPRA, the liability became more defined.

### **Post-COPRA**

The Havells India case laid down a test for misleading advertisements that it must deceive the persons to whom it is addressed or must have the potential to deceive them, and it must, as a consequence, be likely to affect public economic behaviour to whom it is addressed or harm an advertiser's competitor.<sup>13</sup> This also reinforces the principles in the ASCI Code and Guidelines.

The most relevant and recent judgement is the Patanjali case.<sup>14</sup> The Patanjali case essentially laid down a new precedent stating that advertisers, advertising agencies, and endorsers are equally responsible for issuing false and misleading advertisements. The Court added another tier to the diligence requirement by requiring the advertiser or advertising agency to submit a self-declaration form as a condition precedent to releasing any advertisement across any medium attesting to the principles laid down in the Advertising Code as part of the Cable Television Networks Rules, 1994<sup>15</sup>. The issue with this is that it creates an additional burden

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<sup>11</sup> M/S Nestle India Limited v. The Food Safety and Standards Authority (Bom 1688. 2015).

<sup>12</sup> Indian Penal Code § 270, 273, 420 (1860).

<sup>13</sup> Havells India Ltd. v. Amritanshu Khaitan & Ors. (Del. 2015).

<sup>14</sup> Indian Medical Association v. Union of India, (SC. 2024).

<sup>15</sup> Cable Television Network Rules r. 7 (1994).

on the advertisers beyond the already prevalent diligence requirements in COPRA as well as the ASCI Code and Guidelines. This makes the process more time-intensive and costly.

## **Contractual Liability**

### **Relevant Clauses**

In today's world, any advertisement requires a contractual agreement between the influencer or celebrity endorser and the advertiser or advertising agency in most situations which is why it is important to consider the fact that liability may also arise from mutually agreed-upon terms and conditions. Endorsement contracts contain certain clauses and details that are specific to the industry requirements such as the exact endorsed product or service, the endorsement term, the medium or platform, the remuneration, and the representations and warranties, along with the requisite disclosure and liability clauses, to make sure that the celebrity or influencer is aware of all material information. The indemnity clause would incentivise the agreement in itself as it allows the advertiser to take responsibility for any liability arising out of the endorsement. Such clauses are added to reinsure the celebrity or influencer especially since reputational damages are of great consequence to them. For indemnity clauses, it is important to understand that they do not cover any criminal liability that may arise.

Furthermore, the contract may outline the specific duties of the celebrities and influencers to specifically state their role and scope of the endorsement to avoid any ambiguity and to clearly state the acceptable range of activities for which the advertiser is ready to indemnify.

These types of contracts also have a moral clause which permits the celebrity or influencer to terminate or suspend the contract if the advertiser or advertising agency engages in any 'harmful behaviour' which is detrimental to the image of the celebrity or influencer. In India, the same is unilateral stemming from the celebrity or influencer but in countries such as the USA or the UK, endorsement contracts can have a bilateral moral clause which allows either party to suspend or terminate the contract if the other party has certain questionable associations or behaves unacceptably.

Beyond the aforementioned endorsement-specific clauses, the contract will also have

certain boilerplate clauses such as a force majeure clause to outline circumstances in which the contractual obligation to perform is suspended along with intellectual property clarifications, confidentiality, dispute resolution and governing law, and termination to name a few.

### **Imposition of Liability**

The imposition of liability requires proof of intention as well as proof of having material information which can be very difficult to prove. It would require the endorser to voluntarily be part of the advertisement despite knowing the harmful effect of endorsing the same. Establishing the possession of such knowledge while doing the endorsement can be extremely difficult to verify and establish.

Thus, the threshold required to successfully impose liability is high due to the added requirement of proving that the celebrity did not conduct the required standard of due diligence. As mentioned before, since the standard of due diligence is undefined, this creates a gap in the law open to judicial interpretation which can be a concern for all involved parties as it may set dangerous precedents beginning with the Patanjali judgement.

### **Other Considerations**

#### **Deepfakes**

Deepfakes are forms of media in which the image or video is altered to resemble another individual's features realistically to the extent that it is extremely difficult to distinguish from reality as seen in this picture here. The technology is new and emerging but there is no provision in Indian law specifically targeting the dangers that come with deepfakes which is a cause for concern. 27. Currently, the only available protection is found within the IT Act and the IPC<sup>16</sup>. However, there is no legislation specifically for deepfakes nor is there any legal precedent outlining celebrity liability, especially for advertising using unauthorised deepfakes in India.

An advisory was issued to social media intermediaries to identify misinformation and deepfake released by the Union Government on 7th Nov 2023<sup>17</sup>. The advisory states that if any

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<sup>16</sup> Sections 66D, 66E, 67, 67A, and 67B of the Information and Technology Act, 2000; Sections 153, 465, 469, 499, and 509 of the Indian Penal Code, 1860.

