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Reading Material

ONE YEAR ADVANCED DIPLOMA IN MEDIA LAWS

1.3 ADVERTISEMENT AND THE LAW

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Contents

1. CHAPTER I

   Constitutional Freedom of Commercial Speech 5

2. CHAPTER II

   Drug and Magic Remedies (Objectionable Advertisements) Act, 1954 & others Laws 71

3. CHAPTER III

   Civil and Criminal Liabilities 77

4. CHAPTER IV

   Unfair Practices through Advertisements 95

5. CHAPTER V

   Advertising Standards Council of India 107

6. CHAPTER VI

   Misleading Advertisements & Global Regulations 143

CHAPTER I

CONSTITUTIONAL FREEDOM OF COMMERCIAL SPEECH

1.1 Introduction

Advertising is an expression intended for promotion of a product or a service or a concept. As the growth of communicative industry is very fast, so is the advertising industry. Advertising is an economic phenomenon, involving constitutional rights, legal limitations, economic interests and also liabilities towards the receivers of communicated advertisement message.

Advertising as a concept is a product of the increased commercial transaction, and competitive marketing strategies. Every propagatory means to promote a concept or service is a form of advertisement. It is a form of communication like any other process of sending across the message, which can be called medium to reach the masses.

A street play or a wall writing, a religious discourse, a public meeting, a drama, a puppet show, a harikatha or burra katha, or oggukatha, (a folk form of medium in colloquial language) could be a form of medium of communication which can carry an advertisement and hence an 'advertisement'. Marketing is a glorified form of advertising. The campaign plan of a commercial producer of goods includes press conferences, which are important components of 'advertisement'. A news conference either gives out information or advertisement, but never gives 'news' as such. Thus the commercial nature of matter with value of publicity is creeping in into the shape of news or views also. An investigative journalist or an analytical reader might be interested in knowing the hidden facts and may not like the information being doled out by anybody including the statement givers or press conference organizers, or those who address public meetings. Such information is deliberately given to serve the purpose of giver and not that of receiver. Hence that amounts to advertisement only. Strictly speaking, advertisement in terms of print media and electronic media is the material published for promotion of a product involving a payment of consideration for publication, which is expected to fetch some publicity.

Whether in TV, Radio, newspaper or magazine, the advertisement is a significant part, which could be described as life and blood of that medium. Newspaper or TV programme cannot be filled only with advertisement. It has to be interjected or interspersed into a creative or entertaining activity. Depending upon the viewership or acceptability or readership of the programme or newspaper, the value or rate of advertisement varies. With the returns from advertisement, the media survives and prospers.

Justice P B Sawanth and P.K. Bandhyopadhyay, in their Advertising Law and Ethics, traced the history of concept of advertising: “The simplest form of advertising was that of the street criers and the peddlers, who went about selling their wares. The pulpit, the platform, the street meetings and the village gatherings were the other modes of spreading the word. The peddler as well as the prophet resorted to it. One sold his wares, the other his views. Both had to persuade as large a number of people as possible to take-up what they had to offer and were always in need of appropriate means to attract maximum number of people. Therefore, it is true to say that advertising in its commercial sense was born when trade and industry became an organized activity, it was not unknown earlier”[1].

1.2 Definition

Codes of the Advertising Standards Council of India ASCI defined Advertisement as: 'Advertisement' is a paid for communication, addressed to the public on a section of it, the purpose of which is to influence the options of 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 his definition even if it is carried free of charge for any reason.

Section 2(a) of Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 defines ‘advertisement’ for the purpose of that Act only. Still, the definition is useful for inferring the executive meaning of the term. The relevant portion of the definition is: ‘Advertisement includes any notice, circular, label, wrapper, or other document and any announcement made”. Thus an advertisement is any document which announces or proclaims to the public the production, quality, availability or the like of something.

As the advertisement is also a speech, though categorized as commercial, the publisher and printer or editor of the published material, whether it is commercial speech or news story or editorial matter, will be held liable for any kind of illegality. No one can incite through advertisement, another to commit offence, or publish defamatory material or obscene picture or comments, which undermine the respect for judiciary etc.

1.3 Study by UNESCO: MacBride Commission

MacBride Commission appointed by UNESCO for studying the field of communication and its problems all over the world, in its report published in early eighties visualized the enormous growth of advertising. It says: “One of the most lucrative sectors of the communication industry is advertising; with national and transnational ramifications and channels…the dependence of mass media on advertising is also growing. Few newspapers in the world of private enterprise could survive without it. As for radio and television,

[1] Justice PB Sawanth, PK Bandyopadhaya, Advertising Law and Ethics, Introduction, page, v.

advertising provides virtually the sole revenue for the privately owned broadcasting companies, which are dominant in the US and in Latin America, and is an important source for financing in various other companies".

1.3.1. Promoting Desirable Social Aims

Referring to positive aspects of Advertising MacBride Commission observed: "it is used to promote desirable social aims, like savings and investment, family planning, purchase of fertilizer to improve agricultural output, etc. It provides the consumer with information about possible patterns of expenditure (in clothing and other personal needs, in house purchase or rental, in travel and holidays, to take obvious examples) and equips him to make choices; this could not be done, or would be done in a much more limited way, without advertising. Small scale 'classified' advertising- which, in the aggregate, fills almost as much space in some newspapers as 'display' advertising by major companies- is a useful form of communication about the employment market, between local small businesses and their customers, and between individuals with various needs. Finally, since the advertising revenue of a newspaper comes from multiple sources, it fosters economic health and independence, enabling the enterprise to defy pressure from single economic interest or from political authorities".

1.3.2. Persuasion as the purpose

This commission also referred the difference between advertising and editorial content. The avowed purpose of advertising is that of persuasion; a balanced debate in advertising is a contradiction in terms. Because advertising is overwhelmingly directed towards the selling of goods and services, which can be valued in monetary terms, it tends to promote attitudes and life styles which extol acquisition and consumption at the expense of other values. A particular material possession is elevated to a social norm, so that people without it are made to feel deprived or eccentric. The resources of commercial advertising can greatly exceed those at the disposal of individuals or groups in disagreement with the selling campaign, even of the public authorities; thus, the advertising budgets of tobacco companies dwarf the sums spent by governments on warning the consumers of the health dangers of smoking. Various controls and safeguards exist in most countries, such as codes of conduct for advertisers, legislation to ensure accuracy in factual statements, and acceptance policies by radio and television authorities which bar some forms of advertising (thus tobacco advertising in several countries is permissible by poster and in the press but not over the air)

The Commission also pondered over the problem of big players in advertising especially imported advertising in developing countries. It says: "in this situation code of conduct in advertising become more difficult to enforce. Therefore, advertising is seen by many as a threat to the cultural identity and self-realization of many developing countries; it brings to many people alien ethical values; it may deviate consumer demands priorities; it affects and

can often deform ways of life and life styles. Moreover, the threat to withdraw advertising-by private interests or by a government can jeopardize press freedom".

It is in this context the need for regulation of advertising arises.

Advertising may be broadly divided into broadcast advertising and non broadcast (or print) advertising. One of the most important tasks of the research wing of an advertising agency is to select the right media, right region and right language for the advertisement of the good or service of the advertiser. The commonly used media are:

1. newspapers and periodicals
2. television channels
3. radio jingles and informative talks, discussions etc. aiming at specific target audience
4. outdoor signs
5. direct mail
6. Internet

1.4. Medium of Advertisements

The medium with the maximum reach to educated consumers is the medium of newspapers. It is easy and cost-effective to publish an advertisement in newspapers, since the tariff of newspaper advertisements is comparatively less. Also not much cost is incurred in making the advertisement. Television advertisements can combine visuals, sound, music and action to make their duties men's immensely attractive instantaneously appealing. Advertising for broadcasting on television is a costly affair, since making the advertisement and broadcasting are expensive. Television companies generally quote different prices for broadcasting advertisements at different times. But the medium of television has a wider reach than newspapers since it caters to the uneducated population as well. The medium of radio has also got a very wide reach.

As far as India is concerned, the medium of radio reaches more rural population than any other medium. Advertisements on radio are cheaper compared to television advertisements mainly because the cost of making them.

Outdoor signs of publicity is also a very good option for advertising. They can be placed at strategic locations where they will catch attention of the target consumers in the best possible manner. Advertising by direct mail normally means sending communication through post to particular addresses. This has a feeling of personal touch. Desired mailing lists are provided by mass mailing agencies. In this age of rapid communication, direct mail service

and even to e-mail addresses with the help of mailing lists, which are based on the personal information of the persons to e-mail addresses belong.

Advertising on the Internet, which is the newest medium or phenomenon, which is rapidly spreading the world over, is generally done by publishing the advertisements on websites. This can be through creating websites particularly for the purpose of advertising on popular websites for which consideration has to be paid to the companies hosting the websites. Today, the Internet may not have the kind of access to people as the newspapers and television enjoys. But it is fast evolving and already has target groups which are specific and for whom particular goods and services may be advertised.

Advertisers range from business houses to individuals, political parties, non-governmental organizations, social welfare organizations, activist groups etc. the advertising industry is so huge because an enormous number of advertisements are regularly rolled out by different advertisers. Advertisers engage advertising agencies to manage the making of their advertisements to their specifications. Many advertising agencies have cropped up because of the scope of the market. They have created numerous job opportunities. Some of the best professional talent is attracted to the advertising field. The advertising agencies carry out their own research to find out the existing market trends with regard to the goods or services of the advertise and various other aspects. The main work of advertising agency is to create an advertising campaign for the advertiser based on information gathered from the research. The creative team of advertising agency is the heart of an advertisement. An advertisement may make or break a good or service. The secret of success of advertising agency is to give each and every client due importance. "I never tell one client that I cannot attend its sales convention because I have a previous engagement with another client; successful polygamy depends upon pretending to each spouse that she is the only pebble on your beach." [2]

1.5. Constitutional Foundations of Advertisement Freedom

Speech is classified into commercial and non commercial speech to determine the degree of judicial scrutiny over the speech. A simple "commercial advertisement" comes within the concept of "freedom of speech and expression" guaranteed under Article 19(1)(a) of the Constitution of India. 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. It assumes the attributes and elements of the activity under Article 19(1) which it seeks to aid by bringing it to the notice of the public. When it 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

[2] David Ogilvy, Confessions of an Advertising Man, (1971), p. 52, Ballantine Books, quoted in Supra n.1, p. 25.

literature or human thought. It cannot be said that the right to publish and distribute commercial advertisements, advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution.[3]

In ***Hamdard Dawakhana (Wakf) Lal Kuan, Delhi, Union of India***, some goods belonging to petitioners were seized for containing objectionable advertisement. The petitions were filed under Article 32 of the Constitution questioning the constitutional validity of Drugs and Magic Remedies Act as that hampered the campaign programme of products of Hamdard Dawakhana. Drugs Controller could stop the sale of 40 of their products and asked to recall the products sent for sale in Bombay and other states as the compaign launched by them contravened section 3 of the Act. It was contended that advertisement was the means by which freedom of speech and expression under Article 19(1)(a) was exercised and the restrictions imposed by the impugned Act were not covered by Article 19(2). It was also claimed that the Act imposed arbitrary and excessive restrictions on the rights guaranteed by Article 19(1)(f) and (g), Section 3 of the Act gives unguided and 'uncanalised power' to executive to add to the diseases enumerated in section 3. Moreover, the power of confiscation under Section 8 of the impugned Act is violative of the rights under Articles 21, 31 of the Constitution.

The Court examined the history of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, found that its object was the prevention of self medication and self treatment and merely stopping of advertisements offending against morality and decency. The Court said: "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. It is only when an advertisement is concerned with the expression or propagation of ideas that it can be said to relate to freedom of speech. But it cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of the freedom of speech guaranteed by the Constitution." The Supreme Court held that the provisions of the Act were in the interests of the general public and the restrictions imposed were reasonable on the freedom of trade and business of petitioners and were saved by Article 19(6). The words in section 3, 'or any other disease or condition which may be specified in the rules made under this Act' in clause (d) of section 3 which empowers the Central Government to add to the diseases falling within the mischief of section 3 conferred uncanalised and uncontrolled power on the executive and were *ultra vires*. Striking down the impugned words did not affect the rest of the clause as the words were severable. Then the Supreme Court held that "the first part of section 8 which empowered any person authorized by the State Government to seize and detain any document, article or thing which such person had reason to believe contained any advertisement contravening the provisions of the Act imposed an unreasonable restriction on the fundamental rights of the petitioners was

[3] Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India, AIR 1960 SC 554

unconstitutional... if this portion was excised from the section, the remaining portion would be unintelligible and could not be upheld". The impugned words of section 3(d) and the whole of section 8 were declared unconstitutional. The rest of the Act remained unimpaired and constitutional. The court also directed the respondents to return the goods seized.

The Supreme Court of India, in the case of *Tata Press Ltd. v. Mahanagar Telephone Nigam Limited and othe*rs,[4] involving advertising in the Yellow Pages of the telephone directory held that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution and is subject to reasonable restrictions under Article 19 (2) of the Constitution of India. In the United States of America, advertisements come under the category of commercial speech and have to satisfy a less rigorous test compared to non-commercial speech. Commercial speech is not simply speech that someone spends money on to disseminate or publish.[5] Sale of speech does not render it "commercial" for this purpose. Otherwise, most newspapers, books, movies, and other fully protected forms of speech would be commercial speech. Freedom of speech is a fundamental right under the Constitutions of most countries of the world because it is an aid to democratic self-governance. Commercial speech has nothing or very less to do with such democratic self-governance or public decision making. If one sees freedom of speech primarily as a vehicle for individual autonomy and self-fulfillment, commercial speech at least when "spoken" through the artificial voices of inanimate corporations does not seem to qualify as speech that lifts the human spirit of the speaker.[6]

The question is not what qualifies commercial speech for Constitutional protection, but what disqualifies it. Commercial speech is more objective than noncommercial speech because its truth is more easily verifiable. Commercial speech is driven by the profit motive of commercial advertisers. Therefore, it is more durable than non commercial advertising.

Neither value is implicated by governmental regulation of commercial speech. Therefore, commercial speech might have less protection as compared to non commercial speech. When the state tried to reduce the space for advertisements in newspapers as a measure of controlling the freedom, the Supreme Court came to the rescue of media's freedom to secure unhindered revenue from the advertisers without any limitation on space and price.

1.6 Government's efforts to curb the Media's Freedom to Advertise

The state always tried to impose restrictions on speech and commercial activity of the press to compel it to toe the line of the government or not to create any embarrassment to state with critical exposures and piercing criticism. Advertisement being the main source of

[4] AIR 1995 SC 2438.
[5] . Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).
[6] http://www.lexis.com/research/buttonLink?_m=5c5c0936d6b14a032885361875c736f1&_xfercite=<cite cc="USA"

revenue of the newspaper, the Government wanted to aim at restricting this source under some or other excuse. Newsprint Control policy was one such measure to stifle the mass media. The Government of India imposed restrictions upon the import and distribution of newsprint in view of its scarcity and provided that if a newspaper sought to obtain its quota of newsprint from the government, it would have to comply with the conditions laid down in the Control Order, some of which were to operate even subsequently to the supply to a newspaper of its quota.

The Control Order was challenged in *Bennett Coleman v Union of India*[7], as unconstitutional because it substantially curtailed the freedom of the Press by affecting the size of a 'bigger' daily, which in turn, would curtail its circulation. The court held that the restrictions imposed discriminated against the bigger dailies. In the result, while curbing advertisements in a newspaper, whether directly or indirectly, the State must keep within the permissible limits, not only Cl. (6) but also Cl. (2) of Article 19; for advertisements are a substantial source of revenue of a newspaper so that if the restrictions imposed by the State unduly curb the advertisement-revenue of a newspaper, it would constitute a restriction of the freedom of expression itself.

Sakal Papers (Pvt) Limited v. Union of India[8]

The Newspapers (Price and Page) Act 1955 empowered central Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. Under this Act, the Central Government issued The Daily Newspaper (Price and Page) Order, 1960 and fixed the minimum number of pages that could be issued by the newspaper. This was alleged to be contravening the Article 19(1) (a) of the Constitution. The contention was accepted and both the Act of 1955 and the Order of 1960 made under it were held void for being violative of Constitutionally assured Fundamental Right which was not saved by Article 19(2). In order to propagate his ideas, a citizen has the right to publish the same, disseminate them, and circulate them by word of mouth or writing or printing. The right not only extended to the matter and its circulation but also to internal control and freedom over the allocation of space for the matter. To quote The Supreme Court:

The Newspaper Act was intended to affect the circulation and thus directly affect the freedom of speech. The Act seeks to achieve its object of enabling what are termed the smaller newspapers to secure larger circulation by provisions, which without disguise are aimed at restricting the circulation of what are termed as larger papers with better financial strength. The impugned law far from being one, which merely interfere with the right of freedom of speech incidentally, does so directly though it seeks to achieve the end by

[7] AIR 1973 SC 106
[8] AIR 1962 SC 305

purporting to regulate the business aspect of a newspaper. Such a course is not permissible and the Court must be ever vigilant in guarding perhaps the most pernicious of all the freedoms guaranteed by our Constitution, The freedom of speech and expression is of paramount importance under a democratic Constitution which envisages changes in the composition of legislature and Government and must be preserved.

The restrictions were sought to be justified by the Union Government on the ground that since newsprint was in short supply and to be imported, it was necessary to restrict and regulate its distribution and use. The Court pointed out that shortage of newsprint could stop with allotment. If the Government rests content with a fair and equitable allotment of the available newsprint to the consumers, none can quarrel with the policy. Once the allotments are made, newspapers must be left free to determine how they will adjust their newsprint; to determine their pages, their circulation and their new editions within the quota allotted to them. But what the government has done under the garb of distribution of newsprint is the control of the growth and circulation of newspapers so that Newsprint Control has been subverted to Newspaper Control. Freedom lies both in circulation and content. The impugned Newsprint Policy denies newspapers their right of circulation. Even by reducing circulation they are not allowed to increase the number of pages, page area or periodicity. The restrictions are not reasonable restrictions under Article 19(2).

The Court also held that the newsprint policy violates Article 14 because it treats newspapers, which are not equal as equals in assessing the needs and requirements of newsprint.

Recently the Supreme Court directed some multinational soft drink producers to remove the advertisements painted on the historic rocks enroute Kulu Manali area in Himachal Pradesh and imposed a heavy damages of Rs.5 crores for polluting the naturally formed environmentally valuable geographic rocks. The Supreme Court was responding to a news item where the rape of rocks was questioned. The item reads as follows:

The Supreme Court has hauled up several firms, including United States-based soft drinks majors Coca-Cola and Pepsi, for defacing millions of years old rocks in the Himalayas by painting advertisements on them and then trying to cover up the damage.

A three-judge bench of the apex court, headed by Chief Justice B.N. Kirpal, on Sept. 26 ordered Coca-Cola and publishing firm Malhotra Book Depot (MBD) to pay $62,500 each, while Pepsi was told to pay $31,250, textiles major Grasim and manufacturer of detergents Fena $20,833 each, Amaron Batteries $5,208, as well as the State Bank of India and Sleepwel mattresses $2,604 each for damaging rocks at the Rohtang Pass in Himachal Pradesh.

The companies were told to deposit the money within 10 days and to file their responses to the notice by Oct. 11. The court also ordered that companies indulging in similar vandalism in the country should be identified at the earliest and they be penalized.

Former Union law minister Arun Jaitley appeared for Pepsi and Anil B. Divan for Coca-Cola. Jaitley said the advertisements must have been painted by bottlers of the soft drinks' firms. He said the assessment of the cost for restoration should be based on the principle of equity. He pointed out that many big names like Airtel, Sharp, Britannia and Nestle, which had also erred, had been left out. Divan suggested that to assess the environmental damages, the court should take the help of experts.

Located at an altitude of 4,112 meters, Rohtang Pass is the highest point on the Manali-Keylong road, 32 miles from Manali town.

The court had issued notices to the firms after Solicitor General Harish Salve brought to its attention an investigation conducted by The Indian Express on the shocking violation of the region's fragile ecology.

Earlier, Coke and Pepsi were asked to shell out Rs. 200,000 ($4,166) each as cost of assessing the damage. The cola majors had then said they would abide by the court's verdict.

Apart from these firms, the Himachal Pradesh government was also fined Rs.10 million ($208,333) for allowing the companies to paint ads on rocks.

Coke officials could not be reached for comment. A Pepsi spokesman promised to abide by the court ruling but declined to speak further.

Indian corporate watchers and greens cheered the Supreme Court's decision to impose stiff fines on anyone causing environmental damage.

They said the move to penalize Indian and foreign companies for painting advertisements on ecologically sensitive rock face along a stretch of highways would act as a deterrent for others.

"The court has sent out a very clear message that anybody, whether multinational or local companies or state government, who exploit environment for commercial gains will not be spared," said corporate analyst Arun Goyal.

"The fine imposed by the Supreme Court on Coke, Pepsi and others is a warning for other violators who think that in India you can completely disregard the principles of corporate governance and get away with it," Goyal told Indo-Asian News Service[9].

[9] News Report from Indo-Asian News Service, 26th September, 2002

"The court verdict is essentially a warning to those who do not take environmental or other safety aspects seriously when it comes to commercial gains in India," said corporate lawyer Chander M. Lall. "I think the court verdict will act as a severe deterrent because more than the imposition of fine it's the adverse publicity that will damage the image of the offenders like Coca-Cola and Pepsi."

The Supreme Court acted as a perfect saviour of freedom by preventing Government from making repressive laws under the garb of the newsprint control and advertisement control policy, with this historical judgement.

1.7. Media Freedom and Advertisement

Advertisements are the main source of revenue for newspapers. Generally the Government issues number of advertisements to various newspapers. In a way it is another indirect power in the hands of the administration to muzzle the press, which does not toe their line. Then the question is whether a newspaper to which the government did not allot any advertisement can complain of the discrimination and as such a violation of freedom of expression.

1.7.1 Eenadu Case

In *Dainik Sambad v. State of Tripura*[10] it was held that the discriminatory allotment of Government Advertisements to different newspapers of the same category by the State Government would impair the freedom of press violating Article 14 and Article 19(1) (a). However, it was held in *Ushodaya Publication Case*[11] *(Eenadu Case)* newspapers have no right to demand the advertisements from the Government and the Government has the right to choose the newspaper to bring out advertisement. At the same time it was held in this case, that the Government power to distribute the largess through issue of advertisement should not be arbitrary or discriminatory to muzzle a section of press which criticises its policies and programmes. It was observed in the *Gulam Nabi v State of J & K*[12] that if the State chooses to completely stop the issuance of advertisement in the newspapers in the country, no newspaper can have any grievance or seek relief from the court compelling the State to issue Advertisement.

Whether the restriction on advertisement violates fundamental right of freedom of speech or not was the question before the Supreme Court in *Hamdard Dawakhana v Union of India*[13]. If there is a restriction on advertisement to promote the drugs, it was held to be valid restriction and such an order would not violate the freedom of expression. A commercial

[10] Dainik Sambad v State of Tripura, AIR 1989 Gau 30
[11] Ushodaya Publication v. State of A.P. AIR 1981 AP 109
[12] AIR 1990 J & K 13
[13] AIR 1960 SC 554

advertisement has an element of trade and commerce and not in any way connected with advancement of noble thoughts or literature. All advertisement does not relate to the freedom of speech and expression of ideas as contained in Article 19(1)(a).

1.7.2. Advertisement is also part of press freedom

Yellow Pages Case:

In *Tata Press Ltd., Mahanagar Telephone Nigam Ltd,*[14] the Supreme Court held that a commercial advertisement or commercial speech was also a part of the freedom of speech and expression, which could be restricted only within the limitations of Article 19(2). The Nigam permitted contractors to publish telephone directories in "yellow pages" and to raise their revenue from advertisements. These "yellow pages" used to be added to the directory published by the Nigam in white pages. The Bombay High Court allowed the appeal of the Nigam, which sought a declaration that it alone had exclusive right to publish the telephone directory and that the Tata press had no right to publish the list of the telephone subscribers without its permission as it would be violation of Indian Telegraph Act. The Tata press went in appeal to Supreme Court. Admitting the appeal, the Court said: "The Advertisement as a "Commercial Speech" has two facts. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product-advertised. Public at large are benefited by the information made available through the advertisements. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "Commercial speech". The public at large has a right to receive the commercial speech. Article 19(1) (a) of the Constitution not only guaranteed freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. Supreme Court emphatically held that the right under Article 19(1)(a) could not be denied by creating a monopoly in favour of the Government, it could only be restricted on grounds mentioned in Article 19(2) of the Constitution.

This is a welcome deviation from the judgement of the Apex Court in *Hamdard Dawakhana v. Union of India,*[15] wherein it was held that the commercial advertisement did not fall within the protection of freedom of speech and express as such an advertisement had an element of trade and commerce. It was also held in that case that a law which puts restrictions on the publication, through the press or other

[14] (1995) 5 SCC 139
[15] AIR 1960 Supreme Court 554

means, of advertisements to promote the sale of certain good does not violate the right to free speech or the press. But the later developments where the commercial information also became indispensable, it was rightly held in the Tata Press case that the people have right to listen and receive the commercial speech.

The commercial speech as such is also a part of general speech.

1.8. Defamation and Advertisement: New York Times Case

In this case the New York Times newspaper published a full page advertisement sponsored by the Committee to defend Martin Luther King and struggle for freedom in the South, which asserted or implied that the law enforcement officials in Montgomery, Alabama had improperly arrested and harassed Dr. King and other Civil rights demonstrators on the various occasions.

There was description of harsh treatment meted to innocent people by the police. Alabama court found defendant newspaper liable for publishing defamatory material without verifying the facts from its own office which earlier published news stories contrary to the contents of this advertisement. The details are as follows:

On March 29, 1960, The New York Times published an advertisement worth 4,800. Two years later, as a result of libel suits that advertisement looked as if it might cost the Times three million dollars in damages. But on March 9, 1964, despair turned into joy when the United States Supreme Court Issued a ruling that not only removed all dangers of libel damages as a result of the Advertisement but also erected new safe-guards for freedom of expression.

Five libel suits were filed on the basis of the advertisement. The advertisement, titled. Head their Rising Voices" contained these paragraphs;

As the whole world knows by now, thousands of southern Negro Students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed buy the US constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom…

In Montgomery, Alabama, after a student sang 'My Country' Tis of Thee' on the State Capitals steps, their leaders was expelled from school, and truckloads of police armed with shotguns and teargas ringed the Alabama state college campus.

When the entire students body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence; They have bombed his home, almost killed his wife and child. They have assaulted his person. They have arrested him several times for 'speeding' loitering' and similar 'offences'. And now they have charged him with 'perjury' – a felony under which they would impression him for ten years…

Although he was not mentioned by name in the Advertisement Commissioner Sullivan contended that the word 'police' in the paragraph on Montgomery referred to him and every one knew it did because the public knew that he was in-charge of the police. Thus he said, was being accused of 'ringing' the campus with his men and of padlocking, the dinging hall to starve the students into submission. Furthermore he contended that since arrests are ordinarily made by the police, the 'they' in "They have arrested" Dr. King would be read as referring to him. The reader, he said would also identify him as among the Southern violators who committed the other acts mentioned in the same paragraph.

The Times could not deny that some of the statements were inaccurate. Although students staged a demonstration on the State Capital steps they sang the A national Anthem, not, "My country: tis of thee'. Nine students were expelled by the State Board of Education, not for leading demonstration at the Capital but for demanding service at a launch counter in the Montgomery Country Court house on another day. Most, but not all, of the students body had protested the expulsion-not by refusing to re-register but by boycotting classes on a single day; actually all the students had re-registered. The campus-dining hall was not padlocked on any occasion, and the only students barred from eating there were the few who had neither signed pre-registration applications nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring the campus and they had not been called to the campus in connection with the demonstration on the State Capital's steps, as the advertisement imputed. In addition Dr. King had been arrested four times but not seven. There was conflicting evidence as to whether Dr. King had been assaulted.

At the trial Sullivan made a number of effective points to prove malice. He showed that the Times had in its newsroom files, only one floor above the advertising department, clips of previously published articles demonstrating the falsity of the advertisement, but nobody had checked the advertisement against the clips. He cited the fact that the Times had not published a retraction when he had requested once, but had done so for Governor Patterson. And he said that the newspaper had proved its malice right in Court by insisting that, a part from the statement that dinging hall was padlocked, the advertisement was substantially correct.

The jury awarded commissioner Sulivan every dollar he asked 50,000 of them, a stiff price for the times to pay for the 394 copies of the issue that went to Alabama, The Times appealed, but the Alabama Supreme Court upheld the judgement. The Times went to the United States Supreme court and won a reversal. In its decision, which for the first time found libelous utterances protected under the First Amendment, the Court said;

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice – that is with knowledge that it was false or with reckless, disregard of whether it was false or not[16].

The Court set only two conditions as necessary to invoke the privilege; the libel must concern the official is public not his solely private conduct and the remarks must be a knowing lie reckless disregard of the truth.

The Court held that a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions and to do so on pain of libel judgments virtually unlimited in amount leads to "self censorship" under such rule, would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court of fear of the expense of having to do so. This thus dampens the vigour and limits the variety or public debate.

It is inconsistent with the First and Fourteenth Amendments to the US Constitution. The Constitutional guarantee require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with *actual malice*- that is with the knowledge that it was false or with reckless disregard of whether it was false or not.

1.9. Right to Privacy: Freedom of Expression

The Supreme Court observed that the right to privacy is implicit in the right to life and liberty guaranteed under Article 21. It is right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters and none can publish anything concerning his in the matter without his consent. But if such publication is based upon public record including court record, then the aforesaid rule shall not apply. The Court further held that in the case of public officials, it is obvious, right to privacy or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. So far as the Government, local authority and other organs and institutions exercising government power are concerned they cannot

[16] 376 U.S. 254

maintain a suit for damages for defaming them. There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press or media.

However, in the interest of decency an exception was carved out to this rule. The females who are the victim of sexual assault, kidnap, abduction or a like offence should not be further be subjected to indignity of her name and the incident being published in the media or press.

1.10. Right to refuse advertising

There is no legal obligation on a private media company to advertise the products or services of all the advertisers or advertising agencies applying for it. The media have a general right to refuse to publish or broadcast an advertisement, as the case may be, for any reason or for no reason at all. This right is based on the basic principle that the media also has responsibility as regards the advertisements published. Many codes of ethics also clearly provide that the media persons should be well aware of the laws affecting advertising. If the media doesn't adhere to law or ethics as regarding advertising, it can be held responsible for such advertisement. In the case of print media, the Press Council of India, in its Code dealing with advertisements, has specified that the editor shall be responsible for all the advertisements which are published in his newspaper, unless explicitly stated beforehand.[17] It flows from that provision that the editor shall decide whether an advertisement satisfies the publishing.

Similarly, a newspaper publisher cannot be compelled to accept political advertising.

The general principles regarding the said right to refuse are first discussed. The three bases for the right to refuse to publish or broadcast an advertisement are as follows:

1. the general right of businesses to refrain from dealing with anyone, for any reason or for no reason at all, except where the refusal is a method of illegal economic restraint of trade[18]. Basically it concurs with the principle that the independent businessman has a the right to choose his customers;

2. the First Amendment right of a speaker (in this case, the refusing publisher or broadcaster) to refrain from saying that which he or she does not wish to say[19]; and

3. the fact that the First Amendment does not give rise to a right of publication on the part of a rejected advertiser in this context because a privately owned publisher's or broadcaster's refusal is not "state action" to which the First Amendment applies.[20]

[17] Regulation 65 of the Norms of Journalistic Conduct regarding advertising evolved by the Press Council of India

[18] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985)

[19] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 1 Media L. Rep. (BNA) 1898 (1974); Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc., 185 W. Va. 168, 19 Media L. Rep. (BNA) 1061 (1991)

These rights of the media have been highlighted by the Supreme Court of the United States of America, which, in the case of Miami Herald Publishing Co. v. Tornillo[21] held that individual speakers could not have complete access to the institutional press. It observed that "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment."

In the exercise of editorial content and advertisement, the media publishers have the right to make a choice of the material that will be published in the newspaper. This right extends to all types of media. *Homefinders of Am., Inc. v. Providence Journal Co.,*[22] it was held that refusal of a newspaper to carry advertising was not unlawful when the reason for the refusal was the misleading nature of the advertisements. In the case of *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co*[23], emphasis was laid on the consent of the private newspaper media publishers, as regards publishing an advertisement. The choice of material to go into a newspaper constitutes the exercise of editorial control. Various newspapers and other media have their own codes consisting of norms they should adhere to. If the advertisement in question goes against the said norms, the editor has every right to refuse the publication of such advertisement.

