Advertising Malpractices – A Case Study of Pharmaceutical Industry

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Abstract

Advertisement plays an important role in promotion of products. Unless proper restraint is exercised by the producers and marketers, the advertisement may lead to negative results. Evidences show that marketing practices can negatively affect both patients and the health care profession. Many countries have measures in place to limit advertising by the companies. “Pharmaceutical liability” as a part of strict liability is a term used to describe the legal consequences a manufacturer of drugs may face if its products injure people. Cases involving injuries caused by drugs, medical devices and other pharmaceuticals are a subset of product liability cases. The government regulations for product liability are quite strict and looking at the large number of cases of product liability claims it is obvious that such a trend is inevitable. But, it is necessary to strike a balance between suing the guilty and preventing unnecessary burden on the innocent at the same time. This can be done by having more strong implication of the Law and making people aware about their rights and legal aspects. Also, there must be more emphasis from the government side for implication of GMP norms for production of pharmaceuticals. This can reduce the defects in the product which harm public at large.

Many countries have framed laws to check objectionable advertisements to promote general interest of public. In the recent past, the courts have also taken serious view of the unlawful advertisement practices and objectionable advertisement. In India, to protect the public interest and to make restrictions on objectionable advertisement, DRUG and MAGIC REMEDIES ACT of 1954 was passed. The case laws COLAGATE and PAMOLIVE vs. ANCHOR case undertaken in the present study highlight the misuse of advertisement by the other manufacturers to promote their product. Keeping the above facts in mind, the present study has been conducted to understand in detail the advertising in pharmaceutical industry, marketing practices, laws governing advertising and legal cases on malpractices in advertisement and objectionable advertisements.

Key Words: Advertisement, Marketing Practices, Malpractices, Legal Cases, Pharmaceutical Industry, Product Liability
1. Introduction

In order to survive in this highly competitive global market place, it is extremely essential for organizations to have an effective integrated marketing communication plan in place. Having the knowledge about the various types of markets that exist in the world, and in particular in Asia which is perhaps the most rapidly growing market, will help achieve this objective. Thus, marketing becomes an integral part of pharmaceuticals. A major part of Parma marketing is done by advertising.

1.1 Advertising in Pharmaceutical Industry

Drug & Pharmaceutical Industry plays a vital role in the health care of the any country. Rapid growth of this industry requires further attention because even after 50 years of independence, India, with around 15 percent of the World population, accounts for less than 2 percent of the drug production in the world. Annual per capita consumption of medicine in India is less than 2% of that in Japan. Health care expense in India is a dismal 0.8 percent of GDP compared with 12.4 percent in U.S.A. 6.5% in Japan and 6.2 percent in the U.K, despite higher incidence of disease and malnutrition. The poverty and disease in India on one hand calls for higher standard of healthcare and pharmaceuticals production and on the other, stultifies the growth of industry due to poor affordability of an average Indian. Drug & Pharmaceutical industry has therefore, encountered a tough situation which most industry have always found difficult, to provide abundant quantity of quality products at low prices.

The Indian Pharmaceutical industry, valued at $46.2 billion has been witnessing attractive growth rate of 15% to 20% consistently over the past decade (Strategist Quarterly 1998). This growth was build by India's large population, increasing allocation of income to healthcare spending and exports. Exports which currently accounts for 20% of the production value has grown by a compound annual growth rate of 34% in the past few years due to competitive price advantages from India's low labor and other input cost .The Indian market for pharmaceutical products stands at an enormous $58.8 billion. The big 10 companies account for over 30% of that, take away 45 marketer and average sales don't even come anywhere near the $2.5 million marks, that's how fragmented its is some 50,000 brands from over 20,000 companies growing fast enough to embarrass rainy day mushrooms and enough diseases to savage Indian population all several times over and turn Dr. Do little into Dr. Don't care.

1.2 Role of FDA over Drug Advertising

The Food and Drug Administration (FDA) protects public health by assuring the safety, effectiveness, and security of a wide range of products, including human prescription drugs. We also advance public healths by helping people get the accurate, science-based information they need to use medicines appropriately and improve their health.

It serves the public health and welfare in many ways. It oversees the approval and marketing of prescription drugs. The authority is based on a number of federal laws, including the Federal Food, Drug, and Cosmetic Act. Among other areas, this law specifically addresses prescription drug advertising. This law requires that advertisements for prescription drugs be accurate and not misleading.

1.3 Direct-to-consumer (DTC) advertising

It is a relatively new area of prescription drug promotion. No federal law has ever banned DTC advertising. Until the mid-1980s, drug companies gave information about prescription drugs only to
doctors and pharmacists. When these professionals thought it appropriate, they gave that information to their patients. However, during the 1980s, some drug companies started to give the general public more direct access to this information through DTC ads.

1.4 DDMAC — Division of Drug Marketing, Advertising and Communications

Part of the mission of the FDA's Center for Drug Evaluation and Research (CDER) is to ensure that companies that sell prescription drugs also provide information that is truthful, balanced, and accurately described. CDER's Division of Drug Marketing, Advertising, and Communications (DDMAC) oversees prescription drug ad activities. DDMAC does this work by: (1) looking for and taking action against advertisements that violate the law; (2) educating industry and others about the specifics of the law; and (3) encouraging better communication of promotional information provided both to healthcare professionals and to consumers.

1.5 Types of Drug Advertisements

A drug is "prescription only" when medical professionals must supervise its use because patients are not able to use the drug safely on their own. Because of this, Congress laid out different requirements for prescription and non-prescription or "over-the-counter" drugs. Congress also gave the Food and Drug Administration (FDA) authority to oversee prescription drug ads. In turn, the FDA passed regulations detailing how it would enforce those requirements. These regulations are also known as "rules." However, while the FDA oversees ads for prescription drugs, the Federal Trade Commission (FTC) oversees ads for over-the-counter (non-prescription) drugs.

- Product Claim Advertisements
- Reminder Advertisements
- Help-Seeking Advertisements
- Other Product Claim Promotional Materials
- Risk Disclosure Requirements for Different Types of Advertisements

1.5.1 Product Claim Advertisements

Product claim ads are the only type of ads that name a drug and discuss its benefits and risks. However, these ads must not be false or misleading in any way. We encourage companies to use understandable language throughout product claim ads that are directed to consumers. Product claim ads must present the benefits and risks of a prescription drug in a balanced fashion.

