



WHEN THE INFLUENCER ISN'T HUMAN: WHO SHOULD BE LIABLE FOR MISLEADING AI-GENERATED ENDORSEMENTS IN INDIA?

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ABSTRACT

The growing use of artificial intelligence (AI)-generated virtual influencers in social media marketing raises significant concerns regarding consumer protection and accountability for misleading endorsements. Unlike human influencers, virtual influencers are fictional digital personas that lack independent judgment, personal experience, and the ability to verify product claims. This paper examines the adequacy of India's existing legal framework, particularly the Consumer Protection Act, 2019, the Guidelines for Prevention of Misleading Advertisements and Endorsements, 2022, and the Department of Consumer Affairs' 2023 endorsement guidelines, in regulating AI-generated endorsements. It analyses the potential liability of advertisers, virtual influencer creators, marketing agencies, and social media platforms for deceptive promotional content. The paper argues that accountability should not rest upon the fictional avatar but should be determined by the degree of control, commercial benefit, knowledge, and capacity to prevent misleading advertisements exercised by the real entities involved. A control-and-benefit approach may strengthen consumer protection while ensuring proportionate allocation of legal responsibility.

Keywords: Artificial Intelligence, Virtual Influencers, Consumer Protection, Misleading Advertisements, Legal Accountability.

INTRODUCTION

Social media marketing is evolving past the use of conventional human influencers since advertisers have the option to employ artificial, computer-generated personalities to endorse products and services. Virtual influencers may resemble real people, but whoever is behind

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the scenes controls their actions and content.¹ This brings up an interesting issue concerning consumer law: How does one address any misrepresentation made by virtual influencers?

This issue becomes even more relevant in the case of endorsements made by an AI-generated avatar. While a human endorser may use the product himself or herself, examine the features of the product, and make a decision about endorsement, an avatar is simply a fictional character or an avatar created by a computer that looks and communicates like a person. It becomes an accountability problem if the endorsement made is misleading because while the law holds the endorsers and advertisers accountable for their misleading statements, the avatar cannot verify claims nor is it held legally responsible.

India already has a legislative structure that can regulate misleading advertisements and endorsements. There is the Consumer Protection Act, 2019, to provide protections against misleading advertisements, while there are Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022, to establish standards for advertisements and endorsements.² The Government has also come out with guidance on celebrities, influencers, and virtual influencers in relation to their endorsements, which calls for appropriate disclosures of material relationships and due diligence before making any endorsement.³ Nevertheless, it gets difficult to apply such guidelines when it comes to endorsements by fictitious personalities created through artificial intelligence.

The increasing use of AI-powered influencers necessitates an inquiry into responsibility when an endorsement ends up deceiving the consumer. The present paper considers whether the present approach towards misleading advertising is sufficient to deal with endorsements through virtual influencers, and, most importantly, who is supposed to be accountable for it in the real world. It is suggested that the responsibility should not be placed upon the fictitious persona but should rather depend upon various aspects such as who developed the content, who benefited from the endorsement commercially, who had the capacity to verify the claim, and who could prevent the misleading advertisement.

¹ Department of Consumer Affairs, Government of India, 'Endorsement Know-Hows! For Celebrities, Influencers & Virtual Influencers on Social Media Platforms' (2023).

² Consumer Protection Act 2019; Central Consumer Protection Authority, 'Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022' (2022).

³ Department of Consumer Affairs, Government of India, 'Endorsement Know-Hows! For Celebrities, Influencers & Virtual Influencers on Social Media Platforms' (2023).

UNDERSTANDING AI-GENERATED AND VIRTUAL INFLUENCERS

A virtual influencer is a computer-generated character that is intended to interact with people in the same way as human social media influencers. It may have an actual face and personality and even represent a brand or product on social media platforms to reach out to consumers. The difference with the virtual influencer is that it doesn't perform independently, but its visual identity, activity, and messages are created and managed by one or several real people or entities. This point is especially significant regarding misleading endorsements. In cases when a virtual influencer appears to recommend something, the message is actually created by those who stand behind the digital figure.⁴

EXISTING INDIAN LEGAL FRAMEWORK

There is no doubt that the Consumer Protection Act, 2019 will play a crucial role in handling misleading advertisements in India. According to this Act, a misleading advertisement means an advertisement which falsely represents a product or service, makes false representation or warranty of any sort and hides facts of such a nature that there could be a possibility of misleading the consumers.⁵ Furthermore, under the Consumer Protection Act, 2019, the Central Consumer Protection Authority has the power to act against misleading advertisements.⁶ In this regard, where a virtual influencer advertises a product using any kind of misleading claims, such an advertisement would be covered by the existing consumer law, but the main issue would be about the identification of actors responsible for the same.