1.10.2 Exceptions to the right to refuse

The right to refuse can be exercised even in case the media enjoys a virtual monopoly in the area. But the American experience has shown that this right cannot be an absolute one. The right has its own limitations. If the ulterior motive of the media in refusing to advertise is a part of any unlawful scheme, then there is no right to so refuse. For instance, when the publisher is also engaged in a particular other trade and a rival competitor in that other trade wants to advertise in this particular publisher's newspaper for a reason that it has the widest circulation thereby making the publicity effective, the publisher has to oblige. It is an accepted principle that exercise of such a right by a publisher having a dominant position in a particular area may be an attempt to establish a monopoly by refusing to accept advertisements from such persons who advertise with the publisher's competitors. In *Lorain Journal v. United States*[24], a newspaper refused to publish the advertisement of products whose advertisements were aired by a competitor radio station. The Court, noting that the refusal was done in a bid to thwart the competition by using its monopoly power, held that

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[20] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254, 258 (1974); Yeo v. Town of Lexington, 131 F.3d 241, 26 Media L. Rep. (BNA) 1193 (1st Cir. 1997).
[21] 418 U.S. 241, 254, 258 (1974)
[22] 621 F.2d 441 (1st Cir. 1980).
[23] AFL-CIO v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970)
[24] 342 U.S. 143 (1951).

the refusal was illegal.[25] The publication becomes an "essential facility" that must be made available to competitors.[26]

The test is "whether it would be economically or technologically impossible for a plaintiff to create a viable alternative to [the defendant's] facility."[27] In *Twin Labs., Inc. v. Weider Health & Fitness*,[28] the publisher of a body building magazine was also a supplier of body building nutritional supplements. A rival supplier approached him to advertise the formers products in the said magazine. The Court held that the publisher was under no obligation to publish the said advertisement since the competitor had a "viable alternative" advertising medium. One more interesting decision giving due importance to the viable alternative principle is *Cyber Promotions Inc. v. America Online Inc.*,[29] wherein the defendant, a leading service provider on the internet was approached by the plaintiff, a competitor, to advertise its products and services on its website. The request was promptly denied. The court held in favour of the defendant since it was neither a monopolist nor an essential facility, whereby it retained its right to control the advertisements which reach its own subscribers.

1.11. Advertisement Norms for Journalists: Press Council of India

Press Council of India is a constitutional body set up with a purpose to protect the professional standards in journalism, so that the fourth estate serves the purpose in a democratic society in a better manner. The PCI has authority to inquire into defamous and obscene or unfair advertisements and admonish the publishers. The Press Council of India has been established as a result of the Press Council of India Act, 1978. The main objective of the Press Council of India (PCI) has been of preserving the freedom of press. The other aims of the PCI are those of maintenance and improvisation of the standards of newspapers and news agencies in the country. For the purpose of achieving its objects, the PCI has developed a Code of Conduct for newspapers, newspaper agencies and journalists. Apart from legal regulation through several enactments[30], and Advertisement Code developed by ASCI, the code formulated by the Press Council also effectively controls the unfair advertisements.

One of the fundamental objectives of this code is that the press should eschew publication of inaccurate, baseless, graceless, misleading or distorted material. The provisions of the code of conduct dealing with such publications at the general level are as follows:

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[25] The activity came under Section 2 of the Sherman Act.
[26] http://www.lexis.com/research/buttonLink?_
[27] Ibid.
[28] 720 F. Supp. 31, 34 (S.D.N.Y. 1989)
[29] 25 Media L. Rep. (BNA) 1144 (E.D. Pa. 1996).
[30] Legal controls on Advertisements is discussed in subsequent chapter on Regulation.

1. Newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good taste.

2. Newspapers shall not display advertisements which are vulgar or which, through depiction of a woman in a nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.

The PCI code of journalistic conduct also clearly contains guidelines for carrying advertisements in the newspapers (non-broadcast advertisement). The specific provisions of the code dealing with advertisements are as follows:

1. As regards commercial advertisements, journalistic propriety demands that advertisements must be clearly distinguishable from editorial matters carried in the newspaper.
2. Not publish any advertisement which hurts the religious sentiments of any community or section of society.
3. Not to find provisions of Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954.
4. No advertisement should be an awful for illegal for contrary to good taste or to journalistic ethics or proprieties.
5. While publishing advertisement, the newspapers shall specify the amount received by them.
6. No dummy advertisements are to be published. The maintenance and those which are not paid for authorised by the advertiser.
7. There should be no deliberate failure to publish an advertisement in all copies of the newspaper.
8. There should be no lack of vigilance of communication gap.
9. The editor shall have the final say in acceptance or rejection of the advertisement, especially with regard to decency and the obscenity.
10. The editor shall be responsible for all the advertisements which are publish in his newspaper, unless explicitly stated beforehand.

Based on the above principles, the Press Council decided many complaints. For instance, the Tuff Shoes advertisement, which was published in a few newspapers in the late 1990s, was held to consist of an obscene picture as it satisfied the above criteria.

The Press Council of India has given its decision on various complaints over the years. In the complaint concerning Searchlight & Pradeep papers of Patna,[31] the PCI held that in case a wrong is committed by the editor of the newspaper or an employee or even the proprietor, then the matter should be proceeded with against the concerned individual, but the advertisement should not be withheld for that period of time. Some of these cases are discussed in detailed below:

1.11.1. Kamasutra: Censure of 'Illustrated Weekly'[32]

A complaint dated October 31, 1991 has been filed by Sh. Joseph Dias, Special Executive Magistrate of Christian Revival Oriented Social Service (CROSS), Bombay against the Illustrated weekly of India, Bombay for publication of two allegedly highly defamatory photographs in conjunction with an article captioned: "Designer Lover-making" and with 'bold headlines'. "If the Kamasutra is there can Benetton be far behind?" by Pritish Nandy, the then editor of Illustrated weekly in the colour supplement of the magazine's issue dated September 21-27-1991 entitled "The Business Weekly of India". The complainant has submitted that both these photographs are admittedly part of a highly controversial advertisement campaign launched in different parts of the world by a garment manufacturing company called Benetton. The complaint is against the publication of photographs per se as also against the overall impact of the photographs in conjunction with the article, consuming column space far in excess to space devoted to the article. The complainant has submitted that the first photograph purports to depict a Roman Catholic Priest kissing a nun and the second photograph depicts two children in an embrace wherein, the white child is sought to be depicted as an angel and the black child as a devil.

The complainant has submitted that the impact of the headline with the photograph in conjunction is enough to convey to any reasonable person either directly or by innuendo, a highly defamatory imputation about the Catholic Priests and nuns who are doing a great deal of laudable work in the Indian society, especially in the educational and charitable fields. Specifically the defamatory imputation conveyed to the public at large pertains to hinting at sexual behaviour on the part of the members of religious orders sworn inter alia a vow of chastity in the service of God and Society.

Regarding the second photograph the complainant has submitted that it is obvious that it has been published merely towards somewhat perverse racial appetite. The blacks (negroes) are roughly the "dalits" in Amercian society. Racism is alive and kicking in India as well. The complainant has submitted that to depict a black child as a devil is absolutely unpardonable on the part of Benetton, but the respondent's act of publishing the photograph

[31] Decided in 1974.
[32] Decision rendered by Press Council of India on January 6, 1993

in the manner done for the 'benefit' of Indian readers is no better as it serves no useful purpose except as a shock value sales gimmic. Moreover, the theme of angel and devil of which the picture is a tasteless distortion is also down from Christian mythology; as such the publication of the photograph was also bound to offend the sensibilities and the feelings of all Christians. The complainant has further pointed out that the two photographs which accompany the article have been prominently displayed and consume column space far in excess of the space devoted to the article which they purport to accompany.

The complainant has further submitted that the respondent is actuated by malice against the Christian community in general and against their religious orders in particular as is evident by the coverage given by the group of publications of which the respondent is the publishing Director, to the events following murder of the two nuns at Snehsadan in Jogeshwari, Bombay. The role of "The Times of India" newspaper in the reporting of that mater has also already been deprecated by the Hight Court at Bombay and the Press Council of India. Another instance of malice reported by the complainant is the report published in "The Independent" a news paper of which the respondent is editor, in its issue dated August 21, 1991 repeating false allegations against the dead nuns. The complainant has forwarded a copy of this report only for the limited purpose of providing malice.

The complainant has stated that the objectionable portion relating to priest and nun has direct sexual overtones and is essentially meant to provoke and ridicule. Regarding the second photograph, he has submitted it is downright racist and is in direct violation of the professed policy of secularism of Government of India. The complainant has pointed out that there is every, likelihood that the publication would trigger off a communal flare up. The complainant has stated that the two photographs bear no relevance whatsoever to the contents of the article of which these are accompaniments. The complainant has pointed out that the Vatican has also objected to these advertisements which are yet to be released in India. The only motive behind the publication appears to be a desire to sensationalize and attract more buyers.

The complainant has stated that he had drawn the attention of the respondent editor vide their notice dated September 30, 1991 but there was no response. The complainant has further intimated that he had also issued a similar notice of the same date to the editor of the daily. The Afternoon Dispatch and Courier and the editor not only published an unconditional apology in the terms approved by him, but also published the text of the legal notice with prior approval of the advocate for the benefit and information of the readers.

In his written statement dated March 25, 1992, Shri Anil Dharker, the respondent editor has submitted that the editor of the Weekly has changed since the item appeared. He has further submitted that the complaint cannot be taken seriously. All that the Weekly had done was to reproduce an advertisement which had appeared repeatedly all over the world. He has

further submitted that if Mr. Dias has a complaint he should direct it to Benetton whose advertisement it is, or alternatively the Company's advertisement agency. A copy of the written statement was forwarded to the complainant for counter vide letter dated August 5, 1992.

The matter came for consideration before the Inquiry Committee of the Press Council at Calcutta on September 7, 1992. There was no appearance from either side. The Committee decided to proceed on the basis of the material available on record.

Two questions fall for consideration from the pleadings of the parties and the material on record:

(i) Whether the photographs in question and the impugned article appearing in the respondent Weekly offends against the norms of journalistic ethics and public good taste; (ii) if so, how far the editor of the respondent weekly is responsible for their publication?

A perusal of the photographs in question along with impugned article written by the editor Mr. Pritish Nandy, appearing in the Colour Supplement (The Business Weekly of India of Illustrated Weekly of India) under the caption 'Designer love-making' coupled with the bold headline, 'If the Kamasutra is there, can Benetton be far behind' manifestly offends against the ethics of journalism in the context of the multi-racial and multi-religious composition of the Indian nation. One of the photographs depicts a Roman Catholic Priest Kissing a nun and the second portrays two children – one 'black' and another 'white' – interlocked in embrace. The white child is shown with an innocent smile on his face, symbolising an angel. In contrast, the black one is shown with two hairy horns on the head and a severe stare in his eyes, as if he were the very incarnation of the devil. Doubtless, the impugned article taken in conjunction with these photographs has a potential to hurt the religious feelings and racial susceptibilities of certain sections of the Indian society, particularly, the Catholic Christians. The Committee finds no merit in the plea taken by the editor, Anil Dharker (successor of Pritish Nandy) in the written statement. This plea is to the following effect:

Notwithstanding the above, the complaint cannot be taken seriously. All that the Weekly did was to reproduce an advertisement which had appeared repeatedly all over the world. If Mr. Dias has a complainant he should direct it to Benetton whose ad it is, or alternatively to that company's advertisement agency (Benneton's agency). The first part of the plea is covered by the first question posed above, to which the obvious answer is in the affirmative, that is to say, the impugned article and its adjunct photographs are per-se offensive to the norms of journalistic ethics and public good taste.

The second part of the defence plea forms the subject matter of the second question posed above. Clause (e) of Section 2 of the Press Council Act incorporates by reference the

definition of "editor" as given in the Press and Registration of Books Act, 1867 (hereinafter called PRB Act). According to this definition "editor" "means the person who controls the selection of the matter that is published in a newspaper". The term "matter' in this definition obviously includes advertisements, which are to be selected for publication in the newspaper by "editor or some subordinate under his control and supervision".

Section 7 of the Press and Registration of Books Act provides for a two-fold presumption: (a) that the person whose name is printed as 'editor' and (b) that every portion of the issue of the newspaper, including the advertisements, was published on his selection. No doubt, this presumption is rebuttable. Evidence can be led to prove that the person whose name as editor in print occurs on the copy of a newspaper is only a dummy or stooge but the real person, who controls the selection of the matter that is published in a newspaper, is someone else. Same principles by analogy apply, in the realm of journalistic ethics, because what is contrary to law is certainly offensive to the journalistic ethics. In a string of cases the Press Council has settled the principle that unless the editor proves otherwise, he is responsible for the ethicality, propriety, legality or otherwise of all the material (whatever its form may be) published in the newspaper. As a matter of journalistic ethics, therefore, the editor cannot abdicate his responsibility for publishing an advertisement or photograph in the newspaper, which is patently violative of the standards of journalism and good taste, merely by saying that the advertisement or photograph in the newspaper, which is patently violative of the standards of journalism and good taste, merely by saying that the advertisement / photograph was inserted by some other person. In the instant case, the specious nature of defence plea is apparent from the fact that the impugned article has been written by no less a person than the one who was at the material time, the editor of the respondent weekly. The mere fact that the photographs in question were a part of an advertisement which had appeared in several other newspapers world-over is no defence to the charge leveled in the complaint against the respondent weekly and its then editor. In the light of all that has been said above, the Inquiry Committee recommends to the Council to censure the Illustrated Weekly of India for violation of journalistic ethics.

The Council, on consideration of the records of the case and the report of the Inquiry Committee on the allegation contained in the complaint together with its reasoning and findings accepts the recommendations of the Inquiry Committee and decides to censure the Illustrated Weekly of India for violation of journalistic ethics.

1.11.2. Vulgar advertisement of a condom: Another Complaint[33]

Decision of press council in this case explains the process of decision making. The test of the decision is relevant have a complaint on dated December 10, 1991 by Shri Dinesh Bhai

[33] Decision rendered by Press Council of India on March 31, 1993

Trivedi, Member of Parliament (Rajya Sabha) has drawn the attention of the Press Council towards the Sunday Statesman Miscellany, New Delhi and 'Sunday' Magazine of Calcutta for publication of allegedly obscene, indecent and highly vulgar advertisement of a condom under the banner 'Kama Sutra' in several leading newspapers. The complainant has forwarded the issue of "The Sunday Statesman Miscellany' dated October 13 and October 10, 1991 and issue of 'Sunday' weekly dated November 14-30, 1991 in which these controversial advertisements have appeared as a part of the advertisement campaign. The complainant has informed that the campaign is devised and undertaken by a leading advertisement company 'Lintas' for M/s. J.K.Chemicals. The complainant has submitted that he had also had the privilege of raising this issue on the floor of the Parliament (Rajya Sabha) on November 28, 1991.

The complainant has highlighted some portions in the Sunday Magazine, which he submits gives more insight to the subject matter.

The impugned advertisements are of a condom with the brand name 'Kama Sutra'. The advertisements show, two models in suggestive poses. Along with the picture couplets have also been quoted from 'Kama Sutra'' the ancient Indian text. The complainant has submitted that our culture, heritage and traditions go back beyond more than five thousand years and the whole world looks up on our ancient culture to follow and learn lessons out of the same. It is only this culture and heritage which has kept our country and society united. The complainant has further submitted that women in our country command the highest respect. He has stated that the impugned advertisements degrade women as it symbolises women as sex objects. The complainant has submitted that the advertisements only highlight promotion of 'sex itself' and is also misleading the society's young and impressionable minds by quoting extract from 'Kama Sutra'.

The complainant has submitted that some perverted minds out of ignorance are causing great harm to the very fabric of this society in their zeal to promote and market the products for commercial gains, or it is deliberate design to create chaos and disharmony in our society by misleading the innocent minds with this kind of advertisement campaign. The complainant has pointed out that an advertisement of family planning products must essentially restrict itself to educating about the product use in terms of family planning or prevention of sexually transmitted diseases. The complainant has concluded by saying that in the name permissiveness we cannot compromise with decency, the hallmark of any cultured society in the world. He has also urged that the Press Council should examine not only this matter but also all such indecent and vulgar exposures through the media by the various agencies. The complainant has submitted that if these things are not checked immediately then the society would be in for a very rude shock with an irreparable damage.

Show-cause notices were issued to the respondent vide office letter dated January 9, 1991. Sheri V.Sangvi, Editor, Sunday, in his letter dated January 23, 1992 has submitted that since the complainant had made allegations against M/s. Lintas for campaigning vulgar advertisements under the banner of 'Kama Sutra' for M/s. J.K.Chemicals and no allegations have been made against them, they are refraining from making any comments on the allegation purported to have been made against M/s. Lintas. He has requested that the show cause notice issued to them should be recalled.

In his written statement dated February 4, 1992 Shri C.R. Irani, Editor-in-Chief, "The Statesman" has submitted at the outset that since the complainant has not complied with the Inquiry Regulations, therefore the complaint is liable to be dismissed *in limini.* The Hon'ble Chairman, vide his order dated December 16, 1991 had however, waived the procedural requirements of Regulations 3(1) (c) and 3(2). The respondent has further submitted that the complainant prima facie does not disclose that the ingredients of Section 14 of the Press Council Act have been satisfied and thus the complaint is liable to be dismissed in limini on this ground as well, and the proceeding should be dropped. In his submissions on merit, the respondent has submitted:

1. Regarding the contention of the complainant that the impugned advertisement is obscene and highly vulgar, no evidence has led to support such a conclusion and in absence of any such evidence the complaint cannot be taken further.

2. The complainant should disclose the names of all the dailies and periodical in which the advertisements has appeared.

3. The complainant does not indicate the responses from the Parliament when the issue was raised and in its absence they are unable to comment further. In any event, if the Parliament is seized of the matter that is where it should lie.

4. The respondent has emphatically stated that there is no suggestion of vulgarity in the advertisement. He has submitted that he does not understand from where the complainant gets the impression that the advertisement symbolises women as sex objects. He has submitted that it is an allegation without any support either in evidence or in argument.

5. The complainant's argument that the advertisement is contrary to our culture, heritage and tradition does not seem to hold good. He has stated that the complainant is unaware of the beautiful art treasures which our country proudly advertises as tourist attractions consisting of Sun temple at Konark, the temple at Khajuraho and innumerable carvings and frescos to be found all over India. He has submitted that all these are a part of our culture, heritage and tradition and are free from hypocrisy posturing for the sake of effect which has become the hallmark of many of our politicians.

6. He has submitted the complainant's view point that an advertisement on family planning products must essentially restrict to (a) education and (b) prevention of sexually transmitted disease is denied and disputed which at best represent his own personal law.

The respondent has concluded by saying that the complainant's demand is that the Press Council should look into all such indecent and vulgar exposures and prima facie there is no complaint at all which the Statesman is called upon to answer. The respondent has submitted that the word "etc." used by the complainant on page 2 of his letter means that the Press Council should first try and anticipate what "etc." stands for and next, try to answer what can at best be characterised as complainant's very personal reaction to an advertisement campaign. He has stated that this is not a matter which should waste the time of Press Council any further. Copies of the written statement were forwarded to the complainant for information.

(b) Publication of allegedly obscene advertisement campaign regarding Kama Sutra condom in Debonair issue of October, 1991.

The attention of the Press Council of India has been drawn to the publication of an allegedly obscene and objectionable advertisement campaign regarding Kama Sutra condom in the October, 1991 issue of Debonair, an English monthly of Bombay. The magazine was issued show cause notice on January 24, 1992.

In his written statement filed on April 11, 1992 Shri Vanit, Publisher and Group Editor for Debonair publication raised some preliminary objection to the language of the show cause notice. On merit he has submitted that the objection to the journalism and social and economic problems in India and there is absolutely nothing to show that the said advertisement can offend against the present journalistic ethics or public taste. The need for the use of condoms as family planning method cannot be exaggerated.

In fact, it is ardent duty of every newspaper or social worker to campaign for it vigorously by very possible means, so that attention is attracted towards it even by using attractive and impressive advertisements. In fact, need for the use of condom has become very pressing to combat the terrible disease of AIDS.

It is a social responsibility of the newspaper to create consciousness about this danger and to show the way to avoid it. If the council views the said advertisement in this perspective, it will be clear that they are serving the social purpose and by no stretch of imagination, they could be called obscene or objectionable. It is not only Debonair, other newspapers and magazines which have also published similar type of advertisements included daily newspaper like even the Times of India. Yet unlike the daily newspaper, weeklies and other is a different type of magazines which have published similar types of advertisements, the Debonair is a different type of magazine which is published mainly to

cater for the business executives, professionals and other sophisticated readership in society and its readerships very restricted to such intellectuals, professionals and businessmen, etc. Therefore, the apprehension that may be held by the person / persons who objected to such advertisement is misplaced in the case of the readership of the magazine. Considering the class of readership of this magazine, it cannot be said that they are likely to suffer in their moral outlook or become depraved by the impugned materials. In judging the impugned material, whether it falls below the standards of public taste, the environments and all other developments have to be taken into consideration.

The matter came up for consideration before the Inquiry Committee at Calcutta on 7-9-1992. The complainant's counsel (Shri Aniruddha Bose) appeared and sought adjournment. Shri C.R.Irani, Managing Director and Editor-in-Chief of the Statesman (respondent) through his letter dated August 29, 1992, had intimated that he felt strongly about the complaint and has submitted a written statement which was on record. He further said that he would not be in India on the date of the hearing, as he would be leaving on September 5 and returning on September 10, 1992. He had therefore, requested that the matter be adjourned. There was no appearance on behalf of the two other respondents, viz 'Sunday' and 'Debonair'.

The Advertising Standards Council of India has since directed the advertising agency and manufacturer's to withdraw the advertisements having found it objectionable and in bad taste.

The matter again came up for hearing before the Inquiry Committee of the Press Council at New Delhi on December 7, 1992. Complainant Shri Dinesh Bhai Trivedi, M.P. appeared in person. For the respondent newspaper The Statesman, Shri C.R.Irani, Editor-in-Chief, appeared. For Sunday Magazine Shri V.Sanghvi, Editor, appeared. There was no appearance on behalf of Debonair. The following submissions were made by the parties before the Inquiry Committee.

Complainant: I do not have much to add to what I have already stated in my complaint to the Press Council. In fact the complaint is not so much against The Statesman, but really against the agency which devised this advertisement campaign of the Kama Sutra condom. But the media also has no business to carry such advertisement campaigns. This advertisement's thrust is selling sex and not on selling condoms.

Respondent, Shri C.R.Irani of The Statesman: We have already made our detailed submission in our written statement. There is no complaint against the Statesman or the Sunday. Perhaps the Press Council of India could go into the whole question of obscenity. So it is not appropriate for the Press Council to take up this complaint. The difference between selling sex and selling condoms is not clear to me. The object of these advertisements is a message to people for family planning. Moralists say that sex is to be had only if and when procreation is desired. This is not true. Indian tradition of sex is different.

Complainant: In Indian tradition, Khajuraho and other temples, we do not knowwhat period in time these pertain to. Perhaps, at that time, they wanted to increase population. Perhaps they wanted to divert people'' attention from war. There was a news-item in the Telegraph that the Advertising Standards Council of India has found the advertisement to be objectionable and in bad taste and has directed the concerned advertising agency and the manufacturers to withdraw the advertisements. But I agree with Shri Irani that the whole gamut of obscenity should be gone into by the Press Council. Rape and other offence and harassment of women in our society are increasing.

Respondent, Shri C.R.Irani: The complainant's points are exaggerations. There are books available in book shops which are much more obscene.

Complainant: Does Shri Irani want to compare his newspaper The Statesman with the books?

Respondent Shri Vir Sanghi of Sunday: I endorse what has been said by Shri Irani.

The Inquiry Committee has considered the case carefully on the basis of the material available on record and the submissions made by the parties before it. The Press Council of India has already laid down through its various adjudication's that newspaper / periodicals should not publish anything which is obscene, vulgar or offensive to public good taste. Newspapers should not publish an advertisement containing which is unlawful or is contrary to good taste or to journalistic ethics or proprieties. It has been further laid down that newspapers should not display advertisements which are vulgar or which, through picture of a woman in nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.

The expressions 'obscenity' and 'taste' are not capable of precise definitions. They are to be judged with reference to the facts and circumstances of the particular case, depending on the totality of impression left on the reader. Nevertheless, some broad tests, have been indicated in its adjudication's by the Council. In the case of Malayalanadu (198) A.R. 125 at 130) the Press Council laid down that the basis test of obscenity is, whether the matter is "so gross or vulgar that it is likely to deprave and corrupt" persons who may study or examine or look at the particular matter. Another test is, whether depiction of the scene and the language used can be regarded as "filthy", 'repulsive', 'dirty' or 'lewd', these being the normal dictionary meaning of "obscene".

Whether a picture is 'obscene' or not, is to be judged in relation to three tests, namely:

(1) Is it vulgar and indecent?

(2) Is it a piece of mere pornography?

(3) Is its publication mean merely to make money by titillating the sexual feelings of adolescents or adults among whom it is intended to circulate? In other words, does it constitute an "unwholesome exploitation" of sex for the sake of money? (Case of Blitz, Statesman; 1969 A.R. 69, p. 77).

Other relevant considerations are: (a) whether the picture is relevant to the subject matter of the magazine. That is to say, whether its publication serves any preponderating social or public purpose, in relation to art, painting, medicine, research or reform of sex (case of Blitz, Statesman, ibid).

As far as the impugned advertisements are concerned, photographs of the models and the postures in which they have been shown are no doubt obscene, because these are vulgar and indecent in the context of the standards of morality in India. These pictures have the effect of titillating sexual feelings of adolescents and adults who surely read the newspapers and magazines in which the advertisements were published.

The Advertising Standards Council of India is also reported to have found objectionable, behaviour of the couple modeling for the impugned advertisements which served more to titillate than to sell the condom. It is also known that the manufacturers of the condom and the advertising agency in question have already with drawn the impugned advertisement and it is no longer appearing in that form in newspapers and magazines.

Since the impugned advertisement has already been withdrawn, no further action is necessary. The Inquiry Committee recommended to the Press Council to dispose of the cases, with the above observations.

The Council, on consideration of the records of the case and report of the Inquiry Committee on the allegations contained in the complaint together with its reasoning and findings, accepted the recommendations of the Inquiry Committee and decided accordingly.

1.11.3. Obscene Fashion & Yellow Journalism[34]

This is a complaint dated 18.2.92 filed by Shri B.M.Rai of District Thana against 'Society' magazine for publishing obscene photographs in its issue dated Jan. 1992. The complainant has submitted that the photographs which feature the 'JEAN FASHION' series by Calvin Klein are in fact extremely obscene and are just a display of sexual postures. The complainant has alleged that the magazine under the garb of 'FASHION' is indulging in 'Yellow Journalism' to promote its sales, ignoring its responsibilities towards the society and the whole gamut is extremely disgusting.

[34] Decision rendered by Press Council of India on March 31, 1993

The complainant has drawn the attention of the respondent editor vide his letter dated 13.03.92 to the objectionable publication.

The complainant has requested the Council to take up the matter and prevent recurrence of such publications after censuring the recalcitrant publisher.

Show cause notice was issued to the respondent editor vide Council Secretariat letter dated 13.05.92. In his reply dated 04.09.02, the respondent editor submitted his written statement through his counsel, wherein he has stated that due care was taken when all material was published. Denying that impugned pictures were at all, obscene the respondent has stated that sex is an indisputable fact of life and communication about set is not by itself offensive. Referring to the publication of Calvin Klein pictures, it has been stated that Calvin Klein advertisement / ad campaigns had for long been conversation pieces and reputed internationally for their new / fresh / innovative approach to advertising. In fact each campaign has captured the popular imagination by its lyrical and original approach.

The respondent has submitted further that Mr.Bruce Weber, the photographer in question, is considered to be one of the masters in the field. His pictures are neither offensive nor degrading and far from devaluing the human body, his pictures celebrate life.

It is submitted in the written statement that the respondent magazine did not attempt to titillate readers and it was not their intention to boost the circulation of the magazine by publishing the said pictures. The educated readership of the magazine would not in any event be titillated by such art form so creatively expressed.

The respondent has submitted that the complaint is baseless and / or unjustified and it ought to be dismissed. The written statement was forwarded to the complainant for information.

The matter came up for hearing before the Inquiry Committee of the Press Council at New Delhi on 22-2-1993. There was no appearance by or on behalf of the complainant. A letter dated 12-2-1993 had been received from him saying that he had made points/submissions clearly in his letter and that committee would be able to proceed in this matter without his physical presence. He also requested that this absence may be condoned. On behalf of the respondent magazine 'Society' Shri A.N.Hakser, Ms.Dipa Dixit and Shri Y.K.Kumar, counsels appeared.

The respondent referred to their written statement dated September 4, 1992, in which arguments in defence of the impugned publication had been adduced. Besides, the respondent also made the following submissions.

In the feature "Jean Fashion" published by us in the issue of 'Society' magazine of January 1992, the photographs which we have published and the captions in the photo feature is an assessment of Calvin Klein, manufacturers of the international brand of jeans.

These are deliberately done to scandalize. Our magazine is intended for a certain section of the urban people and not rural people. So, publication of these pictures in our magazine does not have the effect of scandalizing our readers. MTV shows pictures much more scandalizing. What may be scandalous to a section of people may not be scandalous to another section of the people. Our case is that, what we have published is not vulgar or obscene. This magazine is not read by young people of 10-12 years who are impressionable age. It is meant for a certain age of people who are educated.

Applying the tests mentioned in Kame Sutra case to determine whether the impugned pictures published in magazine 'Society' are obscene or not, the Committee feels that out of eleven pictures published in the magazine, three are vulgar and indecent and are capable of titillating sexual feelings of the readers of the magazine. The magazine has thus offended the standards of journalistic ethics and public taste. The Inquiry Committee recommended to the Press Council to censure the respondent magazine 'Society' for this.

The Council, on consideration of the records of the case and report of the Inquiry Committee on the allegations contained in the complaint together with its reasoning and findings, accepted the recommendations of the Inquiry Committee and decides to censure the respondent magazine.

1.12. Media and Misleading Ads

In another complaint[35] dated 2-7-1993 Sh. T.P. Thomas of Kanpur has raised the issue of misleading advertisements in newspapers by alleged criminals trading under the garb of sexology and masquerading as sexologists. The complainant has alleged that these co-called sexologists are fraud people and claim to cure people of impotence. They administer medicines and extort huge amount of money. In fact, after the treatment the patients instead of being cured turn out to be sexual maniacs or schizophrenic. Innocent people are enticed by misleading advertisements and land into the incompetent hands of quacks who exploit them to the fullest possible extent. The complainant has also explained the modus operandi of these alleged quacks in detail in the complaint. He had also stated that Ananda Bazar Patrika has not heeded to his advice to stop publishing these misleading and objectionable advertisements. He has requested that the print media be advised to desist from accepting such advertisements in the interest of public health.

[35] Decision of Press Council of India rendered on Oct 10, 1994

The matter came up for consideration before the Inquiry Committee of the Press Council of India at New Delhi on October 11, 1993. The Committee directed that the Secretariat may consult the Ministry of Health and Family Welfare, Government of India for their comments and thereafter the matter may be placed directly before the Press Council, with draft guidelines with the approval of Hon'ble Chairman.

The Ministry of Health & Family Welfare was addressed on the direction of Inquiry Committee of the Press Council of India.

The Ministry of Health & Family Welfare (Department of Health) in a letter dated 8-7-1994 to the Council has informed that the Drugs & Magic Remedies (Objectionable Advertisement) Act, 1954 provides for advertisements of drugs in certain cases and prohibits the advertisements for certain purposes of remedies alleged to possess magic qualities and to provide for remedies connected therewith. The provisions of this Act can, however, be invoked only in cases where advertisements have been made in respect of drugs and magic remedies which contravene the provisions of this Act and the Rules made there under.

3. 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 procurement of miscarriage in women or prevention of conception in women; or

(b) the maintenance or improvement 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.

On consideration of the material on record, the Hon'ble Chairman was of the view that the impugned advertisements brought to notice of the council by the complainant are in contravention of Sections 3(b) and (d) of the Act. Whatever is in contravention of law is patently in violation of ethics. Hon'ble Chairman therefore recommended to the Council to express strong displeasure over such publications in the media and advised it to restrain and refrain from publishing such advertisements. He further recommended that the Ministry may take action as deemed fit under the provisions of the Act quoted herein above. The Press Council accepted it.

1.13. Model Advertisement Policy guide by Press Council

Introduction: Under the Statute passed by the Parliament in 1978, the Press Council of India is enjoined upon to preserve the freedom of Press and to maintain and improve the standards of newspapers and news agencies in India. This is further supported by clause (e) of section 13(1) of the Press Council Act, whereby the Council is required to "keep under review any development likely to restrict the supply and dissemination of news of public interest and importance". There have been a number of occasions where the Press Council has been called upon to look into the complaints of improper or arbitrary denial of advertisements by various authorities, severely affecting the economic viability of newspapers particularly of those in the smaller category.

In the disposing of these complaints, the Council has often observed that governmental authorities should not single out a newspaper for discriminatory treatment in the matter of release of advertisements on account of its critical writings. Release of advertisements should be done not on an adhoc basis but on the basis of a notified policy formulated on some rational criteria. Political consideration should not weigh in the issue. Distribution of advertisements should be equitable as far as possible but smaller newspapers which subsist on government advertisement revenue need special consideration of the governmental authorities. While advertisements cannot be claimed by the newspapers as a matter of right, they are neither a grant to be released at the whim and discretion of the controlling authority.

Against this background, the Press Council of India has considered the question of formulating basic elements of what may be an advertisement policy for the Central and State Governments to adopt. These model guidelines propose broad principles of uniform applicability governing the release of advertisements by central and state governments, union territories administration vis-a-vis their distribution, rate fixation and payment and canalisation.

1. Newspapers registered with the office of the Registrar of Newspapers for India shall be eligible for inclusion in the approved list for release of advertisements.