All product claim ads, regardless of the media in which they appear, must include certain key components within the main part of the ad:

- The name of the drug (brand and generic)
- At least one FDA-approved use for the drug
- The most significant risks of the drug

Print product claim ads also must include a "brief summary" about the drug that generally includes all the risks listed in its approved prescribing information.

"Under the Food and Drug Administration Amendments Act of 2007, print advertisements need to include the following statement: "You are encouraged to report negative side effects of prescription drugs to the FDA."

Broadcast product claim ads (TV, radio, telephone) must include the following:

- The drug's most important risks ("major statement") presented in the audio (that is, spoken) AND
• **Either** all the risks listed in the drug’s prescribing information *or* a variety of sources for viewers to find the prescribing information for the drug. 
This means that drug companies do not have to include all of a drug's risk information in a broadcast ad. Instead, the ad may tell where viewers or listeners can find more information about the drug in the FDA-approved prescribing information. This is called the "adequate provision" requirement. For broadcast ads, we have said that including a variety of sources of prescribing information fulfills this requirement.

1.5.2 **Reminder Advertisements**
- Reminder ads give the name of a drug, but not the drug's uses. These ads assume that the audience already knows the drug's use.
- A reminder ad does not have to contain risk information about the drug because the ad does not say what the drug does or how well it works. Unlike product claim ads, reminder ads cannot suggest, in either words or pictures, anything about the drug's benefits or risks. For example, a reminder ad for a drug that helps treat asthma should not include a drawing of a pair of lungs, because this implies what the drug does.
- Reminder ads are not allowed for certain prescription drugs with serious risks. Drugs with serious risks have a special warning, often called a "boxed warning," in the drug's FDA-approved prescribing information. Because of their seriousness, the risks must be included in all ads for these drugs.

1.5.3 **Help-Seeking Advertisements**
- Help-seeking ads describe a disease or condition but do not recommend or suggest a specific drug treatment. Some examples of diseases or conditions discussed in help-seeking ads include allergies, asthma, erectile dysfunction, high cholesterol, and osteoporosis. The ads encourage people with these symptoms to talk to their doctor. Help-seeking ads may include a drug company's name and may also provide a telephone number to call for more information.
- When done properly, help-seeking ads are not considered to be drug ads. Therefore, we do not regulate true help-seeking ads, but the FTC does regulate them. If an ad recommends or suggests the use of a specific drug, however, it is considered a product claim ad that must comply with FDA rules.

1.5.4 **Other Product Claim Promotional Materials**
- Other types of promotional materials than advertisements are used to promote the use of a drug. These are called "promotional labeling" and include brochures, materials mailed to consumers, and other types of materials given out by drug companies. If these materials mention the drug's benefit(s) they must also include the drug's prescribing information.

1.6 **Risk Disclosure Requirements for Different Types of Advertisements**
- Different advertisements require different amounts of benefit and risk information.
- Reminder ads do not have to include any risk information because they cannot include any claims or pictures about what a drug does or how it works. Reminder ads are only for drugs without certain specified serious risks.
Print product claim ads may make statements about a drug's benefit(s). They must present the drug's most important risks in the main part of the ad ("fair balance"). These ads generally must include every risk, but can present the less important risks in the detailed information known as the "brief summary."

Also, print product claim and reminder ads must include the following statement: You are encouraged to report negative side effects of prescription drugs to the FDA. Visit Med Watch or call 1-800-FDA-1088.

Broadcast product claim ads may make statements about a drug's benefit(s). They must include the drug's most important risk information ("major statement") in a way that is clear, conspicuous, and neutral. In addition, they must include either every risk or provide enough sources for the audience to obtain the drug's prescribing information ("adequate provision").

1.7 Information Delivery to Consumers

1.7.1 Internet

Not that long ago, physicians were considered not just the primary source but often the only source of professional care and advice for patients. Today, in the "Information Age," youngsters see themselves at the center of a knowledge system with multiple sources to choose from and a plethora of informational possibilities. Surpassing the traditional forms of DTC advertising on television and in magazines, the Internet is the second most frequently used information source for both prescription products and health conditions.

It is noteworthy that the United States is one of only two countries that permit direct-to-consumer drug advertisements. The other is New Zealand, where several years ago some health officials and politicians tried and failed to ban drug ads. In this country, drug ads must list known side effects. And under current regulations, drug makers voluntarily submit ads to the F.D.A. for vetting before they appear.

More and more people are proactively searching the Web for information, and it is estimated that each day about seven-and-a-half million people use the Internet to obtain health information. Additionally, the growth of social networks on the Internet and their use for health-information purposes should be noted. More than one in five consumers now cites social networks as a health information resource.

1.7.2 Networked Society

Regardless of their age, people are likely to go online to search for information about pharmaceutical products and healthcare information. Although Gen Y’s and Gen X’ers are more likely to use the Internet than are their parents or grandparents for a multitude of purposes/uses, they are not the only individuals recognizing the potential hidden in the virtual universe. Baby boomers also see the Internet as something exciting and new and are quickly becoming converts to high-speed access and the information it contains. They are readily using it at work and at home, and more than 60% of baby boomers have used the Internet for health-related information in the past twelve months. While health-related and pharmaceutical Websites are popular among all respondents, the younger generation is also using various social networks to search for information.

1.7.3 Finding and Using Information

“Know where to find the information and how to use it - that's the secret of success” -Albert Einstein
The majority of consumers have used various sources in the past year to find prescription and health-related information. However, when asked to single out the one source they most frequently use to learn about prescription medications, almost half, or 49%, of them selected a healthcare professional.

1.7.4 Frequency of Usage and Perceived Utility

There is no doubt that healthcare professionals, the students and practitioners of “medical science,” are perceived as the most useful information source for consumers (rated as such by 88% of users). However, even though the Internet is not viewed as the main source of information and is not used as frequently as healthcare professionals, the majority of respondents, or 62%, find the medium to be among the most valuable sources of information on prescription products and health conditions – even surpassing traditional DTC advertising and educational brochures found in doctor’s offices and/or pharmacies as sources.

