

Online Advertising in India

Regulations: Self and Otherwise

Advertising is essentially a thing to induce consumption to make people buy things they do not want¹.

In a developing economy like India, advertising has a profound impact on how people understand life, the world and themselves, especially with regard to their values, choices and behaviour. Advertising is considered to be the cornerstone of our socio-economic system. Advertising may be viewed as the lifeline of free media, paying costs and making media widely accessible.

An Advertisement may be defined as paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed². Any communication which in the normal course would be recognized as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.

In India, advertising, both traditional and online, has grown in a major way. Ecommerce too is growing exponentially. India's i-population stands at 38.5 million and is all set to cross the 100 million by 2007-08³. Internet advertising is said to have contributed greatly to the growth of online shopping in India some statistics pertaining to the usage of online medium for shopping are produced below.

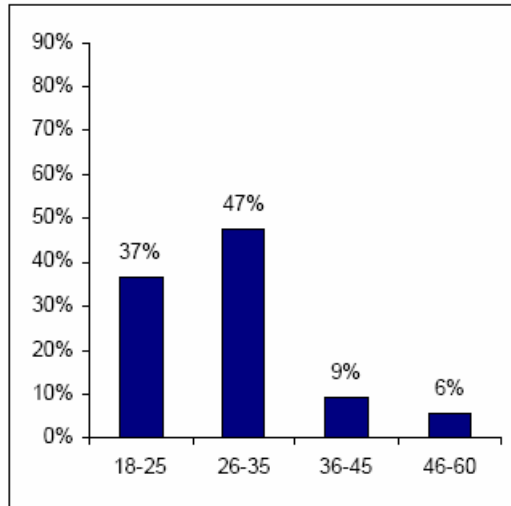
¹ Jawaharlal Nehru quoted in *Kyon Na Azmayen? A Brief History of Indian Advertising* [para 2], Vikram Doctor and Anvar Alikhan, Indian Magazine, Vol.XVIII(January 1997).

² Code of the Advertising Standards Council of India.

³ Internet and Mobile Association of India.

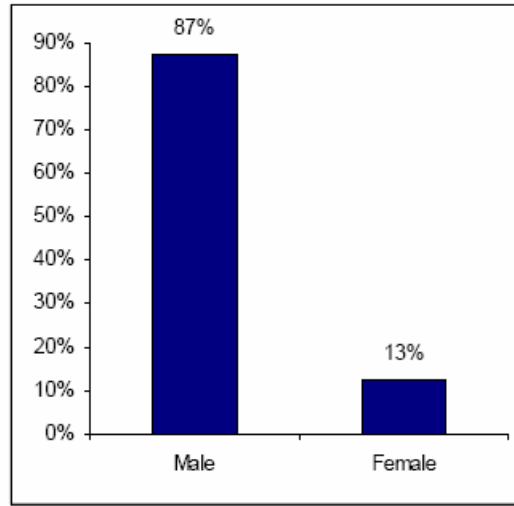
On Shopper – Cybercafé: Demographic Profile-Age, Gender & Marital Status⁴

By Age



Base: 417

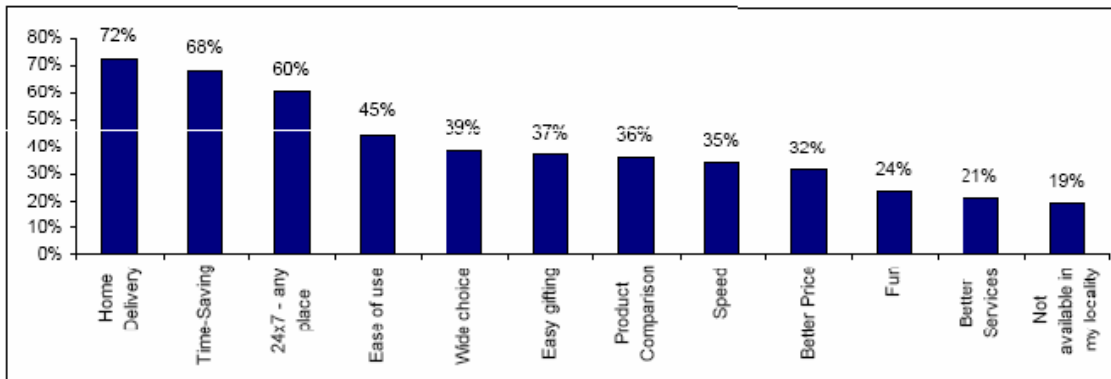
By Gender



Base: 417

- 55% of Cybercafé Shoppers are Unmarried and 29% are married with kids.

What shoppers like about online shopping?⁵



Base: 417

History of Advertising in India

One of the earliest methods of advertising used in India was outdoor display. Eye-catching signs were painted on the walls of buildings, including residential houses visible to pedestrians.

⁴ ibid

⁵ ibid

In the medieval times advertisements were conveyed by town criers appointed by the royalty or merchants. These criers read aloud notices for public information, often accompanied by the beating of drums. Those engaged by merchants used to shout business notices praising the quality or effectiveness of a product. Auctioneers also used to shout the quality and price of the products to attract customers, as they do even today.

Printed advertisements with or without graphics came only with Johann Gutenberg's invention of printing from movable metal type in the 15th Century. As printing developed in the 15th and 16th Century, advertising expanded to include handbills. Trademarks or logos came to be used in the 16th Century when many shopkeepers used to put up such symbols outside their establishments for easy identification⁶. In the 17th Century, as disease ravaged Europe, advertisements of medicines also grew more popular. And as a result of these developments, advertisements, especially newspaper advertisements, became a rage in England. What happened in England permeated to its colonies, like India.

As the economy expanded during the 19th Century, advertising grew alongside. In the USA, classified advertisements became popular, filling pages of newspapers with small print messages promoting various goods. In the early 1800s, display advertising in printed media arrived. Whereas previous newspaper and magazine ads had been limited to short, column-sized ads, now they expanded and included illustrations.

When radio stations began broadcasting in the early 1930's in India, the stations were Government owned and the programs were aired without advertisements. Since then, radio stations have been privatized. And radio station owners earn money by selling sponsorship rights in small time-allocations to businesses. This has led to the development of one of the most popular forms of advertising. Advertising over the radio is very effective in India where the literacy level is low.