2. Advertisements shall be issued only to such newspapers as have been included in the approved lit of central/state governments for release of advertisements. For preparing the approval list, there should be a committee with due representatives of officials as well as non-officials from among media personalities. For the purpose of selecting the newspapers for release of advertisements of different kinds, the authorities should be guided by the following criteria.

(a) Newspaper will be considered as being eligible for advertisement if it has had regular and uninterrupted publication for four months.

(b) A newspaper seeking advertisement should fulfill the requisite qualification already prescribed by state and central governments in regard to periodicity and regularity of

publication, size of the publication, printing arrangements, editorial and managerial set-up.

(c) The circulation of a newspaper has a bearing on the extent of advertisement released. The sources from which authenticated circulation figures could be obtained are:

(i) The Registrar of Newspapers for India;

(ii) Audit Bureau of Circulation; and

(iii)Chartered Accountant, certifying annual circulation statement.

The figures obtained through anyone of these sources should be acceptable for determining the circulation of a newspaper to be enlisted and no other party should question the certificate issued by either of the three above.

(d) Payment of bills by the government should be made within a period of 45 to 60 days of the publication of the advertisement. The payment could be made at reasonable prevalent commercial rate, less 20% commission in view of the bulk value of release.

(e) It will be desirable that small newspapers having regional content are given some weightage.

(f) Suitable weightage may also be given to language newspapers / periodicals published from remote areas, such as North-East, tribal belts and hilly regions and small papers run by linguistic groups.

(g) As far as possible, organs of political parties should not be unduly patronized by the governmental authorities.

A list of newspapers eligible for empanelment should be made a public document available on request. The list should be periodically sent to the Press Council of India, the RNI and also to the recognised newspaper associations.

All disputes regarding inclusion / non - inclusion / removal from the approved list for release of advertisements should be referred to an independent body which may consist of representatives of the government and disinterested members of Press from socio-journalistic fields. Alternatively, dispute could be referred to a body created on the pattern of Press & registration Appellate Board which may consist of the Chairman of Press Council of India and four other members.

These guidelines are not exhaustive because of the limited nature of the issue involved. They have been prepared with the object to eliminate any possibility of discrimination which may directly or indirectly affect the freedom of Press.

1.14. Commercial exploitation of Religious Names

In a communication[36] dated March 7, 1989 addressed to the Editors of ' The Telegraph ' and 'Sunmarg', English and Hindi dailies respectively and copy endorsed to Press Council of India, the complainant Shri Bimal Khemani has drawn in the attention of the editors towards the advertisements which had appeared in 'the Sunmarg' in its issues, dated December 25-28-1988, and in the Telegraph's issued dated December 28, 1988. The advertisement was for 'Ahaar (a restaurant in Calcutta) and was released through 'Though-Shop', an advertising agency. In the advertisements which appeared in 'Sunmarg' daily continuously from December 25-28, 1988 Hindu Gods had been projected in cartoon form saying quotations which, according to the complainant, were derogatory. In the advertisement which appeared on December 25 and 28, 'Lord Krishna had been shown folding a Dosa in his hands like a flute and saying 'Come, Radhika come for the largest Dosas in town". On December 26, 1988, an advertisement appeared which showed Lord Shiva holding a cup of hot beverage saying; "Bom...Kulcha Garam..." and on December 27, 1988, Lord Vishnu was projected with idly in one hand, vadha in another, pudding in third hand and a cup of hot beverage in his fourth hand and saying: "Vadha, Kachori, Uttapam.. my favourite prasadam". The same advertisement of Lord Krishna appeared in "The Telegraph" on December 28, 1988., The complainant strongly objected to the use of religious figures with derogatory remarks in the advertisements. The complainant stated that these advertisements hurt the sentiments of the Hindu community. In spite of his repeated letters the same advertisement of Lord Krishna appeared again in "The Telegraph' in its issue dated March 31, 1989. The complainant again wrote to the Editor. 'The Telegraph' but there was no response from him.

In his written statement the respondent - editor, 'The Telegraph', stated that the advertisement had been published without any intention to hurt the religious feelings of any community. It was also stated that if any person or community was at all hurt by the publication of the advertisement, the respondent-editor apologised and regretted for the same.

Similarly, the respondent - editor, 'Sunmarg', Hindi daily had in his written as well as oral submission stated that as soon as Shri Bimal Khemani wrote to him about the objectionable advertisement was accepted and published in good faith and there was no intention to hurt anyone's personal religious feelings.

[36] Decision by Press Council of India rendered on November 5, 1990

The complainant was asked to intimate whether he wished to pursue his complaints in view of the explanation offered by the two newspapers. No reply had however been received from him.

When the complaints came up for hearing before the Inquiry Committee in its meeting held at New Delhi on October 9, 1990 the complainant did not appear. Out of the two respondent newspapers, the editor of one (i.e. 'Sunmarg') was represented by his counsel Shri Sanjay Chaugey. The editor of the newspaper, 'The Telegraph' was not present or represented by anyone.

The principal question for consideration by the Committee was whether the publication of these impugned advertisements, some of which exhibited Lord Krishna, Lord Shiva and Lord Vishnu as commending food products like dosas, vadas, kachori, uttapam, kulcha garam etc., was contrary to good taste and journalistic ethics even if there was nothing in them, indictable in law. In the Committee's opinion the answer to this question should clearly be in the affirmative. Nothing could be more repugnant to journalistic ethics and good taste than commercial exploitation of the names of prophets, seers or deities which are worshipped by large sections of the people. Even the respondent editor of 'The Sunmarg' had not tried to justify these advertisements as being consistent with the norms of journalistic ethics. He submitted before the Inquiry committee that he had stopped further publication of the advertisement in question as soon as they came to his notice and explained that there was a separate advertisement department of the newspaper and these advertisements did not come before him for approval before publication. He conceded that these advertisements were objectionable, but were inadvertently published without any intention to hurt the religious feelings of any community. The editor further apologised and expressed regrets for the publication of advertisements in question. The stand of 'The Telegraph' was the same. In view of the regrets expressed by the respondent - editors and the action taken by them to stop publication of these advertisements, the Council was of the opinion that no action was warranted against the respondent newspapers.

1.15. Commercial Exploitation of Father of Nation

Shri N.S.Unni, Calicut vide his letter dated 8-10-1988 brought to the notice of the Council[37] an advertisement of M/s. Kunhikanna Jewellery, Gold House, Kannur, which was published in Malayala Manorama, Kannur edition on October 2, 1998. The advertisement had a large visual of the back of Mahatma Gandhi and within the visual was prominently printed the Jewellers Logo, address, phone number etc. as well as the promotion slogan – "For purity only Kunhikannan Jewellery".

[37] Decided by Press Council of India on 6.8.1999

According to the complainant this kind of advertisement using National Leaders was not permissible under journalistic ethics and those who had violated the ethics were punishable under the law.

Since publication of the advertisement of jewellers within the outlines of Mahatama Gandhi's body with commercial promotion was likely to offend the sentiments of the people and was against the standards of journalistic ehtics, show-cause notice was issued to the respondent editor on 17-12-1998.

The respondent editor Malayala Manorma in his written statement dated January 9, 1999 denied the allegation that by publication of the said advertisement they had offended against the standards of journalistic ethics or public taste. According to the respondent, the jewellery house had absolutely no intention to promote their business interest by the said advertisement. According to him, the said advertisement would not come within the purview of the clause 'pictorial representation of Mahatma Gandhi' which is prohibited by Section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950. The respondent requested the Council to drop proceedings.

Shri C.V.Ravindranath, Managing Partner, Kunhikannan Jewellery (whose advertisement had been published in the respondent's paper resulting in filing of the complaint by Shri N.S.Unni) in his letter dated 4-1-1999 submitted that the impugned advertisement did not depict the portrait of Mahatma Gandhi and only symbolises the ethos of Gandhi Jayanti without any sales promotion or commercial aspects involved and as such no controversy should be brought into the genuine and sincere attempt for a national cause.

Vide his letter dated 22-2-1999; Shri Ravindranath further submitted that some other newspapers had also used the portrait of Mahatma Gandhi for their commercial advertisements. He furnished a copy each of the advertisements depicting Mahatma Gandhi in Economic Times, dated 13-1-1999, Matrubhumi dated 30-1-1999 and Deshabhiman dated 14-2-1999 for perusal and information.

The complainant in his letter dated 1-3-1999 pointed out that his intention was just to bring an inappropriate act to Council's attention. According to him, to sell a product utilizing the glory of a national figure was simply inappropriate.

The matter was called for hearing before the Inquiry Committee at Chennai on 6.7.99. The complainant vide his letter dated 26-6-1999 expressed his inability to appear before the Committee due to pre-occupation and requested that matter may be decided on its merits. Shri Santosh Mathew, advocate appeared for the respondent newspaper Malayala Manorama.

Learned counsel for the respondent stated that the publication of the impugned advertisement does not come under the preview of Section 3 of the Emblems & Names

(Prevention of Improper Use) Act, 1950. According to him, prohibition was for the purpose of promotion of trade or business. The said advertisement was published on 2nd October to pay tributes to the Father of the Nation. He contended that the advertiser had no intention to promote the business. He further stated that the newspaper did not indulge in unethical practice by publishing the advertisement which was given by the advertiser.

The Committee has carefully considered the documents and oral submissions of the learned counsel for the respondent. It was not convinced by the argument of the learned counsel that the publication of the impugned advertisement was not in violation of Section 3 of the Emblems & Names (Prevention of Improper Use) Act, 1950. The said Section reads as follows:

"No person shall, except in such cases and under such conditions, as may be prescribed by the Central Government, use or continue to use, for the purpose of any trade, business, calling or profession, or in the title of any patent, or in any trade mark or design, any name or emblem specified in the schedule or any colorable imitation thereof without the previous permission of the Central Government or of such officer of Government as may be authorized in this behalf by the Central Government".

The schedule there under specifically bans under S.No. 9A the use of name or pictorial representation of Mahatma Gandhi except the pictorial use thereof in calendars, where only the name of the manufacturer and printer of the calendars are given and the calendars are not used for advertising goods. This clearly prohibits improper use of the pictorial representation of Mahatma Gandhi which the advertiser has done. There is a caption in English below the impugned photograph which reads "For purity – only Kunihikannan Jewellery" alongwith seal of the council for fair business practices. There is also a caption in Kannada to the same effect. There are also two photographs of Lord Krishna as a child shown wearing jewellery. These captions, the seal, the photographs of Lord Krishna wearing jewellery and telephone numbers of the advertisers are nothing but sale promotion for commercial gain. Hence the argument of the learned counsel that the publication was not to promote business does not hold good. The second defence taken by the learned counsel is that it was published on Gandhi Jayanti. In the opinion of the committee, this does not minimise the use of advertisement for commercial purposes. Combining homage with commercial self-promotion is downright unethcial. Such advertisements are issued more for commercial purpose than for paying homage to the person concerned.

Occasions like the Jayanti etc. are only used as an excuse for doing business which is the main intention.

For all the reasons aforesaid, the Committee felt the need to uphold the complaint. It also noted that advertisements of this nature are becoming the norms on the three National Days viz., the Republic Day, the Independence Day and the Gandhi Jayanti Day. It,

therefore, advised the respondent newspaper in particular and the press in general that while advertisements paying homage may be accepted, keeping in mind the provisions of the aforesaid Act, the press should be cautious that such advertisements are not sought to be commercially exploited by the advertiser.

The Committee also felt that this adjudication could be forwarded to the Advertising Standards Council of India for advising the Advertising agencies against composing advertisements of this nature. It recommended to the Council accordingly.

The Press Council on consideration of the records of the case and report of the Inquiry Committee, accepts the reasons, findings and the recommendations of the Inquiry Committee and decides accordingly.

1.16. ***PCI's objection to "Dial a friend –Enjoy"***

Suo motu inquiry initiated by the Press Council of India against the Asian Age, Indian Express and Jansatta regarding publication of advertisement of telephone numbers offering titillating / suggestive talk service.

In January, 98, the Press Council of India had taken cognizance of some objectionable advertisements referred to it by the Central Government. These advertisements urged members of the public to call telephonically for exciting conversation on a given international telephone number with suggestive phrases and postures. The Council had, on consideration of the matter, advised against publication of such ads as it felt that they were aimed at corrupting adolescent minds being suggestive of prospective titillating talks. The Council had also issued a general appeal to the press not to accept such ads. In April 1998, the Council came across three ads in The Asian Age, Indian Express and Jansatta respectively carrying photographs of women inviting clients for telephonic talk on particular international phone number and took suo motu cognizance of the matter, as the ads were prima facie in violation of specific directions / appeal issued by the Press Council of India in this regard.

Show cause notices were issued to The Asian Age and Indian Express on 13-4-1998 and to Jansatta on 16-4-1998.

The Editor of The Asian Age in his written statement dated 23-4-1998 submitted that on the face of it they felt that the advertisement was not obscene. However, the respondent editor assured the Council not to publish such ads in future.

Jansatta in his written statement dated May 7, 1998 submitted that the impugned ads were received by the daily through an Ad.Agency and thinking that they might be regular

ads, they were published. The respondent intimated that the concerned department had been advised to be careful in future. The respondent also expressed regret over the mistake and assured that such lapses would not be repeated.

Editor-in-Chief, Indian Express in his written statement dated May 25, 1998 challenged the jurisdiction of the Press Council of India in taking two motu cognizance of the ad and submitted that there already existed an Advertising Standards Council of India which regulates advertising. He averred that editorial and advertising are separate and independent parts of a newspaper and the editor is not aware of or responsible for selection of ads. On merits of the case, the respondent submitted that the newspaper had not violated the guidelines / appeal of the Press Council of India dated 23-2-1998 because the impugned ad only gave two telephone numbers on which persons could call and it was not suggestive.

The matters were called out for hearing before the Inquiry Committee at New Delhi on 2-9-1998. There was no appearance on behalf of The Asian Age, The Indian Express and the Jansatta.

The Committee at the outset noted from the record that the Asian Age and Jansatta had expressed regrets for publishing the impugned ad and assured that they will not be carried in future. But the Indian Express, the sister publication of Jansatta, had raised preliminary objection on the jurisdiction of the Council in taking cognizance of the matter. The Committee opined that since the Press Council of India was enjoined upon by the Act to not only raise the standards of the press but ever to foster high public taste and a due sense of right and responsibilities of citizenship among the newspapers, it was well within the parameters of its jurisdiction in inquiring into any published matter, be it a news item, a report, a strip or an advertisement. Further it did not appreciate the submissions that advertising and editorial are separate and independent parts of a paper and an editor cannot be held responsible for selection of ads. It is well settled that under Section (7) of PRB Act, an editor is responsible for all published matters including ads. The Council has also established this in its various adjudications which have culminated in enunciation of norms 63, 64 and 65 as reproduced below:

63. There should be no lack of vigilance or a communication gap between the advertisement department and the editorial department of a newspaper in the matter of considering the propriety or otherwise of an advertisement received for publication.

64. The editors should insist on the right to have the final say in the acceptance or rejection of advertisements, especially those which border on or cross the line between decency and obscenity.

65. An editor shall be responsible for all matters including advertisements published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated beforehand.

On the merits of the case, the Committee reiterated the opinion of the Press Council taken on 22-1-1998 in response to the reference from the Central Government regarding publication of similar entertainment advertisement. "Dial a friend – Enjoy" in leading newspapers. The views expressed by the Council are as under.

"The advertisements "Dial a friend – Enjoy" are misleading and objectionable. The advertisements were suggestive of the fact that the dialogue to be made on these telephones would be obscene and of sex talks. This is likely to pollute the Indian adolescent minds and promote immoral cultural ethos". Expressing this opinion, the Council had written to the Ministry of Telecommunication with a request to initiate necessary steps to check the operation of such numbers and the Committee was happy to note that in August, 1998 the Ministry had issued directions blocking access to the telephone numbers offering such services.

On its own part, the Council had issued an appeal to all the newspapers on 23-2-1998 wherein, the newspapers were urged not to accept such advertisements. In spite of this, The Indian Express had published the ad and had defended the publication also. For the gross violation of good taste and morality, the Committee recommended to the Council to censure the respondent newspaper, The Indian Express, and direct it to publish the gist of the Council's decision within a week of its receipt. The Indian Express was further directed to forward a copy of the issue carrying the same to the Press Council for record. In the case of The Asian Age and Jansatta, the Committee recommended to the Council to drop further proceedings in the matter against them in view of the assurance held out by them.

The Press Council, on consideration of the records of the case and the report of the Inquiry Committee, accepts the reasons, findings and the recommendations of the Inquiry Committee and decides accordingly[38].

The Press Council of India under the Chairmanship of Mr.Justice P.B.Sawant on 22.1.98 at New Delhi has appealed[39] to all owners and editors of newspapers not to accept advertisements which invite general public to dial a given number to obtain access to suggestive talks. It opined that advertisements such as "Dial a Friend – Enjoy" are misleading and objectionable. These advertisements are suggestive of the fact that the dialogue to be made on these telephones would be obscene and of sex talks. This, it felt is likely to pollute the Indian adolescent minds and promote immoral cultural ethos, the council opined. The Council has advised the telecom department to take stringent action against such advertisements.

[38] Decision of Press Council of India on 23.2.1998
[39] Press Note from Press Council of India dated 23.2.1998

1.17. Newspapers should avoid cross commercialism

This principle is very relevant at present. There are many publications that are engaging themselves in unfair trade practices and thereby capturing market for commercial advantage and supremacy over its rivals. There are few managements who have huge investments and run many other businesses parallel to the newspaper business. They play with the prices in the market by reducing the rates of the paper and thereby gain good market and in turn 'killing' the small and medium scale newspaper industries. As the later could not afford to reduce their prices they vanish from the market and the former will survive in the market, as the newspaper business is not the sole source of money to it. In order to prevent this kind of cut throat competition the council made on of the guide lines saying that the newspapers should not engage themselves through the print media, in crass commercialism or unseemly, cut throat commercial competition with their rivals, for earning ever more profits for their proprietors, in a manner which is repugnant to the high standards of journalism and good taste, and tends to down grade the primary role of the press as an institution of Democracy to a secondary, subservient place[40].

1.18. Code for Advertisements over All India Radio & Doordarshan

The Commercial Broadcasting Service of the All India Radio started functioning in November, 1967. This Service was basically introduced for the purpose of advertising goods and services through the medium of radio. There was no law regulating the content of advertisements broadcast over this medium, which could have resulted in widespread misuse of the same. The All India Radio had introduced a Code for Commercial Broadcasting in 1968 to regulate the content, tone and treatment of the advertisements, to ensure that the advertisements do not mislead the consumers and to ensure that they are not repugnant to good taste. Among other things, this Code incorporates the Code of Ethics for Advertising in India by the Advertising Standards Council of India, Code of Standards in relation to the advertising of medicines, and Terms and Standards of Practice for Advertising agencies.[41]

This Code lays down standards which are to be taken as minimum standards of acceptability.[42] These standards are not static, but are dynamic since they are subject to review based on time and prevailing norms of listeners' susceptibilities. The standards laid down are for the purpose of developing healthy advertising practices on the All India Radio.

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[40] The Hindusthan Times V The Times of India, 11th A R, Case No.3, P.93.
[41] Extracted from the Foreword to the Code by Mr. Keshav P. Pande, Deputy Director General, All India Radio, on 31- 8- 1987.
[42] Introduction to the Code.

India does not have a comprehensive law dealing with advertising. The Code has strongly recommended that all those engaged in advertising should get familiarized to the laws of the country dealing with specific aspects of advertising, in particular, the following:

1. Drugs and Cosmetics Act, 1940;
2. Drugs Control Act, 1950;l
3. Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954;
4. Copyright Act, 1957;
5. Trade and Merchandise marks Act, 1958 (which has been replaced by the trade Marks Act, 1999);
6. Prevention of Food Adulteration Act, 1954;
7. Pharmacy Act, 1948;
8. Prize Competition Act, 1955;
9. Emblems and Names (Prevention of Improper Use) Act, 1950;
10. Consumer Protection Act, 1986;
11. Indecent Representation of Women Act (Prohibition) Act, 1986;
12. AIR/ Doordarshan Code;
13. Code of Ethics for advertising in India issued by the Advertising Standards Council of India;
14. Code of Standards in relation to the advertising of medicines and treatment; and
15. Standards of practice for Advertising Agencies.

1.18.1. To conform to the Constitution and the Law

1. Advertising shall be so designed as to conform to the laws of the country and should not offend against morality, decency and religious susceptibilities of the people. No advertisement shall be permitted which:-
   (i) derides any race, caste, colour, creed and nationality;
   (ii) is against any of the directive principles, or any other provision of the constitution of India;
   (iii) tends to incite people to crime, cause disorder or violence, or breach of law or glorifies violence or obscenity in any way;
   (iv) presents criminality as desirable;
   (v) adversely affects friendly relations with foreign States;

(vi) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or State Dignitary;

(vii) relates to or promotes cigarettes and tobacco products, pan masala, liquor, wines and other intoxicants;

2. No Advertisement as News

No advertisement message shall in any way be presented as news.

.3. No mixture of Religion and Advertisement

No advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature; advertisements must not be directed towards any religious or political end or have any relation to any industrial dispute.

4. Prohibited areas of Advertisement

Advertisements for services concerned with the following shall not be accepted:-

(i) Money lenders;

(ii) Chit Funds;

(iii) Saving schemes and lotteries other than those conducted by Central and State Government organisations, Nationalised or recognised banks and Public Sector Undertakings;

(iv) Matrimonial agencies;

(v) Unlicensed employment services;

(vi) Fortune tellers or sooth-sayers etc. and those with claims of hypnotism;

(vii) Foreign goods and foreign banks;

(viii) Betting tips and guide books etc. relating to horse-racing or other games of chance.

5. No Advertisements of defective goods and deficient services

The items advertised shall not suffer from any defect or deficiency as mentioned in Consumer Protection Act, 1986.

6. No Promotion for Super Natural Qualities

No advertisement shall contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or super-natural property or quality, which is difficult of being proved, e.g., cure for baldness, skin whitener, etc.

7. No Guarantees

8. No advertisement shall contain the words 'Guarantee' or 'Guaranteed' etc., unless the full terms of the guarantee are available for inspection by the Director General, All India Radio, and are clearly set out in the advertisement and are made available to the purchaser in writing at the point of sale or with the goods; in all cases, terms must include details of the remedial action available to the purchaser. No advertisement shall contain a direct or implied reference to any guarantee which purports to take away or diminish the legal rights of a purchaser.

Duty to substantiate

9. Advertisers or their agents must be prepared to produce evidence to substantiate any claims or illustrations. The Director General reserves the right to ask for such proofs and get them examined to his full satisfaction. In case of goods covered by mandatory quality control orders, the advertiser shall produce quality certificate from the institutions recognised by the Government for this purpose.

No disparaging Remarks against Other's products

10. Advertisements shall not contain disparaging or derogatory references to another product or service.

11. Testimonials must be genuine and used in a manner not to mislead the listeners. Advertisers or advertising agencies must be prepared to produce evidence in support of their claims.

12. No advertisement of any kind of jewellery (except artificial jewellery) or precious stones shall be accepted.

13. Information to consumers on matters of weight, quality or prices of products, where given, shall be accurate.

14. Advertisements indicating price comparisons or reductions must comply with relevant laws.

15. No advertisement shall be accepted which violates AIR Broadcast Code which is reproduced below:-

General Rules of Conduct

The Code further contains general rules of conduct in advertising, advertising and children and procedure for enforcement of the Code.

As regards the enforcement of the Code, complaints or reports on contraventions of the Code, received by the All India Radio may in the first instance be referred by the Director General to the Advertisers' Association concerned with request for suitable action. If complaints under the Code cannot be satisfactorily resolved at the Association's level, they shall be reported to the Director General who will then consider suitable action. As regards any complaints under the Code received by the All India Radio concerning a party outside the purview of the various member Associations, the Director General will draw the attention of such party to the complaint and where necessary, take suitable action on his own.

The Code is complimentary to all the existing laws mentioned above and the general provisions or the other aspects of the code do not conflict with them.

1.18.2. Code for Doordarshan

The above Code also gives a general description regarding the importance of advertising with regard to dissemination of information and says that practices which impair public confidence on advertising should be contained. As regards advertising on Doordarshan, it contains the requisite do's and dont's of advertisements. It covers all items of publicity which are broadcast on Doordarshan.

Like the All India Radio Code, the present Code also specifies that the standards laid down therein should be taken as minimum standards of acceptability. It further specifies that these standards would be liable to be reviewed from time to time in relation to the prevailing norms of the viewers' susceptibilities. Like the All India Radio Code, it also strongly recommends all those engaged in advertising to familiarize themselves with the same list of laws as given in the former Code. Under the Code, the Director General of Doordarshan shall be the sole judge of the suitability or otherwise of an advertisement for telecast and his decision in this regard shall be final. Some more important principles codified for Doordarshan are as follows:

Genuineness is precondition for Educational Advts.

1. Doordarshan accepts the advertisements of educational institutions / colleges. However, it must be ensured that the institutions / colleges are genuine so as to ensure that students do not get misled.

Doordarshan will also accept advertisements relating to holiday resorts and hotels.

Doordarshan also accepts the advertisements relating to real estate including sale of flats / land, flats for rent both commercial and residential. However, to ensure that viewers do not

get misled by false claims, it has been decided that all such advertisements must carry a statutory message at the end in the form of super imposition or caption as follows:-

"Viewers are advised to check the genuineness of the claims made"

Doordarshan has also allowed the telecast of:

(i) Foreign products and foreign banks including financial services;

(ii) Jewelry and precious stones;

(iii) Mutual funds approved by SEBI;

(iv) Hair dyes;

(v) Matrimonial agencies;

(vi) Astologers / Numerologists.

2. The items advertised shall not suffer from any defect or deficiency as mentioned in Consumer Protection Act 1986.

3. No advertisement shall contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or super – natural property or quality, which is difficult of being proved, e.g. cure for baldness, skin whitener, etc.

4. No advertisement shall contain the words 'Guarantee' or 'Guaranteed' etc. unless the full terms of the guarantee are available for inspection by the Director General, Doordarshan and are clearly set out in the advertisement and are made available to the purchaser in writing at the point of sale or with the goods. In all cases terms must include details of the remedial action available to the purchaser. No advertisement shall contain a direct or implied reference to any guarantee which purports to take away or diminish the legal rights of a purchaser.

5. Scientific or statistical excerpts from technical literature etc., may be used only with a proper sense of responsibility to the ordinary viewer. Irrelevant data and scientific jargon shall not be used to make claims appear to have a scientific basis they do not possess. Statistics of limited validity should not be presented in a way as to make it appear that they are universally true.

6. Advertisers or their agents must be prepared to produce evidence to substantiate any claims or illustrations. The Director General reserves the right to ask for such proofs and get them examined to his full satisfaction. In case of goods covered by mandatory quality

control orders, the advertiser shall produce quality certificate from the institutions recognised by the Government for this purpose.

7. Advertisements shall not contain disparaging or derogatory references to another product or service.

8. Imitation likely to mislead viewers shall be avoided.

9. Visual and verbal representation of actual and comparative prices and costs shall be accurate and shall not mislead on account of undue emphasis or distortion.

10. Testimonials must be genuine and used in a manner not to mislead the viewers. Advertisers or advertising agencies must be prepared to produce evidence in support of their claims.

11. The picture and the audible matter of the advertisement shall not be excessively 'loud'. This is to ensure that between the programme and the advertisement there is a smooth change-over avoiding jerkiness or shock to the viewers.

12. Information to consumer in matters of weight, quality or prices of products where given shall be accurate.

13. Advertisements indicating price comparisons or reductions must comply with relevant laws.

14. No advertisement shall be accepted which violates AIR and TV Broadcast Code which is reproduced below:-

It also provides that no advertisement shall be accepted which violates AIR and TV Broadcast Code, which prohibits advertisements relating to:

1. criticism of friendly countries;
2. attack on religions or communities;
3. anything obscene or defamatory;
4. incitement to violence or anything against the maintenance of law and order;
5. anything amounting to contempt of court;
6. aspersions against the integrity of the President and the Judiciary;
7. anything affecting the integrity of the nation; and
8. criticism by name of any person.[43]

[43] Ibid, Rule 19.

Therefore, the Code for Commercial Advertising on Doordarshan is essentially similar to the All India Radio Code for Commercial Broadcasting.

The above codes emerged when state controlled electronic media was the only popular media. All those responsibilities of State were incorporated in this code. With the spread of electronic media by inclusion of foreign satellite channels owned by private nationals and multi national companies, the code has lost possibility of application, though the it is still significant and to be positively observed. The Code is observed more in failure. The AIR and Doordarshan lost chunk of their Advertisement revenue to highly competitive private channels, which is one of the most relevant reasons to impossibility of maintaining the code. As the state controlled electronic media cannot afford to say no to commercial advertisements at present, the code remains on the paper. There is no mechanism so far, to enforce the code for private channels either on TV or Radio. Of course, the Cable Act with new amendments in 2002 attempts to control and regulate the media with new obligation of following these codes. However, translating into an operational code is yet to be seen.

1.19. Advertising and Children

The Press Council of India evolved yet another set of rules for Advertisements regarding children.

1. No advertisements for a product or service shall be accepted if it suggests in any way that unless the children themselves buy or encourage other people to buy the products or services, they will be failing in their duty or lacking in loyalty to any person or organisation.

2. No advertisement shall be accepted which leads children to believe that if they do not own or use the product advertised they will be inferior in some way to other children or that they are liable to be condemned or ridiculed for not owning or using it.

3. No advertisement likely to bring advertising into contempt or disrepute shall be permitted. Advertising shall not take advantage to the superstition or ignorance of the general public.

4. No advertisements of talismans, charms and character-reading from photographs or such other matter as well as those which trade on the superstition of general public shall be permitted.

5. Advertising shall be truthful, avoid distorting facts and misleading the public by means of implications by false statements, as to:

6. the character of the merchandise, i.e. its utility, materials, ingredients, origin etc;

7. the price of the merchandise, its value its suitability or terms of purchase;

8. the services accompanying purchase, including delivery, exchange, return, repair, upkeep etc;

9. personal recommendations of the article or service;

10. the quality or the value of competing goods or the trust worthiness of statements made by others.

11. Testimonials of any kind from experts etc. other than Government recognised standardisation agencies shall not be permitted.

12. No advertisement shall be permitted to contain any claim so exaggerated as to lead inevitably to disappointment in the minds of the public,.

13. Methods of advertising designed to create confusion in the mind of the consumer as between goods by one maker and another maker are unfair and shall not be used. Such methods may consist in:

14. the imitation of the trademark and the name of competition or the packaging or labelling of goods; or

15. the imitation of advertising devices, copy, layout or slogans.

16. Indecent, vulgar, suggestive, repulsive or offensive themes or treatment shall be avoided in all advertisements. This also implies to such advertisements which themselves are not objectionable as defined above, but which advertise objectionable books, photographs or other matter and thereby lead to their sale and circulation.

No advertisement in respect of medicines and treatments shall be accepted which is in contravention of the code relating to standards for advertising of medicines and treatments.

1.20. Medical Ethics

The Medical Council of India prohibits advertising by a professional belonging to it. The Indian Medical Council (Professional Conduct Etiquette and Ethics) Regulations, 2002 have been made by the Medical Council of India in exercise of the powers conferred under Section 20A read with Section 33 (n) of the Indian Medical Council Act, 1956, with the previous approval of the Central Government. Chapter 6 of the said Regulations deals with advertising. It has laid down a list of unethical acts, one of which is advertising, and lays down that a physician shall not aid or abet or commit any of such unethical acts.

Soliciting of patients directly or indirectly by a physician, by a group of physicians or by institutions or organizations is unethical. A physician shall not make use of him/ her (or his/ her name) as subject of any form or manner of advertising or publicity through any mode, either alone or in conjunction with others which is of such a character as to invite attention to him or to his professional position, skill, qualification, achievements, attainments, specialities, appointments, associations, affiliations or honours and/ or such charter as would ordinarily result in his self-aggrandizement. A physician shall not give to nay person, whether for compensation or otherwise, any approval, recommendation, endorsement, certificate, report, or statement with respect of any drug, medicine, nostrum remedy, surgical or therapeutic article, apparatus, or appliance or any commercial product or article with respect of any property, quality, or use thereof or any test, demonstration or trial thereof, for use in connection with his name, signature or photograph in any form or manner of advertising through any mode nor shall he boast of any cases, operations, cures or remedies or permit the publication of report thereof through any mode. A medical practitioner is however permitted to make a formal announcement in press regarding the following:

1. on starting practice
2. on change of type of practice
3. on changing address
4. on temporary absence from duty
5. on resumption of another practice
6. on succeeding to another practice
7. public declaration of charges.

Printing of self photograph or any such material of publicity in the letterhead or on signboard of the consulting room or any such clinical establishment shall be regarded as acts of, self advertisement and unethical conduct on the part of the physician. However, printing of sketches, diagrams, picture of human system shall not be treated as unethical.