1.8 Internet vs. Traditional Advertising - a Perspective

Consumers were asked to evaluate various media channels – such as the Internet, television, and magazine advertisements – on a variety of attributes related to information timeliness, trustworthiness and efficacy. The results of the study showed that most agreed that accessibility and the ability to help them better understand the product(s) are the primary benefits of online advertising. On the other hand, consumers felt that traditional TV commercials still deliver more meaningful messages and appear to successfully motivate consumers to further research the advertised medication.

1.9 How Often Do We Intentionally Seek Health Information Online?

With the Internet being one of the main sources for prescription and health-related information, it is not surprising that online advertising has its place in driving behavior and increasing visibility of prescription products. With one in three consumers seeking prescription or health-related information weekly or more often, they are continually increasing their exposure to online advertisements. Links, banner ads, and buttons are all ways of bringing an online user to a particular Web page. So it is not uncommon for people to come across advertising for various prescription products during everyday searches. However, random exposure to these advertisements does not guarantee attention or necessarily drive users to spend time on a particular Webpage.

2 Statement of the Problem

The customers in modern times rely on the media and internet even for their health problems. Doctors’ prescriptions also play an equally important role in curing health problems. But due to increasing competition, the pharmaceutical companies sometimes are misleading the consumers with the advertisements of their products. Ignorant about the negative effects of the use of a particular drug, they often pressurise the medical practitioners to prescribe a specific drug as per the advertisement claims which ultimately leads to side effects or cause another health problem. Therefore, it is the duty of the pharmaceutical companies to be ethical in making the advertisement and caution the consumers about the negative effects of the use of a particular drug.

The present study is an attempt to bring into light few cases where advertisement malpractices by the pharmaceutical companies has caused health hazards and had to later ban their Ads/ the product. Attempts have been made to highlight the relevant laws in this regard.

2.1 Main Objectives of the Study

The main objectives of the study are:
To examine the nature of pharmaceutical advertising in general and review the studies taken place in this context.

To study the existing laws in force in India regarding the manufacture and sales of pharmaceutical drugs and the laws which impose restrictions on advertising.

To analyze and study leading cases on malpractices in advertising so as to make a clear understanding of the need to impose restrictions on advertisement pharma products.

2.2 Methodology

For the purpose of the present study, secondary data has been used. Information has also been collected through websites and analyzed to derive meaningful results to achieve the above objectives. In the light of the above objectives, a leading case decided in the learned court has been selected i.e. Colgate-Palmolive (India) Limited vs. Anchor Health. The case deals with advertisement malpractices by the producers of identical products. Many other case laws have been discussed and analyzed at appropriate places.

2.3 Significance of the Study

The study is highly significant as it purports to reflect advertising malpractices and their impact on the society.

3 Laws Governing Pharmaceutical Advertising

3.1 The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 is an Act which helps to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. The provisions of the act relating to the control of advertisement malpractices are briefly given below:

(a) Under this Act, advertisement includes any notice, circular, label, wrapper, or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke;

(b) Drug includes

(i) A medicine for the internal or external use of human beings or animals;

(ii) Any substance intended to be used for or in the diagnosis, cure, mitigation, treatment or prevention of disease in human beings or animals;

(iii) Any article, other than food, intended to affect or influence in any way the structure or any organic function of the body of human beings or animals;

(iv) any article intended for use as a component of any medicine, substance or article, referred to in sub-clauses (i), (ii) and (iii);

(c) magic remedy includes a talisman mantra kavacha, and any other charm of any kind which is alleged to possess miraculous powers for or in the diagnosis, cure, mitigation treatment or prevention of any disease in human beings or animals or for affecting or influencing in any way the structure or any organic function of the body of human beings or animals;

(cc) registered medical practitioner means any person,

(i) who holds a qualification granted by an authority specified in, or notified under Section 3 of the Indian Medical Degrees Act, 1916 (7 of 1916) specified in the Schedules to the Indian Medical Council Act 1956 (102 of 1956); or
(ii) who is entitled to be registered as a medical practitioner under any law for the time being in force in any State to which this Act extends relating to the registration of medical practitioner;

(d) Taking any part in the publication of any advertisement includes

(i) The printing of the advertisement;

(ii) The publication of any advertisement outside the territories to which this Act extends by or at the instance of person residing within the said territories;

3.1.1 Prohibition of advertisement of certain drugs for treatment of certain diseases and disorders

Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for

(a) The procuring of miscarriage in women or prevention of conception in women; or

(b) The maintenance or improvements of the capacity of human beings for sexual pleasure; or

(c) The correction of menstrual disorder in women; or

(d) The diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule, or any other disease, disorder or condition (by whatsoever name called) which may be specified in the rules made under this Act;

Provided that no such rule shall be made except

(i) In respect of any disease, disorder or condition which requires timely treatment in consultation with a registered medical practitioner or for which there are normally no accepted remedies, and

(ii) after consultation with the Drugs Technical Advisory Board constituted under the Drugs and Cosmetics Act, 1940 (23 of 1940), and, if the Central Government considers necessary, with such other persons having special knowledge or practical experience in respect of Ayurvedic or Unani systems of medicines as that Government deems fit.

3.1.2 Prohibition of misleading advertisements relating to drugs

Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement relating to a drug if the advertisement contains any matter which

(a) Directly or indirectly gives a false impression regarding the true character of the drug; or

(b) Makes a false claim for the drug; or

(c) Is otherwise false or misleading in any material particular.

3.1.3 Prohibition of advertisement of magic remedies for treatment of certain diseases and disorders

No person carrying on or purporting to carry on the profession of administering magic remedies shall take any part in the publication of any advertisement referring to any magic remedy which directly or indirectly claims to be efficacious for any of the purposes specified in Section 3.

3.1.4 Prohibition of import into, and export from India of certain advertisement

No person shall import into, or export from, the territories to which this Act extends any document containing and advertisement of the nature referred to in Section 3, or Section 4, or Section 5, and any documents containing any such advertisement shall be deemed to be goods of which the import or export has been prohibited under Section 19 of the Sea Customs Act, 1878 (8 of 1878), and all the provisions of that Act shall have effect accordingly, except that Section 183, thereof shall have effect as if for the word ‘shall’ therein, the word may were substituted.
4. Ban on Pharmaceutical Advertising: Analysis of Legal Cases

In the 1980s, Nancy Reagan told Americans to “Just Say No” to recreational drugs. Later, Representative Jerrold Nadler, Democrat of New York, has introduced a bill called the Say No to Drug Ads Act.