Advertising in India takes a number of forms and is not confined to just selling of products and services. One would come across various forms of advertising in direct-mail, magazines, newsletters, newspapers, slogans, online discussion groups and chat groups, posters and bulletin boards, radio announcements, telemarketing, webpages, yellow pages, outdoor, public service advertising, etc. Online advertising is the most recent form of advertising that's gaining popularity in India. Wikipedia⁷ defines online advertising as a form of advertising using the Internet and world-wide-web to deliver marketing messages and attract customers.

⁶ Justice P B Sawant & P K Bandopadhyay, Advertising Law & Ethics, Universal Law Publishing, 2002 Ed.

⁷ http://en.wikipedia.org/wiki/Online_advertising

Media being as powerful as it is, it is prone to some misuse. Lets consider one such example as it relates to advertising.

Misleading & Surrogate Advertising

The Consumer Protection Act⁸, advertising Code⁹, Censor Board¹⁰ and working group on Misleading Advertisements set up by the Consumer Affairs, Food and Public Distribution Department, Government of India, have all dealt with the issue of misleading advertisements. The preferred solution is to ask the advertiser to issue a corrective advertisement to neutralize the effect of misleading advertisements.

In India, due to severe restrictions on advertising certain products like alcohol, tobacco products, medicines and baby food, a whole genre of misleading / surrogate advertising has emerged. In such advertising, a brand is endorsed using a product different from the actual product being promoted. Like in the matter of United Breweries Limited vs. Mumbai Grahak Panchayat, the matter of debate included the advertisements of Bagpiper Soda. This advertisement was held to be a surrogate advertisement for Bagpiper whiskey. The National Consumer Disputes Redressal Commission, New Delhi, held that the word “soda” was used in an inconspicuous manner, while the word “Bagpiper” was boldly stated, with the baseline “India’s largest, World’s No. 3”.

Advertising Regulation in India

The Government of India has not set up a regulatory body in India to regulate advertisements. Depending on the nature of the grievances, the power to regulate advertisements may be exercised by a vast variety of authorities, including the courts, Central and State Governments¹¹, tribunals¹² or the police authorities¹³. In addition to these authorities, is the Press Council of India Act, 1978 which is also empowered to regulate press advertisements. The Council is guided by its “Norms of Journalistic Conduct”¹⁴ in the regulation of advertisements. The Press Council has the power to hold an inquiry into a complaint against a newspaper and if it finds that the newspaper has violated the standards prescribed by the council, it may warn, admonish or censure the newspaper, the editor or journalist as the case may be¹⁵.

⁸ Elaborated later.

⁹ As elaborated in Annexure A hereto.

¹⁰ As elaborates in Annexure B hereto.

¹¹ As for instance, under the Young Persons (Harmful Publications) Act, 1956; the Cable Television Networks (Regulation) Act, 1995.

¹² For instance, the Copyright Board for a violation under the Copyright Act, 1957 or the consumer for a constituted under the Consumer Protection Act, 1986.

¹³ Under the Cable Television Networks (regulation) Act, 1995 or the Indian Penal Code, 1860.

¹⁴ As elaborated in Annexure C hereto.

¹⁵ The Press Council of India Act, 1978, Section 14.

India however, does have a self regulatory body dealing with both online and other forms of advertising. This is the Advertising Standards Council of India.

Advertising Standards Council of India (ASCI)

To monitor certain standards and fairness in the domain of advertising, Advertising Standards Council of India was established in India in 1985¹⁶. Advertising Standards Council of India (ASCI) is a self regulatory voluntary organization. The role and function of the ASCI is to deal with complaints received from consumers and industry against advertisements which are considered as false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition and in contravention to the advertising code¹⁷ laid down by the ASCI. While safeguarding consumer interests; ASCI also monitors and guides the commercial communications of practitioners in advertising.

The impetus for establishing ASCI was the quantity of false, misleading and offensive advertising in India that resulted in consumers having an increasing disbelief in advertising, and a growing resentment of it. Misleading, false advertising, according to ASCI constitutes unfair competition. Not only does it lead to market-place disaster, but also to litigation. ASCI adopted a Code for Self-Regulation in Advertising, which is committed to honest advertising and fair competition in the market-place. It stands for the protection of the legitimate interests of consumers and all concerned with advertising - advertisers, media, advertising agencies and others who help in the creation or placement of advertisements. As the Code becomes increasingly accepted and observed pro-actively, ASCI believes that three things will begin to happen:

- Fewer false, misleading claims
- Fewer unfair advertisements
- Increasing respectability

Member of ASCI, are allowed to mould the course of Self-Regulation and participate in the protection of healthy, effective advertising. They have a say, through the Board of Governors, in the further development of the Code and future appointments to the Consumer Complaints Council (CCC).

¹⁶ Registered in Oct. 1985, u/s 25, as a Not-For-Profit Co., under the Indian Companies Act 1956.

¹⁷ The ASCI Code is a self-regulatory code which is not legally binding on parties. However, in practice ASCI members include various media, publishers etc. who normally abide by decisions of the Complaint Complaints Council set up by ASCI. The ASCI Code covers all media including the online media. Please also refer to the section on General Requirements. Disobedience of ASCI's decision does not lead to any civil or criminal consequences. Its enforcement mechanism is through non-publication of the contravening advertising by its media members.

ASCI Organization

ASCI has 16 members as its Board of Governors. ASCI ensures equitable representation of advertisers, agencies, media and other advertising services, on its Board. ASCI has its own independent, fully staffed Secretariat of 5 members, headed by a Secretary General.

CCC Organization

The CCC has 21 members, constituting mainly¹⁸ of non-advertising professionals representing civil society, chosen from eminent and recognised opinion leaders in their respective disciplines such as medical, legal, industrial design, engineering, chemical technology, human resources and consumer interest groups.

The CCC met 14 times from April 2006 to March 2007¹⁹. It considered a total of 140 complaints. 72% of the complaints were upheld by the CCC, which have resulted in the advertising being either withdrawn or modified appropriately.

Standards of Conduct

The advertising code has four Chapters encapsulating various parameters and criteria for advertising in India. The Code applies to advertisement read, heard, and viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant numbers of consumers in India. Chapter I deals with truthfulness and honesty of representations, claims made in advertisements and safeguards against misleading advertisements. Under Chapter I (e) of the Code²⁰, advertisements inviting the public to invest money cannot contain statements which may mislead the consumer in respect of the security offered, rates of returns or terms of amortization. Where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumptions, such conditions or assumptions must be clearly indicated in the advertisement.