ASCI has formulated a Code of Standards in Relation to the Advertising of Medicines and treatments as follows:

1.20. Advertising of Medicines and Treatments

This code has been drafted for the guidance of advertisers, manufacturers, distributors, and advertising media. The harm to the individual that may result from exaggerated, misleading or unguaranteed claims justifying the adoption of a very high standard and the inclusion of considerable detail in a code to guide those who are concerned with this form of

advertising. Newspaper and other advertising media are urged not to accept advertisements in respect of any product or treatment from any advertiser or advertising agent who disregards the provisions of this code in any form of advertising or publicity relating to that product or treatment. The provisions of this code do not apply to an advertisement published lby or under the authority of a Government, Ministry or Department, nor to an advertisement published in journals circulated to registered medical practitioners, registered dentists, registered pharmacists or registered nurses.

Under Section 1 General Principles were enumerated.

1. No claim of CURE:

   No advertisement should contain a claim to cure any ailment or symptoms of ill-health, not should any advertisement contain a word or expression used in such a form, context as to mean in the positive sense the extirpation of any ailment, illness or disease.

2. Illness etc., properly requiring medical attention:

   No advertisement should contain any matter which can be regarded as offer of medicine or product for, or advice relating to, the treatment of serious diseases, complaints, conditions, indications or symptoms which would rightly receive the attention of a registered medical practitioner (see Sec. 2)

3. Misleading or exaggerated claims:

   No advertisement should contain any matter which directly or by implication misleads or departs from the truth as to the composition, character or action of the medicine or treatment advertised or as to its suitability for the purpose for which it is recommended.

4. Appeals to fear:

   No advertisement should be calculated to induce fear on the part of the reader that he is suffering, or may without treatment suffer from an ailment, illness or diseases.

5. Diagnosis or treatment by correspondence:

   No advertisement should offer to diagnose by correspondence disease, conditions or any symptoms of ill-health in a human being or request from any person or a statement of his or any other person’s symptoms of ill-health with a view to advertising as to or providing for treatment of such conditions of ill-health by correspondence. Nor should any advertisement offer to treat by correspondence any ailment, illness, disease or symptoms thereof in a human being.

6. Disparaging references:

   No advertisement should directly or by implication disparage the products, medicines or treatments of another advertiser or manufacturer or registered medical practitioner or the medical profession.

7. College, clinic, institute, laboratory:

   No advertisement should contain these or similar terms unless an establishment corresponding with the description used does in fact exist.

8. Doctors, hospitals etc.

   No advertisement should contain any reference to doctors or hospitals, whether Indian or foreign, unless such reference can be substantiated by independent evidence and can properly be used in the manner proposed.

9. Products offered particularly to women:

   No advertisement of products, medicines or treatments of disorders or irregularities peculiar to women should contain expression which may imply that the product, medicine or treatment advertised can be effective in inducing miscarriage.

10. Family Planning:

    Advertisement for measures or apparatus concerning family planning would be permissible in so far as they conform to the generally accepted national policy in this behalf.

11. Illustrations:

    No advertisement should contain any illustration which by itself or in combination with words used in connection therewith is likely to convey a misleading impression, or if the reasonable inference to be drawn from such advertisement infringes any of the provision of this code.

12. Exaggerated copy:

    No advertisement should contain copy which is exaggerated by reason of improper use of words, phrases or methods of presentation e.g., the use of words ‘magic, magical, miracle, miraculous’.

13. Natural remedies:

    No advertisement should claim or suggest contrary to the fact, that the article advertised is in the form in which it occurs in nature or that its value lies in its being a ‘natural’ product.

14. Special claims:

    No advertisement should contain any reference which is calculated to lead the public to assume that the article, product, medicine or treatment advertised has some special property or quality which is in fact unknown or unrecognised.

15. Sexual weakness, premature aging, loss of virility:

    No advertisement should claim that the product, medicine or treatment advertised will promote sexual virility or be effective in treating sexual weakness or habits associated with sexual excess or indulgence or any ailment, illness or disease associated with those habits. In particular such term as ‘premature aging’, ‘loss of virility’ will be regarded as conditions for which medicines, products, appliances or treatment may not be advertised.

16. Slimming, weight reduction or limitation or figure control:

    No advertisement should offer any medical product for the purpose of slimming, weight reduction or limitation or figure control. Medical products intended to reduce appetite will usually be regarded as being for slimming purposes.

17. Tonics:

    The use of this expression in advertisements should not imply that the product or medicine can be used in the treatment of sexual weakness.

18. Hypnosis:

    No advertisement should contain any offer to diagnose or treatment of complaints or conditions by hypnosis.

19. Materials to students:

    Materials meant for distribution in educational institutions must not carry advertisement of anything other than those of value to students.

Under Section 2 some Restrictions imposed by statute on advertising on Medicines and Treatments:

1. Rule 106c of the Drug Rules, 1945, provides that, no drug may convey to the intending user thereof any idea that it may prevent or cure one or more of the diseases or ailments specified in schedule 'J'.

Schedule 'J'

Blindness	Bright disease	Cancer
Cataract	Deafness	Delayed menstruation:
Diabetes	Epilepsy	Hydrocele
Infantile paralysis	Leprosy	Leucoderma
Lockjaw	Locomotor Ataxia	nsanity
Tuberculosis	Tumors	enereal diseases (in general)
Female diseases (in general)	Fevers (in general)	Fits
Glaucoma	Goitre	Gonorrhea
Soft cancer		
Heart diseases	High blood pressure	Lupus
Obesity	Paralysis	Plague
Rupture	Sexual impotence	Small Pox

2. No drug may purport or claim to procure or assist to procure, or may convey to the intending user thereof any idea that it may procure or assist to procure miscarriage in women.

The Advertising Agencies Association of India, Bombay has formulated certain standards for Practice for Advertising Agencies. Those standards are:

1. Every member of the Association shall carry on his profession and business in such a manner as to uphold the dignity and interests of the Association.

2. Every member shall refrain from canvassing advertisers or prospective advertisers in such a way as to reflect detrimentally upon advertising agents in particular.

3. Canvassing is permitted subject to the condition that a member may be known to the client of another member by its own capabilities as an advertising agency but may not

submit a specific report or detailed recommendations concerning the client's advertising unless so requested by him in writing.

4. No member shall pay or undertake to pay or allow to an advertiser or his agent or representative, the whole or any portion of the standard rate of commission resulting or to result to such member from any advertising medium nor promise or procure or undertake to procure advertising, or at a reduced rate nor supply free or partly free to any advertiser, any advertising material, including finished drawings, or other art work, photographs, blocks, stereos, matrice or the like, typesetting or printing nor defray in whole or in part the salary of any employee of an advertiser, nor grant any allowances, discount or the like nor render any service having the effect of rebating the commission allowed by an advertising medium. The sharing of commission with member or overseas agency or with agent by this Association shall, however, be permitted.

5. The practice of submitting speculative campaigns is unhealthy to the growth of the advertising services and no speculative campaign shall be submitted by any member of the Advertising Agencies Association of India. By speculative campaign, it is meant, producing a campaign unsolicited by an advertiser and equally producing a campaign where the advertiser had requested one or more advertising agencies to do so, unaccompanied by a firm offer of business. That members shall notify the Secretary of the Association if any such queries were made by prospective advertiser, and that such information shall be circulated by the Secretary to all members.

6. Any member relinquishing an account on the ground of slow payment, doubtful credit or incurring a bad debt, shall immediately notify the Secretary of the Association and such information shall be circulated in strict, confidence for information and protection of the members.

7. No business shall be accepted which is conditional upon the payment of commission fee or reward to a third party not a full time employee of the members either for introducing the business or for services in connection with the account thereafter. This rule, however, shall not preclude a member from employing copy-writers or production men at fees commensurate with the values of their work.

Obligation to Clients

1. Member Agencies must continue to render full agency service in reasonable conformity to the Association Agency Service Standards.

2. Members shall retain either commission granted by media owners or charge the clients a service fee which shall never be less than 15% of the client's gross expenditure.

3. Nor shall they supply material for advertising on any basis that can be considered as direct or indirect or secret rebating. Where no commission is allowed by the media owner, the member will charge his clients minimum of 15% on the gross cost.

4. Members will not accept discounts or commission, other than the regular agency commission allowed by the publishers without the client's knowledge and consent.

5. Members shall at all times use their best efforts to obtain for their clients the lowest rates to which such clients are entitled.

Obligation to Suppliers

Members shall take all steps to assure themselves as to the financial soundness of their clients.

Obligation to Fellow Agencies

1. Members are required to use fair methods of competition; not to offer the services enumerated above or services in addition to them without adequate remuneration or extension of credit facilities or banking services.

2. Members shall neither prepare nor place any advertisement in any medium, which

   (a) is knowingly a copy or a plagiarism of any other advertisement of any kind whatsoever;

   (b) makes attacks of a personal character, or makes uncalled for reflections on competitors or competitive goods;

   (c) is indecent, vulgar, suggestive, repulsive or offensive either in theme or treatment.

   (d) Is objectionable medical advertising that makes remedial or curative claims, either directly or by inference, not justified by the facts of common experience;

   (e) Concerns a product known to the member to contain habit forming or danger drugs; or any advertisement which may cause money loss to the reader or injury to health or morals or loss of confidence in reputable advertising and honourable business or which is regarded by the Executive Committee of the Advertising Agencies Association of India, as unworthy. In the event of a member providing to the satisfaction of the Executive Committee that a client has withdrawn his account on the grounds of the member's refusal to undertake unethical advertising (as described above) no other member shall accept any business whatever from the said client.

1.21. E.U to outlaw Tobacco Advertisements[44]

A report from the staff reporter of The Hindu from Brussels revealed that the European Union is contemplating to have a comprehensive law banning Tobacco Advertisements. The majority of European Union Health Ministers have agreed to outlaw tobacco advertising by July 2005.

The new rules will also prohibit advertisements promoting tobacco in newspapers and at sporting events like Formula One motor racing, on radio and the Internet. The proposal to prohibit cigarette manufacturing companies from sponsoring sporting events – particularly Formula One motor racing – may have a significant impact on the politics and finances of motor racing events.

All this has been agreed on by the Health Ministers, despite opposition from Britain and Germany, where the tobacco industry has tremendous political clout. The British Health Minister lobbied behind the scenes to exempt Formula one racing from the proposed ban. The ruling Labour Party had accepted an amount equivalent to Rs. 70 crores from the head of Formula One racing some time ago. But the money was returned after much public and media controversy. German newspapers and magazines are estimated to earn very substantial amounts every year from tobacco companies.

The E.U. Health Commissioner (Minister), David Byrne, termed the agreement to ban tobacco advertising as "another nail in the coffin of tobacco industry". It is also an open secret that the industry often retains key decision makers on its payrolls to do "promotional and lobbying work" in an increasingly hostile environment. Such personnel may include even former prime ministers, who are hired at a very high fee.

A former British Prime Minister was paid the equivalent of $500,000 a year in addition to entertainment and travelling expenses.

The tobacco industry has conveniently argued that cigarette advertising is aimed only at existing smokers in a competition between various brands. The general perception is that a ban on cigarette advertising will only help "established" brands to consolidate their hold on consumers, as it will be much harder for new competitors to break into the market. Mr. Byrne wants to cut the European death rate from tobacco-related illnesses to the much lower American level.

It is also ironical that the cigarette companies are now focusing their marketing and distribution efforts in Third World countries, where there is no anticigarette legislation and where politicians can be retained on their pay rolls for far less sums. In Africa, for example, these companies usually hire young relatives of key politicians to promote their products.

[44] The Hindu, 4th December 2002.

The E.U. Health Ministers also signed recommendations urging member nations to make further efforts to eradicate tobacco use among children and adolescents. This calls for banning automatic cigarette vending machines. Television advertising of tobacco products is already banned under a separate E.U. law, explained the Hindu report.

Despite the proposed ban on advertising on newspaper, Internet and radio, it remains to be seen how the powerful "tobacco lobby" on both sides of the Atlantic can be permanently muted. The German lobby, for example, argues that the local newspapers in smaller towns should be allowed to carry cigarette advertisements because they do not have a pan–European circulation. This is obviously a ploy to retain some foothold but the anti-smoking lobby and pressure groups have vehemently opposed such demands, commented the news report.

One of the world's largest tobacco companies – the Imperial Tobacco Company of Britain – said it was disappointed by the E.U. decision but did not say whether it would legally challenge the new rules. Some companies indulge in indirect advertising – like using a cigarette brand name for a clothing item. According to the European Commission, more than half a million Europeans die of tobacco – related diseases each year. European authorities have claimed that cigarette advertising has played a crucial role in encouraging tobacco smoking. The European Union addressed the issue as a health hazard and reminded the social responsibility of media and tobacco lobby not to encourage the people to smoke.

1.22. What Media Cannot Do in Advertising?

Based on various enactments and Codes developed by several voluntary agencies and professional bodies, the following do's and don'ts were formulated by the authors of Book "Advertising Law & Ethics"[45]

1. Individual media and media groups should preferably establish their own codes of ethics. Some newspapers and magazines refuse to publish advertisements for tobacco and alcoholic beverages. Most of them investigate the reliability of advertisers before accepting their copy. (Self regulation code).

2. Do not possess, sell, let to hire or otherwise promote circulation of any harmful publication in any part of India. (Young Persons (Harmful Publication) Act, 1956).

3. No prize competition for prizes exceeding Rs.1000 a month should be held without a licence. And no newspaper or other publications should publish advertisements in violation of the above prohibitions. (Prize Competition Act, 1955).

[45] PB Sawanth, PK Bandhyopadhyay, Advertising Law and Ethics, pp 227-231.

4. Advertisements – textual, pictorial, graphical or otherwise – should not generate hatred, contempt or disaffection towards Government or between different classes of citizens in India. (Indian Penal Code, 1860).

5. Do not use in advertisement the name, emblem or official seal of the United Nations and some of its specialized agencies and also the Indian National Flag, the name, emblem or official seal of Government of India or a sate, Supreme Court, High Court and some official organs, Rashtrapati Bhavan, Raj Bhavan, some luminaries like Shivaji Maharaj, Mahatma Gandhi and some internationally acclaimed human service organisations like St. John Ambulance Association (India), and the Tuberculosis Association of India. Also do not use any name that may suggest official patronage for the product etc. advertised. (Emblems and Names (Prevention of Improper Use)Act, 1950).

6. Avoid unauthorised use in your advertisements another person's/organisations's trade mark. This may attract civil and criminal liabilities.

   Also do not advertise your goods etc. with false trade description which is an offence punishable under law. (Trade and Merchandise Marks Act, 1958).

7. Advertisements in any form must not be used for use of drugs for effecting miscarriage or prevention of conception in women or maintaining a man's capacity for sexual pleasure or correcting menstrual disorders or treatment of venereal disease etc.

   Similarly, false or misleading advertisements for efficacy of drugs or magic remedies of certain diseases should be avoided. (The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954).

8. Advertisements to get protection under Copyright Act, 1957 must be original. So it must not be copied from another or must not be commonplace, that is in the public domain. (Copyright Act, 1957).

9. Do not publish or cause to be published or take part in publication of advertisements representing a woman indecently. (Indecent Representation of Women (Prohibition) Act, 1950).

10. Do not claim orally, through advertisement or by way of a product label your product to be of a quality which it does not really possess. You will be then guilty even if no standards of purity have been prescribed for that product under rules. (Prevention of Food Adulteration Act, 1954).

11. Do not print, possess or advertise for sale or distribution of any ticket, coupon or other document for use in prize chit or money circulating scheme, or otherwise take part in

any such advertisement or prize chit or money circulation activity except as may be provided for in the relevant Act. Penalty for violation may be imprisonment up to two years and a fine up to rupees three thousand. (The Prize Chits and Money Circulation Schemes (Banning) Act, 1978).

12. Advertisers are advised not to use in their advertisements for drugs or cosmetics any report of a test or analysis made by a government analyst / agency or any extract from such a report. Penalty for violation up to Rs.500. (Drugs and Cosmetics Act, 1940).

13. In civil contempt you are not to willfully disobey any judgment, decree, direction, order writ or other process of a court or breach an undertaking given to a court; and in criminal contempt which is not relevant for advertisers, you are not to publish by words, signs, visible representations or otherwise scandalising or tending to scandalise, or obstructing administration of justice or otherwise found guilty of committing criminal contempt of court. Such acts are punishable under law. (Contempt of Court Act, 1971).

14. Consumers, Councils are mandated to better protect the interests of consumers, including safeguarding them from exploitation and providing them opportunities to seek redressal against unfair trade practices. Your advertisements should not violate these rights of consumers. (Consumer Protection Act, 1986).

15. Under the Representation of People Act, 1951 publicity, propaganda etc. in various ways in connection with an election is prohibited within 48 hours of an election. Violation may attract imprisonment up to 2 years or fine or both.

    Again there are rules for declaration by the publisher of any election pamphlet and also, supply of copies of such pamphlets or posters to the Chief Electoral Officer / District Magistrate. Contravention may attract imprisonment up to six months or a fine up to rupees 2000. (Representation of People Act, 1951).

16. Do not publish or otherwise display objectionable and unethical advertisements encouraging self-medication and self-treatment. (T.K.Kuppuswamy v.Union of India, AIR 1991 Mad 17).

17. Do not put your advertisement directly or indirectly interfering with the property of another, such as wrongful pasting of bills upon someone else's wall or erecting a hoarding in front of someone's wall etc. You are there by liable for payment of damages. (To succeed in an action for nuisance the plaintiff must prove that he has suffered some substantial damage or inconvenience). (Cobb v.Saxby, (1914) 3 KB 822).

18. Your advertisements must not obstruct a place to which the public have a right to access; nor should you erect a dangerous structure near a highway. You are then liable to prosecution for creating a public nuisance. (Salvin v. North Brancepeth Coal Co. Ltd., (ch. 705)

19. An editor of a newspaper should be careful enough to publish anything, including an advertisement in his newspaper. And as a matter of journalistic ethics he cannot abdicate his responsibility for publishing an advertisement or a photograph in the newspaper, which is patently violative of the standards of journalism and good taste, merely by saying that the advertisement or the photograph was inserted by some other persons. (Press Council of India decision on January 6, 1993 in the case of defamatory photographs published with an article captioned "Designers Love-Making" by the newspaper's editor, Mr.Pritish Nandy).

20. Do not publish advertisements with obscene pictures mean merely to make money by titillating the sex feeling of adolescents and adults among whom the newspaper circulates or which constitute "unwholesome exploitation" of sex for money. (Press Council of India's verdict in the case of Society magazine, Bombay, regarding Calvin Kelin's advertisements "Jean Fashion", March 31, 1993).

21. No misleading advertisements should be published. Advertisements were published by the Anand Bazar Patrika of Calcutta issued by the self proclaimed "Sexologists" claiming to cure people of impotency. The Press Council found the advertisements in contravention of Sections 3(b) and (d) of the Drugs & Magic Remedies (Objectionable Advertisement) Act, 1954, and expressed strong displeasure over such publications in the media and advised the paper to restrain and refrain from publishing such advertisements.) (Press Council's decision of October, 10, 1994).

22. Your advertisements should not hurt the religious feelings of any community by inappropriate use of the name or photograph / pictorial presentation of goods or goddesses in promoting commercial products. (The reference is to advertisements published in "The Telegraph" and "Sanmarg" English and Hindi dailies in which advertisements on behalf of a Calcutta restaurant, "Ahaar" appeared repeatedly in the above papers using images of Hindu gods Shiva, Vishnu and Krishna inviting customers to eat "Kulcha Garam" "Vadha", "Dosa", "Uttapam" etc. The Press Council found them contrary to good taste and as such, against journalistic ethics.) (Decision rendered on November 5, 1990).

23. Do not issue advertisements like "Dial a friend – Enjoy" as was published by the Asian Age, Indian Express and Jansatta in April 1998, inviting public to call on a given international telephone number with suggestive phrases and postures. The purpose of the advertisements was to encourage sex talk on telephone capable of corrupting

adolescent minds being suggestive of prospective titillating talks. The Press Council found the advertisements misleading and objectionable, and as such punishable. (Press Councl's suo motu enquiry against The Asian Age and others in February, 1998).

24. Advertisements must not be published mixed up with editorial matter so that the two are clearly distinguishable and don't get mixed up. Journalistic propriety and ethics demand this. (Press Council of India's Advertisement Code).

25. Advertisements must not even tend to malign or hurt the religious sentiments of any community or section of society. (Press Council of India's Advertisement Code).

26. Advertisements must not contravene provisions of any relevant Act, like Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, or any other law of the land, or go against good taste or journalistic propriety or ethics. (Press Council of India's Advertisement Code).

27. Do not publish unauthorised or unpaid dummy advertisements which are against journalistic ethics. (Press Council of India's Advertisement Code).

28. Since success of advertising depends on public confidence, no practice should be permitted which tends to impair this confidence. (Code of the Advertising Standards Council of India).

29. No advertisement should have the effect of impairing the confidence of the public on the product or its manufacturer, for the success of the advertisement depends upon public confidence. (ASCI Code).

30. Do not use in your ad without permission, the name of firm, institution or person to get an undue advantage or by exposing to ridicule or disrepute. (ASCI Code).

31. Advertisements shall not distort facts, nor mislead the consumer by means of implications or omissions either by statements or visual presentations. (ASCI Code).

32. Advertisements shall not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge, or cause grave or widespread disappointment in the minds of consumers. This applies more in the case of offers of free gifts, prizes, etc. (ASCI Code).

33. Obvious untruths or exaggerations to amuse or attract customers are permissible only if these are not being misunderstood as genuine qualities of a product. (ASCI Code)

34. Advertisements should contain nothing indecent, vulgar or repulsive which is likely to cause grave or widespread offence. (ASCI Code).

35. Do not make 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. (ASCI Code).

1.23. What Media Can Do in Advertising

1. Self regulation by the advertising industry is better than state control. Early in the 20th century in Britain, before the advertising industry became well organised, the sharp and unethical practices of some advertisers prompted the rise of self-regulation to avoid state controls. This has worked reasonably well.

2. Advertising trade associations should be mainly concerned with maintaining high standards.

3. Radio and television should cooperate closely to avoid permitting advertising that might cause unfavourable social reactions.

4. Newspapers while publishing advertisements should publish the tariff charged for each advertisement to ensure that no unusual fee over and above the normal market rate is charged, which may have other undesirable implication. (Press Council of India's Advertisement Code).

5. Newspapers should ensure that an advertisement is published in all issues of an addition or editions contracted for. Deliberate omission constitutes gross professional misconduct. (Press Council of India's Advertisement Code).

6. There should always be proper communication, vigilance and understanding between the advertisement department and the editorial department to avoid acceptance or publication of an undesirable advertisement. (Press Council of India's Advertisement Code).

7. Editors should assert their right to accept or reject advertisements, particularly those which border on or cross the line between decency and obscenity. (Press Council of India's Advertisement Code).

8. Editors should own full responsibilities for advertisements and editorial matters published in his newspapers, unless such responsibilities are clearly disclaimed in advance in respect of any such or all such published material. (Press Council of India's Advertisement Code).

9. Advertisements must be truthful in descriptions, claims and comparisons, and these should be capable of substantiation on demand. (ASCI Code).

10. Occasional and unintentional lapse in the fulfilment of advertised promise or claim is permissible if the said promise or claim is capable of fulfilment, say, by a typical specimen of the product advertised. (ASCI Code).

Observe fairness in competition so that the consumer's need to be informed on choice in the market-place and the canons of generally accepted competitive behaviour in business is both served. For example, advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the good will attached to the trademark or symbol of another firm or its product or the goodwill acquired by its ad campaign. (ASCI Code).

CHAPTER II

DRUG AND MAGIC REMEDIES (OBJECTIONABLE ADVERTISEMENTS) ACT, 1954 & OTHER LAWS

2.1 Introduction

Drug and Magic Remedies (Objectionable Advertisements) Act, 1954 aimed at preventing unreasonable advertisements regarding drugs and medicines in the interest of public health. It is a kind of public interest legislation which prevents the people from being carried away by the misleading advertisements. The Act imposes criminal liability on the misleading drug advertisers. It prevents self-medication and business type aggressive marketing of drugs through advertisements.

a) What is advertisement?

The Act also provides for comprehensive definition of advertisement: "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 [Section 2(a)].

b) Magic Remedy

Magic remedy means 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.

This Act penalize the Advertisements of drugs claiming magic remedies., dealing with procurement of miscarriage or prevention of conception in women;[46] Section 3 says that no person shall take any part in 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) procurement of miscarriage or prevention of conception of women
b) the maintenance or improvement of the capacity of human beings for sexual pleasure: or
c) correction of menstrual order in women; or

[46] Section 3, Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

d) 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 Cosmetic Act, 1940 and, if the Central Government considers necessary, with such other persons having special knowledge or practical experience in respect of Ayurvedic or Unani system of medicines as that Government deems fit.

This section clearly prohibits from advertising the drugs or capsules claiming to improve the capacity to improve sexual pleasure or correction of menstrual disorders or drugs for causing miscarriage or prevention of conception. Advertisement of condoms do not come under the purview of this category as that is not a drug and will not affect the chemistry of body. Such drugs can be used only under constant guidance by registered medical practitioners for a specific purpose of treatment after due diagnosis. It is against public policy and public welfare to promote such products. That is the reason why the sales and promotion of drugs like viagra are prohibited. However, the advertisements suggesting the possible improvement of capacity in human beings in attaining pleasure in sexual activity are appearing under different nature covered under deceptively different suggestion.

"Taking part in the publication of any advertisement" includes- the printing of advertisement, the publication of any advertisement outside the territories to which this Act extends by or at the instance of a person residing within the said territories. [Section 2(d)]

c) Misleading Advertisements

Section 4 prohibits misleading advertisements relating to drugs.

The misleading advertisements relating to drugs, giving a false impression regarding the true character of the drug or making a false claim about the effect of the drug, are also prohibited by this Act. This section says: 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.[47]

Section 3 and 4 deal with advertisements relating to drugs while those relating to magic remedies are dealt with in Section 5. Section prohibits advertisements of drugs for the treatment of certain diseases and disorders, as specified in the Schedule, e.g., miscarriage of women and prevention of conception, maintenance or improvement of the capacity of human beings for sexual pleasure; diagnosis and cure of venereal diseases, etc. Section 4 prohibits misleading advertisements relating to drugs.

Both these provisions are subject to the overall exceptions contained in S 14 the relevant items of which are:

a. any book dealing with any of the matters specified in S 3 from a bona fide scientific or social stand point

b. any advertisement relating to a drug sent confidentially to a registered medical practitioner or to a chemist for distribution among registered medical practitioners or to a hospital or laboratory;

c. any advertisement relating to a drug printed or published with the previous sanction of the Government;

d. any advertisement which is permitted under the Drugs Act Rules made thereunder.

Power is further, conferred by Section 15 upon the Central Government to grant exemptions from liability under the foregoing provisions.

d) Conditions of Liability for Liability under S3

The conditions for prosecution under this section must be strictly adhered to. The ingredients of the offence under this section are:

a) the accused should have taken part in the publication of an advertisement,

b) that advertisement should have reference to a drug,

c) that drug must be suggested as a cure for

(i) the procurement of miscarriage or prevention of conception of women;

(ii) the maintenance or improvement of sexual capacity,

(iii) the correction of menstrual disorders; the diagnosis, cure, mitigation, treatment or prevention of any disease etc. specified in the Schedule of the Act or in the Rules

[47] Section 4, Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

made thereunder. [State of Karnataka v Sivasubramanya (1978) Cr L J 853 (Knt) DB]

e) No Advertisement about magic remedies

Section 5: 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.

It prohibits advertisement of the magic remedies for treatment of certain diseases and disorders. The penalty will include six months of imprisonment in case of a first conviction and one year in case of subsequent conviction, with or without fine. (Section 7)

Section 6 prohibits import into and export from India of any documents containing an advertisement, prohibited by Sections 3,4 and 5. Such documents are deemed to be goods prohibited under Section 19 of the Sea Customs Act 1878.

Section 8 empowers any Gazetted officer authorised by State Government to enter and search if the offence under this Act has been or being committed, to seize any advertisement which he has reason to believe contravenes any of the provisions of this Act, examine the record, register, document and seize them. Provisions of Criminal Procedure Code will apply in case of seizure or search etc.

If the offences are committed by a company, the company also is made liable under Section 9. Every person who was in charge of and was responsible to company for the conduct of business as well as the company shall be deemed to be guilty of offence. As the Advertisement companies are involved in big way in making advertisements and publishing them with their responsibility, this section imposing liability on the Companies is significant.

f) Cognizable Offences

To give seriousness to the offences under this Act, they are proclaimed to be cognizable offences under Section 9A. The Act was amended in 1963 to make the offences under this Act cognizable.

Section 10 provides that the offences under this Act can be tried by any court not inferior to Magistrate Court.

Section 10A empowers the state to forfeit the document and its copies, article or thing containing advertisement in respect of which contravention is made.

g) Advertisements Exempted from Act

Section 14 says that the provisions of the Act are not applicable to

a) any sign board or notice displayed by a registered medical practitioner on his premises indicating that treatment for any of the diseases or disorders specified in Section 3, the Schedule or the rules made under this Act, is undertaken in those premises, or

b) any treatise or book dealing with any of the matters specified in Section 3 from a bona fide scientific or social standpoint

c) any advertisement relating to any drug sent confidentially in the corner prescribed under Section 16 only to a RMP, and

d) any advertisement relating to a drug printed or published by the Government.

e) any advertisement relating to a drug printed or published by any person with the previous sanction of the Government granted prior to the commencement of the Amendment Act in 1963 to amend this Act.

Government can for reasons recorded withdraw the sanction after giving the person an opportunity of showing cause against such withdrawal.

h) Power to Exempt

According to Section 15 Central Government can exempt any advertisement from the application of this Act, if public interest requires that advertisement relating to any drug or class of drugs or any specified class of advertisement relating to drugs, by a notification.

Section 16 empowers the Central government to make rules for carrying out the purposes of this Act. The Government may specify any disease or disorder or condition to which the provisions of Section 3 will apply. It can also prescribe the manner in which the advertisement of articles or things confidentially.

CHAPTER III

CIVIL & CRIMINAL LIABILITIES

3.1. Legal Regulation of advertising in India

There is no Advertisement Law as such. No specific enactment is contemplated in India dealing wholesomely with advertising. That is also not a requirement as there are different legislations, which provide for specific regulations for advertising. The principles scattered in different statutes have to be collected to know the whole of advertisement regulation, as law presumes that everyone knows law and states that it's ignorance is no excuse.

3.1.1. Advertisement as an invitation to Offer & Contract Act

The transaction of publicity campaign involves contractual relationship between the advertiser and advertising agency. Advertiser is the principal who entrusts the job of providing publicity to goods or services he offers to general public. It is the duty of the advertising agency as an 'agent' to execute the commissioned activity as per the instructions and requirements specified in the terms of the contract. Thus general principles of contract govern the relationship between the principal and agent i.e., advertiser and the agency. The Indian Contract Act defines the relationship between the principal and agent and that governs the relation between the advertiser, the advertising agency and the target audience. Generally the contract is the result of offer and its acceptance. An advertisement is an invitation to offer, i.e., a step prior to offer. It is for the receiver of advertised communication to send the offer if he is convinced with the message received. Thus an advertisement is a step before the beginning of the contract of purchase or sale of the goods are services, information about which is advertised for advertiser by the advertising agency.

SPC Engineering Co. (India) Ltd. v. Union of India[48] An advertisement inviting tenders or bids is not in itself an offer, which creates a right until accepted. Invitation of tender is a mere attempt to ascertain whether an offer can be obtained within such a margin as the employer is willing to adopt.

3.1.2. Mistake in advertisements

An advertisement in *Carlill v. Carbolic Smoke Ball Co*. had mistakenly indicated a reward of 1000 pounds instead of 100 pounds. The right of the claimant to demand the reward, assuming all necessary conditions had been fulfilled, would have depend upon where lay responsibility for the error. If it lay with the publisher, the advertiser would be free of the

[48] AIR 1966 Cal 259.

responsibility. The reward winner would be rightly claiming 1000 pounds from the publisher and not from the advertiser[49].

3.1.3. Hoardings

The advertiser who makes use of hoardings, walls or other property for display of his announcements must be careful that in doing so he does not overstep his own right to the free use of his property and commit a breach of similar rights enjoyed by others. Such a breach may occur in one of several ways.

3.1.4. Outdoor advertising

The general public has rights which operate as restrictions on the advertiser. The obstruction of a place to which the public has a right to access or erection of dangerous structures near a highway may render the advertiser liable to prosecution for creating a public nuisance. If it distracts the attention of the traffic, the police authorities are given powers to remove it, under Motor Vehicle Act in India.

'A direct interference with the property of another, such a wrongful pasting of bills upon someone else's wall is a trespass; and indirect interference with the rights of another, such as erecting a hoarding in front of someone's wall, may constitute a nuisance. Either may give the injured party a right of action for damages[50].

There is an example in case of *Cobb v. Saxby*[51] which explains the duty of advertisers to respect the rights of neighbours, violation of which might result in liability to pay damages. In this case the plaintiff and defendant were owners of their respective adjoining houses. The side wall of the defendant's house projected into a street a short distance beyond the front of the plaintiff's house. The plaintiff erected boards close to their side wall and at right angles to his own house in such a way that the defendant was prevented from using the wall for advertisement purposes. It was held that a right of access to the highway includes the right of access to, the wall of the building, and to have the advertisement on the wall displayed to the uninterrupted view of passersby. The plaintiff had wrongfully interfered with the defendant's right by erecting his boards in front of the wall and the defendant was entitled to an injunction restraining him from maintaining boards in this position. To succeed in an action for nuisance the plaintiff must prove that he has suffered some substantial damage or inconvenience.