The editorial of Indian Journal of Pharmacology (2002) mentions: "All advertising is inherently unethical. That's how you sell things" said a New York attorney. Selling drugs is like selling any other commodity. Pharmaceutical companies choose to spend more on medical drug promotion rather than on research and development because drug promotion is what earns them money.

There are various cases where the courts in India too have taken a serious view on the advertisements made by various pharmaceutical companies which have dangerous effect on consumer health or their continuous use can cause some sort of disorders or health problems but the facts are not made known to the consumers. Sometimes, false claims are made regarding the cure of a certain disease without clinical testing of the same. Certain cases where a ban has been imposed on such advertisements are highlighted below:

Case-1: Curb advertisements that promise health cures

According to a report published in ‘The Tribune’, the government has finally turned its attention to a problem that has serious repercussions on consumer health: advertisements that promote drugs and health cures and gadgets.

Today, cures of questionable efficacy and gadgets of unknown values are being peddled through not just the print, but also television and the Internet. There is a proliferation of such advertisements that exploit the vulnerability of those suffering from certain diseases or an inferiority complex regarding their physical stature or looks.

The Drugs and Magic Remedies (Objectionable Advertisements) Act is specifically meant to tackle such false and misleading claims, but it is totally outdated and inadequate to deal with the present-day situation — it has no provision to tackle television and Internet advertisements. The Union Health Ministry has said that the law is being amended to curb such advertisements and award stringent punishment to those found guilty of violation.

As it stands, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, basically prohibits four kinds of advertisements pertaining to drugs and magical cures. Section 3 of the Act says that no person shall take any part in the publication of any advertisement promoting a drug or leading to the use of a drug for the procurement of miscarriage in women or prevention of conception in women; the maintenance or improvement of the capacity of human being for sexual pleasure; and correction of menstrual disorders in women.

Section 3 further prohibits any advertisement promoting drugs for the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule. The schedule lists a number of diseases, disorders or conditions such as diabetes, cataract, cancer, fevers (in general), obesity, rheumatism, impotence, high or low blood pressure, female diseases, epilepsy, stature of persons, venereal diseases, glaucoma, sterility in women, dropsy, etc.

Section 4 of the Act prohibits those advertisements relating to a drug if they contain any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false
claim for the drug or is otherwise false or misleading. Section 5 of the Act prohibits advertisements of
magic remedies for treatment of certain diseases and disorders. 
Violation of the law attracts imprisonment for six months or fine or both, for first conviction and for
subsequent conviction, imprisonment for a year or fine or both.
The Union Ministry of Health has said that the amended law would not only tackle advertisements on
the electronic media, but would also provide for severe punishment to those that violate the law. The
move is welcome, but it would be far more effective if the law were to provide for corrective
advertisements — in fact this is absolutely necessary to ensure that the impression created by a false
or misleading advertisement is corrected through a series of advertisements.
But amendment of the law is only one part of the solution. What is equally important is its strict
implementation Remember Neeraj clinic, Rishikesh? Despite the Magic Remedies Act,
RK Gupta advertised with impunity his clinic and claimed that he was offering a sure cure for
epilepsy. Ironically, way back in 2000, the Indian Medical Association had declared him a quack after
a committee had found that he was giving his patients toxic drugs in high doses. Then in May 2003,
following a complaint from a consumer, the Advertising Standards Council of India had held that the
advertisement violated the Drugs and Magic Remedies (Objectionable Advertisements) Act. Yet, he
continued to advertise and the drug control departments failed to act, resulting in thousands of
consumers falling prey to these advertisements.
In fact there are a number of advertisements in the print media itself, promoting indigenous cures or
medicines for a variety of ailments listed in the Schedule of the Act and no action whatsoever is taken
against any of them. If only the enforcement agencies were active, there would not be cases like the
one that went before the State Consumer Disputes Redressal Commission in Kerala some years ago.
Young Nadiya, who was short, was attracted to an advertisement that promised to convert a dwarf into
Amitabh Bachchan. Fathima Hospital, which had issued the advertisement, promised her that she
would gain 10 cm in six months through surgery, costing Rs 32,000. The so-called correction surgery
left her bedridden. Eventually, she approached Apollo Hospital, Chennai, which could restore her
movement, but not completely. If the state Health Department had done its job, the girl would not
have had to go through so much of physical and mental pain and anguish.
So in addition to amending the law, the government should provide for an independent mechanism to
monitor the implementation of the law and ensure its stringent enforcement. Corrective
advertisements are also absolutely essential.

Case 2: Ban of Tobacco Advertisements by the Government of India
On Feb 6, 2001 Government of India (GOI) dropped a bombshell on the tobacco Industry when it
announced that it would shortly table a bill banning Tobacco Companies from advertising their
products and sponsoring sports and cultural events. The objective of such a ban was to discourage
adolescents from consuming tobacco products and also arm the Government with powers to launch an
anti-Tobacco Program.

Case 3: Ban on certain Drugs in USA
Some legislators and consumer advocates in USA have cited past episodes where they say that there is
need for tighter regulation of drug advertising.
In 2004, for example, Merck withdrew the pain drug Vioxx from the market over safety concerns,
after years of robust sales that were stoked by extensive consumer advertising.
In 2008, Pfizer stopped running a television commercial for its blockbuster cholesterol drug Lipitor after critics charged the ad misrepresented the credentials of a doctor who endorsed the drug.

In February, attorneys general from 27 states ordered Bayer Pharmaceuticals to run a $20 million campaign to correct deceptive ads for Yaz, a popular birth control pill.

Recently, under a settlement with attorneys general from 35 states who charged that Merck and Schering-Plough had overstated the benefits of the cholesterol drug Vytorin, Merck agreed to submit all new television commercials to the F.D.A. for approval before they are broadcast.

Because health problems with new pills sometimes emerge several years after the drugs go on the market, critics react more strongly to drug ads than to ads for products like cars or alcohol whose risks are known, said Prasad Naik, a professor of management at the University of California, Davis.