<sup>17</sup> Press Information Bureau (2023) *MeitY issues advisory to all intermediaries to comply with existing IT rules*. Available at: <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1990542&ref=static.internetfreedom.in>. (Accessed 29 July 2024).

of these legal infractions of the IT Act or its Regulations are discovered or reported, there will be legal repercussions<sup>18</sup>. Not conforming with the requirements of the IT Act would strip the social media intermediaries (SMIs) of their protection under Section 79(1) which exempts online intermediaries from liability for any third-party information, data, or communication link made available or hosted by them<sup>19</sup>.

Additionally, another advisory by MeitY was issued to all intermediaries to comply with existing IT rules on 26th December 2023<sup>20</sup>. The advisory stated that reasonable efforts must be made to identify misinformation and deepfakes and that due diligence is used to identify information that violates user agreements, rules and regulations, and other relevant guidelines.

An important judgement on celebrity personality rights to consider is a recent Delhi High Court judgement where the plaintiff is Anil Kapoor.<sup>21</sup> Anil Kapoor sought the protection of his name and persona against misuse over the internet which included his voice, photograph, image, and likeness. He specifically claimed personality rights, including the right to publicity, copyright in the dialogue and image in associated works, and common law rights including the right to be protected against passing off, dilution and unfair competition. The Court stated that the right to privacy is implicit in the right to life under Article 21 and thus no one can publish anything about an individual and his image, family, etc. without their consent regardless of whether the same is truthful or not.<sup>22</sup> However, in the present case, the Court agreed with the requirement to protect Anil Kapoor's likeness, image, persona etc. from being misused. The Court granted him an injunction against the Defendants.

Consider a hypothetical scenario, wherein a deepfake is used to advertise a product using a celebrity's likeness resulting in a consumer being wronged due to misleading advertising, the question is whether the liability will fall on the celebrity.

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<sup>18</sup> Information and Technology Act § 66D, 66E, 67, 67A, 67B (2000); Information and Technology Rules r. (3)(1)(b) (2021).

<sup>19</sup> Information and Technology Act § 79(1) (2000).

<sup>20</sup> Press Information Bureau (2023) *Union Government issues advisory to social media intermediaries to identify misinformation and deepfakes*. Available at: <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1990542&ref=static.internetfreedom.in>. (Accessed 29 July 2024).

<sup>21</sup> Anil Kapoor v. Simply Life India, (Del 6914. 2023).

<sup>22</sup> Constitution of India art. 21 (1956).



Based on the precedent set by the Anil Kapoor case and the Maggi case, the principles can be used to attempt to answer the same<sup>23</sup>. Based on the Anil Kapoor case, the celebrity has a right to prevent the misuse of their image for commercialisation which includes the usage of deepfakes. Thus, any use of his likeness would require his consent. However, the Court has not clarified the exact parameters of consent. Whether this consent amounts to an act affirming his assent to the same or whether it also includes silence, and a lack of objection is an aspect which has not been clarified. In the Maggi case, there was an explicit contractual relationship in the form of an endorsement deal between the celebrities and the advertiser. This created a direct nexus allowing the aggrieved individuals to file an FIR against the celebrities. Thus, there needs to be some manifestation of agreeing to the use of their image for the advertisement for there to be a source of liability.

In light of the highlighted issue and the currently available remedies, there is a lack of preventative legislation since the IT Act and Rules are remedial in nature. There exists a lacuna in the law concerning preventative measures to minimise unrestricted access to and use of dangerous tools that can make such deceptive media. The existing legislation does not take into account the prevalence of new and emerging technologies.

There is also a lack of a specific enforcement mechanism or body solely dedicated to countering such issues. The current regulations only focus on online takedowns in the form of censorship or criminal prosecution but lack a deeper understanding of how generative and equally dangerous AI and deepfake technology are. It will get increasingly difficult to police such a thing as it veers very closely to policing the entirety of the internet.

## Conclusion

In conclusion, the liability of celebrities is currently a relatively unexplored and dynamic topic concerning existing jurisprudence. In light of the advent of technological advancements, digital media has become a very dangerous medium, especially for advertising. There is a need for advertising specific regulatory authorities as well as the development of precedents that are agreeable and conducive to the industries largely affected by the same. It remains ever-so-important for the law to be dynamic and constantly developing. It is also

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<sup>23</sup> Anil Kapoor v. Simply Life India, (Del 6914. 2023); M/S Nestle India Limited v. The Food Safety and Standards Authority (Bom 1688. 2015).

important for the Indian Courts to be aware of international developments in celebrity and influencer liability to be at pace on a global level.