However an advertiser has more freedom to put up a huge hoarding in a commercial area. Such a right is not available in residential location. It is for the citizen to show how his right

[49] (1893) 1 QB 256).
[50] Salvin v. North BrancepethCoal Co Ltd. LR (Ch 705)[50],
[51] (1914) 3 KB 822

suffered because of a hoarding in a commercial area before seeking any relief against the nuisance by erecting a huge hoarding. It was the issue in another case *Our Boys Clothing Ltd.v. Molborn Viaduct Land Co. Ltd.*[52], wherein a huge hoarding was put up in a thickly populated area which, besides being hazardous was big, ugly, obtrusive and vulgar. The court held that in a purely residential area this consideration would have more weight but in a business area an advertisement hoarding is not a nuisance because it is big, ugly and obtrusive and the court is reluctant to interfere with the putting up of the advertisement, as it would be necessary for the plaintiff to show some substantial loss of ordinary comfort or interference with the enjoyment of his own property before he could secure the removal of advertisements upon this ground.

The question of an invasion in other's right by an advertiser was decided in *Salvin v. North BrancepethCoal Co Ltd*[53]., A direct interference with the property of another, such a wrongful pasting of bills upon someone else's wall is a trespass; and indirect interference with the rights of another, such as erecting a hoarding in front of someone's wall, may constitute a nuisance. Either may give the injured party a right of action for damages.

3.1.5. Advertisement obstructing the people's rights

The people in general also have rights which must be respected by the advertiser. The obstruction of a place to which the public has a right to access or erection of dangerous structures near a highway may render the advertiser liable to prosecution for creating a public nuisance.

In the case of *Our Boys Clothing Ltd.v. Molborn Viaduct Land Co. Ltd.*[54], a huge hoarding was put up in a thickly populated area which, besides being hazardous was big, ugly, obtrusive and vulgar. The court held that in a purely residential area this consideration would have more weight but in a business area an advertisement hoarding is not a nuisance because it is big, ugly and obtrusive and the court is reluctant to interfere with the putting up of the advertisement, as it would be necessary for the plaintiff to show some substantial loss of ordinary comfort or interference with the enjoyment of his own property before he could secure the removal of advertisements upon this ground.

3.1.6. Illegal advertisements

Lotteries, Betting Advertisements, Election Advertisements, Indecent Advertisements, Medical Advertisements, Advertisements promoting Tobacco and Wines are illegal as they are prohibited by law. British Parliament has imposed criminal sanction on the production of

[52] 127 CR 344
[53] LR (Ch 705)
[54] 127 CR 344

certain very varied categories of advertisements, which on grounds of public interest, it desires to discourage.

3.1.7. Lotteries

Legislation on this subject was originally designed to protect a revenue raising monopoly enjoyed by the Government itself. There has never been a statutory definition of word 'lottery'. It has been left to the courts to decide that what the law prohibits is a scheme for distribution of prizes by lots or chance[55]. Keeping lottery is an offence under Section 294A of Indian Penal Code. (see below)

3.1.8. Sale of packets of tea containing prize coupons is bad

In case of *Willis v. Young*[56], a newspaper, to promote its circulation, distributed numbered medals, the winning number, announced in the paper being entitled to a prize of 100 pounds. Nothing was paid by the participants who were not even obliged to buy copies of the paper. Nevertheless the scheme was held to be a lottery.

It was also held in *Elvin and Powell Ltd v. Plummer Roddis Ltd.,*[57] that where an advertisement for lotteries and similar betting schemes is based on misrepresentation, the remedies will be which are appropriate to fraudulent, negligent or innocent misrepresentation.

3.1.9. Betting advertisements

Advertisements relating to betting in any form are held illegal. Advertisements of coupon competitions are prohibited. In the case of *Rex. v. Sroddart*[58], a newspaper published regular notices of coupon competition by which prizes were offered toreaders who successfully forecast the result of forthcoming races and sent in the coupons with their forecasts and with a sum of one penny for each coupon sent in. The proprietor of the newspaper was convicted under setion 1 of the Betting Act, 1853 for keeping premises for the purpose of receiving money on the promise thereafter to pay money on contingencies relating to horse racing. The conviction was confirmed on appeal. The Royal commission discussed at length the problem of Advertising on the issue and submitted its report on Betting, Lotteries and Gambling with its review. It felt that a great difficulty in the way of any scheme of control was to distinguish plain advertisements from the passing of betting information. They favoured total prohibition of betting advertisements.

[55] Taylor v.Smetten, 1883 QBD 207
[56] (1902) 1KB 448
[57] (1933) 50 TLR 158
[58] (1901) 1QB 172

Wagering and betting advertisements including lotteries are banned in several legislations in India also. Some of those legislative prohibitions are discussed below.

3.2. Advertisements and Law of Crimes

3.2.1. Obscenity in Advertisements

The advertiser is expected to be cautious in preparing the advertisement copy, as he would be liable for the penal consequences of the material published. The Indian Penal Code prescribes punishments for exhibition or sale or distribution of obscene material to any other persons, especially to minors, as they are defined as offences. State has power to prevent obscenity and restrict the freedom of press to that extent.

The Indian Penal Code provides that whoever advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person shall be punished with imprisonment and fine.[59]

The section provides an exception to objects to which the section does not apply, keeping in view the social fabric of the country. Section 293 prohibits the sale, hire, distribution, exhibition or circulation or attempt of any of them of any obscene object referred to in section 292 to any person under the age of twenty one years.

In *Ranjit D. Udeshi v. State of Maharashtra*[60] the test of obscenity was established. Any material or communication either through advertisement or article is lascivious or appeals to prurient interests 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. This case emphasized on the point that the offense contemplated by section 292 of the Indian Penal Code could not be complete unless it was shown that the accused had a guilty mind. In *C.T.Prim v. State of West Bengal*[61] case also held that mens rea was required under section 292 of the Indian Penal Code. The court gave an example of a blind man being used for the purpose of selling some obscene publications. The Court opined that unless the blind man knew what type of literature he was in possession of, he cannot be proceeded under this section. Section 292 reads as follows:

Whoever, by words, wither spoken or written, or by signs or by visible representations or otherwise promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or

[59] Section 292 (2) (d) of the Indian Penal Code.
[60] AIR 1965 SC 881
[61] AIR 1961 Cal 177 (DB)

castes or communities shall be fined with imprisonment which may extend to three years, or with fine, or with both.[62]

The test of obscenity is whether the publication, read as a whole, has a tendency to deprave or corrupt those whose minds are open to such immoral influence and into whose hands such a publication may fall. Each work must be examined by itself and a comparison with other works may not improve the quality of a book which is indecent or obscene[63]. Courts cannot act as censor or authority of public morality or decency. "Obscene" means "offensive to chastity or modesty, expressing or personating to the mind or view something that delicacy, purity and decency forbid to be expressed, impure, as an obscene language, obscene pictures" anything expressing or suggesting unchaste and lustful idea, impure, indecent, loud[64]. A book "Life and world of Call Girls" despite reference to sex, its object is to help eradicate evils of prostitution, is not obscene[65].

The difference between obscenity and pornography is that first pornography denotes writings, pictures etc., it tenders to arouse sexual desire, while obscenity includes writing etc., not intended to do so but which have that tendency. Both offend public decency and morals. Pornography is obscenity in a more aggravated form[66].

Common law has recognized the publication of any blasphemous, treasonable, seditious or immoral character as a misdemeanor and has made it an offence punishable by fine and imprisonment. An advertisement is obscene if it is of a character calculated to deprave and corrupt those whose minds are open to immoral influences and into whose hands it may fall. Advertisements of such a nature generally make the advertiser, the advertising agency and the publisher liable.

In *Rex v. Hicklin*,[67] an obscene book was advertised in a newspaper. It was held that advertising such a book amounts to obscenity and the person publishing the advertisement is liable to criminal proceedings. Even though the advertisement itself is not necessarily containing any obscene matter, the very knowledge of the publisher that the advertisement seeks to promote the sale of indecent material is sufficient.

On the same lines, in the case of *Rex v. De Marry*,[68] the defendant was the editor of the newspaper which published an advertisement which gave information and publicized certain obscene books and prints. The advertisements by themselves did not contain any obscene matter. After the advertisement appeared in the newspaper, the police warned the publisher

[62] Section 153-A (1) (a) of the Indian Penal Code.
[63] G. Jairaj v State of Karnataka, 1999 (1) RCR (Crl) 43 (Kant DB)
[64] In re D. Pandurangan, 1953 Cr LJ 763
[65] Promalla Kapur (Dr) v Yashpal Bhasin 1989 Cr LJ 1241 (Del)
[66] PK Samanath v State of Kerala, 1990 Cr LJ 542 (Ker)
[67] LF 3QB 371.
[68] (1907) 1 K.B. 388.

of the content of the books and works which were being advertised. The editor paid no heed to the warnings of the police and still accepted and published the advertisements. He was held liable.

3.2.2. Obscenity under English Law

Halsbury's Laws of England contain specific penalty for obscene and indecent public notices or advertisements. Any person who affixes to or inscribes on any building, wall, post, tree etc., any indecent or obscene ads or printed or visual matter visible to others is liable on summary conviction to a penalty not exceeding 20 pounds or to imprisonment for any term not exceeding one month. Any ads relating to venereal disease is deemed to be printed or written matter of an indecent nature.

3.2.3. Obscene libel in advertisement

The publication of any matter as blasphemous, treasonable, seditious or immoral character is a misdemeanour at common law punishable by fine and imprisonment. An advertisement falls within the definition of 'obscene libel' if it is of a character calculated to deprave and corrupt those whose minds are open to immoral influences and into whose hands it may fall. For such a publication both the advertiser and the publisher are liable.

It is an offence to advertise any obscene book and the person publishing the advertisement renders himself liable to criminal proceedings even though the advertisement itself contains no indecent matter, but knows that it is designed to sell works of an obscene nature[69].

In the case of Re. v. De Marry[70] the defendant was the editor of a newspaper which published advertisement of certain obscene books and prints. The advertisements themselves contained no indecent matter, but the defendant was warned by the police of the character of the works to which the advertisements referred. Nevertheless, he continued to accept and publish the advertisements and it was held that he was rightly convicted of aiding and procuring the sending of obscene matter through post, contrary to the Post Office Act, 1908.

3.2.4. How to assess the Obscenity: PCI suggestions

The Press Council of India has framed certain guidelines for regulating non broadcast advertisements. The Press Council also has held in its various decisions that newspapers and periodicals should not publish anything which is obscene, vulgar offensive to public taste. Newspapers should not publish any advertisement which contains matter which is unlawful, or is contrary to good taste or to journalistic ethics or proprieties. It has also laid down that

[69] Rex v. Hicckin, LF 3QB 371
[70] (1907) 1 KB 388

newspapers should not display advertisements which are vulgar or which, through the picture of a woman in a nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.

Obscenity has to be judged in accordance with the facts and circumstances of the particular case, depending on the totality of the impression left on the reader. The basic test of obscenity given by the decisions of the Press Council of India is whether the matter is so gross or vulgar that it is likely to deprave and corrupt persons who may study or examine or look at the particular matter. Another test is whether the depiction of the scene and the language used can be regarded as filthy, repulsive, dirty or lewd.[71]

The three tests to determine whether a picture is obscene or not are as follows:

1. Is it vulgar and indecent?

2. Is it a piece of mere pornography?

3. Is its publication meant merely to make money by titillating the sexual feelings of adolescents or adults among whom it is intended to circulate?[72]

There are other relevant considerations viz., whether the picture in question is relevant to the subject matter of the product or service which the advertisement purports to sell. The PCI renders its decision on the basis of the material available on record and the submissions made before it. Another instance where the PCI censured a magazine for publishing a magazine was in the case of the Society magazine, the decision of which was rendered on March 31, 1993. Details of these decisions by the Press Council of India are available in previous chapter on Ethics and Self Regulation.

The intention to publish the offending advertisement should be proved in order to find the publisher guilty. In *Narayanan v. State of Kerala*,[73] the issue was whether the proprietor of the printing press who had nothing to do with the authoring of a certain obscene literature or editing or circulating it in the magazine "Kochuseetha" is guilty of an offence under section 292 (a) of the Indian Penal Code, which says that a person who produces or has in his possession any obscene material, provided it is for sale or hire or distribution or public exhibition or circulation is guilty of an offence under the section. The High Court of Kerala held that the said publisher was only doing a 'job work' and the person to be charged under that section is the editor of the magazine "Kochuseetha". In addition, there is no mens rea (guilty mind) in case of the publisher. Therefore, he was acquitted.

[71] PCI decision rendered on March 31, 1993 on the advertisement of Kama Sutra condom in the Debonair issue of October, 1991
[72] PCI decision in the case of Blitz, Statesman 1969 A.R. p. 77.
[73] 1970 Kerala Law Times 605.

3.2.5. Information Technology Act

Section 67 of the Information Technology Act, 2000 provides that there should be no obscene publications on the Internet. "Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if 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 to all relevant circumstances, to read, see or hear the matter contained or embodied in it shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with a fine which may extend to two lakhs rupees".

3.2.6. Obscenity in the United States of America

In *Ginsberg v. New York*,[74] the Court upheld a statute prohibiting materials found to be "obscene as to minors," a category somewhat narrower than indecency. The statute prohibited only the direct commercial sale of magazines containing such content to minors and did not ban any communications between adults. In *New York v. Ferber*,[75] the Court upheld a New York statute which prohibited persons from knowingly promoting child pornography. It pointed out that the only effective way for the state to regulate child pornography "may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."

In *Basiardanes v. City of Galveston*[76] a building owner brought suit challenging a city zoning ordinance that banned advertisements for adult bookstores or theaters. Striking down the ordinance, the Fifth Circuit found that the advertising ban insufficiently served the governmental interest in controlling obscenity and held that the regulation was not drawn narrowly enough.

In *State v. Holmberg*,[77] the Minnesota Court of Appeals affirmed the conviction of adult bookstore operators under a statute forbidding display of merchandise or pictures of "products or entertainments on the premises" in the windows or other areas visible from outside the building. It prohibited display of "their merchandise in a manner that would be visible from the sidewalk in front of the establishments.

[74] 390 U.S. 629 (1968).
[75] 458 U.S. 747 (1982)
[76] 682 F.2d 1203 (5th Cir. 1982)
[77] 545 N.W.2d 65 (Minn. Ct. App. 1996).

In *Hamilton Amusement Center v. Verniero*,[78] the New Jersey Supreme Court upheld a statute restricting the size, number, and content of signs that sexually oriented businesses could display. The court commenced its analysis by saying that the case "calls for the sensitive balancing of the interests of sexually oriented businesses and free speech with the State's interests in minimizing the adverse secondary effects caused by those businesses. The court also had no difficulty finding that the regulation directly advanced the interests of safety and aesthetic appearance.[79]

3.2.7. The Indecent Representation of Women (Prohibition) Act, 1986

This Act punishes indecent representation of women, which means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way 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. It provides that no person shall publish or cause to be published or arrange to take part in the publication or exhibition of any advertisement which contains indecent representation of women in any form.

It also empowers authorized officer to enter and search, seize any advertisement or any book etc.[80] the provisions of Criminal Procedure Code relating to any search or seizure will apply with regard to indecent publications also. In *PK Somnath v. State of Kerala*[81] it was held that it was the duty of the court in proceedings before it to decide the nature of publication alleged to have contained photographs depicting women indecently and see whether or not it offends the provisions of the Act. The need of comparing the impugned publication with other magazines does not arise. Models like Madhu Sapre and Anand Milind faced criminal prosecutions for obscenity under IPC and Indecent Representation Act for posing in nude for an advertisement of shoes. There are several such prosecutions for shaping the advertisement in obscene manner and representing women in obscene manner.

Advertising agencies and public relations professionals are expected to be aware of these limitations made in the interest of dignity of women. As the commercial advertisements today use the portrait of a woman for promotion of any type of product, the legal restrictions imposed by this Act have to be kept in mind while framing such ads. The punishment for the offence of indecent representation of women is imprisonment up to two years in the first instance and it may go up to five years on subsequent convictions, with or without fine. If the company commits this offence, Section 7 punishes every person who was in charge officer. Thus the Advertising Company also cannot escape from criminal liability for obscene or indecent representation of woman in advertisement.

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[78] 156 N.J. 254, 716 A.2d 1137 (1998),
[79] http://www.lexis.com/research/sel?
[80] Sections 2, 6 of The Indecent Representation of Women (Prohibition) Act, 1986
[81] 1190 Cr LJ 542.

3.3. Defamation by Advertisement

Defamation is an injury to a person's reputation. It is both a crime and a tort, i.e., a civil wrong. The law of civil defamation is not codified. The law of criminal defamation is codified in the Indian Penal Code 1860[82]. Section 499 states when an act of imputation amounts to defamation. Sections 500, 501, 502 punish the defamation.

Section 499 of Indian Penal Code defines what defamation is and Section 500 prescribes punishment. Advertisement as a form of libel attracts equal liability like any other form of defamation. Oral advertisement also can be brought under the ambit of criminal defamation as per the definition under Section 499. A libel for which an action will lie is a defamatory statement made or conveyed by written or printed words or in some other permanent form, published of or concerning the plaintiff, to a person other than the plaintiff. An action for libel may arise when advertising agencies or advertisers resort to comparative advertising in case some false statement is made with regard to the product or service of the competitor.

Section 499 says: Whoever by words either spoken or intended to be read or signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 2 to this section says: It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Thus an advertisement affecting the reputation of a company may result in criminal prosecution of the advertiser. Explanation 3 is also relevant. An imputation in the form of an alternative or expressed ironically, may amount to defamation. Comparative advertisements or denigrating other competitors in their enthusiasm to fetch more publicity or for aggressive marketing should not lead to defamation.

However, the principle that truth is a defence to defamation holds good in case of advertisements too. There are provisions with regard to defamation in comparative advertising in most statutes and codes dealing with advertising[83].

In the case of *Compaq Computer Corporation v. Dell Computer Corporation Ltd.,*[84] the defendant resorted to a comparative advertisement, wherein comparisons were drawn between the computers belonging to the two companies with regard to the price, performance, reputation and service guarantees. It amounted to a trade libel since the comparison was done in such a manner as to belittle Compaq's computers. Misstatements were also involved, since the computers, in reality, did not have the same configuration, as

[82] Sections 499-502, Indian Penal Code, 1860
[83] For detailed study of defamation, see Module II of Media Laws .
[84] [1992] FSR 93.

claimed by the defendant in the advertisement. Therefore, the court ruled in favour of the plaintiff since the material differences contradicted the implication of the advertisement that both the computers were essentially the same.

> In case the advertise resorts to comparative advertising with an intention to denigrate the competitor's products, then it can be restrained by law. Denigration is the unfair attack by an advertiser discrediting other businesses or their products. It may even lead to act of defamation.

The wrong of defamation consists in the publication of a false and defamatory statement respecting another person without lawful justification or excuse. Truth or justification, fair comment, and privilege- absolute or qualified, are the defenses available in an action for defamation. Remedy mainly is the damages. The amount of damages depend on the rank and social position of the parties, nature of the imputation, mode of publication, mitigating circumstances and aggravating factors, apology and its acceptance.

According to Section 499, IPC making any imputation in words, signs or visible representations, with the intention or knowledge of harming the reputation of the person concerning whom it is made, is crime of defamation. Imputation means accusation. Truth said for public good is a defense available under first exception. Second exception protects a fair comment on the conduct of public servant and third exception deals with defense of the criticism conduct of persons who are not public servants. Substantially true reporting of court proceedings is not defamation according to fourth exception. Fair comment on judgment, conduct of parties is not an offence as per fifth exception. It is not defamation to express any fair opinion on the merits of any creative performance, says the sixth exception. Passing of censure by the person in higher authority is no defamation according to seventh exception. Eighth exception protects the accusation in a complaint to higher authority in good faith, from the charge of defamation. It is not an offence to make an imputation on the character of another for the protection of the interest of the person making it or of any other person for the public good, says the ninth exception. Tenth exception exempts a caution in good faith to one person against another from defamation. From these ten exceptions it is clear that critical remarks, fair comments and imputations against the character are not prohibited or penalized. The press and public relations personalities are expected to activate their role in building opinions in the society within the framework of these exceptions.

3.4. Rumours

The Criminal Law Amendment Act, 1961[85] provides for the offence of making, publication or circulation in any notified area, of any statement, rumour or report which is, or

[85] Section 3(2) Criminal Law Amendment Act, 1961.

is likely to be prejudicial to the maintenance of the public order or essential supplies or services in that area or is prejudicial to the interests of the safety or security of India.

3.5. Incitement to an Offence

Incitement to an offence is a ground based on which freedom of speech and expression can be restricted by the State[86]. By resorting to a publication or advertisement or speech, the commission of any offence or criminal act cannot be incited. The freedom of speech cannot be misused to incite the people for rioting or involving in communal strife or any other unlawful activity.

3.6. Sedition by Advertisement

By publication of advertisement, no one should commit an offence of sedition. Section 124A defines what sedition is and prescribes punishment for it. Whoever words, either by spoken or written, or by signs, or by visible representations or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

3.7. Promoting enmity between different groups by Advertisement

Section 153A of IPC punishes any publication, which intends to create enmity between different groups of people. An advertisement should not promote enmity. It may be part of their ethical values but the advertisers should remember that law imposes an obligation with a threat of criminal prosecution and penalty for provoking and disturbing advertisements.

Section 153A says: Whoever, (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities. (Parts (b) deals with any act with such an intention and (c) deals with organization of any exercise, drill, or other similar activity. Such an offence shall be punishable with imprisonment which may extend to three years, or with fine, or with both.

3.8. Imputation against National Integration in any Advertisement

Section 153-B of Indian Penal Code imposes another obligation on publishers. There shall be no imputations or assertions prejudicial to national integration. Advertising for a

[86] Article 19(2) of the Constitution of India.

political party which owes no allegiance to Constitution and who's policy is division of country could be a crime.

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise;

(a) makes or publishes 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 Constitution of India as by law established or uphold the sovereignty or integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, 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

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community and such assertion, counsel plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punishable with imprisonment which may extend to three years, or with fine, or with both.

According to Section 3 of National Security Act, 1980, the government is empowered to make an order or preventive detention of a person with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers; the security of India or of a State, the maintenance of public order; and the maintenance of supplies and services essential to the community. The words 'in any manner' includes by means of writing. Hence the media should be careful about these aspects which incites violence or creates hatred between different communities.

3.9. Lottery offence

The second paragraph of Section 294-A penalises the publication of any advertisement relating to an unauthorised lottery, for which not only the maker of the advertisement but also the proprietor, printer and publisher of the newspaper in which it appears would be liable[87]. Of course, the proposal which has been advertised must relate to a 'lottery' which means a scheme for the distribution of prizes solely by a lot or chance, as distinguished from a transaction involving skill[88].

[87] Lilomal, AIR 1940 Sind 91
[88] Gurubaksh (1934) Lah 51

3.10. Contempt of Court Act, 1971

No advertisement can contain a scandalizing remark on the courts and judicial officers. It is an offence to promote the idea of defying or disobeying the court of law and its orders or directions. There shall be no interference in the process of court or any comment that will be prejudicial to the proceedings pending before the court of law.

Contempt of Court is of two kinds- civil and criminal. Civil contempt means willful disobedience to any judgment, order, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to court.[Section 2(1)(a) & (b)]. Criminal contempt means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court: or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii)Interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice in any other manner.

In other words, scandalizing the court, abusing the parties concerned with cause; and prejudicing the mankind against persons before the cause is heard are the three forms of criminal contempt.

The High Court is a court of record and can punish for the contempt of itself or of its subordinate courts. Criminal contempt means the publication of any matter or the doing of any other act which scandalizes or tends to scandalize, lowers or tends to lower the authority of any court, or prejudices or interferes or tends to interfere with, the due course of any judicial proceeding, or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Road Hoardings

In *Atmaram Kanodia v. Prasad*,[89] it was held that Contempt of Court was disobedience to the court by acting in opposition to the authority, justice and dignity thereof. It signifies a wilful disregard or disobedience of the court's order. It also signifies such conduct as tends to bring the authority of the court and the administration of law into disrepute. Hoarding in disregard to the High Court directions was held to be an offence under Contempt of Court Act.

[89] (1990) 94 Cal W N 393

In *V M Kanade v. Maddhav Gadkari*[90] the limitation in filing a case was in issue. A Contempt proceeding filed expeditiously after the publication of contemptuous advertisement was taken in to cognizance and issued rule within one year; petition came up for hearing after three and a half years; It was held that was no ground for dropping the proceedings as there was no delay in filing the petition.

3.11. Crimes under the Official Secrets Act, 1923

No advertisement can contain an official secret. The information categorized as official secret cannot be revealed through any Advertisement. The Official Secrets Act, 1923 provides punishments for the offences of revealing the official secrets. The offences under this Act are serious offences affecting the State. Giving information which may not be secret but which may be useful to enemy is an offence under Section 3. Public interest requires that certain class of privileged papers such as cabinet papers, minutes of discussions between Heads of Departments, high level interdepartmental communications, papers concerning government policies, and dispatches from Ambassadors abroad, should not be disclosed in public interest.[91]

This Act punishes two offences-spying and wrongful communication of secret information. Section 3 of the Act makes it an offence if any person for any purpose prejudicial to the safety or interests of the State does spying. Under section 5, it is an offence if any person willfully communicates any secret official code or password or any other information to any other person without authorization. Receiving any such secret information is also an offence under this section 5. This section covers only secrets of a ministry or department of the government but not those of incorporated institutions, like a university, Government Company or public corporations as held in the following case[92].

In *State of Kerala v. K. Bala Krishna and another* [93] the Kerala High Court held that the publication of the budget, a secret document in a newspaper 'Kaumudi' before its presentation to the State Assembly, was an offence committed by the newspaper, its editor, printer, publisher and the correspondent, under section 5 of the Act.

This Act also punishes unauthorised use of uniforms, falsification of reports, forgery, personation, and false documents (Section 6). Interfering with officers of the police or members of the Armed Forces of the Union is an offence under Section 7. Section 8 imposes a duty on every person to give on demand to Superintendent of police or other officer, any information in his power relating to an offence or suspected offence under Section 3. Failure to give such information is also an offence. Section 9 punishes attempts and incitement to

[90] (1990 Cr. Law Journal 190 (DB) – Bombay High Court.
[91] Rajnarain v Indira Nehru Gandhi, AIR 1975 SC 865
[92] Sections 3 and 5 of Official Secrets Act, 1923
[93] AIR 1961 Kerala 25

commit offences under this Act. Section 11 provides for issuance of search warrants while section 12 gives power to arrest. Section 15 imposes liability on companies also.

3.12. The Prize Competitions Act, 1955

In this highly competitive world it has become common to introduce several schemes as prize competitions inviting the members of the public to participate, to popularize the products or the organization. The Prize Competitions Act 1955 prohibits the element of gambling in the garb of these competitions. Prize Chits and Money Circulation Schemes (Banning) Act 1978 also prohibits such undesirable practices.

Whether called a crossword prize competition, a missing-word prize competition, picture prize competition or by any other name, in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words or figures, is called prize competition[Section 2(d)]. This section can hit those competitions which are in the nature of gambling and in which success does not depend to any substantial extent on skill.

These words may cover those puzzles the solution of which is entirely dependent on 'chance' (i.e., those in the nature of gambling which does not depend to any substantial extent on skill. Gambling schemes are punishable under these Acts. A prize competition for which a solution was prepared before-hand[94] is clearly a gambling prize competition because the competitors are only invited to guess what the solution prepared by the promoters might be[95] or to have the opportunity of taking blind shots at a hidden target[96].

For the same reason, a prize competition for which the solution is determined by lot is a gambling adventure. Competitions in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or is not yet generally known would also comprehend only those which are in the nature of a lottery or gambling, excluding those which involve substantial degree or skill. Television programme 'Kaun Banega Crorepati' telecast by Star TV was challenged on the ground of gambling, but it was held that that programme did not violate any of the codes of conduct laid down by the Government. it is a mere skill and knowledge of the participant and does not amount to gambling as element of wagering is absent in the programme.[97]

[94] Barclay v Pearson, (1893) 2 Ch. 154.
[95] Willis v Young, (1907) 1 KB 448
[96] Coles v Odhams Press, (1936) 1 KB 416
[97] Bimalendu De v Union of India, AIR 2001 Cal 30, S. Singaram v Government of Tamil Nadu, AIR 2001 Mad 419

It provides control and regulation of prize competition where the prize offered exceeds one thousand rupees a month. The law provided for licensing of such prize competitions where the prize offered exceeds one thousand rupees a month.

The state is empowered by this Act to forfeit the publication containing the prohibited prize competition advertisement or material. The Act says where a newspaper or another publication contains any prize competition promoted or conducted in terms of the provisions of this Act or any advertisement thereto, the state government may, by notification in the official gazette, declare every copy of publication containing the prize competition or the advertisement, to be forfeited by the Government.

3.13. The Prize Chits and Money Circulation Schemes (Banning) Act, 1978

The Prize Chits and Money Circulation Schemes (Banning) Act, 1978, section 5 prohibits publication of any advertisement of the prize chit or money circulation scheme or any such matter descriptive of, or otherwise relating to the prize chit or money circulation scheme as is calculated to act as an inducement to persons to participate in them. For this offence the punishment prescribed is imprisonment which may extend to two years or with fine which may extend to three thousand rupees or with both(Section 6).

Section 5 prohibits printing, publishing of any ticket coupon or other document for use in the prize chit or money circulation scheme or sells or distributes or offers or advertises for sale or distribution or has in his possession for the purpose of sale or distribution any ticket, coupon or other documents for use in the prize chit or money circulation scheme; or prints publishes or distributes or has in his possession for the purpose of publication or distribution – (i) any advertisement of the prize chit or money circulation scheme; or ....such matter... It will be an offence and imprisonment for it shall not be less than one year and the fine shall not be less than one thousand rupees, [Section 5 (b) and (c)]

Any newspaper or other publication containing material about prize chit or money circulation scheme can be forfeited to the Government (Section 8).

3.14. Bogus Scheme: An Offence

If any person or company fraudulently or dishonestly induces another to deliver any property or deposit any amount with them will amount to cheating under Section 415 of Indian Penal Code for which a punishment of three years imprisonment or fine or both can be imposed. Bogus schemes and false claim of quality may bring the business firms and their PR men into criminal trial for fraudulent misrepresentation, cheating etc.

CHAPTER IV

UNFAIR PRACTICES THROUGH ADVERTISEMENTS

4.1. CONSUMER RIGHTS

The Consumer Protection Act, 1986 provides for protection of the interests of the consumers. This Act has specific provisions dealing with unfair trade practices. Misleading advertisements and unfair claims, misrepresentations can be questioned by the consumers based on the violation of rights through deficiency in services and defects in goods sold.

Advertising carry the message effectively if it has good credibility which will be established by the quality of product and services. An advertisement cannot endorse a less quality product and introduce it into the consumer market. Consumers now gained greater consciousness and awareness. The society and law making body have properly responded in generating a movement and law to protect the interests of the consumer. It is the duty of any organisation and any PR professional to safeguard those interests. While propagating the product and campaigning for its purchase the quality has to be assured and the norms prescribed by the Consumer Protection Act has to be strictly followed.

This Act provides for better protection of the interests of consumer and for that purpose made provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith. The Act sought to protect the following rights of the consumer. 1.The right to be protected against marketing of goods which are hazardous to life and property. 2. The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices. 3. The rights to be assured access to variety of goods at competitive prices. 4.The right to be heard and to be assured that consumers interests will receive the consideration at appropriate forums, right to seek redressal against unfair trade practice or unscrupulous exploitation of consumers. 5. Right to consumer education.

The Act lays down substantive principles of law and also some principles of procedure. It defines defect, deficiency, restrictive trade practices and unfair trade practice and entitles a complainant to make a complaint on the ground of adoption of unfair or restrictive trade practice by a trader. Consumer also can complain against the defect in goods purchased or agreed to be purchased or deficiency in the services availed or agreed to be availed and, on proof of the same, empowers the redressal agency to award one or more of the reliefs enumerated in Section 14(1) of the Act.

Act creates a right in favour of a purchaser of goods and a hirer or availer of services and a corresponding obligation on the manufacturer and trader of goods and provider of services. The Act also creates machinery for the enforcement of these rights and obligations.
District Forum, State Commission and National Commission were created at district, state and national level respectively for resolving the Consumer disputes and an appeal was permitted from the National Commission to the Supreme Court.

4.1.1. How to make a Complaint

A complaint can be filed by I) a consumer or ii) recognised consumer association, if the consumer is member of that association, iii) one or more consumers, if there are more consumers, with the permission of the District forum, according to Section 12. However husband can file a complaint on behalf of the wife.

The Consumer Act is made to simplify the procedure and avoid the complexity so that an ordinary citizen can file a complaint without any difficulty. No formalities are prescribed. No language or form is strictly prescribed. It is enough if the complaint is legible and understandable. It can be made on an ordinary white paper. A person making complaint is called complainant while the other party is called opposite party. The complaint should contain the following necessary things.