“Five years later, they say it causes blindness, and now you’re in trouble,” said Mr. Naik, who has conducted research on pharmaceutical marketing. So it makes sense, he said, that “legislators are sensitive to it and say, ‘Don’t make it so easy to sell.’ ”

5. Advertisement Malpractices – A Case analysis of Colgate Palmolive (India) Ltd. vs. Anchor Health and Beauty Care Private Ltd. (2008)

"Comparison lies at the root of modern advertising" says Cornish, W., in his book "Intellectual Property"(4th Edn.). In McDonalds Vs Burgerking {(1986) FSR 45} Whitford J., warned that "advertisements are not to be read as if they are testamentary provision in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared".

Yet, comparative advertisements have led to a lot of litigation and the case on hand is one. Filed by Colgate Palmolive (India) Ltd., for a permanent injunction restraining the defendant from in any manner continuing the telecast of the impugned Television advertisements, telecasting any other advertisement which is disparaging or slandering the Colgate tooth pastes and for damages to the tune of Rs.10,01,000/. Simultaneously, M/S. Swabhanu Universal Agencies, the stockist of Colgate Palmolive (India) Ltd., has come up with a similar suit for identical reliefs. Pending their suit, they have come up with for an interim order of injunction restraining the respondent from in any manner continuing with the telecast of the impugned Television advertisements, filed as plaint and recorded in a CD.

While the plaintiff is the manufacturer of Dental Care products, including tooth pastes under the Trade Mark "Colgate", the other plaintiff is their stockist. The defendant in both the suits manufactures and markets tooth pastes under the brand name "Anchor". Both of them have been indulging in an "advertisement war" against each other, for quite some time.

5.1 The grievance of the plaintiff

The grievance of the plaintiff in these suits is that the defendant recently came out with a Television Commercial, advertising their tooth paste "Anchor". The TV Commercial was telecast in Tamil as well as in Hindi in various Satellite Channels. In the advertisement, a Hindi Film actress advises her daughter that "Anchor" tooth paste is the only tooth paste containing Triclosan, Calcium and Fluoride and that it is the first tooth paste providing all round protection. Ultimately, the actress questions the viewer as to when the viewer would change over to "Anchor" tooth paste. The plaintiff has filed the
Story Board of the Tamil version of the impugned advertisement and its Hindi version as plaint along with the suit.

5.2 The objections of the plaintiffs

The objections of the plaintiffs are not to the advertisement as a whole. The objection is confined only to 4 issues. They are as follows:-

- The first objection of the plaintiff is to the claim made in the advertisement that "Anchor" is the "ONLY" tooth paste containing all the 3 ingredients viz., Calcium, Fluoride and Triclosan.
- The second objection of the plaintiff is to the statement in the advertisement that "Anchor" is the "FIRST" all round protection tooth paste.
- The third objection of the plaintiff is to the statement that the Fluoride in "Anchor" tooth paste gives 30% more cavity protection.
- The fourth objection of the plaintiff is to the statement that Triclosan contained in "Anchor" tooth paste is ten times more effective in reducing bacteria.

5.3 Reasoning of objections of plaintiff

The first and second objections of the plaintiffs to the use of the words "ONLY" and "FIRST" in the offending advertisement of the defendant, is on the basis that even the products of the plaintiff contained all the 3 ingredients viz., Calcium, Fluoride and Triclosan and that long prior to the appearance of the defendant in the market, the plaintiff established itself as a pioneer in the world of Dental Care products such as tooth paste. Therefore according to the plaintiff, the defendant's claim that their tooth paste is the only tooth paste containing all the 3 ingredients and that their tooth paste is the first to provide all round protection, is obviously a false statement. Though according to the plaintiff, a false statement which stops at being a mere puffery may be within the tolerance limits permitted by law, a claim which exceeds the said limit would amount to disparagement of the other people's products and that therefore the same cannot be allowed to continue. Similarly, the third and fourth objections of the plaintiff with regard to the fluoride protection and the efficiency of Triclosan, are on the basis that every tooth paste is supposed to contain 1000 ppm (particles per million) of fluoride and that the fluoride content is also regulated by Rule 149-A of the Drugs and Cosmetics Rules. When the ingredients of a normal tooth paste are just the same, the claim of superiority that the defendant's product would give 30% more cavity protection and 10 times more effective in fighting bacteria, were obviously false, intended to mislead the consumers.

5.4 Counter Affidavit by the Respondent

The respondent originally filed a counter affidavit, wherein the respondent confined itself only to certain preliminary objections regarding the conduct of the plaintiff. It is stated in the said counter affidavit that in view of the fact that there are several litigations pending between the plaintiff and the defendant, mediation was already initiated before a learned Judge of the Delhi High Court at the instance of the Delhi High Court and that the plaintiff had suppressed this fact in the plaint. The respondent has also stated that they have already filed a suit for injuncting the plaintiff from using the slogan "all round decay protection" as it is an imitation of the respondent's slogan "all round protection". The respondent has given a summary of the litigations pending before various Courts between the very same plaintiff and the defendant. Also contended in the counter affidavit that the Television Commercial complained of by the plaintiff contains only the positive features of the
defendant's toothpaste and that there is no negative comment about the plaintiff's toothpaste. It is also stated in the counter affidavit that the advertisement did not make a reference to any other toothpaste. According to the respondent, there is nothing in the Television Commercial which disparaged or denigrated the plaintiff’s product and that therefore no injunction could be granted.

5.5 Reply by the Plaintiffs Raising an Additional Issue

After the respondent filed the counter affidavit, the applicant filed a reply raising an additional issue that an advertisement was posted in the webportal "youtube", in which the respondent showed the toothpaste of other companies, with the artist rejecting all other tooth pastes towards the end of the advertisement. This reply affidavit was filed by the applicant in order to disprove the statement made by the respondent in their counter affidavit to the effect that the toothpaste of other companies are not referred to in their TV Commercial at all.

5.6 Objections of the Plaintiffs met by the Respondents

It is only in the "Response to the Reply Affidavit" that the respondent has attempted to meet the 4 objections of the applicant/plaintiff directly. Since they go to the root of the matter, they are extracted as follows:-

(a) With regard to the first objection of the plaintiff regarding the use of the word "ONLY", the defendant contends that the word "ONLY" is intended to mean that among the White toothpaste range, the defendant's product contains the 3 ingredients.