¹⁸ 9 members are from advertising practitioners.

¹⁹ Since 1986, 1335 complaints were upheld. At least 79% of these ads were withdrawn, concluded or modified appropriately so as to avoid contravention of the Code and thereby respecting the rights of consumers and competitors. Almost 50% of these advertisers were not members of the ASCI.

²⁰ An excerpt from one of the provisions from Chapter I: Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions. Advertisements shall not contain statements or visual presentation which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised or the advertiser or about any other product or advertiser.

Chapter II deals with indecent or vulgar advertisements²¹, Chapter III deals advertisements of hazardous or harmful products²² and Chapter IV deals with fairness in competition²³.

Complaint Procedure

The Schematic process prescribed by the ASCI for processing a complaint against an advertisement is as follows:

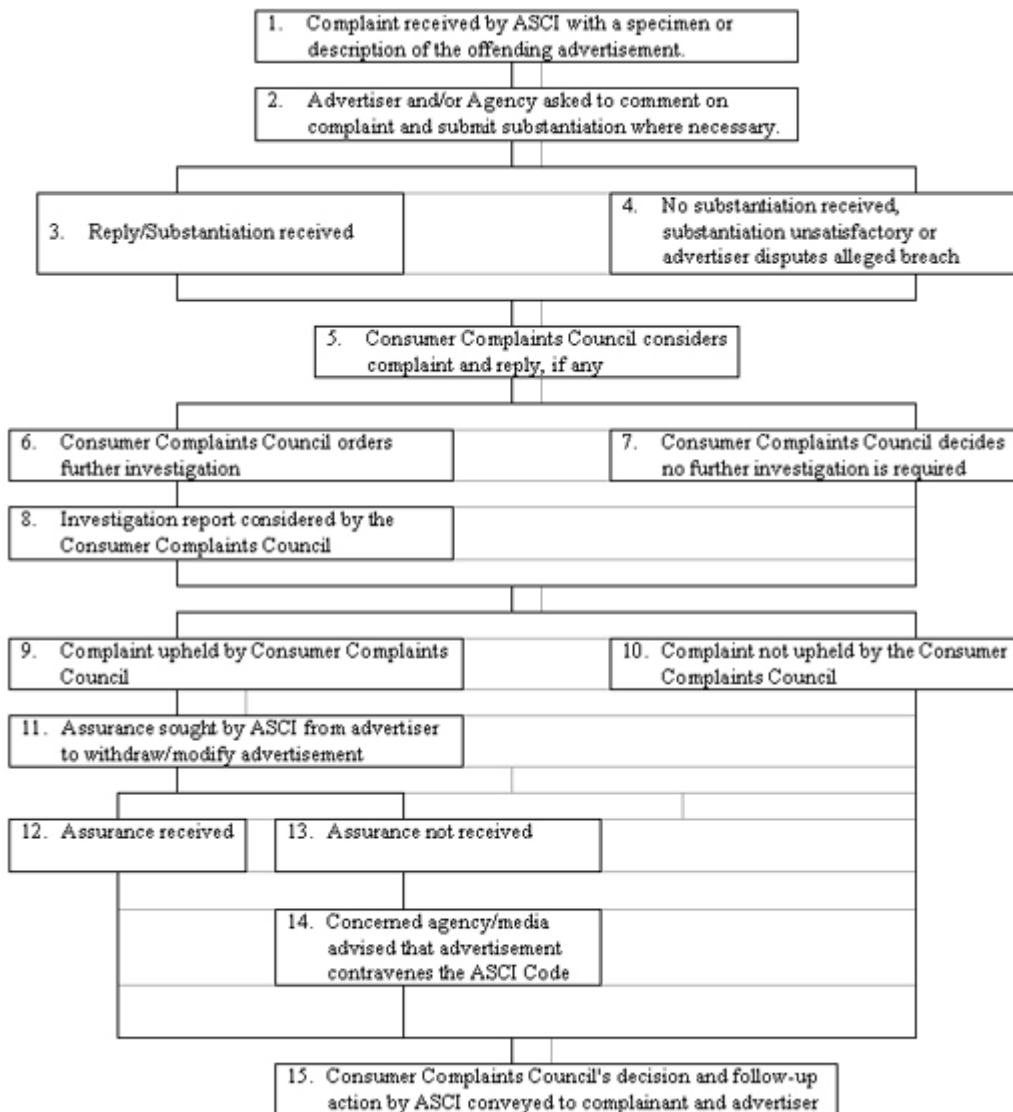
²¹ An excerpt from one of the provisions from Chapter II: Advertisements should contain nothing indecent, vulgar or repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence.

²² An expert from Chapter III : No advertisement shall be permitted which:

- Tends to incite people to crime or to promote disorder and violence or intolerance
- Derides any race, caste, colour, creed or nationality
- Presents criminality as desirable or directly or indirectly encourages people - particularly minors - to emulate it or conveys the modus operandi of any crime
- Adversely affects friendly relations with a foreign State

²³ An excerpt from one of the provisions of Chapter IV: To ensure that Advertisements observe fairness in competition such that the Consumer's needs to be informed on choice in the market-place and the canons of generally accepted competitive behaviour in business are both served. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided:

- It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product
- The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case
- The comparisons are factual, accurate and capable of substantiation
- There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared
- The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication



The procedure for filing a complaint to the CCC, including for online advertising is provided on its website. For online advertisements, the following information needs to be provided with the complaint:

- Name of server.
- URL / website address.
- Date the advertisement was observed.
- Location of complainant.

The complaints can be made in electronic form, online.

Statutes Impacting Advertising

While there may not be a clear decision on the point, for the purposes of this paper it is understood that all legislations which touch upon advertising would, unless to the contrary has been stated, also cover online advertising. Thus this brief overview may be read to cover online advertising too.

Constitution of India

The Constitution of India guarantees freedom of speech and expression²⁴ to all its citizens subject to a few exceptions²⁵. Publication of advertisements has been recognised as “commercial speech” and has been granted protection under Article 19(1)(a) of the Constitution²⁶ even by the Supreme Court of India.

