

Business Standard

Making celeb endorsers liable

The letter of the law currently favours celeb endorsers, unless the government decides to bring in stricter provisions to make them accountable for lapses in a product or service

Sudipto Dey June 07, 2015 Last Updated at 21:15 IST

The question whether celeb endorsers are liable for lapses of a manufacturer or service provider in India has been debated ever since Nestle's Maggi brand of instant noodles fell afoul of food testing authorities. The legal fraternity, too, appears to be divided on the matter. However, most legal experts believe even if celeb endorsers are booked under certain provisions of the law, it is difficult to prove in the court of law that the act of endorsement was done with a clear intent to harm anyone.

Legal experts point out that rights and obligations of a brand ambassador are covered by the contract between the endorser and the company. "It is possible that the endorser is engaged by an advertising agency and not the company; in which case, the terms and conditions of the contract will be different. Additionally, there may not be any contractual relation between the endorser and the company," says Gowree Gokhale, Partner, Nishith Desai Associates.

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Ramesh Vaidyanathan, managing partner, Advaya Legal, points out that it is common practice that both the brand owner and the brand endorser provide contractual representations to each other. "The celebrity's representations are mostly restricted to non-endorsement of competing products, while the brand owner provides specific representations about the product quality. Celebrities also seek extensive indemnities from the brand owners to protect them against any civil liability," says Vaidyanathan.

Under the Indian Penal Code, any person who sells or offers for sale noxious or unfit food, can be prosecuted if he knew that the food was unfit. In the Maggi case, a criminal liability case has reportedly been filed under the Indian Penal Code under Sections 270 (malignant act likely to spread infection of disease dangerous to life), 273 (sale of noxious food or drink), 276 (sale of drug as a different drug or preparation) and 420 (cheating and dishonesty) against celebrity endorsers.

"A bare reading of the law will show that the charges filed under Sections 420 and 276 are likely to fall apart in court as they deal with 'cheating with regard to property' and the 'sale of drug as a different drug or preparation' respectively, which is not the case here. The

other two sections specifically require the accused to have done the act with a clear intent, which looks very difficult to prove in this case," says Vaidyanathan.

While Indian laws are silent on the liability of endorsers, the Food Safety and Standards Act, 2006 (FSSA) expressly provides that "any person who is party to an advertisement" that falsely describes any food, or is likely to mislead as to the nature or quality of the food can be held liable for a penalty of up to Rs 10 lakh. Legal experts say that any monetary penalty if imposed is typically picked up in the contractual indemnities provided by the brand owner.

According to Gokhale, one can complain to the Advertising Standards Council of India (ASCI), a self-regulating body, against any perceived mis-representation in an advertisement. The ASCI can give a direction for modification or withdrawal of an advertisement. "Such advertisements are evaluated on principles of honesty, responsibility, fairness and decency. However the orders are not enforceable, but are generally followed by industry", says Gokhale.

Consumers may make a claim under the law of tort against an endorser, but there is no precedent for such a claim in India, says M S Ananth from law firm Nishith Desai Associates. Under the Consumer Protection Act, a trader or service provider may be prosecuted for deficiency of service, unfair trade practice or any defect. "However, it does not prosecute an endorser," he adds.

International norms

In the US, Federal Trade Commission (FTC), the competition law regulator, has certain guidelines for endorsements by celebrities. FTC has prescribed standards for endorsers, and when an endorser would be liable.

"Advertisements are evaluated on 'good reason to believe' test to examine if the endorser actually uses or believes the features of the product. Celebrities can be liable if they fail the 'good reason to believe test'," explains Gokhale. However, Vaidyanathan notes that there is still no criminal liability in such situations, and that there can only be civil liability.

In Europe, a voluntary self-imposed code precludes celebrities from endorsing medicines, medical treatments, tobacco and alcohol. In China, there have been attempts to hold celebrities liable for various products. For instance, Jackie Chan, too, was sought to be prosecuted for endorsing a 'chemical free' shampoo which allegedly had cancer-causing ingredients. "China does not have a 'false and misleading' test, and suits against endorsers failed since there was no legal relation between the endorser and the product or company," says Gokhale.

Changing the law

Legal experts and consumer right activists point out that the Central Consumer Protection Council constituted under the Consumer Protection Act had in a meeting at Kochi in February last year suggested the need for strategies to deal with liability of stakeholders, including celebrities, for misleading advertisements. It had set up a sub-committee to look into the issue. However, no suggestions came up from the committee, and there has been no amendment to the Consumer Protection Act. Many in the legal fraternity feel that the government should amend existing laws to come out with clear guidelines around rights and liabilities of celeb endorsers.

Still many, like Amit Vyas, associate partner in law firm Economic Laws Practice, are not convinced of the need to bring celeb endorsers under the ambit of law. "It looks like a far-fetched proposition to make brand ambassadors personally liable for deficient products. As long as the brand ambassadors see to it that the product that they are endorsing has been granted the required approvals or permits, if required, from the requisite statutory authority, they ought not to be held personally liable for deficiency in goods or service" he says.

One thing certain to come out of the current debate over the legal liabilities of brand ambassadors is that the business of brand endorsement will become more circumspect.