(b) In respect of the objection relating to the usage of the word "FIRST", the defendant contends that it relates to the use of the slogan "all round protection", coined by the defendant for the first time in the year 2005.

(c) With regard to the third objection, the defendant contends that the superiority of Triclosan is well known and that all the 3 ingredients are not present even in Colgate's Cibacca Variant.

(d) With regard to the fourth objection, the defendant contends that the usage of optimum quantity of fluoride protects against tooth decay and that it is neither false nor disparaging.

The respondent/defendant has also enclosed a copy of a legal notice issued by their counsel to the webportal "youtube", challenging their action in posting an advertisement without their authorisation.

On the basis of the said legal notice, the respondent/defendant contends that they are not responsible for the advertisement that appeared in the "youtube" without their knowledge or consent.

The respondent seeks to explain the rationale rather than justify the use of the words "ONLY" and "FIRST" in their advertisement. In other words, the respondent does not seek to establish that there are no other tooth pastes which contain all 3 ingredients. The respondent does not also seek to establish that their product was the first to arrive in the market. On the other hand, the word "ONLY" is sought to be explained with reference to a range of their own products and the word "FIRST" is sought to be explained not with reference to the product but with reference to the slogan "all round protection".

In view of such a stand taken by the respondent, it is clear that their product is neither the only product to contain all the 3 ingredients nor the first in the market. Therefore, if the advertisement in question sends a message to a man of average intelligence and a weak brain amenable to an advertisement wash, as though the defendant's product is either the only product containing all 3 ingredients or the first in the market, such a message is misleading. This is exactly why, the first
lesson taught to a consumer, in movements to create awareness, is that "every rupee spent on advertisement is a nail on the coffin of consumer's sovereignty".

But, unfortunately, there is no codified law in India to restrain companies from indulging in false publicity campaign (except to a limited extent under the MRTP Act and the Consumer Protection Act). We only have judge-made laws developing in the recent past. But the decisions of various Courts which have contributed to the development of law on this issue have drawn inspiration only from "English decisions". All contracts, except perhaps the contract of Insurance which is one of Uberrima Fidei, are founded upon the principle of Caveat Emptor (buyer beware).

5.7 Various cases were quoted in the present case to decide the various issues:

5.7.1 Mr. Arvind P. Datar, learned Senior Counsel relied upon the decision of the District Court, Illinois in Ulick, et al Vs. PC World Communications, Inc. {1986}, in which the District Court granted an injunction prohibiting the defendant from making a false claim that their magazine was the "FIRST" sophisticated magazine to be entirely written, edited and produced on personal computer based systems. The Court upheld the objection to the use of the word "FIRST" on a finding of fact that the plaintiff's magazine preceded the defendant's magazine.

5.7.2 The learned Senior Counsel also relied upon a decision of the District Court, North Carolina Charlotte Division in Southern Shows Inc. Vs. Exposition Enterprises {1985 US Dist. Lexis 22039}, in which the Court granted an injunction restraining the respondent from using the word "ONLY", in relation to a home and garden show conducted by the defendant. While granting the injunction, the Court observed that "when a statement is shown to be actually false, consumer reaction to the advertising need not be shown and that the very falsity of the claim is sufficient to show the plaintiff's likelihood of success in the suit on merits". English Law Relating to Sales of Goods

An action will lie for written or oral falsehoods, not actionable per se, or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce and where they do produce, actual damage.

5.7.3 Turning to the development of law on the issue in India, it appears that the earliest decision was that of the Calcutta High Court in Chloride Industries Ltd vs. The Standard Batteries Ltd decided on 30-9-1994. A single Judge of the Calcutta High Court held therein that if the goods are disparaged maliciously or with some other such intent to injure and not by way of fair trade rivalry, the same would be actionable.

5.7.4 The decision of the Calcutta High Court in Reckitt & Colman of India Ltd vs. M.P.Ramachandran & others {1999} appears to have set the trend in the direction that the law has taken in India, over the last decade. Almost all subsequent decisions on the point of law refer to the said decision. Five principles were enunciated in the said decision which are as follows: -

I) a tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue.

II) He can also say that his goods are better than his competitors', even though such statement is untrue.

III) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
IV) He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible.

V) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining the repetition of such defamation."

The settled law on the subject appears to be that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad so as to puff and promote his goods. It, therefore, appears that if an action lies for defamation an injunction may be granted."

5.7.5 The next decision is also that of the Delhi High Court in Pepsi Co., Inc. and others vs. Hindustan Coca Cola Ltd (2003). In that case, an advertisement in which a boy was shown preferring THUMS UP to PEPSI on the ground that the former was a stronger drink while the latter was meant for children, was in issue. While holding that the same amounted to disparagement, the Division Bench of the Delhi High Court held in paragraph-12 and 22 as follows:-

"What is disparagement. The New International Websters' Comprehensive Dictionary defines disparage/disparagement to mean, "to speak of slightlying, undervalue, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation. " The Concise Oxford Dictionary defines disparage as under, to bring dis-credit on, slightlying of and depreciate." "The war of advertisement against each other's products is going on but that does not entitle the respondents to contend nor can be permitted to plead the past conduct as a good defence to denigrate the product of the appellant nor is the market place a suitable substitute for injunction."

"Generally, the publication of any false and malicious statement which tends to disparage the quality, condition, or value of the property of another, and which causes him special injury or damage, is actionable. ..... A cause of action for defamation generally does not arise in favour of one whose merchandise or products are criticized, not for the purpose of obtaining a competitive advantage, but merely to express displeasure or dissatisfaction therewith, nor is an advertisement actionable which does no more than state a claim that the plaintiff's goods are inferior to those of the defendant........

It is firmly established that malice, express or implied, in the making of the slanderous statement is an essential ingredient of a cause of action for slander of title". Halsbury's Laws of England, Fourth Edition, Volume 45 defines tort as 'civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of a right imposed or conferred by law rather than by agreement.' "If a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action. I find it difficult, nay impossible; to hold a party liable for libel when all that has been stated by the competitor is the truth. Truth is always a complete defence against any assault or challenge regardless of whether any damage is sustained as a result of it. It is indeed unfortunate that the Government has not established an authority armed with sufficient
powers to put a stop to false advertising. It is not difficult to distinguish between claims that are exaggerated and those which are false; the latter should be stopped by a Regulatory Authority.