An illustration of the Supreme Courts stand on this fundamental right can be summed up in the following case laws:

In Hamdard Dawakhana v. Union of India²⁷ the Supreme Court addressed the issue as to whether the Drug and Magic Remedies Act, which put restrictions on the advertisements of drugs in certain cases and prohibited advertisements of drugs having magic qualities for curing diseases, was valid as it curbed the freedom of speech and expression of a person by imposing restrictions on advertisements. The Supreme Court held that, an advertisement is no doubt a form of speech and expression but every advertisement is not a matter dealing with the expression of ideas and hence advertisement of a commercial nature cannot fall within the concept of Article 19(1)(a).

However, in Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd²⁸, a three judge bench of the Supreme Court differed from the view expressed in the Dawakhana case and held that ‘commercial advertisement’ was definitely a part of Article 19(1)(a) as it aimed at the dissemination of information regarding the product. The Court, however, made it clear that the government could regulate commercial advertisements, which are deceptive, unfair, misleading and untruthful.

²⁴ Article 19(1)(a)

²⁵ Article 19(2)

²⁶ Indian Express Newspapers (Bombay) Private Ltd. and Ors. V. Union of India and Ors. AIR 1986 SC 515; Tata Press Ltd. V. Mahanagar Telephone Nigam Limited and Ors. AIR 1995 SC 2438;

²⁷ AIR 1960 SC 554.

²⁸ (1995) 5 SCC 139.

In its celebrated decision, Bennett Coleman & Co. v. Union of India²⁹ the Supreme Court ruled that a newsprint policy like the one before the Court was violative of the freedom of the press because it imposed restrictions which severely constricted newspapers in adjusting their page number and circulation and also curtailed the area of advertisement. The Court ruled that loss of advertisements seriously affects the circulation of a newspaper and a restraint on advertisements would clearly affect the freedom of the press. This case arose in the State of Andhra Pradesh. The proprietor of a Telugu language daily, Eenadu, complained that Government had withdrawn advertisements from its paper on account of extraneous reasons, namely its criticism of the Government, and this had adversely affected the circulation of the paper and its revenue. The action of the Government was challenged. The High Court did not accept the contention that a newspaper has a constitutional right to obtain advertisements from the Government. It, however, held that the Government cannot exercise this power or privilege to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press, or as a weapon to punish newspapers which criticise its policies and actions. It has to use the funds in a reasonable manner consistently with the object of the advertisement viz. to educate and inform the public about the activities of the Government.

Consumer Protection Act

This statute provides for the establishment of a Central Consumer Protection Council with the object of promotion and protection of the rights of the consumer, including protection against unfair trade practices³⁰. The Act also empowers the District Forum to take measures to discontinue the unfair trade practices. The Forum also has the power to issue corrective advertisements to neutralize the effect of a misleading advertisement. India does have other legislations that regulate unfair trade practices, in addition to the Consumer Protection Act.

Information Technology Act, 2000 (IT Act)

The IT Act makes the publication and transmission in electronic form of material which is lascivious or appeals to the prurient interest or its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, punishable with imprisonment and fine. The IT Act applies to any offence committed by any person outside India, if it involves a computer, computer system or computer network located in India. The offences under the IT Act are punishable with imprisonment and/or fine.

²⁹ Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106Ê

³⁰ “Unfair Trade Practice” has been defined in Section 2 of the Consumer Protection Act, 1986

The Central Government after consultation with the Cyber Regulations Advisory Committee and in exercise of the provisions of Section 67 and 88 (*Constitution of the Cyber Regulations Advisory Committee*) of the IT Act, has prescribed an enforcement mechanism for blocking websites that are in contravention of Section 67 of the IT Act.

The IT Act is currently under severe scrutiny in India, as its scope leaves a lot to be desired. The internet has thrown up its fair share of problems, including those relating to online advertising. Some of these include, issues pertaining to privacy wherein a user is bombed with messages and images without ever soliciting or requesting to be the recipient of these messages. Another aspect in front of regulators relates to cross border issues, where the inbound advertisement is from a jurisdiction where the legal regime is hostile or non co-operative to India.

Indian Penal Code, 1860 (IPC)

The IPC makes it a punishable offence to advertise any obscene publication or its distribution, sale, hire or circulation³¹. It is also an offence under IPC to publish advertisements relating to any lottery which is not a state lottery or which is not authorized by the State Government³². The IPC prohibits the sale, distribution, public exhibition or circulation of any obscene book, pamphlet, paper, drawing, painting, representation, figure or any other obscene object³³. The following advertisements would be considered an offensive and may attract punishment of imprisonment and/or fine:

- Promote by words, spoken or written, or by signs or by visible representations, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or religious groups or castes or communities, on grounds of religion, race, place of birth, residence, language, caste or community.
- Make or publish any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the sovereignty and integrity of India.
- Assert, counsel, advise, propagate or publish that any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons.

³¹ Under Section 292(2)(d) of the Indian Penal Code, the keeper, printer or publisher may be held liable under this provision for the publication of an obscene advertisement. *Kherode Chandra Roy Chowdhury v. Emperor*, (1911) ILR 39 Cal 377. Under section 292 (2) (d), an advertisement through any means that any person is engaged or is ready to engage in the sale, distribution, public exhibition, circulation any obscene book, pamphlet, paper, drawing, painting, representation, figure or any other obscene object, is punishable with imprisonment and/or fine.

³² Section 294-A of the Indian Penal Code

³³ Section 292 (d).

- Insults by words, either spoken or written, by signs or by visible representations, the religion or the religious beliefs or a place of worship of a class of citizens with deliberate and malicious intention of outraging the religious beliefs of that class.

The Young Persons (Harmful Publications) Act, 1956

This statute makes it a punishable offence to advertise a “harmful publication”. A “harmful publication” is a publication portraying the commission of offences, acts of violence or cruelty or incidents of a repulsive or horrible nature, in such manner as would tend to corrupt a young person³⁴.

Indecent Representation of Women (Prohibition) Act, 1986 (IRWA)

This statute prohibits the publication of advertisements which contains indecent representation of women in any form. Under Sections 2(c), (d), 3 and 4 of IRWA, no person may publish or cause to be published or arrange or take part in the publication of advertisements, books, pamphlet, film, slide, writing, paper, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form. An indecent representation of women is the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a manner as to have the effect of being indecent, or derogatory to or denigrating women or is likely to deprave, corrupt or injure the public morality or morals.

Any offence committed under Section 3 and 4 is punishable with imprisonment and/or fine.