1. Name description and address of the complainant.
2. Name description and address of the opposite party
3. The facts relating to complaint and when and where it arose.
4. Documents in support of the allegations contained in the complaint.
5. The relief which the complaint claims.[98]

The Consumer Protection Act provides scope for making a complaint against

a) false representation (Section 2 (1) rule (1),
b) false offer or bargain price (rule 3),
c) Schemes offering gifts, prizes etc-Section 2(1) rule (3),
d) Non compliance with the prescribed standards (rule 4),
e) Hoarding, Destruction or refusal under rule (5).

The Act provides the right to be protected against the marketing of goods which are hazardous to life and property, and the right to be informed about the quality, quantity,

[98] According to Rule 14, The Consumer Protection Rules, 1987

potency, purity, standard and price of goods to protect the consumer against unfair practices besides the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers. No advertisement of a consumer goods can hide the above required information or propagate the points which would mean unscrupulous exploitation.

4.1.2. False Representation

"Unfair trade practice" means a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or deceptive practice including any of the following practices namely:

The Practice of making any statement, whether oral or written or by visible representation (which include an Advertisement either in print or electronic media) which,

a) falsely suggests that good are of particular standard, quality, grade, composition, style or model[99], e.g., false claims to the effect that the goods were created and recommended by a doctor or were based upon a scientific formula could be restrained.

b) falsely suggests that the services are of a particular standard or quality or grade

c) falsely suggests that any rebuilt , second hand, renovated or reconditioned or old goods as new goods;

d) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories uses or benefits which such goods or services do not have; In *Proctor and Gamble Home Products Ltd., Hindustan Lever Ltd*[100]., tall claims about its New Ceramides Sunsilk Extra Treatment Shampoo found to be highly exaggerated and misleading, and thus the company was restrained by an injunction.

e) represents that the seller or supplier has a sponsorship or approval or affiliation which such seller or supplier does not have.

f) makes a false or misleading representation concerning the need for or usefulness of any goods or services; In the matter of *Hindustan Oil Co*.[101], claim that its cooking gas units through the use of kerosene saved 30 per cent against the LPG System was held to be not proper, therefore unfair trade practice and thus restrained.

g) gives a warranty or guarantee as to the durability performance or efficacy of the goods which is not based upon adequate or proper tests. Burden of proof lies on the representer to show that the goods were adequately and properly tested. In *Godrej & Boyce Mfg. Co (p)Ltd, Re*[102], giving of a warranty or guarantee under this clause is not falsified by

[99] Perma Maid Co v F.T.C. 121 F 2d 282 (1941)
[100] (1997) II CPJ 21 (MRTP),
[101] 1997 II CPJ 30 MRTPC
[102] (1991) 70 Comp Cas 224 MRTPC

breach thereof. Breach of warranty is not unfair practice; it is only a breach of contract, for which a different remedy can lie and not this remedy.

h) represents to the public in a form that looks like a guarantee or warranty or a promise to replace, maintain or repair the goods until they achieve a specified result and the representation is materially misleading or there is no reasonable prospect that the guarantee etc., contained in the representation shall be carried out.

i) materially misleads the public about the prices at which such goods are available in the market;

j) gives false or misleading facts disparaging the goods, services or trade of another person. In *M. Balasubramaniam v Jyothi Laboratories*[103], the respondent's advertisement that was telecast in Doordarshan, Madras Kendra was alleged to be calculated to disparage the complainant's products and hence, it was an unfair trade practice. However, because of lack of proof it was held not an unfair trade practice.

False Offer of Bargain Price and Schemes Offering Gifts and Prizes, etc:

The advertisers for the multinational consumer good manufacturers devise schemes which involve more lotteries to promote their products in the garb of competitions. Some times the companies offer some thing free with a purchased product, the price of which, in fact includes the cost of the 'free' product also. This could be a false offer of bargain price and a prohibited gambling scheme of lottery. Resorting to such schemes will be unfair trade practice.

The Commission held in *Bharti Devi, Re*[104] case that the announcement of sale of textiles at throw-away prices which were not verifiable because neither the quality of goods was mentioned nor their prices, was unfair.

In *Polar Industries Ltd., G.R. Luthra*[105], an advertisement offering off-season discount on fans calculated in reference to future sales and not present prices, has been held to be unfair.

In *Society of Civic Rights v Colgate Palmolive (India) Ltd* [106], the respondent company advertised a contest called the "Colgate Trigard Family Good Habits Contest", in which a number of prizes were announced. The contestant is asked to send an entry for the contest along with upper portions of two cartons with which their products, Colgate Trigard toothbrushes were sold. Every contestant was thus required to purchase at least two toothbrushes. It was basically a nature of lottery. As the contest was for the purpose of promoting sales of the respondent's products or its business interest, it was, therefore, held to

[103] 1997 II CPJ 30 MRTP
[104] (1987) 61 Comp Cas 734 MRTP
[105] (1987) 61 Comp cas 805 MRTPC
[106] (1991) 72 Comp Cas 80 MRTPC

be an unfair trade practice within the meaning of Section 36(3)(b). However the contest continued with any hindrance and it was completed before the decision of the MRTP Commission was announced. MRTPC directed the Colgate Palmolive not to repeat such an unfair trade practice.

4.1.3. Non Compliance with the prescribed Standards

Complaints of under weight and false contents would fall under the category of this unfair trade practice. In *Procter & Gamble Home Products v Raj Dev Bharadwaj*, [107]a customer purchased Aerial Super detergent powder packet which was declared to weigh 1.125 Kilograms including a cake. Each packet was underweight by 50 gms. This was held to be unfair practice under Section 2(1)(r) of Consumer Protection Act and the Consumer Redressal Forum directed the appellant to pay Rs 2000 as compensation.

4.1.4. Hoarding, Destruction or Refusal to sell

Hoarding the products for making better gains when prices go up or the demand rises because of non-availability of goods in the market is a traditional economic crime the merchants resort to. It is termed as unfair trade practice. Destruction and refusal to sell are also other aspects of similar economic wrong. Civil Supplies Law also punishes such a hoarding or refusal or destruction of goods as an offence. It is essentially the crux of the Essential Commodities Act. If the product which is hoarded by the merchant or manufacturer is intended to raise or has the effect of raising the cost of those or similar goods or services, it amounts to unfair trade practice, as held in Food Specialities Ltd, Re,

4.1.5. Advertisement and Consumer Case

In *A Mohan Reddy v. Venkataramana Reddy*[108], a Complainant intended to get advertisement regarding sale of plot published in the newspaper Udayam daily dated 18th April 1993 (Sunday) and paid Rs. 200 towards advertisement charges advertisement appeared on 20th April 1993 (Tuesday). Complainant's allegation that he was obliged to sell the plot for less than its worth as on Tuesdays lesser number of people read advertisements as compared to Sundays. The District forum and State Commission had held against the complainant on the ground that the petitioner had not produced any material to show that he had instructed the newspaper to publish the advertisement on a Sunday only. The National Commission held that there was no proof to show that findings of the above forums were vitiated by any error or illegal exercise of jurisdiction particularly because the complainant had not sold the plot at all. The National Commission being in agreement with the lower forums dismissed the appeal.

[107] (1991) III CPJ 251 (HP SCDRC, Shimla)
[108] 1986 – 96 Consumer 1961 (NS)

Major changes made by Consumer Protection (Amendment) Act, 2002 are as follows –

- Enhancement in monetary limit of District Forum from Rs 5 lakhs to 20 lakhs and of State Commission from Rs 20 lakhs to Rs one crore
- Payment of fees for filing complaint/appeal
- Complaint/appeal will have to be admitted first
- Reason to be recorded if decision not given within specified time
- Cost of adjournment can be imposed
- Interim orders can be passed
- In absence of President, senior most member can discharge functions of President
- Pre-deposit of certain amount before appeal is entertained
- Notice can be sent by Fax/courier.

Exclusive domain of Consumer Fora:

MRTP Commission used to deal with the cases of unfair trade practices by consumer goods manufacturers and service providers through the advertisements. With the passing of Competition Act 2002, the MRTP Commission became an extinct. Now it became an exclusive domain of the Consumer Forum to deal with the complaints of wrongful and misleading advertisements affecting the rights of the consumer.

4.2. COMPETITION LAW AND IMPACT ON ADVERTISEMENTS

4.2.1. Monopolies and Restrictive Trade Practices Act

The MRTP Act as originally framed did not confer any power on to the Commission to grant temporary injunction during the course of enquiry. The Sachhar Committee Report, however, recorded that power to issue temporary injunction order ought to be made available to the Commission in order to give effect and strengthen the jurisdiction and authority of the Commission and it is by reason there for the legislature thought it fit to incorporate Section 12-A in the body of the Act by MRTP Amendment Act, 1984 conferring such a power on the Commission. Section 12-A reads as below :

"12-A. Power of the Commission to grant temporary injunctions. - (1) Where, during an enquiry before the Commission, it is proved, whether by the complainant, Director General, any trader or class of traders or any other person, by affidavit or otherwise, that any

undertaking or any person is carrying on, or is about to carry on, any monopolistic or any restrictive or unfair trade practice and such monopolistic or restrictive, or unfair trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of any consumer or consumers generally, the Commission may, for the purposes of staying or preventing the undertaking or, as the case may be, such person from causing such prejudicial effect, by order, grant a temporary injunction restraining such undertaking or person from carrying on any monopolistic or restrictive, or unfair, trade practice until the conclusion of such enquiry or until further orders.

(2) The provisions of Rules 2-A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall, as far as may be, apply to a temporary injunction issued by the Commission under this section, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to any enquiry before the Commission."

Section 36-A defines unfair trade practices.

In *Colgate Palmolive(India) Ltd. v. Hindustan Lever Limited*[109], the question before the court was unhealthy competition between two giant advertisers. The appellant herein had filed a complaint with the MRTP Commission that the Hindustan Lever Limited's advertisement of their product 'New Pepsodent', which claimed that it has 102% more germ fighting capability compared to the 'leading toothpaste'. Colgate Palmolive alleged that the leading toothpaste being referred to in the advertisement is Colgate Dental Cream and the advertisement was aimed at disparagement of the appellant's product. The Commission upheld the complaint and granted an injunction against Hindustan Lever Limited. Following this, Hindustan Lever Limited filed a complaint to the MRTP against Colgate Palmolive alleging that the latter's toothpaste advertisement's claim of germ fighting, tooth decay fighting and bad breath stopping was highly misleading and amounted to an unfair trade practice. But the complainant could not furnish any kind of evidence. Therefore, the MRTP did not uphold the complaint as far as the above three claims were concerned. But it did prevent Colgate from using the 'shakti chakra' symbol, which was not even prayed for by the complainant. They filed cross appeals before the Supreme Court, which held that the MRTP Commission was right in not granting injunction against the Colgate advertisement, since there was a lack of evidence and there was a delay in filing the complaint against Colgate. Also, the Supreme Court held that a trade advertisement containing a simple recommendation of the quality of the goods by the seller to gain purchasers, unless intended to be a warranty, would not amount to an unfair trade practice.

[109] AIR 1999 SC 3105.

4.2.2. Globalization & Raghavan Committee

The Monopolies and Restrictive Trade Practices Act MRTP Act 1969 administered by an independent commission has in the recent past lost much of its powers. During the Licence Raj, its primary occupation was to avoid concentration of economic power through building large asset bases or dominance in the market place The Commission has powers to initiate action against established unfair trade practices, including claims with regard to quality, competition and prices.

In view of the genuine fear that the patent system would lead to monopolies, the government proposed a Competition law. As the MRTP Act does not protect the consumer from the evils of monopoly, which may result from new IPR legislations.

There are competition laws in several countries with strong patent systems in operation. It is, therefore clear, that the protection of intellectual property should be subservient to an effective Competition law. However the debate is going on as to whether the required results of fair and free competition can be achieved by appropriate amendments to strengthen the current MRTP Act or through new legislation.

> Notwithstanding the utmost respect for strong intellectual property protection systems through the instruments of patents, proprietary trade marks, copyrights, designs, registrations and trade secrets, the US and European Union countries have strict competition laws. They protect consumers from anti-Competitive abuses which could result from monopolies granted under those legislations.

The new competition policy expects to regulate the anti-Competitive activities and thus, provide basis for the new Competition Law.

4.2.3. Purpose of Competition Act

The purpose of the new Act should be to prevent abuse of economic power gained through innovation and ownership of technology, usually practiced by adopting one or more of the following methods, according to M. D. Nair, author of article Wanted an effective anti-competition law.[110]

1. Imposing unfair purchase or selling prices or other unfair trading practices.

2. Entering into contracts with parties for sharing of a market, limiting production or fixing prices.

3. Manipulating the production and distribution to the prejudice of consumers;

[110] M. D. Nair, "Wanted an Effective Anti-Competition law" The Hindu, January 12, 2000, page 25.

4. Entering into contracts with parties for sharing of a market, limiting production or fixing prices;

5. Refusing licenses to third parties even for a reasonable royalty, particularly when the holder has no intention of producing the product and making it available.

6. Withholding important technical progress from public against public interest

7. Imposing unfair and discriminatory sales prices and conditions;

8. Forming cartels between competitors to gain monopolies in the market and fixing prices.

For the purposes of enforcing the principles of the policy for Competition law, an independent and effective competition authority is required to be established. When it is required to promote the adequate IPR protection, it is also essential to ensure, at the same time, that measures to enforce the patentee's rights do not themselves become roadblocks to fair and legitimate trade.

4.2.4. Impact on Advertisements of Professional Services

Raghavan Committee on Competition Policy and Law made certain recommendations in this regard. In any competition environment, it is a question of survival of the fittest. One of the arguments of the domestic industrialists is that if a foreign professional comes to India to compete with local professionals, the latter should also be permitted to move to other countries to practice and compete.

> A professional practises according to the law of the land in which he comes into contact with his client. Hence the professionals must know the law of the land concerned, and it is presumed that they know it. Professional body in which he or she is a member, will impose a code of conduct and expects every member of that body to adhere to it. The licence issued by the body or the enrolment certificate allows him to practice and thus regulates the behaviour of that professional. At present neither the Medical Council of India nor the Bar Council of India allow the member-professionals to advertise and if they advertise the scope of their services, they are liable to disciplinary actions by the professional bodies.

In the absence of such authority to advertise, the competition against foreign skilled professional in India will be uneven and not on a level playing field. It may be now imperative, if the foreign professionals are allowed to practice in India, for professional bodies of the country to amend their rules and permit the members to advertise so that they can reach the market after creating due awareness among the people about the skills, talents, experience and knowledge as well as the scope of services expected from or offered by an

individual professional. Then it will be up to the market to chose. If not the people have to be guided only by heavily popularized advertisements by brand names.

The Raghavan Committee emphasises that India's competitiveness lies in services rather than in the manufacture sector. The quality of services rendered by Indians in various professional fields is now known world over and hence there should not be any restrictions on their movement or advertising options.

The Committee Report evolved following suggestions on the Services aspect:

1. A profession enjoys monopoly rights of practice in its designated field and thebody administering the profession enjoys considerable autonomy in its administration. These monopoly rights and autonomy should be used for regulating the quality of theprofession, the standards of entry and discipline and accepted norms of performance. They should not be used to limit competition.

2. Professionals should not be denied normal opportunities of association and promotion and opportunities for growth and development. There should be no attempt to prevent the use of firm names on narrow technical considerations and to act in a manner which insulates them not only from global competition but also from the opportunity for global contact and interaction.

3. Professional bodies should not utilise their rights of autonomy tocounter the normal challenges of global integration. It is illogical tohave a totally protected profession in an environment of global industrial integration.

4.2.5. The Competition Act, 2002

The Competition Act, 2002 provided for establishment of Competition Commission of India CCI and take over the regulatory authority from the MRT Commission, as the Competition Law replaces the MRTP Act 1969, according to Raghavan Committee report. Cases pending in respect of Monopolistic Trade Practices or Restrictive Trade Practices will be transferred to Competition Commission of India, [s 66(3)]. All cases of Unfair Trade Practices except those relating to disparaging of goods will be transferred to National Consumer Disputes Redressal Commission constituted under Consumer Protection Act. National Commission will transfer these cases to concerned state commissions. Cases in respect of disparaging goods of MRTP Act will be transferred to Competition Commission.

Though the words 'Restrictive Trade Practice RTP' is not used in Competition Act, the provisions in respect of anti-competitive agreements in Section 3 and Abuse of dominant position in Section 4 are similar provisions of Restrictive Trade Practices under MRTP Act.

Hence, case law under MRTP will be relevant, though may not be binding on Competition Commission.

4.2.6. Anti-Competitive Agreements Void

No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India (Section 3(1). Any agreement entered into in contravention of the provisions contained in Section 3(1) shall be void Section 2(2). If any enterprise in engaged in identical or similar trade of goods or provision of services, which

a) directly or indirectly determines purchawe or sale prices,

b) limits or controls production, supply, markets, technical development, investment or provision of services,

c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services or number of customers in the market or any other similar way,

d) directly or indirectly results in bid rigging or collusive bidding shall be presumed to have an appreciable adverse effect on competition.

4.2.7 Abuse of Dominant Position

Section 4(2) states that there shall be an abuse of dominant position under Section 4(1) if an enterprise follows any of the following practices. If any of the following practice is followed, it is abuse and no further proof of any damage or loss is required.

a) unfair or discretionary conditions in purchase/sale.

b) limiting or restricting production or development

c) denial of market access

d) supplementary obligations unconnected to main contract

e) using dominant position to enter another market.

Thus the new Competition Law which is assented to by the President in 2002 is not prescribing any advertising norms and do not deal with the unfair practices like misrepresentation and misleading promotion etc. Any deficiency or unfair practice including misleading advertisement can be questioned before the Consumer Forum if the rights of consumers are affected.

4.2.8. Overall scheme

The Act is designed for following purposes - (a) Prohibition of anti-competitive agreements (b) Prohibition of abuse of dominant position and (c) Regulation of combinations.

A quasi-judicial authority named 'Competition Commission of India' is constituted. The Commission will consist of judicial as well as non-judicial persons to give Competition Commission of India (CCI) an overall perspective.

On receipt of complaint or reference, CCI can issue order to Director General to investigate. His report will then be considered by CCI. The CCI will hear the concerned parties and then pass necessary orders. CCI will sit in benches. Each bench will consist of at least one judicial person of rank of Judge of High Court.

CCI is empowered to recommend division of dominant enterprises. It can order de-merger in case of merger/ malgamation that adversely affects competition. Suitable powers are given to Commission and penalties are prescribed to ensure that orders of Commission are obeyed.

Jurisdiction of Civil Court is barred and only appeal to Supreme Court only if substantial question of law are involved.

CHAPTER V

THE ADVERTISING STANDARDS COUNCIL OF INDIA

5.1. Introduction

Anywhere in the world self-regulation in advertising alone is effective. Emulating the various countries, the Indian marketing and advertising professionals also took the initiative to set up a council for self regulating the content of advertisements, in the form of the Advertising Standards Council of India (ASCI). It is efficient and effective redressal machinery for the stoppage of misleading, untruthful, indecent or unfair advertisements.

The main associations, which have been responsible for the setting up of the ASCI, are:

1. The Indian Society of Advertisers;
2. The Advertising Agencies Association of India; and
3. The Indian Newspapers Society.

The ASCI was set up in October, 1985 and registered as a non profit organization under section 25 of the Indian Companies Act, 1956. Till date, it is the only professional association, which deals with self-regulation of the contents of all advertisements, whether published or broadcast in India.

The Board of Governors, which manages the ASCI, is made up of 16 members who are elected from advertisers, advertising agencies, the media and allied professions. This Board of Governors appointed the Consumer Complaints Council (CCC) for the purpose of examining the complaints received by the Council. The CCC consists of 14 members, six of whom are ASCI member practitioners and the remaining eight of whom are non advertising professionals who are eminent and recognized opinion leaders in their respective disciplines such as Medical, Legal, Industrial Design, Engineering, Chemical Technology, Human Resources and Consumer Interest Groups. However, a new proposal has been made by the Board of Governors to increase the number of members in the CCC from 14 to 21 i.e., an increase of the non advertising professionals from the existing 8 to 12 (for interaction of more professions in the CCC) and an increase in the ASCI member practitioners from the existing 6 to 9.

There are four categories of members to the ASCI. As of March 1st, 2002, there were a total of 248 members who can be divided as follows:

1. Category A- Advertisers (121)

2. Category B- Press/ Media (39)

3. Category C- Advertising Agencies (68)

4. Category D- Allied Professions (20)

The ASCI is very broad based to cover the entire gamut of Media vehicles which carry advertisements, ranging from printing and publishing (including the internet), audio visual, promotion or merchandising vehicles to even packaging as a vehicle of promotion. It does not clear or approve advertisements. It invites complaints from the consumers as well as intra industry complaints. The ASCI has been in existence for more than 16 years, but many consumers are unaware of the same.

The procedure for processing a complaint against an offending advertisement has been amended and implemented from December 1, 2000. The entire procedure of processing the complaints received by the ASCI is as follows:

1. When a complaint is received, the Secretariat of the ASCI passes on the entire complaint as it is received to the advertiser concerned in the form of an attachment to a letter seeking comments without revealing the identity of the complainant, within five working days of receipt of the complaint.

2. The advertiser will be given two weeks from the date of receipt of the letter from the ASCI.

3. In case the complaint appears to be frivolous on the face of it, then the Secretary General will, instead of sending the letters to the advertiser, refer the complaint to the Vice Chairman. If the Vice Chairman also feels that the complaint is frivolous, then the complaint will be put up at the next CCC meeting as it is. The CCC will direct further action.

4. After the comments are received, the complaint with all its supporting information and the comments of the advertiser or advertising agency complained against will be placed on the agenda for the next CCC meeting. A meeting of the CCC is held every month.

5. The ASCI will set up a panel of experts in areas wherein complaints are commonly received, so as to avail of expert technical opinion before the CCC takes a final decision.

6. If a complaint is upheld, the party complained against will be informed of the CCC decision within five days from when it was made. The complainant will not be informed immediately, leaving an interval of fifteen days during which time the ASCI will make

all efforts to seek compliance of the advertiser with the CCC decision and on receipt of this assurance, the complainant will be informed. In case the complaint is not upheld, then the complainant and the advertiser will be informed simultaneously.

7. In case a positive response is not received or compliance is not assured by the advertiser in case the complaint is upheld, then the Vice Chairman of the ASCI will write to the advertiser requesting their commitment for the same in two weeks. The concerned agency and media vehicle will also be informed that the advertisement contravenes the code. The Associations of Practitioners in Advertising will also be sent request letters from the Chairman of the ASCI to influence their constituents who are the parties complained against, to refrain from indulging in such advertisements.

5.2 Mission to Regulate Standards in Advertising

The main aim of the Advertising Standards Council of India is to maintain and enhance the public's confidence in advertising. Towards this objective, the ASCI seeks to ensure that advertisements confirm to its Code for Self Regulation in Advertising. The ASCI does all it can to ensure that the Code is propagated and to inculcate a sense of responsibility among advertisers, advertising agencies and others connected with the creation of advertising and the media to observe the said Code. It encourages the public to complain to it in case anyone finds a particular advertisement, in any medium, offensive. It also seeks to ensure that a prompt and objective consideration is given to each and every such complaint by an impartial committee. Finally, the ASCI endeavours to achieve compliance with its decisions through reasoned persuasion and the power of public opinion.

The specific self regulations that are of considerable importance are as follows:

1. The Codes of the Advertising Standards Council of India;

2. The norms of journalistic conduct regarding advertising evolved by the Press Council of India;

3. Code for Commercial Advertising on Doordarshan; and

4. All India Radio Code for Commercial Broadcasting.

5.2.1. The Code of the Advertising Standards Council of India

The Code for Self-regulation in Advertising has been 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 Nov 20th, 1985. It was amended later on in 1999. The object of the Code is to control the content of advertisements. It is not to hamper the sale of products which may be found to be offensive.

Definitions

- 'Advertisement' is a paid for communication, addressed to the public on a section of it, the purpose of which is to influence the options of 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 his definition even if it is carried free of charge for any reason.

- 'Product' is anything which forms the subject of an advertisement, and includes goods, services and facilities.

- 'Consumer' is any person or corporate body whose likely to be reached by an advertisement whether as an ultimate consumer, in the way of trade or otherwise.

- 'Advertiser' is anybody, including an individual or partnership or corporate body or association, on whose belief that element is designed and on whose account advertisement is released.

- 'Advertising agency' includes all individuals, partnerships, corporate bodies or associations, who or which work for planning, research, creation of placement of advertisements for the creation of material for advertisements for advertisers or for other advertising agencies.

- 'Media owners' being glued individuals in effective control of the management of media of their agents; media are any means used for the propagation of advertisements and includes press, cinema, radio, television, hoardings, hand bills, direct mail, posters, intranet, etc.

- 'minors' are defined as persons were below the age of 18 years

- '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.

- 'Publish' means to carry the advertisement in any media whether it be by printing, exhibiting, broadcasting, displaying, distributing, etc.

5.2.2. Declaration of fundamental principles

This code has been drawn up by people in professions and industries in or connected with advertising along with representatives of people affected by advertising. The basic objectives of the code are as follows:

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 or harmful to society or to individuals, particularly minors, to a degree or of a type which is unacceptable to society at large.
4. To ensure that advertisements observe fairness in competition such that the consumer's need to be informed on choice in the marketplace and the canons of generally accepted competitive behaviour in business are both served.

I. SAFEGUARDS AGAINST MISREPRESENTATIONS AND MISLEADING ADVERTISEMENTS

The Chapter 1 of this code is aimed to ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard the people against misleading advertisements.

1. Advertisements must be truthful. All descriptions, claims and comparisons which relate to matters of objectively acceptable fact should be capable of substantiation. Advertisers in advertising agencies are required to produce such substantiation as a man 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 these 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 to ridicule or disrepute. If any event required to do so by the Advertising Standards Council of India, the advertiser and advertising agency shall produce explicit permission from the person, firm or institution to which reference is made in the advertisement.

4. Advertisements shall not 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 advertisements shall be permitted to contain any claims so exaggerated as to lead to grave or widespread disappointment

in the minds of consumers.

For example

(a) products are not be described as free when 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 "up to five years guarantee" or "prices from as low as Rs. Y" are not acceptable if there is 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 prudunt 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 amorisation; where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumptions must be clearly indicated in the advertisement.

(f) advertisements inviting the public to take part in lotteries or price competitions permitted under law or which hold out the prospect of gifts shall state clearly all material conditions as to enable the consumer to octane at true and fare view of their prospects in such activity. Further, such advertisers shall make adequate provisions for the judging of such competitions, announcement of the results and the fair distribution of prices of 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 until this section of the code is discharged adequately if the advertiser publicises 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 court 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.

II. TO ENSURE STANDARDS OF PUBLIC DECENCY

The objective of Chapter II is to ensure that advertisements are not offensive to generally accepted standards of public decency.

Advertisement 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.

III. NO PROMOTION OF HAZARDOUS THINGS

The Chapter III of the code is designed to safeguard against the indiscriminate use of advertising for 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 advertisements shall be permitted which:

    a. tends to incite people to crime or to promote disorders and violence or intolerance
    b. the rates in the 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 on 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 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. Advertising and shall not, without justifiable reason, show or refer to dangerous practices or manifest a disregard for safety or encourage negligence.
4. Advertisement should contain nothing which is in breach of the law not 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 a purporting to be advertisements for other products they 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 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 their advertising in question, the media used and the markets targeted.
    b. Whether there exist in the advertisement under complaint any direct or indirect clues on 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 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.

IV. Fairness in Competition

The Chapter IV aims to ensure that advertisements observe fairness in competition such that the consumer's need to be informed on choice in the marketplace 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 goods 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 the subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or to suggest that a better bargain is offered than is truly the case.
b. The comparisons are factual, accurate and capable of substantiation.
c. There is not likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.
d. The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.
e. Advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take undue advantage of the goodwill attached to the trademark 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 lost within 12 months of the first general circulation of the advertisements/campaign complaint against.
b. the complaint provides substantiation regarding the claim of prior invention/usage abroad.

Standards of conduct

The success of advertising depends on public confidence. Therefore no practice should be permitted which tends to impair this confidence. The ASCI's Code for Self-regulation in Advertising are to 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' suggests allowed have for susceptibilities.

5.3. Drugs and Cosmetics Act, 1940

This Act prohibits the use by an advertiser of the use of a report made by the Central Drugs Laboratory or by a Government Analyst for the purpose of advertising and imposes a fine of up to five hundred rupees for the contravention of the same.[206]

In *Dharam Deo Gupta v. State of Uttar Pradesh*[207] the word 'false' in section 17 means forged. Where a label attached to the goods declared that a particular firm X was the manufacturer of those goods, whereas in reality, the actual manufacturer is another firm Y, then the goods will be held to be misbranded as they have the tendency to mislead the buyer of the drug or the cosmetic.

5.4. Young Persons (Harmful Publications) Act, 1956

The Advertisements cannot contain any undue details of criminals and crimes. The law prohibits glorification of criminals. The Young Persons(Harmful Publications) Act, 1956 provides a penalty for a person who sells, lets on hire, distributes publicly, exhibits or in any manner puts into circulation any harmful publication or for purposes of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in possession any harmful publication; or advertises or makes known by any means whatsoever, that any harmful publication can be procured from or through any person. A wide meaning is given to 'advertises' whereby any means of advertising is prohibited under this Act.

In Narayanan v. State of Kerala[208] the case involving Section 3 (1) of the YPHP Act, 1956 and Section 292 (a) of the Indian Penal Code the question before the High Court of Kerala was whether the proprietor and manager of a printing press, who did not have anything to do with the writing, editing and circulation of certain obscene literature can be convicted under the above provisions. The Court held that the printing press only printed the bi weekly magazine concerned, and it amounted to job work. The person who is responsible

[206] Section 29 of the Drugs and Cosmetics Act, 1940.
[207] AIR 1958 All 865.
[208] 1970 Kerala Law Times 605

for the editing, sale, distribution etc. is the editor. The other important aspect to be noted here is the absence of mens rea (guilty mind) of the proprietor and manager of the printing press. Therefore, it was held that the above persons could not be tried under the said provisions of Act.

This act is levelled against 'horror comics' and penalises the advertisement, sale, distribution, circulation etc of 'harmful publications' which mean any publication which consists of stories, with or without the addition of any written matter, portraying a commission of crimes; or acts of violence or cruelty; or incidents of a repulsive nature, in such a way that the work as a whole would tend to corrupt a child or young person in whose hands it might fall (whether by inciting or encouraging him to commit crimes of violence or cruelty or in any other way whatsoever) It provides for punishment of imprisonment which may extend to six months, or with fine, or with both [Section 3]. The reason is that the dissemination of such publications is likely to encourage anti-social tendencies among the children, according to statement of objects and reasons of this Act. On a conviction for such offence, the Court may order the destruction of the offending publication [Section 3(2)] Section 3(1)(c) specifically says that the advertisement about procurement of harmful publication from or through any person, is a punishable offence.

This Act also empowers the state government to forfeit every copy of a harmful publication in the manner laid down under section 4, and the police to search, seize and destroy harmful publication, in the manner provided in Section 6. Offences under this law are cognizable offences (Section 7)

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

This Act prohibits improper use of national emblems and names for promotion of products or for commercial advertisements. The names like Shivaji, Mahatma Gandhi, Tricolour national flag, buildings like Rashtrapathi Bhawan or Rajbhawan cannot be used as part of the design of the advertisement in an improper way. The Act imposes a penalty up to Rs 500 for such an improper use.[209]

Sable Waghire & Co v. Union of India[210]*:* Section 3 of the Act provides that the existing businesses are given certain period by the Government so that they can alter their emblems, designs, names etc so that they can carry on their trade. The provision is a built in safeguard to mitigate any hardship that may arise from the rigour of the law. The provisions impose only a reasonable restriction on Article 19 (1) (f) and (g).

Emblem means any emblem, seal, flag, insignia, coat-of-arms or pictorial representation specified in the Schedule: The Schedule contains the following emblems:

[209] Sections 3 and 5 of The Emblems and Names (Prevention of Improper Use) Act, 1950:
[210] AIR 1975 SC 1172.

1. Name, Emblem, or official seal of United Nations of Organization,
2. World Health Organization,
3. UNESCO,
4. the Indian National Flag,
5. the name and emblem or official seal of the Government of India or any State Government or any of its department,
6. the emblems of the St John Ambulance Association of India,
7. President, Governor, Sadr-i-Riyasat or Republic of Union of India,
8. any name suggest or be calculated to suggest the patronage of the Government of India or State Government,
9. connection with any local authority or any corporation or body constituted by the Government,
10. pictorial representation of Rashtrapathi, Rashtra Bhavan, Raj Bhavan,
11. Shivaji Maharaj or Mahatma Gandhi or the Prime Minister of India, (except the pictorial use thereof on calendars where only the name of the manufacturers and printers of the calendars are given and the calendars are not used for advertising goods)
12. The medals, badges or decorations instituted by the Government from time to time or the miniatures or replicas of such medals, badges or decorations (or names of such medals, badges or decorations or of the miniatures or replicas thereof)
13. The name emblem or official seal of the International Civil Aviation Organization.
14. The word ‘interpol’ which is an integral part of the international criminal police organization.
15. The name emblem or official seal of the World Meteorological Organization
16. The name and emblem of the Tuberculosis Association of India
17. The name emblem and official seal of the International Atomic Energy Agency
18. The names, ‘Ashok Chakra’ or ‘Dharma Chakra’ or the pictorial representation of Ashok Chakra as used in the Indian National Flag or in the official seal or emblem of the Government of India or State Government or of a Department of any such Government.