5.7.6 Again in *Dabur India Limited Vs. Colgate Palmolive India Ltd (AIR 2005 Delhi 102)*, an advertisement showing the tooth powder manufactured by a competitor to be abrasive, was in issue. Viewed that, generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or generc of a product within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified.

5.7.7 In *Karamchand Appliances Pvt. Ltd vs. Sh. Adhikari Brothers and Ors. {2005}* the Delhi High Court was concerned with mosquito repellents ALL OUT and GOOD NIGHT. The offending advertisement showed a lady removing the ALL OUT pluggy and replacing it with GOOD NIGHT with a background voice claiming that the latter's turbo vapour chases the mosquitoes at double the speed.

"Disparagement: Matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible, things or upon their quality".

"A statement about a competitor's goods which is untrue or misleading and is made to influence or tends to influence the public not to buy."

5.7.8 In *Hindustan Lever Ltd vs. Colgate Palmolive India Ltd (1998)*, the subject matter of dispute was an advertisement issued by Hindustan Lever Ltd., claiming that its "New Pepsodent" toothpaste was "102% better than the leading toothpaste". Colgate Palmolive Ltd., filed a complaint on the file of the MRTP Commission under Section 36A {(viii) & (x)} of the MRTP Act. They also moved an application for injunction. In the injunction application, the MRTP Commission recorded a prima facie finding that the reference made in the advertisement to the "leading toothpaste" was that of Colgate. Therefore an interim order of injunction was granted apart from certain directions. The said order was under challenge before the Supreme Court. The Supreme Court refused to interfere with the order on the ground that the interlocutory order passed by the Commission was purely a discretionary order. But the Supreme Court did not go into the question of law in great detail in that case.

5.7.9 But unfortunately, all the above decisions of the various High courts have not taken note of some interesting developments that have taken place in U.K. and U.S.A., post 1980s. As stated earlier, even *De Beers case* was decided in 1975, much before the Consumer Protection Act, 1987 was enacted in U.K. Apart from the Consumer Protection Act, 1987, several other statutory regulations have also been introduced in England and commercial advertising has come under scanner. Therefore it is necessary to take note of some of these developments.

In U.S., the Federal Trade Commission established under the Federal Trade Commission Act, takes care of false and misleading advertisements. There is a paradigm shift from "competitor's interest" to "consumer's interest" in such cases.

In England, all advertisements are subject to a combination of statute, common law and self-regulation. The Advertising Industry in U.K. has been successful in self-regulation.

The Advertising Standards Authority regulates the content of advertisements, sales promotion and direct marketing in the U.K. They make sure standards are kept high by applying the Advertising
Standards Codes. ASA can stop misleading, harmful or offensive advertising. They can ensure sales promotions are run fairly. The authority investigates complaints about advertisements.

Now coming to the Indian scenario, there is no codified law regulating advertisements in India. But there are statutory provisions scattered here and there in several enactments. The Advertisement Code set out under Rule 7 of the Cable Television Network Rules, 1994 does not deal with false, misleading or disparaging advertisements.

The Advertising Standards Council of India (ASCI) is a non statutory Tribunal set up in 1985 and incorporated under section 25 of the Companies Act, 1956. It entertains and disposes of complaints based on its Code of Advertising Practice (CAP). The Code is based on certain fundamental principles, one of which is "To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements".

It is seen from the above definition of "unfair trade practice" that it includes any false representation that the goods are of a particular standard, quality, quantity, grade, composition, style or mode. It also includes the making of a false or misleading representation concerning the need for or the usefulness of any goods or services.

The law relating to unfair trade practice existing from 1969 under the MRTP Act and later imported into Consumer Protection Act, 1986 does not appear to have been taken advantage of by very many persons to prune misleading advertisements, despite the introduction of Cable Television Networks (Regulation) Act, 1995 and the Rules issued thereunder. But before jumping to a conclusion that such a remedy is available for the asking, we may have to examine one more fundamental issue, namely that of advertisement as a free commercial speech and the status of the right of the consumer to know and receive information, both of which forms part of the fundamental right of freedom of speech and expression.

5.7.1 The Constitutional status of a Commercial Advertisement was considered by the Supreme Court in Hamdard Dawakhana vs. Union of India {1960}. It was held therein that "an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed". The Constitution Bench of the Apex Court held in that case that when an advertisement "takes the form of a Commercial Advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech, for the object is not propagation of ideas - social, political or economic or furtherance of literature or human thought; but the commendation of the efficacy, value and importance of the product which it seeks to promote."

The Supreme Court went on to hold in the said decision that the right to publish and distribute commercial advertisements, cannot be said to be a part of freedom of speech guaranteed by the Constitution.

5.7.11 In a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit. Therefore, it is only on the touchstone of public interest that such advertisements are to be tested. This is why the Supreme court held in Tata Press case that "Public at large is benefited by the information made available through the advertisement." As a matter of fact the very basis of the law relating to Trade Marks is also the protection of public interest only, since the courts think of an unweary purchaser,
who may buy a spurious product on the mistaken impression that it was brand 'x'. The same logic should form the basis for an action in respect of disparaging advertisements also.

Keeping the above principles in mind, if we get back to the facts of the present case (which we have perhaps left way behind) it is seen that the advertisement in question contains four claims on the part of the defendant namely, (i) that Anchor is the only toothpaste containing all the three ingredients, namely Calcium, Fluoride and Triclosan, (ii) that Anchor is the first all round protection toothpaste (iii) that Anchor toothpaste gives 30% more cavity protection and (iv) that the Triclosan contained in Anchor is 10 times more effective in reducing Bacteria.

As stated earlier, the explanation given by the respondent to the use of the words "only" and "first" are not actually satisfactory. The advertisement certainly gives out an impression that Anchor is the only toothpaste containing all the three ingredients, while it is in fact not. There are other toothpastes in the market which contain all the three ingredients. Similarly, the use of the word "first" is not in relation to the slogan "all round protection", as is sought to be projected. It gives an impression as though historically it is the first to give such protection. The respondent has not come out with any scientific basis for such a claim. Therefore the usage of the words "only" and "first" actually falls within the meaning of Unfair Trade Practice under Section 2(1)(r)(1)(i) and (vi) of the Consumer Protection Act, 1986.