The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (CTPA)

The CTPA prohibits advertisement of cigarettes and other tobacco products which, directly or indirectly, suggest or promote the use or consumption of cigarettes³⁵ or any other tobacco products, by any person who is either engaged in the production, supply or distribution of such products or by a person having control over a medium who causes such advertisements to be advertised through that medium or by a person who takes part in such advertisement. Therefore, CTPA holds the publisher of the advertisement also responsible for publishing the advertisement.

³⁴ Section 2 (a) of the Young Persons (Harmful Publications) Act, 1956

³⁵ Section 5 of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

As an aside, it would be worthwhile to mention that the statement of objects and reasons of the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, *inter alia* provides that smoking of cigarettes is a harmful habit and, in course of time, can lead to grave hazards. Similarly, the objects and reasons of the CTPA provide that tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated 8,00,000 deaths annually in India.

The Drugs and Magic Remedies (Objectionable Advertisements) Act (DMRA)

This statute prohibits advertisements of drugs for certain purposes and of treatment of certain diseases and disorders. It also prohibits misleading advertisements relating to drugs and advertisements of magical remedies for the treatment of certain diseases and disorders³⁶.

Under this Act, “advertisement” includes any notice, circular, label, wrapper or other document and any announcement made orally or by means of producing or transmitting light, sound or smoke³⁷. The DMRA prohibits publication and/or the import or export of any document that contains advertisements which:

- Claim that a drug may be used for procurement of miscarriage or prevention of conception in women, improvement of capacity of human beings for sexual pleasure, correction of menstrual disorder in women and for other diseases or disorders specified under the DMRA;
- Are misleading;
- Are for magic remedies that, directly or indirectly, claim to be efficacious for treatment of specified diseases and disorders.

The Drugs and Cosmetics Act, 1940 (DCA)

Under Section 18 of the DCA no person can by himself or by any other person on his behalf manufacture for sale or for distribution, sell, stock or exhibit or offer for sale or distribute any drug that:

- is not licensed under the DCA or contravenes the terms of the license;
- is not of a standard quality, misbranded (refers to packaging and labelling requirements), adulterated or spurious;
- through any statement, design or device accompanying the drug or through any other means, claims to prevent, cure or mitigate any disease or ailment or to have any such effect as maybe prescribed.

³⁶ Section 3,4,5 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

³⁷ Section 2(a) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

Similar restrictions apply to advertisements for traditional drugs such as Ayurvedic, Siddha and Unani. Under Section 29 of the DCA, the use of any report of a test or analysis (or its extract) made by the Central Drugs Laboratory or a Government Analyst, in an advertisement is prohibited. Contravention of the above provisions of the DCA is a criminal offence and involves punishment of imprisonment and/or a fine.

The Emblems and Names (Prevention of Improper Use) Act, 1950

This statute prohibits the use, for professional or commercial purposes, of select emblems and names of national or international significance. An advertiser who makes commercial use of such emblems and names would be liable under this statute³⁸.

*Monopolies and Restrictive Trade Practices Act, 1969 (MRTP)*³⁹

Section 36A of the MRTP lists out practices considered to be Unfair Trade Practices (UTP). A UTP is a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services adopts any unfair method or unfair or deceptive practice, including the practice of making any statement, whether orally or in writing or by visible representation, which *inter alia*:

- Falsely represent that the goods/services are of a particular standard, quality, grade, composition, style or model, and that the re-built, second-hand, renovated, reconditioned or old goods are new goods.
- Make false or misleading statements concerning the need for or the usefulness or regarding the sponsorship, approval, or affiliation of any goods and services.
- Make a materially misleading representations to the public concerning the price at which a product or like products or goods have been or are or will be originally sold.
- Gives false or misleading facts disparaging the goods, services or trade of another person.
- Offers gifts, prizes or other items with the intention of not providing them or creating an impression that something is being given free of charge when it is fully or partly covered by the price.
- Conduct any contest, lottery, game of chance or skill.

SEBI (Stock-brokers and Sub-brokers) Rules, 1992 - Code of Conduct for Stock-brokers

³⁸ Section 3 of The Emblems and Names (Prevention of Improper Use) Act, 1950

³⁹ The Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP") regulates monopolistic, restrictive and unfair trade practices. India has recently legislated its antitrust law, the Competition Act, 2002. However, the new statute has not yet fully come into force (expected early next year). Once the Competition Act, 2002 coming into force in its entirety, the MRTP Act will stand repealed and the UTP provisions of the MRTP Act will be enforced under the Consumer Protection Act.

A stock-broker or sub-broker is prohibited from advertising his business publicly unless permitted by the stock exchange, including in their internet sites, by subsidiaries, group companies etc.

SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995

These regulations prohibit any person from making any statement, or disseminate any information which is:

- Misleading in a material particular.
- Likely to induce the sale or purchase of securities or have the effect of increasing or depressing the market price of securities, without care of whether the statement or information made is true or false or having reasonable knowledge that the statement is misleading in any material particular.

This excludes general comments made in good faith in regard to :

- the economic policy of the government;
- economic situation in the country; and
- trends in securities market.

SEBI (Mutual Funds Regulation), 1996: SEBI Guidelines for Advertisements by Mutual Funds

The Guidelines list out detailed requirements for advertisements by Mutual Funds. The guidelines apply to all forms of advertisements, communications, released in any form and through any media including websites. It defines an “advertisement” as any material published or designed to be published on which a mutual fund has no control over the audience and which is broadly distributed.

The guidelines list detailed requirements on the following subjects:

- Content
- Standards of communication
- Forms of advertisements (e.g. tombstone advertisement, product launch advertisement, performance advertisement)
- Use of rankings
- Required disclosures
- Time periods

Securities and Exchange Board of India (“SEBI”) (Disclosure and Investor Protection Guidelines), 2000

“*Advertisement*” under these Guidelines includes notices, brochures, pamphlets, circulars, show cards, catalogues, hoardings, placards, posters, insertions in newspapers, pictures, films, cover pages of offer documents or any other print medium, radio, television programmes through any electronic medium.