5.6. The Prevention of Insults to National Honour Act, 1971

This Act penalises the insult to Indian National Flag and Constitution of India. Section 2 provides for imprisonment upto three years or with fine or with both for person who ever in any public place burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words either spoken or written or by acts) the Indian National Flag or the Constitution of India or any part thereof. Section 3 punishes whoever intentionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing with imprisonment for a term which may extend to three years or with fine or with both.

Any advertisement or publication should not depict the national flag or constitution in a distorted way, as that would attract the penal provisions of this Act.

5.7. The Prevention of Food Adulteration Act, 1954

Under Section 2(i) (a) the Act has defined the term 'adulterated'. It also provides that an article of food can be said to purport to be of a particular nature, substance or quality when it is advertised as being so in various media. If the article sold is not what it purports to be, then the seller thereof would be guilty even though no standard of purity has been prescribed under the Rules.

When there is a signboard or advertisement indicating a particular commodity being of a certain nature, substance or quality, the seller thereof would be guilty even though no standard of purity has been prescribed under the Rules[211].

5.8. The Juvenile Justice (Care and Protection of Children) Act, 2000

Section 21 of this Act provides that (1) no report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any picture of any such juvenile be published;

Provided that for reasons to be recorded in writing the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile. (2) Any person contravening of provisions of subsection(1) shall be punishable with fine which may extend to one thousand rupees.

[211] 1976 Criminal Law Journal 1302.

5.9. Advertisements and Law of Civil Wrongs (Torts)

Any advertiser will be generally liable for various kinds of civil wrongs like negligence, passing off, misrepresentation defamation and fraud etc. The uncodified law of torts or civil wrongs continues to be a strong regulation that threatens the irresponsible advertisements.

5.10 Negligence

The virtually universal immunity of publishers and broadcasters from liability for acts done by believing negligently false statements appearing in the media is based on fundamental common-law principles supported by constitutional free-speech and free-press concerns.[212]

According to Common law, there are four essential conditions to be satisfied for attributing liability for negligence. They are:

(1) A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks;

(2) A failure on the person's part to conform to the standard required: a breach of the duty ;

(3) A reasonably close causal connection between the conduct and the resulting injury (or proximate cause); an

(4) Actual loss or damage resulting to the interests of another.[213]

This rule has been broadened. One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[214]

Proximate cause has been limited to information provided:

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply the information or knows that the recipient intends to supply it; and

[212] http://www.lexis.com/research/buttonLink?_m=48bb169b238bfcd15760fddfc1b57e71&_xfercite=<cite cc="USA"
[213] Prosser and Keeton, Torts, (5th ed., 1984), § 30, p. 1641-65.
[214] http://www.lexis.com/research/buttonLink?_m=48bb169b238bfcd15760fddfc1b57e71&_xfercite=<cite cc="USA"

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions it is intended to protect them.

Today, even the media can be held responsible. In case an advertisement is found to be tortuous, then liability is upon the concerned advertising agency (for placing the advertisement), the advertiser (for supplying the information) and the media (for printing/ publishing the advertisement). But there are defenses available to the above mentioned parties. Generally, the media owners have a contract with the each advertising agency to indemnify them in case of any legal action arising out of the publication of any advertisement placed by that agency. This is because the general principles of the law of contract will apply and if damages are awarded by the court, the indemnifier will pay the damages. The agency may also recover the same amount from the advertiser, in case it has a similar contract of indemnity with the advertiser.

The tort of disparagement or trade libel is concerned with the injurious falsehood of speech. Although the common-law requirements make a disparagement tort claim generally more difficult to establish than one under the defamation torts, the disparagement theory is increasingly being used, in lieu of or in addition to a defamation claim, as a remedy against allegedly false statements, whether the statements are commercial in nature or otherwise.

5.10.2. Passing off

Passing off is a kind of tort[215]. "No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device, or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer". It is an actionable wrong for any person to pass off his goods or business as and for the goods or business of another person by whatever means that result may be achieved. It is applied to many forms of unfair competition where the activities of one person cause damage or injury to the goodwill associated with the activities of another person.

The essential characteristic which must be present in order to create a valid cause of action for passing off has been stated by Lord Diplock in *Erven Warnink v. Townend (Advocate)*[216] as follows:

[215] Tort is a civil wrong for which the remedy is an action for damages.
[216] (1980) RPC 31 at 93 (HL)

1. Misrepresentation.

2. Made by a person in the course of trade,

3. To prospective customers of his or ultimate customers of goods or services supplied by him,

4. Which is calculated to injure the business or goodwill of another trader,

5. Which causes actual damage to a business or goodwill of the trader by whom the action is brought in or will probably do so.

Remedies

Remedies in a passing off action include an injunction, damages or an account of profits and delivery-up of the offending article for erasure or destruction.

5.10.3 Colourable Imitation

Colourable imitation is another form of infringement of patented tool or machine. In this type of infringement a person may make slight difference in the appearance of his article though he really used the same essential features of the patent. The infringement by imitation is also common with regard to trademarks where the infringer may change some small feature and present as if it is the registered trademark. An innocent third party like a printer of labels who facilitate a passing off without actual knowledge may be liable for negligence but a person who receives such orders in the ordinary course of trade is not to be expected to institute enquiries about the lawfulness of use.

In case of comparative advertisements, if there is a misrepresentation of the product advertised leading to a confusion in the market and eventual damage, this is an action for the tort of passing off. It is a common law remedy for unregistered trade marks and general misrepresentation where there is no other remedy. Lord Diplock, in *Warninck v. Townend*[217] laid down five characteristics necessary to launch a valid passing off action. These are:

a. a misrepresentation;

b. made by a trader in course of trade;

c. to prospective customers of his or ultimate customers of goods and services supplied by him;

[217] [1979] AC 731.

d. which is calculated to injure the business or goodwill of another trader (there should be a reasonable foreseeability with regard to this); and

e. which causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so.

Nourse L.J. in ***Consorzio del Prosciutto di Parma v. Marks & Spencer plc and others***[218] refined the above characteristics into the classical trinity of:

a. a reputation or goodwill acquired by the plaintiff in his goods, name, mark etc.;

b. a misrepresentation by the defendant leading to confusion or deception; causing

c. damage to the plaintiff.

In ***Associated Newspapers Group plc v. Insert Media Ltd and Others***[219], the plaintiff was a magazine publisher who brought a suit to prevent the defendant from unauthorized insertion of advertising pamphlets between the pages of the magazines. The court held that such insertion would be a misrepresentation that they were authorized by the publishers. Hence the action for passing off was upheld.

The common law remedies for passing off are damages, an inquiry into established loss, an account of the defendant's profits, an order for delivery up or destruction of the infringing articles and injunctive relief.

Passing off has a degree of relevance with comparative advertising. In McDonald's ***Hamburgers Ltd. v. Burger King (U.K.) Limited***,[220] the defendants advertised their burgers with the slogan "It's Not Just Big, Mac". The burger of McDonald's are popular as Big Mac. The advertisement resorted to comparison of the defendant's product with that of the plaintiff. The main allegation in the suit was that the consumers, upon reading that advertisement would mistakenly associate Big Macs at the defendant's place of business, and therefore, an injunction should be granted against the offending advertisement. The court agreed with the plaintiff.

In such actions, the reasonable man test is employed. In case the reasonable consumer would not be confused as regards the origin of each product in a comparative advertisement, no action of passing off would lie.[221]

[218] [1991] RPC 351.
[219] [1991] FSR 380.
[220] [1986] FSR 45.
[221] For instance, Ciba Geigy Plc v. Parke Davis & Co Ltd., [1994] FSR 8.

5.10.4. Puffery

Puffery may be defined as a legal exaggeration of praise lavished on a product that stops just short of deception. A number of advertisements in the market today are not offers, but are 'mere puffs'.[222] An advertisement amounts to puffery when the description of the product or service given by the advertisement is a mere opinion which cannot be legally binding, taking into consideration the intention of the advertisement. Puffery, therefore, is a form of opinion statement, and considered unreliable. Claims that are mere exaggerations or "hyperbole"[223] were considered to be puffery, and therefore not deceptive.

It is difficult to draw the line between a misrepresentation and a puff. In the case of ***Carlyll v. Carbolic Smoke Ball Company***[224] the defendant issued an advertisement that its smoke balls have the effect of preventing influenza and offered to pay 100 Pounds to anyone who volunteered to inhale the smoke balls and in spite of that contracted influenza. The advertisement also contained a statement that the requisite amount has been deposited with the Alliance Bank, Regent Street, showing their sincerity in the matter. The plaintiff was successful in the suit. The court felt that a reasonable man would take the statement as a representation demonstrating a clear intention by the company to abide by its promise. Therefore, the company could not get away by claiming that it never intended to pay. In ***Dimmock v. Hallett***,[225] useless land was described as very fertile and improvable. The court looked at the intention behind this description and held that it is a flourishing description by the auctioneer, who gave the description, and as such amounted to a puff.

The perception of a reasonable man has changed over the years. The outlook of the reasonable man has relaxed. Today, an opinion given in an advertisement cannot be legally binding. To put it more clearly, some statements of opinion are mere puffs. Others, while more specific, yet have no legal effect as they are not positive assertions of fact but only statements of opinion or belief.[226] Terms like "the best" or "the greatest" were sales talk. Thus for example, an advertisement slogan which says "probably the best beer in the world" is not legally binding and amounts only to puffery and "The Greatest Show on Earth" is not what everyone considers the greatest. Puffery claims are those which (1) reasonable people do not believe to be true product qualities, and (2) are incapable of being proved either true or false. Such claims can be neither false nor can they create belief. It is not always clear whether a statement contained in an advertisement is a factual one or one of opinion. In case the maker of the statement has some particular qualification or experience relevant to the representation, then it is more likely that it is a statement of fact, which is legally binding.[227]

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[222] Advertising Law, The College of Law, London, p. 204.
[223] http://advertising.utexas.edu/research/biblio/index.html
[224] [1893] 1 QB 256.
[225] (1866) 2 ChD 21.
[226] Trietel, Law of Contracts, 6th ed.
[227] Esso Petroleum v. Mardon, [1976] QB 801.

Recently a tobacco company was made liable to pay 28 billion dollars for misleading the people with wrongful advertisement. According to a report from Los Angles in The Hindu dated 6th October 2002, a Los Angeles Country Superior Court jury awarded a staggering $ 28 billion in punitive damages on Friday to a smoker with lung cancer who had accused Philip Morris Inc. of luring her into a life-long tobacco habit with fraudulent advertising and marketing. The news item also states: The award, to Betty Bullock (64) of Newport Beach, was by far the largest punitive damage amount ever granted an individual plaintiff in a smoking case.

This is not just a single case. There are several instances of imposition of liability for misleading advertisements. The Los Angeles Report stated that "The previous record, $ 3 billion, was won in a California court last year by the same lawyer, Michael Piuze, who represented Ms. Bullock. In September, the jury awarded Ms Bullock $750,000 in economic damages and $100,000 for pain and suffering".

At a news conference after the jury's decision, Mr.Piuze said the jury had seen company documents that he said proved that Philip Morris had engaged in a 50-year conspiracy to hide the harmful effects of its products. "Having seen those documents," Mr. Piuze said, "the jury was properly horrified and did exactly the right thing." He said he expected that Ms. Bullock, who is in the final stages of cancer, would "never see a penny" of the damage award. But he said he was gratified to have defeated Philip Morris, which along with other cigarette makers, has suffered a string of court losses. "They are starting to lose, and the'are starting to lose big time," he said, as per the report in The Hindu.

Philip Morris quickly announced that it would ask the court to reverse the jury's verdict and order a new trial. If the request for a new trial is denied, the company said, it will appeal the verdict to the California Court of Appeals. "The jury should have focused on what the plaintiff knew about the health risks of smoking," said William S. Ohlemeyer, Vice-president and associate general counsel at Philip Morris. "And whether anything the company ever said or did improperly influenced her decision to smoke or not to quit. Instead, it appears that this decision speaks to more general policy issues regarding smoking that can't fairly be decided in law suits like this." The tobacco industry has been hit with a number of huge damage awards in the past several years, but most have been reduced on appeal. The $3 billion won by Mr.Piuze's other client, Richard Boeken, a former heroin addict with cancer who died earlier this year, was reduced to $100 million. Philip Morris complained in a statement that the jury's punitive damage award was 33,000 times greater than its compensatory damage award, far in excess of previous awards in similar cases. The U.S. Supreme Court has suggested that punitive damages should be a much smaller multiple of compensatory damages, perhaps 4-to-1, but it has not issued strict guidelines. Ms. Bullock started smoking when she was 17, and continued despite repeated requests by members of her family that she quit. Mr. Piuze argued at trial that Philip Morris had concealed the dangers of cigarette

smoking with a campaign of lies that began in the 1950s. The "NEW YORK TIMES" was quoted as source by the Hindu.

5.11. Intellectual Property Rights (PR & IPR)

The expression "Intellectual Property" is of recent origin. This term communicates the rights regarding five basic intellectual properties namely (I) Trade Secret, (ii) Patent, (iii) Copy Right, (iv) Trade Mark and (v) Mask work dealing with the design for element of semiconductor chip. IPR law is basically a municipal law[228] (Law of the Country). Later it became a significant subject of international law, which is now comprehended by several multi-lateral international conventions. Intellectual property is totally different from 'real property'. The difference is because of the certainty of the value of IPR and the method and manner of the economic exploitation of the IPR. This property is of many forms- patents, industrial designs, copyrights, trademarks, know-how and confidential information. These can be stolen or pirated or misappropriated in a serious way than ordinary moveable or immovable property. Intellectual property is intangible or incorporeal. It is a product of human intellect. Copying it is an international problem with wider ramifications. Advertisers using the information copyrighted are supposed to be cautious about the implications.

The intellectual property rights law has now taken deep roots in the international arena. International community took initiative to achieve uniformity as to the nature of rights combined enforceability and sanctions for breaches thereof. Several international conventions including Berne Convention of 1986 afforded international protection for literary and artistic works.

The Rome Convention 1961 provided for the protection of performers, producers and phonograms and broadcasting organizations. The Paris Convention 1967 provided the protection of Industrial property taking in its ambit not only in industry and commerce, but agricultural and agricultural based industries manufacturing wines, grains, tobacco, fruits, cattle, minerals etc. The Berne Convention 1971 for "Protection Literary and Artistic works. The Treaty on Intellectual Property was in respect of Integrated Circuits 1989. World Intellectual Property Organization was established by a Convention on 14-7-1967. Its purpose is to promote the intellectual property throughout the world cooperating with Paris Union 1883 and Berne Union 1886. WIPO has a membership of 157. India is a signatory to Berne Convention 1886 and Universal Copyright Convention of Geneva 1952. India has promulgated the International Copyright Order 1958 in exercise of powers conferred by Sec. 40 of Copyright Act, 1957, which is now replaced by International Copyright Order 1991. It provides for same protection to the citizens of foreign Member State as its own nationals. Under this order the signatories to the Berne Convention and Universal Copyright Convention (Geneva) and their nationals get protection. Patents and trademarks registered

[228] There are two kinds of Law, International Law and Municipal Law which means the Law of the Country

outside India are recognized and enforced and protected if they have acquired international reputation and goodwill. The Courts in India have extended the principle of passing off, colourable imitation and unfair trade competition to stop the infringement of foreign registered trademark or patent. The Trade Related Aspects on Intellectual Property Rights (TRIPS) incorporated not only the substantive and adjective law (procedural law) but also Alternative Dispute Resolution. India is a signatory to the TRIPS Agreement; it will come into force with effect from 1st January 2001, as per the agreement.

5.11.1. The Patents Act 1970

First Indian law on Patents was enacted in 1856 for grant of exclusive privileges of inventor. This was replaced by another Act in 1859. The Inventions and Designs Act 1888 was made to enable the Governor General in Council to register the inventions and designs, giving monopoly right to inventor or the author of the design. It was replaced by Designs Act of 1911, which adopted the provisions of Patents and Designs Act 1907 of United Kingdom. This law provided for registration of designs and legal proceedings in case of piracy or imitation of the design. Indian Patents and Designs Act was replaced by Patents Act of 1970. Earlier Copy Right Act was passed in 1957 and Trade and Merchandise Marks Act in 1958.

Thus The Designs Act, 1911, The Copy Right Act, 1957, The Trade & Merchandise Act, 1958 and The Patents Act, 1970 provided for civil remedies for economic and commercial exploitation of the Intellectual Property Rights, the enforcement of these rights and remedies available against infringement.

In case of patents for new inventions the patentee gets the exclusive right to manufacture the product patented or to use the process patented for a maximum period of 14 years. But in case of drugs and food the exclusive right accrues for a much shorter period of 7 years. After the expiry of the term of patent, the invention becomes public property and any person can freely use it. For an industrial design registered in the Designs Act the registered owner of the design gets the exclusive right to apply the design to the article covered by registration for a maximum period of 15 years (5 years at a time).

5.11.2. The Copyright Act 1957

The author of a copy right in literary, dramatic, musical or artistic work gets exclusive right to commercially exploit the work during his life time and thereafter for another period of 50 years. In regard to works like cinematography films and music records the copyright protection is limited to 60 years from the year of publication[229]. Literary work is defined to include computer programmes, tables and compilations including computer databases. In 1994 some more amendments were carried out in the Copyright Act, 1957 to fulfill the

[229] The period of protection was increased from 50 to 60 years by an amendment in 1992

criteria set out in TRIPS. The international community is now asking for protection to computer programmes also under the copyright regime.

In ***Associated Publishers v. K. Bhashya***[230] the High Court of Madras held in this case that it is not original skill or labour in execution and not originality of thought which is required. The plaintiff expended his labour and skill in producing a portrait of Mahatma Gandhi by a combination of parts of two other photographs of the Mahatma in a new way so as to produce a different result. Thus the plaintiff is entitled to a copyright in the picture prepared by him.

There can be copyright in a material object but not in an idea. The purpose of the copyright is not to create a monopoly in respect of ideas but the purpose is only to extend protection to the authors and artists in the field of literature and fine arts. What is sought to be achieved is to protect the author and artist from an unlawful reproduction of his works and exploitation of his art by others. What is frowned at is privacy of "ideas" of the author or artist[231].

If there is intellectual contribution by two or more persons pursuant to a preconcerted joint design, to a composition of a literary work, then those persons have to be regarded as joint authors[232].

In ***Mishra Bandhu Karyalaya v. S L Kaushal***,[233] it was observed that the laws of copyright do not protect ideas, but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The compiler of a work in which absolute originality is of necessity, is entitled without exposing himself to a charge of piracy, to make use of preceding works upon the subject, when he bestows such mental labour upon what he has taken and subjects it to such revision and correction as to produce an original result. The question is whether there has been any infringement of copyright depends on whether a colourable imitation has been made. Whether the work complained of is or is not a colourable imitation of another, is essentially a question of fact and the burden of proving that fact undoubtedly is on the person accepting it.

In ***Maulvi Omar Ali v. J.N.Mishra***,[234] it was held that if a defendant who is undoubtedly at liberty to draw upon common sources of information, saved himself the trouble and labour requisite for collecting that information by adopting the plaintiff's work in general plan, style and arrangement with colourable variation, he is guilty of infringement of plaintiffs copyright even though the plaintiff's work is based on materials which are common property.

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[230] AIR 1961, Mad 116.
[231] (1976 17 Guj Law Reporter 338)
[232] (1988 36 Delhi Law Times 31).
[233] AIR 1970 MP 261 (DB)
[234] (1995) 61 Cal LJ 573 (DB)

The intellectual property in a design or trademark can be acquired by registration under Designs Act and Trademarks Act respectively. But there is no such requirement for copyright. Registration for copyright is not necessary under that statute. Copyright subsists as soon as the work comes into existence and is published.

Like copyright all other intellectual property rights are negative rights. That means that the IPR is the right to prevent others and competitors from commercially exploiting the IPR to the detriment of the owner of the intellectual property. However, a licensee who acquired the right to commercially exploit the IPR by paying a consideration makes substantial benefit under this law. A patentee may as well assign his rights or licenses them to an entrepreneur, for a one-time lump sum payment or for the payment of royalty. The registered design can also be similarly exploited. The commercial exploitation and registered trademark, however is not permissible unless the licensee is registered as the actual user because unfettered licensing of trademark in the same manner as that of design, copyright or patent would destroy the property rights in the trade mark. This is the important difference between other IPRs and trademarks.

In Walter v. Lane, 1900 Appeal Cases 539 it was held that the "Copyright is, no doubt, the sole right to reproduce a work which is capable of being the subject of copyright protection or any substantial part hereof, in any material form whatsoever. Reporter of a speech delivered in public is the author of his own reports.

Copyright in Advertising catalogue

Grace. v. Newman[235],; *Hotten v. Arthur* IH & M 603 followed: 'A person employing another to compile a book of designs has himself the copyright in the work. Copyright may subsist in an advertising catalogue'.

In ***Maple and Co.v.Junior Army and Navy Stores***[236], it was held that the illustrated catalogue for advertisement and not for sale is a book and subject matter of copyright.

Copyright in Headings of Ads

In ***Lamb v. Ewans***[237], it was held: 'A publisher of trade advertisements classified under different headings has copyright in such headings though not in the advertisements themselves'.

[235] (1875) 19 E of 623
[236] (1882) 21 Ch. D 369
[237] (1893) 1 Ch.. 218(225)

Patents give temporary protection to technological inventions. Patent protection though limited in point of time, grants absolute protection preventing others from arriving at the same result by independent means by using the same method described in specifications.

Invention has been defined by this Act to mean any new and useful (I) Article, process, method or manner of manufacture; (ii) machine, apparatus or other article; (iii) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.[238]

Some inventions cannot be patented. The inventions contrary to law and morality, inventions, which are frivolous, mathematical formula of abstract theory, living organisms, the method of agriculture and horticulture and food and drugs per se, besides inventions relating to atomic energy cannot be patented.[239]

The IPRs are enforced by an action for infringement of those rights before the District Court or High Court. Criminal prosecution also can be launched in respect of piracy of trademark and copyright. As per section 108 of the Patents Act, 1970 and Section 106 of the Trademarks Act, 1958, the competent court namely the District Court can grant the relief of injunction, or at the option of the plaintiff relief of damages or an account of profits. In the case of trademarks the court can further order for delivering up of infringing labels and marks for destruction or for erasing. A suit for passing off and or colourable imitation and the suit for grant of relief in the case of baseless threats of infringement proceedings are the main legal actions. Most common and important remedy is grant of injunction. All the three Acts, Copyright Act, Patents Act, Designs Act specifically provide for the grant of injunctions preventing the infringements.[240]

A complaint for the offence of infringement of the copyright may be made by the owner of the copyright. In the case of joint authors any one of them can make the complaint, without joining the other co-author, because the right of a joint author it bring an action or other proceeding is 'individual' (s.56)

Infringement of a copyright is not only a civil wrong for which a suit lies but also a statutory offence which is punishable under s. 63.Section 62 specifically deals with the jurisdiction for a civil proceedings vested exclusively in the 'district court'. For a criminal complaint provisions of Code of Criminal procedure will apply. Under Section 64 the police have power to seize infringing copies. Owner of the copyright can file the suit for a civil remedy, which is either an injunction to restrain the infringement before the mischief is done by publication or circulation, or for damages.

[238] Section 2(1)(j) of Patents Act, 1970
[239] Section 3, Patents Act, 1970
[240] Section 108 of Patents Act,1970, Section 106 of Trade Marks Act, 1958 and Section 55 of Copyright Act, 1957

Defences: The general defenses available in an action for infringement of IPR are:

(a) implied consent to use the trademark acquiescence,

(b) plea of honest on concurrent user and

(c) denial of any monopoly in the IPR, and

(d) plea of assignment in case of copyright[241].

5.11.3. Trade marks Act, 1999

The law relating to trademarks was codified first in the Trade and Merchandise Marks Act, 1958. It has been replaced by the Trade Marks Act in 1999. Section 78 of the Trade and Merchandise marks Act, 1958 provides that it is an offence of trade or business to apply false trade description to any goods or to supply and offer to supply goods to which false trade description to a material extent is applied. Any advertisement with false trade description to a material extent is an offence under this Act.

Trade mark & copyright

There was a warning to Advertisers in the case of *Grant v. Kelloggs Co.*[242], popularly known as "snap, crackle and pop" case. From 1932 to 1939, Lernon Grant, a well know commercial artist whose foray was portrayal of fairy folk did a long series of drawings for advertising Rice Krispies, marketed by the Kelllogg Co. The entire agreement with the artist was oral. There was apparently no arrangement between Grant and Kellogg Company Directors concerning the title of the art work done by Grant. The figures were popular as Snap, Crackle and Pop. After Grant & Kellogs parted company Kellogg continued using figures on their products and for their advertisements. Grant brought suit claiming that Kelloggs could not continue using drawing as he retained all artistic property rights in them.

The court held in favour of defendants; it observed: "If in the transfer there was any limitation for the benefit of the plaintiff that limitation, restriction or reservation, whatever it may be called, must have been clearly expressed. Otherwise it will not be presumed." Since Grant had not reserved any rights in the drawing, Kellogg owned them without restriction and could continue to use them.

5.11.4. Art work as valuable advertising property

The above case warns the advertiser to protect his art work as valuable property through written agreements to avoid any possible avoidable litigation. In *Grace v. Newman*[243], *Hotten*

[241] Power Control Appliances v. Sumeet Machine (1994) 2 SCC 499
[242] 58F Supp 48
[243] (1875) 19 E of 623

v. Arthur[244], the judgement was followed. Though the case ended in a victory for the advertiser, it was a warning to the advertiser to protect art work which may develop into a valuable advertising property. A person employing another to compile a book of designs has himself the copyright in the work. A person employing another to compile a book of designs has himself the copyright in the work. Copyright may subsist in an advertising catalogue.

Walter v. Lane[245], Copyright is, no doubt, the sole right to reproduce a work which is capable of being the subject of copyright protection or any substantial part hereof, in any material form whatsoever. Reporter of a speech delivered in public is the author of his own reports.

The Copyright may subsist in an advertising catalogue. In *Maple and Co. v. Junior Army and Navy Stores*[246], it was held that an illustrated catalogue for advertisement and not for sale was a book and subject matter of copyright.

In *Lamb v. Ewans*[247], it was held that the publisher of trade advertisements classified under different headings had copyright in such headings though not in the advertisements themselves.

5.12. Representation of People Act, 1951

This Act prohibits pre-election malpractice and corrupt practices which wrongfully influence the voters' minds. There are several restrictions on propaganda and advertisements.

5.12. 1 No Election Propaganda before Polling

This Act mandates that public meetings are prohibited during the period of forty eight hours ending with the hour fixed for the conclusion of the poll.[248] In this context, it also prevents the display or propagation of any election matter. Anyone contravening the mandatory provisions set out above shall be punishable with imprisonment for a term which may extend to two years or with fine or with both. There are also other provisions like section 127A which places restrictions on the printing of pamphlets, posters etc. by mandating that the names and addresses of the publishers or printers thereof are printed on the face of the pamphlet.

Only exceptions are the announcements of the date, time, place or other particulars of the election to be held; and routine instructions to election agents and workers.

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[244] IH & M 603
[245] 1900 Appeal Cases 539
[246] (1882) 21 Ch. D 369
[247] (1893) 1 Ch. 218 (225)
[248] Section 126 of the Representation of People Act, 1951.

Any Advertisement or poster or bill containing an appeal by a candidate or his agent to vote or refrain from voting for any person on the ground of his religion, race or caste community or language or the use of, or appeal to, religious symbols or the use of, or appeal to, national symbols, such as national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate is a corrupt practice in elections. [Section 123 (3)]

5.12.2. Promoting enmity

The promotion of, or attempts to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language, or by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospect of the election of that candidate or for prejudicially affecting the election of any candidate is a corrupt practice [Section 123(3A)]

Any other person promoting enmity between different classes of people in elections is an offence under Section 125 of Representation of People's Act. While Subsection 123 (3A) defines the corrupt practice of promoting enmity by the candidate or his agent, Section 125 talks about the promoting enmity by any other person during election to punish with the imprisonment which may extend up to 3 years or fine or with both.

5.12.3. Publishing False Statement

The publication of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election is a corrupt practice according to Representation of People's Act.

5.13. Accident Causing Advertisements: Motor Vehicles Act, 1988

There shall not be any advertisement of hoarding which distract the attention or concentration of the driver on the road. Motor Vehicle Act gives power to police officers to remove the Accident causing advertisements.

A State Government may, by notification in the Official Gazette, empower any police officer not below the rank of a Superintendent of Police to remove or cause to be removed any sign or advertisement which is in his opinion so similar in appearance to a traffic sign as to be misleading, or which, in his opinion, is likely to distract the attention or concentration of the driver.

5.14. Deposit Soliciting Advertisements Prohibited: National Housing Bank Act, 1987

This bank is prohibited soliciting deposits by advertisements. Section 35 prohibits soliciting of deposits by unauthorized persons. According to it, a person can solicit deposits of money on behalf of the housing finance institution either by publishing or causing to be published any prospectus or advertisement or in any other manner only if he has been authorized in writing by the said housing finance institution to do so and specifies the name of the institution which has so authorized him; and the prospectus or advertisement complies with any order made by the National Housing bank under section 30 and with any other provision of law for the time being in force applicable to the publication of such prospectus or advertisement.

5.15. No Advertisements on Sex Determination Facilities; Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

This law is passed to prevent female foeticide caused after the determination of sex of the foetus through ultrasonography technology. The Nursing Homes and Clinics are prohibited by this Law from advertising facilities of this kind. Section 22 prohibits advertisements relating to pre natal determination of sex of the child. Subsection (1) of the above section prohibits advertisements in any manner regarding facilities of pre natal determination of sex available at such Centre, Laboratory, Clinic or any other place Advertisement has been given a particularly wide definition for the purposes of this section. Section 22 also provides that any person who contravenes the provisions of subsection v(1) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

5.16. Advertisements for Deposits; Companies Act, 1956

Companies cannot propagate for deposits generally. They have certain statutory obligations to fulfill for advertising to invite deposits. Section 58A of the Companies Act, mandates that companies are not to invite deposits from the public unless an advertisement, including therein a statement showing the financial position of the company, has been issued by the company, in such form and in such manner as may be prescribed.

5.17. Misleading Advertisements & SEBI Guidelines

SEBI also prohibits misleading advertisements. The SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities market) Regulations, 1995[249] prohibits misleading advertisements to induce the sale or purchase of securities.[250] It also prohibits any

[249]Vide Notification No. 856 (E) dated 25- 10- 1995.
[250] Regulation 5 (1).

person from making any statement or disseminating information which is misleading and is likely to induce the sale or purchase of securities.[251]

5.18 No Advertisements for soliciting clients and cases: Advocates Act

Advocates constitute a noble profession and they are not expected to resort to cheap practices of soliciting the clients and litigations. Section 35 of the Advocates Act 1961 sets the high moral tone and the considerable public service the Bar is associated with and its key role in the developmental and dispute-processing activities and, above all, in the building up of a just society and constitutional order, has earned for it a monopoly to practise law and an autonomy to regulate its own internal discipline. Section 35 of the Advocates Act, among other things, prohibits advertising of any sort to solicit work by advocates. The leading case in this respect is Bar Council of Maharashtra v. M.V. Dabholkar[252] which reaffirmed the provision and also made the definition of advertisement very stringent. The court held that Professional ethics were born with the organised Bar, even as moral norms arose with civilised society. The Advocates must have (1) solicited work (2) from a particular person (3) with respect to a case. Unless all the three elements are satisfied, it cannot be said that an advocate has acted beyond the standard of professional conduct and etiquette. In view of the tender of unconditional regret and apology by the advocate which, according to the Court, expiated his guilt in part, the Supreme Court allowed the appeal, but reduced the period of suspension.

5.19. Transplantation of Human Organs Act, 1994

Human organs are not spare parts of machines to be purchased at commercial centers. Thus this Act penalises the advertisements for selling or purchasing human organs like kidneys. This Act provides that any person who publishes or distributes or causes to be published or distributed any advertisement inviting persons to supply any human organ for payment, or offering to supply any human organ for payment, or initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ, or indicating that the advertiser is willing to go in for such initiations or negotiations shall be punishable with imprisonment and fine.

5.20. Ten Restrictions on Advertisements: Cable Television Networks (Regulations) Act, 1995

The Act provides that no person shall transmit or re-transmit through a cable service any advertisement unless such advertisement is in conformity with the prescribed advertisement code.[253] There is a proviso which provides that nothing said herein shall apply to the

[251] Regulation 5 (2).
[252] AIR 1976 SC 242.
[253] Section 6 of the Cable Television Networks (Regulation) Act, 1995.

programmes of foreign satellite channels which can be received without the use of any specialized gadgets or decoder.

The Cable Television Networks Rules 1994 prescribes Ten Commandments to advertisers on Cable services.

1. Not to offend morals: Rule 7 says that advertising carried in the cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscriber.
2. No Advertisement against Constitution, Law and encourage Crime: No advertisement shall be permitted which;

    (i) derides any race, caste, colour, creed and nationality,

    (ii) is against any provision of the Constitution of India;

    (iii) tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way;

    (iv) presents criminality as desirable;

    (v) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or a State dignitary;

    (vi) in its deception of women violates the Constitutional guarantees to all citizens. In particular no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasizes passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The cable operator shall ensure that the portrayal of the female form, in the programmes carried in his cable service is tasteful and aesthetic and is within the well-established norms of good taste and decency:

    (vii) exploits social evils like dowry, child marriage.