In other words, I find the respondent guilty of an Unfair Trade Practice, because of the false or misleading information that the advertisement purports to propagate. However, I do not find the respondent guilty of disparagement. In such circumstances, what is the test to be adopted for determining whether a restraint order is to be issued against the respondent or not?.

5.7.12 In Colgate Palmolive (India) Ltd Vs. Hindustan Lever Ltd (1999), the Supreme Court crystallised specific considerations for a Court in the matter of grant of interlocutory injunction as follows:

"We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below: (i) extent of damages being an adequate remedy;
(ii) Protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;
(iii) The Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;
(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case the relief being kept flexible;
(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;
(vii) Whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise."
Thus public interest is one of the tests prescribed by the Apex court in the above case for clinching the issue on such matters.

Therefore, on the analogy of the same principle, this court is also competent to issue appropriate interim orders, in the light of the finding that the respondent is guilty of unfair trade practice, by projecting their product as the only product containing 3 ingredients and as the first product to provide all round protection. Even by their own admission, the claim of the respondent as being the ONLY and FIRST toothpaste is not intended to convey the meaning that it does. Therefore the plaintiffs have a prima facie case. Since it is in public interest not to permit the respondent to continue with such a misleading claim, the balance of convenience is not in favour of the respondent. Applying the test laid down by the Apex Court in Colgate Palmolive case, it is clear that when public interest is involved, the question of allowing the wrong to continue on the ground that it can be adequately compensated in terms of money, does not arise.

Therefore, in the result, all the applications are allowed to a limited extent, restraining the respondent from using the words "ONLY" and "FIRST" in the offending advertisement, in a manner sending a message as though the respondent's product is either the only one containing all 3 ingredients or the first to provide all round protection. However it is made clear that the observations and findings recorded here are only prima facie and shall not prejudice the case of both parties in the final hearing of the suit.

6. To Sum up

The case law states that every advertisement cannot be a matter of Freedom of Speech. The scope and objective of the Act don’t interfere with the Right of Freedom of Speech. The restrictions are imposed under the ‘Drug and Magic Remedies (Objectionable Advertisement) Act of 1954’ are mainly to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited. These restrictions have been imposed in the interest of well-being of the people. However, the court observed that the Act has not made adequate provisions to seize and detain any document, article or anything which contains any advertisement contravening any of the provisions of the Act and issued writ of mandamus, thereby, directing the respondents to return all the goods seized from the petitioners. Further, the court observed that the power of specifying diseases and conditions as given in s. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation. And hence, was declared to be unconstitutional.

On the basis of the above, it can be stated that

- The advertisements affected by the Act do not fall within the words freedom of speech within Art. 19(1)(a) and hence there is no direct abridgement of the right of free speech.
- The court denied that the restrictions under the Act to be either excessive or disproportionate or are not in the interest of the general public’.

7. Conclusions

On the whole the study reveals that, the situation seems to be quite alarming. The cases cited above explain the need to put a bar on advertising the products of pharmaceutical companies as they are not only harmful to the health but are sometimes dangerous for the society because they affect our future generations. Advertisement, on the one hand, spreads knowledge about the new products, on the other
hand, it needs to provide true picture about the possible outcome of its use and the long term impact of
the same. The advertisement must honour social, moral and ethical values. The World Health
Organization (WHO), in an attempt to support and encourage the improvement of health care through
the rational use of drugs and to curb unethical marketing practices, came out with a landmark "Ethical
criteria for medicinal drug promotion" in 1988 and has recommended their implementation to its
member countries. This document defines drug promotion as "all the information and persuasive
activities by manufacturers and distributors in order to induce the prescription, supply, purchase
and/or use of medicinal drugs". It also suggests what can be considered appropriate hospitality and
gifts. There is evidence that drug utilization problems are increasingly encountered in many
developing countries due to the unethical marketing practices of the pharmaceutical industry.
Unfortunately the guidelines drawn up by the WHO, are flouted in practice with impunity since there
are no effective legislative measures to support them. The concern of the WHO is understandable. It is
for the drug industry to decide that they have a moral responsibility to cure and nourish the
community.

1. Drug & Pharmaceutical Industry plays a vital role in the health care of the any country. Rapid
growth of this industry requires further attention because even after 50 years of independence,
India, with around 15 percent of the World population, accounts for less than 2 percent of the
drug production in the world.

2. A unique feature of the pharmaceutical market is that it is one of the most fragmented markets
in the country. The maximum market is held by small companies, the largest pharmaceuticals
company holding only 6 percent of the market share. This leads to unique marketing mixes.

3. The drug industry argues that DTCA advertising helps 'educate' consumers of potential
conditions and encourages them to see their doctor for diagnosis and treatment. While
acknowledging that DTCA increases the amount spent on prescription drugs, they argue that
in the long run early treatment and diagnosis reduces spending on other medical services, such
as hospitalisation.

4. Critics of DTCA argue that the industry's advertising is primarily emotional in style and
understates the adverse side-effects and as such is misleading. They also argue that the
claimed health benefits are overstated. Surveys reveal that people who have seen DTCA ads
will often request the prescribed the drug. DTCA campaigns will usually aim to have pre-
primed doctors via a parallel promotional campaign. Critics argue that this results in over-
diagnosis of a condition and the inappropriate use of prescription drugs, even where non-drug
treatments are as or more effective. As a result, DTCA unnecessarily drives up the overall cost
of healthcare without necessarily improving the health of those treated.

5. Various laws have been enacted in the different countries of the world to put a ban on
malpractices of advertising. In India also Drug and Magic Remedies Act1954 was enacted to
discourage self medication and to check unlawful practices.

6. Various cases in the courts indicate that there are a lot of objectionable advertisements by the
pharmaceutical industry which sometimes play with the health of the people. Many cases are
lying in the courts for unethical advertising practices. There are others which follow unlawful
advertisements to sell their products. The case law of COLAGATE and PAMOLIVE vs.
ANCHOR undertaken in the present study authenticate the above assertions.
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