There are detailed requirements under these Guidelines on Pre and Post Issue of securities’ advertisements. In addition, there are general guidelines also set out for issue advertisements, briefly set out below:

- Be truthful, fair and clean and not contain any untrue or misleading statement.
- Reproduce or purport to reproduce any information contained in an offer document in full disclosing all relevant facts and not restrict to select extracts.
- Be clear, concise and understandable language and extensive use of technical, legal terminology or complex language and the inclusion of excessive details which may distract the investor, should be avoided.
- Not contain statements which promise or guarantee rapid increase in profits.
- Not contain any information what is not contained in the offer document.
- Display no model, celebrities, fictional characters, landmarks or caricatures or the likes on a form part of the offer documents or issue advertisements.
- Not appear in the form of crawlers (advertisements which run simultaneously with the programme in a narrow strip at the bottom of the television screen) on television.
- Not include any issue slogans or brand names for the issue, except the normal commercial name of the company or commercial brand names of its products already in use.
- No slogans, expletives or non-factual and unsubstantiated titles should appear in the issue advertisements or offer documents.
- If any advertisement carries any financial data, it should also contain data for the past three years and should include particulars relating to sales, gross profits, net profit, share capital, reserves, earnings per share, dividends and the book values.
- Contain names of issuer company, address of its registered office, names of the main lead merchant bankers and registrars to the issue.

There are other detailed requirements under these Guidelines regarding content, form and time frame of the issuing the advertisement.

The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

This statute prohibits advertisements relating to predetermination of sex.

The Transplantation of Human Organs Act, 1994

This statute makes it a punishable offence to issue advertisements inviting persons to supply, for payment a human organ.

The Representation of the People (Amendment) Act, 1996 (RPA)

There is a prohibition on the display to the public any election matter by means of cinematography, television or other similar apparatus in any polling area during the period of 48 hours ending with the hour fixed for the conclusion of the poll for any elections in that polling area. “*Election matter*” under the RPA means any matter intended or calculated to influence or affect the result of an election.

The Lotteries (Regulation) Act, 1998

Under this statute a State Government has the discretionary powers to organize, conduct or promote a lottery, including advertising thereof. Different states have enacted laws/regulations to regulate the sale, promotion, advertisement and distribution of lotteries including online lotteries, such as the States of Maharashtra, Sikkim, Punjab and Harayana etc. Some States on the other hand have prohibited the conduct of lotteries within their states.

Public Gambling Act, 1867 (PGA)

Under Section 3 of the PGA, the owning, keeping, care or management, financing or in any manner assisting in conducting the business of any Common Gaming House is prohibited.

Censorship

While this paper does not cover censorship as an issue, some guidance on forms and content for advertisements may be obtained from the censorship norms applied by the Censor Board of India while certifying films and advertisements for public exhibition. A listing thereof is provided in Annexure B hereof.

Summing it up ...

The aim of advertisement is to promote sales of products or service by affecting a purchasing decision. Although the benefits of advertising are numerous it is one aspect of marketing that is subjected to a severe criticisms. And now there is a new medium for advertisers to explore, the Internet! While there may be no specific legislations governing online advertising in India, ASCI does recognize online advertising. ASCI's Code of advertising and existing statutes provides necessary guidance and arsenal to combat errant advertisers. Finally, guidance may be sought by simplify reading the Terms and Condition's of the website, the advertiser wants to advertise on. This exercise will avoid any negative repercussions following release of an online advertisement.

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Annexure A

The Code for Self Regulation in Advertising

Adopted by The Advertising Standards Council of India under Article 2 (ii) of its Articles of Association at the first meeting of the Board of Governors held on November 20, 1985.

The Code was amended in February 1995 and in June 1999.

The purpose of the Code is to control the content of advertisements, not to hamper the sale of products which may be found offensive, for whatever reason, by some people. Provided, therefore, that advertisements for such products are not themselves offensive, there will normally be no ground for objection to them in terms of this Code.

Declaration of Fundamental Principle

This Code for Self-Regulation has been drawn up by people in professions and industries in or connected with advertising, in consultation with representatives of people affected by advertising, and has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising, with the following as basic guidelines, with a view to achieve the acceptance of fair advertising practices in the best interest of the ultimate consumer:

1. To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.
2. To ensure that advertisements are not offensive to generally accepted standards of public decency.
3. To safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large.
4. To ensure that advertisements observe fairness in competition so that the consumer's need to be informed on choices in the market-place and the canons of generally accepted competitive behaviour in business are both served.

The Code's rules form the basis for judgement whenever there may be conflicting views about the acceptability of an advertisement, whether it is challenged from within or from outside the advertising business. Both the general public and an advertiser's competitors have an equal right to expect the content of advertisements to be presented fairly, intelligibly and responsibly. The Code applies to advertisers, advertising agencies and media.

Responsibility for the Observance of this Code

The responsibility for the observance of this Code for Self-Regulation in Advertising lies with all who commission, create, place or publish any advertisement or assist in the creation or publishing of any advertisement. All advertisers, advertising agencies and media are expected not to commission, create, place or publish any advertisement which is in contravention of this Code. This is a self-imposed discipline required under this Code for Self-Regulation in Advertising from all involved in the commissioning, creation, placement or publishing of advertisements.

This Code applies to advertisements read, heard or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant number of consumers in India.

The Code and the Law

The Code's rules are not the only ones to affect advertising.

There are many provisions, both in the common law and in the statutes, which can determine the form or the content of an advertisement.

The Code is not in competition with law. Its rules, and the machinery through which they are enforced, are designed to complement legal controls, not to usurp or replace them.

Definitions

For the purpose of this Code:

- a. an advertisement is defined as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Any communication which in the normal course would be

recognised as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.

- b. a product is anything which forms the subject of an advertisement, and includes goods, services and facilities.
- c. a consumer is any person or corporate body who is likely to be reached by an advertisement whether as an ultimate consumer, in the way of trade or otherwise.
- d. an advertiser is anybody, including an individual or partnership or corporate body or association, on whose brief the advertisement is designed and on whose account the advertisement is released.
- e. an advertising agency includes all individuals, partnerships, corporate bodies or associations, who or which work for planning, research, creation or placement of advertisements or the creation of material for advertisements for advertisers or for other advertising agencies.
- f. media owners include individuals in effective control of the management of media or their agents; media are any means used for the propagation of advertisements and include press, cinema, radio, television, hoardings, hand bills, direct mail, posters, internet, etc.
- g. minors are defined as persons who are below the age of 18 years.
- h. any written or graphic matter on packaging, whether unitary or bulk, or contained in it, is subject to this Code in the same manner as any advertisement in any other medium.
- i. to publish is to carry the advertisement in any media whether it be by printing, exhibiting, broadcasting, displaying, distributing, etc.