Moreover, the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 provide for more guidelines in the matter of the function of endorsers. In particular, it mandates that an endorsement is to indicate a genuine and reasonably current opinion that is based on sufficient knowledge or experience of the promoted product or service. Additionally, where there is a material relationship between the endorser and the advertiser that might influence the credibility of the endorsement, such relationship should also be disclosed.⁷ Such disclosure is fairly simple when it comes to an endorser in human

⁴ Department of Consumer Affairs, Government of India, 'Endorsement Know-Hows! For Celebrities, Influencers & Virtual Influencers on Social Media Platforms' (2023).

⁵ Consumer Protection Act 2019, s 2(28).

⁶ Consumer Protection Act 2019, ss 10 and 21.

⁷ Central Consumer Protection Authority, 'Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022' (2022), paras 11–13.

form. Nevertheless, the problem emerges when the endorser takes the form of a virtual person and, therefore, cannot express an opinion and gain experience of his/her own accord.

The Indian regulatory framework too has taken into account virtual influencers. In 2023, the Department of Consumer Affairs released its 'Endorsement Know-hows!' guidelines for celebrities, influencers, and virtual influencers using social media platforms. The emphasis of the guidelines is that any endorsement ought not to be misleading and proper disclosure should be made wherever necessary.⁸ The importance of this particular recognition is that it highlights the fact that a virtual influencer is not able to avoid consumer protection requirements simply because it is a fictitious personality. Nonetheless, the mere recognition of virtual influencers as part of the endorsement framework cannot answer the question of who is responsible if there is a misleading statement made.

THE ACCOUNTABILITY PROBLEM

The problem is connected with the gap between the person who appears as the endorser and the actors who are truly behind the endorsement. While the consumer sees an artificial personality making a statement about some products, that avatar is not able to make any decisions regarding content and product recommendations of its own will. It can be developed by the brand itself, the advertising agency, the author of the avatar or some other organisations that participated in the creation or approval of the commercial message. So, the issue lies not in finding the one who made the misleading statement, but in establishing the actor who controlled the process.

The issue of due diligence is another problem with the guidance. Current endorsement guidance expects the celebrities and influencers to make an assessment of whether the advertiser can support the claims made in the ad and states that the product or service was used by the endorser himself.⁹ This standard could be meaningful to a human influencer because he or she has the opportunity to analyse the available information and to use the product or service. A virtual influencer, on the other hand, does not have the capability of conducting due diligence

⁸ Department of Consumer Affairs, Government of India, 'Endorsement Know-Hows! For Celebrities, Influencers & Virtual Influencers on Social Media Platforms' (2023).

⁹ Department of Consumer Affairs, Government of India, 'Endorsement Know-Hows! For Celebrities, Influencers & Virtual Influencers on Social Media Platforms' (2023); Central Consumer Protection Authority, 'Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022' (2022).

and making a true personal evaluation. Any review or recommendations made by him will still be performed by people behind him and not by the virtual persona itself.

WHO SHOULD BE LIABLE?

The Brand or Advertiser: It is usually the case that the brand or the advertiser takes ultimate responsibility when they have authorised, approved, or benefited from the misleading statement. The brand is usually the one who starts the advertising campaign, gives out information regarding the product and benefits from increased sales. They can also have the capability to ensure whether the statements they are making about their product are true before they go public. As such, if the misleading statement comes from the information given or approved by the brand, it is hard to place the responsibility on the avatar, who does not have the capability to judge the product independently or control the message.¹⁰

The Creator or Controller of the Virtual Influencer: The person or entity controlling the virtual influencer would also be liable in cases where the entity controls the content of the message. Unlike a human influencer who can make independent decisions, the virtual influencer cannot decide for itself what to say, whether the statement is true, and what products to recommend. Ultimately, these decisions will be made by the person or the entity controlling the virtual persona. Thus, when the entity controlling the virtual persona makes or influences in any way the making of a misleading statement, that entity cannot escape liability just because the message was delivered using an imaginary virtual influencer persona. The scope of liability will depend on the extent of control of the entity over the content of the message.