Standards of Conduct

Advertising is an important and legitimate means for the seller to awaken interest in his products. The success of advertising depends on public confidence. Hence no practice should be permitted which tends to impair this confidence. The standards laid down here should be taken as minimum standards of acceptability which would be liable to be reviewed from time to time in relation to the prevailing norm of consumers' susceptibilities.

Chapter-I

To ensure the Truthfulness and Honesty of Representations and Claims made by Advertisements and to Safeguard against misleading Advertisements.

1. Advertisements must be truthful. All descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called upon to do so by The Advertising Standards Council of India.
2. Where advertising claims are expressly stated to be based on or supported by independent research or assessment, the source and date of this should be indicated in the advertisement.
3. Advertisements shall not, without permission from the person, firm or institution under reference, contain any reference to such person, firm or institution which confers an unjustified advantage on the product advertised or tends to bring the person, firm or institution into ridicule or disrepute. If and when required to do so by the Advertising Standards Council of India, the advertiser and the advertising agency shall produce explicit permission from the person, firm or institution to which reference is made in the advertisement.
4. Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions. Advertisements shall not contain statements or visual presentation which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised or the advertiser or about any other product or advertiser.
5. Advertisements shall not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers.

For example:

- a. Products shall not be described as 'free' where there is any direct cost to the consumer other than the actual cost of any delivery, freight, or postage. Where such costs are payable by the consumer, a clear statement that this is the case shall be made in the advertisement.

- b. Where a claim is made that if one product is purchased another product will be provided 'free', the advertiser is required to show, as and when called upon by The Advertising Standards Council of India, that the price paid by the consumer for the product which is offered for purchase with the advertised incentive is no more than the prevalent price of the product without the advertised incentive.
 - c. Claims which use expressions such as "Upto five years'guarantee"or "Prices from as low as Rs. Y"are not acceptable if there is a likelihood of the consumer being misled either as to the extent of the availability or as to the applicability of the benefits offered.
 - d. Special care and restraint has to be exercised in advertisements addressed to those suffering from weakness, any real or perceived inadequacy of any physical attributes such as height or bust development, obesity, illness, impotence, infertility, baldness and the like, to ensure that claims or representations directly or by implication, do not exceed what is considered prudent by generally accepted standards of medical practice and the actual efficacy of the product.
 - e. Advertisements inviting the public to invest money shall not contain statements which may mislead the consumer in respect of the security offered, rates of return or terms of amortisation; where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumptions, such conditions or assumptions must be clearly indicated in the advertisement.
 - f. Advertisements inviting the public to take part in lotteries or prize competitions permitted under law or which hold out the prospect of gifts shall state clearly all material conditions as to enable the consumer to obtain a true and fair view of their prospects in such activities. Further, such advertisers shall make adequate provisions for the judging of such competitions, announcement of the results and the fair distribution of prizes or gifts according to the advertised terms and conditions within a reasonable period of time. With regard to the announcement of results, it is clarified that the advertiser's responsibility under this section of the Code is discharged adequately if the advertiser publicizes the main results in the media used to announce the competition as far as is practicable, and advises the individual winners by post.
6. Obvious untruths or exaggerations intended to amuse or to catch the eye of the consumer are permissible provided that they are clearly to be seen as humorous or hyperbolic and not likely to be understood as making literal or misleading claims for the advertised product.

7. In mass manufacturing and distribution of goods and services it is possible that there may be an occasional, unintentional lapse in the fulfilment of an advertised promise or claim. Such occasional, unintentional lapses may not invalidate the advertisement in terms of this Code.

In judging such issues, due regard shall be given to the following:

- a. Whether the claim or promise is capable of fulfilment by a typical specimen of the product advertised.
- b. Whether the proportion of product failures is within generally acceptable limits.
- c. Whether the advertiser has taken prompt action to make good the deficiency to the consumer.

Chapter II

To ensure that Advertisements are not offensive to generally accepted standards of Public Decency.

Advertisements should contain nothing indecent, vulgar or repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence.

Chapter III

To safeguard against the indiscriminate use of Advertising in situations or of the Promotion of Products which are regarded as Hazardous or Harmful to society or to individuals, particularly minors, to a degree or of a type which is Unacceptable to Society at Large.

1. No advertisement shall be permitted which:
 - a. Tends to incite people to crime or to promote disorder and violence or intolerance.
 - b. Derides any race, caste, colour, creed or nationality.
 - c. Presents criminality as desirable or directly or indirectly encourages people - particularly minors - to emulate it or conveys the modus operandi of any crime.
 - d. Adversely affects friendly relations with a foreign State.

2. Advertisements addressed to minors shall not contain anything, whether in illustration or otherwise, which might result in their physical, mental or moral harm or which exploits their vulnerability. For example, Advertisements:
 - a. Should not encourage minors to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels or the like.
 - b. Should not feature dangerous or hazardous acts which are likely to encourage minors to emulate such acts in a manner which could cause harm or injury.
 - c. Should not show minors using or playing with matches or any inflammable or explosive substance; or playing with or using sharp knives, guns or mechanical or electrical appliances, the careless use of which could lead to their suffering cuts, burns, shocks or other injury.
 - d. Should not feature minors for tobacco or alcohol-based products.
 - e. Should not feature personalities from the field of sports, music and cinema for products which, by law, either require a health warning in their advertising or cannot be purchased by minors.
3. Advertisements shall not, without justifiable reason, show or refer to dangerous practices or manifest a disregard for safety or encourage negligence.
4. Advertisements should contain nothing which is in breach of the law nor omit anything which the law requires.
5. Advertisements shall not propagate products, the use of which is banned under the law.
6. Advertisements for products whose advertising is prohibited or restricted by law or by this Code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this Code. In judging whether or not any particular advertisement is an indirect advertisement for a product whose Advertising is restricted or prohibited, due attention shall be paid to the following:

- a. Whether the unrestricted product which is purportedly sought to be promoted through the advertisement under complaint is produced and distributed in reasonable quantities having regard to the scale of the advertising in question, the media used and the markets targeted.
- b. Whether there exist in the advertisement under complaint any direct or indirect clues or cues which could suggest to consumers that it is a direct or indirect advertisement for the product whose Advertising is restricted or prohibited by law or by this Code.
- c. Where Advertising is necessary, the mere use of a brand name or company name that may also be applied to a product whose Advertising is restricted or prohibited, is not reason to find the advertisement objectionable provided the advertisement is not objectionable in terms of (a) and (b) above.

Chapter IV

To ensure that Advertisements observe fairness in competition such that the Consumer's need to be informed on choice in the Market-Place and the Canons of generally accepted competitive behaviour in Business are both served.

1. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided.
 - a. It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.
 - b. The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
 - c. The comparisons are factual, accurate and capable of substantiation.
 - d. There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.
 - e. The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.

2. Advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the goodwill attached to the trade mark or symbol of another firm or its product or the goodwill acquired by its advertising campaign.
3. Advertisements shall not be similar to any other advertiser's earlier run advertisements in general layout, copy, slogans, visual presentations, music or sound effects, so as to suggest plagiarism.
4. As regards matters covered by sections 2 and 3 above, complaints of plagiarism of advertisements released earlier abroad will lie outside the scope of this Code except in the under-mentioned circumstances:
 - a. The complaint is lodged within 12 months of the first general circulation of the advertisements/campaign complained against.
 - b. The complainant provides substantiation regarding the claim of prior invention/usage abroad.

Annexure B

Central Board of Film Certification, India | Guidelines

- (i) Anti social activities such as violence are not glorified or justified;
- (ii) The modus operandi of criminals, other visuals or words likely to incite the commission of any offence are not depicted;
- (iii) Scenes
 - a. showing involvement of children in violence as victims or perpetrators or as forced witnesses to violence, or showing children as being subjected to any form of child abuse;
 - b. showing abuse or ridicule of physically and mentally handicapped persons; and
 - c. showing cruelty to, or abuse of animals, are not presented needlessly.
- (iv) Pointless or avoidable scenes of violence, cruelty and horror, scenes of violence primarily intended to provide entertainment and such scenes as may have the effect of de-sensitising or de-humanising people are not shown;
- (v) Scenes which have the effect of justifying or glorifying drinking are not shown;
- (vi) Scenes tending to encourage, justify or glamorise drug addiction are not shown;
- (vi-a) Scenes tending to encourage, justify or glamorise consumption of tobacco or smoking are not shown;
- (vii) Human sensibilities should not be offended by vulgarity, obscenity or depravity;
- (viii) Such dual meaning words as obviously cater to baser instincts are not allowed;
- (ix) Scenes degrading or denigrating women in any manner are not presented;

- (x) Scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incidence is germane to the theme, they should be reduced to the minimum and no details are shown;
- (xi) Scenes showing sexual perversions shall be avoided and if such matters are germane to the theme they should be reduced to the minimum and no details should be shown;
- (xii) Visuals or words contemptuous of racial, religious or other groups are not presented;
- (xiii) Visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitude are not presented;
- (xiv) The sovereignty and integrity of India is not called in question;
- (xv) The security of the State is not jeopardized or endangered;
- (xvi) Friendly relations with foreign States are not strained;
- (xvii) Public order is not endangered;
- (xviii) Visuals or words involving defamation of an individual or a body of individuals, or contempt of court are not presented⁴⁰; and
- (xix) National symbols and emblems are not shown except in accordance with the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950).

⁴⁰ Scenes that tend to create scorn, disgrace or disregard of rules or undermine the dignity of court come under the term 'Contempt of Court'

Annexure C

Norms of Journalistic Conduct

- i) Commercial advertisements are information as much as social, economic or political information. What is more, advertisements shape attitude and ways of life at least as much, as other kinds of information and comment. Journalistic propriety demands that advertisements must be clearly distinguishable from news content carried in the newspaper.
- ii) Newspaper should not publish liquor & tobacco advertisements. No advertisement shall be published, which promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor and other intoxicants.
- iii) Newspaper shall not publish advertisements, which have a tendency to malign or hurt the religious sentiments of any community or section of society.
- iv) Advertisements which offend the provisions of the Drugs and Magical Remedies (Objectionable Advertisement) Act, 1954, or any other statute should be rejected.
- v) Newspapers should not publish an advertisement containing anything which is unlawful or illegal, or is contrary to public decency, good taste or to journalistic ethics or propriety.
- vi) Journalistic propriety demands that advertisements must be clearly distinguishable from editorial matter carried in the newspaper. Newspapers while publishing advertisements should specify the amount received by them. The rationale behind this is that advertisements should be charged at rates usually chargeable by a newspaper since payment of more than the normal rates would amount to a subsidy to the paper.
- vii) Publication of dummy or lifted advertisements that have neither been paid for, nor authorised by the advertisers, constitute breach of journalistic ethics specially when the paper raises a bill in respect of such advertisements.
- viii) Deliberate failure to publish an advertisement in all the copies of a newspaper offends against the standards of journalistic ethics and constitutes gross professional misconduct.

- ix) There should be total co-ordination and communication between the advertisement department and the editorial department of a newspaper in the matter of considering the legality propriety or otherwise of an advertisement received for publication.
- x) The editors should insist on their right to have the final say in the acceptance or rejection of advertisements, specially those which border on or cross the line between decency and obscenity.
- xi) Newspapers to carry caution notice with matrimonial advertisements carrying following text *

“Readers are advised to make appropriate thorough inquiries before acting upon any advertisement. This newspaper does not vouch or subscribe to claim and representation made by the advertiser regarding the particulars of status, age, income of the bride/bridegroom”.
- xii) An editor shall be responsible for all matters, including advertisements published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated beforehand.
- xiii) Tele-friendship advertisements carried by newspapers across the country inviting general public to dial the given number for ‘entertaining’ talk and offering suggestive tele-talk tend to pollute adolescent minds and promote immoral cultural ethos. The Press should refuse to accept such advertisements.
- xiv) Classified advertisements of health and physical fitness services using undignified languages, indicative of covert soliciting, are violative of law as well as ethics. The newspaper should adopt a mechanism for vetting such an advertisement to ensure that the soliciting advertisements are not carried.
- xv) Advertisements of contraceptive and supply of brand item attaching to the advertisement is not very ethical, given the social milieu and the traditional values held dear in our country. A newspaper has a sacred duty to educate people about precautionary measures to avoid AIDS and exhibit greater far sight in accepting advertisement even though issued by social welfare organisation.