The Advertising or Marketing Agency: In addition, an advertising or marketing agency can be held accountable if it is actively involved in the creation and approval of the false endorsement. In some instances, the agency can design the marketing campaign and create the script or create the content used by the virtual influencer. Nevertheless, the agency's involvement in a particular advertising campaign does not necessarily make it liable for the dissemination of a misleading endorsement unless there was actual knowledge that such a statement is misleading. Furthermore, the issue should be whether the agency had any control over the misleading statement such that it could suppress the statement.¹¹

¹⁰ Consumer Protection Act 2019, ss 2(2), 2(28) and 21.

¹¹ Consumer Protection Act 2019, ss 2(1), 2(2), 2(28) and 21.

What About the Platform: In addition, the use of such social media platforms may also contribute to the dissemination of misleading AI-generated endorsement information, but liability should not be established merely because the platform hosts the content. Social media platforms usually work as an intermediary, and therefore are bound by their own set of laws and regulations.¹² Their contribution may be considered in the case if they participate actively in the advertisement, promotion, or targeting of such content, or if they neglect to act where the applicable law prescribes them to do so. The framework of consumer protection law has also acknowledged that, in certain situations, the actions concerning misleading advertisements may include the actions of intermediaries and social media platforms.¹³ Thus, the liability of the platform should be established in light of its activity.

A CONTROL-AND-BENEFIT APPROACH TO LIABILITY

What would be more appropriate would be to assign the liability in proportion to the extent to which the participants contributed to the process of creating and publishing the endorsement. Instead of assigning the liability to all parties involved regardless of their role in the matter, the law should consider whose control the content came under, whom the commercial advantage derived from the advertisement accrued to, who had the knowledge or capability to verify the statement and who was the most capable of avoiding the misleading endorsement. This method is aligned with the existing consumer protection regime, which takes into consideration that misleading advertisements may involve different participants such as advertisers and advertising agencies.¹⁴ If this were applied to the case of AI-generated endorsements, the liability would be assigned to the actors having any connection with the misleading statement and not the fictional avatar making the statement.

This way would also enable sharing of responsibility in cases where several parties are involved in the misleading endorsement. For instance, the company that issues or approves the false endorsement would be mainly responsible, while the controller of the virtual influencer would share the responsibility if he/she was aware of the false endorsement. An advertising agency would also be responsible for its part in creating misleading information. The reason for

¹² Information Technology Act 2000, s 79; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 3.

¹³ Consumer Protection Act 2019, s 21; Information Technology Act 2000, s 79; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 3.

¹⁴ Consumer Protection Act 2019, ss 2(1), 2(2), 2(28) and 21; Central Consumer Protection Authority, 'Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022' (2022).

adopting this strategy would not be to automatically hold all participants liable, but rather to ensure that the responsibility would be assigned proportionally to each one's degree of control, knowledge and involvement. In this way, real entities would not be able to evade liability by simply conveying misleading information through an AI-generated person.

Such an approach would also facilitate the distribution of liability where there is more than one participant in the process of providing misleading endorsements. The company that would distribute or approve such a misleading endorsement would take primary responsibility for it, while the owner of the virtual influencer would take part of the liability for it, in case he/she knew about this. The advertising agency would be responsible for their contribution to the creation of misleading information. The reason why this approach would be chosen is not to put every participant under liability at once, but to allocate responsibility for it in accordance with their level of involvement. This way, real people could not escape liability for providing misleading information through the AI-generated individual.

CONCLUSION

The increasing deployment of AI-generated and virtual influencers to endorse products through online advertisements may have transformed the nature of advertising, but it must not lead to a failure to protect consumers. Indian laws provide a mechanism that is capable of handling misleading advertisements as well as the influence exerted through them by influencers and virtual influencers. However, since the virtual influencers are mere digital characters that do not exist in the real world, the liability will have to shift to the persons who control the content of the virtual advertisement, which is likely to be misleading. Control over the content, benefits derived from it, knowledge of the misleading statement, as well as the capacity to stop it from harming consumers, can all be considered when identifying the person responsible for the misleading advertisement.