3. Not for Religious and Political Ends: No advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature; advertisements must not be directed towards any religious or political end.
4. No Defect Goods or Services: The goods or services advertised shall not suffer from any defect or deficiency as mentioned in Consumer Protection Act, 1986.
5. No Advertisements on miraculous property: No advertisement shall contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or supernatural property or quality, which is difficult of being proved.

6. No ‘loud’ voice: The picture and the audible matter of the advertisement shall not be excessively ‘loud’.
7. Not to show children in poor light: No advertisement which endangers the safety of children or creates in them any interest in unhealthy practices or shows them begging in an undignified or indecent manner shall not be carried in cable service.
8. No vulgarity: Indecent, vulgar, suggestive, repulsive or offensive themes or treatment shall be avoided in all advertisements.
9. No violation of standards: No advertisements which violate, the standards of practice for advertising agencies as approved by the Advertising Agencies Association of India, Bombay, from time to time shall be carried in the cable service.
10. Separate Advertisements from Programme: All advertisements should be clearly distinguishable from the programme and should not in any manner interfere with the programme viz., use of lower part of screen to carry captions, static or moving alongside the programme.

5.21. Insurance Law & Restrictions on Advertisement

The Insurance Regulatory & Development Authority (IRDA) in consultation with the Insurance Advisory Committee has set forth regulations named Insurance Regulatory and Development Authority (Insurance Advertisements and Disclosure) Regulations, 2000 for systematic regulation of advertisements in the insurance industry.

5.21.1. Definition

An insurance advertisement means and includes any communication directly or indirectly related to a policy and intended to result in the eventual sale or solicitation of a policy from the members of the public, and shall include all forms of printed and published materials or any material using the print and or electronic medium for public communication such as:

a) newspapers, magazines and sales talks;

b) billboards, hoardings, panels;

c) radio, television, web-sites, e-mails, portals;

d) representations by intermediaries;

e) leaflets;

f) descriptive literatures, circulars;

g) sales aid flyers;

h) illustration form letters;

i) telephone solicitations;

j) business cards;

k) videos;

l) faxes; or

any other communication with a prospect or a policy holder that urges him to purchase, renew, increase, retain or modify a policy of insurance.

5.21.2. Non Advertisement material

The following materials shall not be considered to be an advertisement provided they are not used to induce the purchase, increase, modification or retention of a policy of insurance:-

a) materials used by the insurance company within its own organisation and not meant for distribution to the public;
b) communications with policy holders other than materials urging them to purchase, increase, modify, surrender or retain a policy;
c) materials used solely for the training, recruitment, and education of an insurer's personnel, intermediaries, counselors and solicitors provided they are not used to induce the public to purchase, increase, modify, retain a policy of insurance;
d) any general announcement sent by a group policy holder to members of the eligible group that a policy has been written or arranged.

5.21.3. Unfair/misleading advertisement

An advertisement issued by an insurer must not fall in the category of an unfair or misleading advertisement. "Unfair or Misleading Advertisement" shall mean and includes any advertisement.

a) that fails to clearly identify the product as insurance;

b) makes claims beyond the ability of the policy to deliver or beyond the reasonable expectation of performance.

c) describes benefits that do not match the policy provisions;

d) uses words or phrases in a way which hides or minimizes the costs of the hazard insured against or the risks inherent in the policy.

e) omits to disclose or discloses insufficiently. important exclusions, limitations and conditions of the contract;

f) gives information in a misleading way;

g) illustrates future benefits on assumptions which are not realistic nor realisable in the light of the insurer's current performance;

h) where the benefits are not guaranteed, does not explicitly say so as prominently as the benefits are stated or says so in a manner or form that it could remain unnoticed;

i) implies a group or other relationship like sponsorship, affiliation or approval that does not exists;

j) makes unfair or incomplete comparisons with products which are not comparable or disparages competitors.

5.21.4. Standards by ASCI

Every insurer or intermediary shall follows recognised standards of professional conduct as prescribed by the Advertisement Standards Council of India (ASCI) and discharge its functions in the interest of the policy holders. Only properly licensed intermediaries may advertise or solicit insurance through advertisements.

5.21.5. Identity of advertiser

Every advertisement for insurance shall state clearly and unequivocally that insurance is the subject – matter of the solicitation and state the full registered name of the insurer, intermediary, insurance agents.

5.21.6. Advertising on the internet

A website or a portal of an insurer or an intermediary shall_-

a) include disclosure statements which outline the site's specific policies vis-a-vis the privacy of personal information for the protection of both their own business and consumers they serve;

b) display their registration, licence numbers on the web-sites;

Except where otherwise specifically excluded or restricted, no form or policy otherwise permissible for use shall be deemed invalid or impermissible if such form or policy accurately reflects the intentions of the parties in such form or policy as published electronically or transmitted electronically between parties.

5.21.7. Information about changes to IRDA

Any change in an advertisement would be considered a new advertisement. IRDA shall be informed at the time of filing the advertisement the extent of change in the original advertisement.

5.21.8. No advertisement by Agent without authority

Every advertisement by an insurance agent that affects an insurer must be approved by the insurer in writing prior to its issue. It shall be the responsibility of the insurer while granting such approval to ensure that all advertisements that pertain to the company or its products or performance comply with the regulations and are not deceptive or misleading.

5.21.9. Advertisements where prior approval not required

An agent shall not be required to obtain written approval of the company prior to issue for those advertisements developed by the insurer and provided to agents, the generic advertisements limited to information like agent's name, logo, address and phone number and advertisements that consist only of simple and correct statements describing the availability of lines of insurance, reference to experience, service and qualifications of agents but making no reference to specific policies, benefits, costs or insurers.

5.21.10. Restrictions

A third party shall not be allowed to do any of the following to:-

a) distribute information about an insurance policy, intermediary or insurer on its letterhead;

b) allow an insurance intermediary or insurer to distribute information about an insurance policy, insurance or insurance company on its letterhead;

c) distribute information about an individual insurance policy, or about an intermediary or insurer in its envelopes, unless –

d) the third party is providing only a distribution service for the insurance advertisement and is not itself soliciting the coverage, and

e) the insurance information is a piece separate from any other information distributed by the third party and clearly indicates its origin;

f) recommend that its members purchase specific insurance products;

g) imply that a person must become a member of its organization in order to purchase the a policy;

h) imply that a purchaser of a policy by becoming member of a united group of persons shall receive special advantages from the insurer not provided for in the policy.

Permissible activities for a third party, group or association

A third party, group or association may:

a) endorse an insurance company or insurance intermediary's product and provide truthful statements, quotes and testimonials endorsing the insurance products to the insurance company for use in the company's advertisements, so long as the language does not convey directly or indirectly a recommendation that members of the organisation purchase the product:

b) Provide an insurance company with information about its membership and collect compensation based upon sales for the information.

5.21.11. Action against Non – compliance

If an advertisement is not in compliance with the IRDA (Insurance Advertisements) Regulations. 2000 the IRDA may take action in one or more of the following ways:

a) issue a letter to the advertiser seeking information within a specific time not being more than ten days from the date of issue of the letter;

b) direct the advertiser to correct or modify the advertisement already issued in a manner suggested by the Authority with a stipulation that the corrected or modified advertisement shall receive the same type of publicity as the one sought to be corrected or modified;

c) direct the advertiser to discontinue the advertisement forthwith;

d) any other action deemed fit by the Authority (IRDA) keeping in view the circumstances of the case, to ensure that interests of the public are protected.

The advertiser may seek additional time from the Authority to comply with the directions justifying the reasons therefor. The Authority, may however refuse to grant extension of time if it feels that the advertiser is seeking the time only to delay the matters. Any failure on the part of the advertiser to comply with the directions of the Authority may entail the Authority to take such action as deemed necessary including levy of penalty.

5.21.12. Statutory warning in proposal for an insurance product by an insurer

Regulation 13 of the IRDA (Insurance Advertisements) Regulations, 2000 provides that every proposal for insurance products shall carry the stipulation as prescribed in Section 41 of the Insurance Act, 1938. The stipulation reads, "No person shall allows or offer to allow, either directly or indirectly, as an inducement to any person to take out or renew or continue an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person taking out or renewing or continuing a policy accept any rebate, except such rebate as may be allowed in accordance with the published prospectus or tables of the insurer."

CHAPTER VI

MISLEADING ADVERTISEMENTS & GLOBAL REGULATIONS

In their quest for making profits, the producers indulge in misleading the consumers. The Cyber Advertisement is another area of effective marketing strategies which mislead the people without any hesitation. World over, several jurisprudences developed regulations to contain the malpractices, misleading tactics and unfair practices to impose restrictions on advertisers.

In the "Press Laws and Practice", which dealt with a comparative study of Press Freedom in European and Other Democracies, mentioned in brief about the restrictions over the Advertising among 11 countries and analysed the press freedom as to Advertisement and limitations over it under European Convention of Human Rights and European Community of Law. The Eleven countries include: Australia, Austria, Canada, France, Germany, Netherlands, Norway, Spain, Sweden, United Kingdom, United States.

6.1. Australia

The Smoking and Tobacco Products Advertisements (Prohibition) Act, 1989 prohibits cigarette and tobacco advertising in the print media. The ban has been criticized as discriminatory in that it exempts advertising in newspapers printed or published outside of Australia which are brought into Australia for sale, free distribution or personal use.

In 1991, the federal government introduced legislation to proscribe political advertising on radio and television. This attracted widespread opposition, not only by political parties but also the Human Rights Commission and the Press Council. The Bill was amended to restrict advertising only during election and referendum campaigns. The High Court invalidated the legislation in August 1942.

6.2. Austria

Unlike broadcasting where legal restrictions on alcohol and tobacco advertising exist, there are no restrictions on advertising in newspapers. There currently is discussion as to whether cigarette advertising should be completely forbidden.

As far as competition law is concerned, the situation is more difficult. For instance, until recently the courts ruled invalid all forms of comparative advertising (that is advertising which states that the advertised product is better than another named product). However, court are now beginning to change their opinions, especially since the Constitutional Court recognized that advertising comes within the protection of Article 10 of the European

Convention. Certain kinds of comparative advertisements are now tolerated, so long as they are neither misleading, deprecating, insulting for offensive. The Constitutional Court declared restrictions on advertising by lawyers and tax consultants unconstitutional.

6.3. CANADA

Canadian courts have generally adopted the attitude that commercial speech is not protected by Section 2(b) of the Charter. The federal government enacted legislation prohibiting tobacco advertising, though the legislation may be challenged in the courts. Commercial speech may fall under the purview of libel if a company uses comparative advertising that implies a competitor's product is inherently inferior. Similarly, truth in advertising is legally required.

Sections 70.1 (1) and 72 of the Canadian Elections Act, which prohibited anyone other than nominated candidates and registered parties from incurring election expenses or placing political advertisements during an election campaign, was successfully challenged in 1984.

6.4. FRANCE

Advertising of certain products or goods (including tobacco, spirits and pharmaceuticals) is either forbidden or severely regulated in the interests of public safety and health.

Political advertising during election campaigns is regulated by Article 47 et seq. And 89 et seq. Of the Electoral Code; paid political advertisements are forbidden in both the print and broadcasting media during the three months preceding an election (Article 52 (1).

6. 5. GERMANY

Advertisements enjoy many of the protections of press freedom. Section 10 of the Lander press laws requires that advertisements must be marked as such in newspapers. Paid information in the editiorial section of a publication is illegal under the press laws, and the Press Council is of the opinion that public confidence in the public function of the press would be eroded if the editorial part of newspapers were to contain advertisements.

Advertising in the guise of information is unfair competition by the editor and the advertiser. However, in every case the line has to be drawn between information and advertisement. The general clause of Section 1 of the Law against Unfair Competition of 1909 permits injunctive relief and claims for damages against acts of unfair competition. Dissemination of false facts about goods, services and customers would qualify as such an act.

Comparative advertising (whereby one product is compared favourably to another named product) in general is illegal. Exceptions are given, however, in cases where there is a

serious public interest in information. This is the case, for example, where a product poses health hazards. These provisions are not applicable to official comparative tests of goods. In view of the public interest in the quality of goods which are on the market, in 1964 the Federal Government set up a foundation named Warentest to make comparative tests of goods in independent laboratories and publish results. In approving publication of such information the courts held that the public interest in objective information outweighs business interests in unhindered competition.

6.6. THE NETHERLANDS

Article 7(4) of the Constitution states that commercial advertising is not accorded freedom of expression. The term "commercial advertising" encompasses commercial purposes in the widest sense, involving offers to sell goods or services. Article (2) of the Media Act States that the terms "commercials" and "advertising" are not deemed to include raising support for or encouraging favourable attitudes towards institutions of an academic, scientific, cultural, spiritual, religious, political or charitable nature, insofar as such actions do not relate to the purchase or use of a particular commercially available product or service.

6.7. NORWAY

Alcohol and tobacco advertising is forbidden. This includes advertising any product that carries the same label as tobacco brand (for example, Camel Boots).

Advertising that conflicts with the principle of equality of the sexes is prohibited under Section 1 of the Act on Marketing. Section 1 states:

An advertiser and anyone who creates advertising matter shall ensure that the advertisement does not conflict with the inherent parity between the sexes and that it does not imply any derogatory judgment of either sex or portray a woman or a man in an offensive manner.

Section 1 has not caused any problems for the daily press.

The Forbrukerombudet (Consumers Ombudsman) supervises marketing and may forbid marketing which conflicts with the law. The Forbrukerombudet's decision may be appealed to the Marketing Council, which makes the final decision.

6.8. SPAIN

Organic Law 5/85 of 19 June on the regulation of general elections prohibits political advertising outside periods of election campaigns (Article 53). During election campaigns, paid political advertising in newspapers and other private publications and on private radio stations are permitted (Article 58.1-2) Paid political advertisements are prohibited on TV

and public radio, where political parties are granted free time for their political propaganda, the length of which varies according to the number of votes each party obtained in the previous elections of the same kind (Article 60). Organic law L.O. 2/1998 of 3 May, states that private television is subject to the same rules as the public media and thus cannot accept payment for political advertisements.

Television advertising of tobacco and drinks containing more than 20 per cent alcohol is prohibited.

The FPA provides that advertising for tobacco and alcohol may be restricted. Although all other advertising, in theory, is protected, the courts have imposed a few restrictions on commercial speech. These restrictions apply only to what the courts call "pure commercial speech" and not to political or ideological advertising.

6.9. UNITED KINGDOM

The Advertising Standards Authority (ASA) is a private body set up by the advertising industry. It monitors a code of practice in order to ensure that advertisements are "legal, decent, honest, and truthful". The effectiveness of this body is based on the fact that newspapers will refuse to carry advertisements which are held to fail the ASA Code of Practice.

Political advertising concerning general party policies is unrestricted. Advertising concerning particular candidates during an election campaign must be authorized by the candidate or his or her agent. It is an offence to issue any other advertisement for the purpose of procuring a candidate's election.

6.10. UNITED STATES

Consistent with the First Amendment's special protection of speech concerning public affairs, regulations of political advertising are presumptively unconstitutional, and could be upheld only if shown to be necessary to promote some compelling public interest. As always, this stringent standard is difficult to satisfy.

While the Supreme Court has strongly protected political speech by commercial entities, such as corporations, it has accorded only weaker protection to "commercial speech", which it has defined as speech that advertises a product or service for profit or for another business purpose. While commercial speech currently receives less protection than political speech, it still receives far more protection under modern Supreme Court jurisprudence than it did until the early 1970s, when it was deemed wholly beyond the First Amendment pale . First, the court must determine whether the expression is truthful, non-misleading, and concerns a lawful commercial activity. If not, it may be freely regulated; if so, it may be regulated only

if the regulation directly advances a substantial government interest without unnecessarily restricting speech.

The Court's modern commercial advertising cases reflect the view that the consuming public has a protected interest in the free flow of accurate information concerning lawful activity. Consequently, the advertising of potentially harmful but nonetheless legal products, such as alcohol and tobacco, is as protected as that of any other lawful product. While the states have broad constitutional authority to regulate the liquor industry, including its advertising, there are currently no federal restrictions on advertisements of alcohol in the print media. The only federal restriction on tobacco advertisements is a requirement that they bear a health warning prescribed by the United States Surgeon General.

6.11. EUROPEAN CONVENTION ON HUMAN RIGHTS

Information of a commercial nature is protected under Article 10 although the court will grant governments a wider margin of appreciation to restrict commercial speech than other forms of expression. The court, in the Markt Intern case, examined restrictions on information of a commercial nature found by the German courts to constitute unfair competition and thus to injure the reputation or rights of others. Markt Intern, a consumer magazine, has published an accurate account of a chemist's dissatisfaction with a mail-order firm. The German courts ruled that the story created a false impression and thus constituted unfair competition. A bare majority of the European Court upheld the court's order and rejected arguments urging a greater measure of protection for commercial speech.

In a second case, the Court ruled that a statement should not be treated as commercial speech if its primary purpose is to inform the public about a topic of legitimate public interest. In that case, the German courts had issued and upheld an injunction against a veterinary surgeon on the ground that information he had given to a journalist concerning his own practice in the course of urging the need for more comprehensive veterinary night services violated the prohibition on advertising by members of the “liberal professions". The court concluded that the publicity Dr Barthold may have received was secondary to "the nature of the issue being put to the public at large" and that the German courts' prohibition of any statement that might have a slight advertising effect was likely to discourage "members of the liberal professions from contributing to public debate on topics affecting the life of the community" and " to hamper the press in the performance of its task of purveyor of information and public watchdog.

EUROPEAN COMMUNITY

Various EEC measures govern the harmonization of the legal regimes within the member states concerning misleading advertising and the advertising of particular products such as foodstuffs, and medicinal products for human use.

The Directive on Television Broadcasting prohibits televised advertisements for cigarettes tobacco products, medicinal products and treatment available only on prescription, and limits the advertisement of alcoholic beverages. In addition, television advertisements must not prejudice respect for human dignity, include any discrimination on grounds of race, sex or nationality, be offensive to religious of political beliefs, or encourage behaviour prejudicial to health, safety, or the protection of the environment. Specific reference to advertising in the press is contained in a draft proposal on tobacco product advertising. The proposal at present is for a directive which would require member states to introduce legislation which would, amongst other measures: (a) prohibit all advertising for tobacco products in publications mainly intended for persons under the age of 18; and (b) require the inclusion of a certain specific health warning in any advertisement in the press or any bill or poster for cigarettes, and of a general health warning for other tobacco products.

None of the directives or proposals discussed above provides specific penalties or methods of enforcement.

Analysis of Restrictions on Advertising around the world

All countries distinguish between ordinary commercial speech and political advertising.

6.11.1. Political Advertising

In some countries (Germany, Spain), political advertising is restricted except during declared campaign periods. Other countries (France, UK) impose restrictions only during campaign periods. In France during the three months preceding an election, paid political advertisements are forbidden in both the print and broadcasting media and the content of unpaid advertisements is regulated. In 1984 the Canadian Supreme Court struck down as unconstitutional sections of the election law which prohibited anyone other then candidates and registered parties from paying for political advertisements during election campaigns. As a result corporations and other private parties are entitled to advertise their views on political issues. In the UK, it is an offence to issue an advertisement during an election campaign in support of a particular candidate without that candidate's authorization.

The Dutch courts generally will enquire only whether a political advertisement is defamatory or misleading. However, a Dutch voluntary code provides additional standards, requiring that political advertisements be clearly marked as such and may not be anonymous, untruthful, below the general standards of good taste, or published in the editorial part of a paper. A Code commission recommends whether or not political advertisements should be published, and publishers associated with the two leading publisher's associations have agreed to follow the Commission's recommendations. Although refusal to publish a political advertisement is generally not unlawful, collective refusal pursuant to a commission recommendation may constitute a tort; in one case a court ruled that refusal to publish a

political advertisement that included a picture was justifiable only if the picture would be considered extremely tasteless or indecent by an overwhelming majority of the Dutch population.

In the US, any regulation of political advertising, including by commercial entities such as corporations is presumptively unconstitutional and would have to satisfy a heavy burden to be permitted.

6.11.2. Commercial Advertising

In several countries, commercial advertisements (those whose primary purpose it to promote a product or service for profit or other business interest) receive constitutional protection, although to a lesser degree than press freedom and other forms of expression (Austria, Germany, Sweden, US); in a few, commercial speech receives no constitutional protection (Canada, Netherlands).

Most Countries restrict or prohibit the advertising of alcohol and/or tobacco products for reasons of public health (Austria, Canada, Netherlands, Norway, Spain, Sweden), and some also regulate advertisements for pharmaceutical products (France). In Austria the ban applies only to radio and TV broadcasting. In the Netherlands linking the use of alcohol with sports, health, Children, or maturity is prohibited, and tobacco advertisements are banned from radio and TV. Canada bans all tobacco advertising but permits alcohol advertisements. In the US, while the states have broad authority to regulate tobacco and alcohol advertising, there currently are no federal restrictions on alcohol advertising in the print media and the only requirement concerning tobacco advertisements is that they bear a health warning prescribed by the US surgeon General.

Paid advertisements must be marked as such in Germany and are entirely prohibited in the editorial sections of papers.

In the UK, the advertising industry established a private Advertising standards Authority which monitors a code of practice to ensure that advertisements are “legal, decent, honest, and truthful". Most newspapers refuse to carry advertisements which the Authority considers to fall below code standards.

Several countries require advertisements not to be misleading or untrue (Canada, Germany, US). Norwegian law bans advertisements which "imply any derogatory judgment of either sex or portray a woman or a man in an offensive manner". A consumers' ombudsman supervises marketing and may forbid advertisements that conflict with the law; decisions may be appealed to a Marketing Council.

Comparative advertising (stating that the advertised brand is better than other named products) was banned for several years in Austria until the European Court of Human rights ruled that commercial speech is entitled to some protection. Austria now permits such advertisements so long as they are neither misleading, deprecating, insulting nor offensive. Germany generally prohibits comparative advertising except when there is a serious public interest in the information, such as concerning hazardous products. The government established an independent foundation to carry out comparative tests, the results of which may be published. In Canada, comparative advertising may constitute libel.

Several countries prohibit or regulate advertising by members of certain professions, although the Austrian Constitutional Court declared restrictions on advertising by lawyers and tax consultants to be unconstitutional.

6.12 Restrictions on misleading advertisements in cyber space

The advertisement online, in mobile, telemarketing etc is impounding the minds of the consumers all over the world. The Internet is connecting advertisers and marketers to customers from Boston to Bali with text, interactive graphics, video and audio. With the high speed and wide reach the advertisers on line are indulging in all kinds of tactics to woo the consumers. Especially, leader of the third world, India is considered as cheap and wide market, where they can tell anything and sell anything leaving the consumer to his own fate. While population is phenomenally high, the awareness of consumer rights in India is inversely proportional to population. The regulatory mechanism is not that strong with executive branch of government suffers from indifference, red tape and prone to be corrupted by bribing corporates. The adjudicatory mechanism with it's overburdened litigation and crumbling pendency is terribly slow in answering the violations of consumer rights. Not only those, the cyber advertisement issues are yet to be fully understood by the people, lawyers and judges. All these give undue advantage to cyber fraudsters to dupe the gullible with false, misleading, fraudulent advertisements.

Internet marketing, telemarketing, mobile advertisements etc. come in conflict with several freedoms. While the marketers and suppliers exercise their freedom of business right, left and center the consumers are left high and dry as their rights to choose, safety, privacy etc are totally violated en mass. A strong regulatory and a comprehensive legislation to control the invading advertisers on cyberspace is immediate need. There should be an additional mechanism with required personnel to deal with new violation of rights, under the new statute. Besides this, Indian consumers also need strong advertisement authorities, regulatory codes and bodies to review the compliance of regulations.

The Indian Internet industry, like in the early years of this decade, is convulsed by less-than-spectacular consumer growth and depressed advertising revenues. The Internet space in India is categorized into four categories by Satya Prabhakar, Founder and CEO of Sulekha.com.[159]

6.12.1. Content and Basic Service Providers

This include horizontal and vertical portals that focus on providing manufactured content across multiple interest areas such as news, movies, finance and travel and basic services such as email, stock quotes. (e.g., Yahoo, Rediff, Sify, Indiatimes) This also includes social sites such as Facebook, Orkut and others. The revenue model for these sites is almost entirely through display advertising by large brands.

6.12.2. Search Providers

This includes general purpose and niche service providers (e.g., Google, Yahoo, Live and Ask.) These sites earn revenues mostly through cost-per-click adwords.

6.12.3. Local Commerce Providers

These are sites that focus on enabling chiefly two functions: enabling users to transact amongst themselves and enabling users to find local businesses (e.g., Sulekha, Naukri, Shaadi) these sites earn their revenues through user fees and response advertising of small to medium businesses (SMBs).

6.12.4. Ecommerce Providers

These are the sites that sell specific goods, hard and soft, in different domains such as general purpose ecommerce, airline travel, bus travel and more. (e.g., Indiaplaza, Yatra, eBay) These sites earn revenues through transaction commission.

The problems with large corporate display advertising, as identified by the Satya Prabhakar are as follows:

- Marketing heads of big brands do not believe brands can be built online and therefore do not allocate large spends for online advertising.
- Supply of inventory outstrips demand for online advertising, keeping the CPMs depressed; in fact, the CPMs in India for online advertising have barely budged over the last 10 years.

[159]http://www.siliconindia.com/guestcontributor/guestarticle/150/Whither_Internet_Advertising_in_India_Satya_Prabhakar.html. last accessed on 19.9.2010

- Since online advertising can precisely be tracked, marketers hold online advertising to a more rigorous, and less profitable, metrics of cost per click, cost per lead/action.

Mr Satya Prabhakar predicts a very intensive use of internet if some problems could be crossed over. He says: The problem that plagues all of us in the new media space is that Internet usage is not growing at a searing pace and Internet usage through mobile phones is non-existent. There are two trends, however, that offer high promise: large screen mobile phones and small screen light-weight laptops. What will spur widespread, intense use of the Net in India is portability coupled with ubiquitous net connectivity at a reasonable cost. My view is that this will happen in the next 18 months. Within the next six months, we will see the sales of sub-Rs. 10,000, 2-pound feather-weight netbooks with sufficient primary and secondary storage and constant connectivity. And the sale of sub-Rs. 10,000 large display phones. These two devices will usher in astonishing explosion of Internet use and the companies that will benefit are those that toiled to build their brands over the last 10 years.

6.13. Federal Trade Commission in US

The Federal Trade Commission Act allows the FTC to act in the interest of all consumers to prevent deceptive and unfair acts or practices. In interpreting Section 5 of the Act, the Commission has determined that a representation, omission or practice is *deceptive* if it is likely to:

- mislead consumers and
- affect consumers' behavior or decisions about the product or service.
- In addition, an act or practice is unfair if the injury it causes, or is likely to cause, is:
    a) substantial
    b) not outweighed by other benefits and
    c) not reasonably avoidable.

The FTC Act prohibits unfair or deceptive advertising in any medium.[160] That is, advertising must tell the truth and not mislead consumers. A claim can be misleading if relevant information is left out or if the claim implies something that's not true. For example, a lease advertisement for an automobile that promotes "$0 Down" may be misleading if significant and undisclosed charges are due at lease signing.

In addition, claims must be substantiated, especially when they concern health, safety, or performance. The type of evidence may depend on the product, the claims, and what experts

[160] http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus28.shtm. Last accessed on 19.8.2010

believe necessary. Sellers are responsible for claims they make about their products and services. Third parties - such as advertising agencies or website designers and catalog marketers - also may be liable for making or disseminating deceptive representations if they participate in the preparation or distribution of the advertising, or know about the deceptive claims.

- Advertising agencies or website designers are responsible for reviewing the information used to substantiate ad claims. They may not simply rely on an advertiser's assurance that the claims are substantiated. In determining whether an ad agency should be held liable, the FTC looks at the extent of the agency's participation in the preparation of the challenged ad, and whether the agency knew or should have known that the ad included false or deceptive claims.

- To protect themselves, catalog marketers should ask for material to back up claims rather than repeat what the manufacturer says about the product. If the manufacturer doesn't come forward with proof or turns over proof that looks questionable, the catalog marketer should see a yellow "caution light" and proceed appropriately, especially when it comes to extravagant performance claims, health or weight loss promises, or earnings guarantees. In writing ad copy, catalogers should stick to claims that can be supported. Most important, catalog marketers should trust their instincts when a product sounds too good to be true.

Other points to consider:

- Disclaimers and disclosures must be clear and conspicuous. That is, consumers must be able to notice, read or hear, and understand the information. Still, a disclaimer or disclosure alone usually is not enough to remedy a false or deceptive claim.
- Demonstrations must show how the product will perform under normal use.
- Refunds must be made to dissatisfied consumers as promised.
- Advertising directed to children raises special issues. That's because children may have greater difficulty evaluating advertising claims and understanding the nature of the information provided. Sellers should take special care not to misrepresent a product or its performance when advertising to children. The Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus has published specific guidelines for children's advertising.

The FTC staff paper on ‘Dot Com Disclosures: Information About Online Advertising’, provided additional information for online advertisers. The paper discussed the factors used to evaluate the clarity and conspicuousness of required disclosures in online ads. It also discusses how certain FTC rules and guides that use terms like "writing" or "printed" apply to

Internet activities and how technologies such as email may be used to comply with certain rules and guides.

6.14. Issues of Privacy of Consumer

The Internet provides unprecedented opportunities for the collection and sharing of information from and about consumers. But studies show that consumers have very strong concerns about the security and confidentiality of their personal information in the online marketplace. Many consumers also report being wary of engaging in online commerce, in part because they fear that their personal information can be misused.

The FTC tried to enhance awareness about privacy among consumers and also simulated the need for honouring the privacy among the marketers.

In June 1998, the FTC issued 'Online Privacy: A Report to Congress'. This Report noted that while over 85 percent of all websites collected personal information from consumers, only 14 percent of the sites in the FTC's random sample of commercial websites provided any notice to consumers of the personal information they collect or how they use it. In May 2000, the FTC issued a follow-up report, 'Privacy Online: Fair Information Practices in the Electronic Marketplace'. While the 2000 survey showed significant improvement in the percent of websites that post at least some privacy disclosures, only 20 percent of the random sample sites were found to have implemented four fair information practices: notice, choice, access and security. Even when the survey looked at the percentage of sites implementing the two critical practices of notice and choice, only 41 percent of the random sample provided such privacy disclosures.

One reason the Internet is an excellent marketing and advertising tool is that it provides much more information about consumer behavior than is available through traditional print-based media.

By monitoring visitors on Web site, and collecting reactions to ads placed on other Web sites, marketer can obtain a host of consumer information, including how many people viewed ad, what percentage of people clicked on the ad, what percentage of people purchased that product after seeing the ad, which pages on that Web site are visited most often, the names of other Web sites the customers have visited, and customers' e-mail addresses and other personal information.

Unfortunately, the ease of collecting consumer data has resulted in fraud, violations of consumer privacy, and identity theft. As a result, consumers are increasingly wary of providing personal information, and more laws are being passed to protect their rights.

6.15. Law of Privacy of consumer

Long before the Internet, the U.S. government passed laws protecting the privacy of consumers' personal information and shielding them from misleading, fraudulent, and deceptive advertising practices. These laws also apply to the Internet. The U.S. Federal Trade Commission (FTC) publishes guidelines to help businesses apply older laws to the Internet. For instance, the three primary legal requirements for *truth in advertising* are:

- Advertising must be truthful and not misleading.
- Advertisers must have evidence to back up their claims.
- Advertisements cannot be unfair.

To honor these legal requirements when advertising on the Internet, the FTC recommends that businesses:

- Place disclosures on the same Web page as the claim they apply to, and when necessary, provide adequate visual cues to indicate that a consumer must scroll down on the page to view the disclosure.
- When hyperlinking to disclosures, make the link obvious and noticeable, label the link accurately and indicate its importance, place the link near relevant information, ensure that the link takes consumers directly to the disclosure, and monitor link usage to ensure its effectiveness.
- Display disclosures prior to purchase.
- Ensure that an advertisement's "text, graphics, hyperlinks, or sound do not distract consumers' attention from the disclosure."

If Web business sells other companies' products, the FTC can also hold them responsible for misleading ads and product descriptions, even when those materials are provided by the manufacturer. The FTC recommends that "to protect themselves, catalog marketers should ask for material to back up claims rather than repeat what the manufacturer says about the product" and that "in writing ad copy, catalogers should stick to claims that can be supported." The FTC pays closest attention to ads that make health or safety claims, or that present data or statistics that consumers would have difficulty verifying.

6.16. SPY Act

In addition to pre-existing laws, the U.S. Congress has enacted several new laws that govern Internet advertising and privacy. The most important of these is H.R. 29, more commonly known as the SPY Act (Securely Protect Yourself Against Cyber Trespass Act), which came into effect on March 5, 2005. The Act prohibits specific types of Internet advertisements and methods for manipulating users' computers, including:

- Advertisements that cannot be closed "without undue effort or knowledge by the user."
- Advertisements that can only be closed by "turning off the computer or closing all sessions of the Internet browser for the computer."
- Modifying a computer user's browser settings so that a different Web page appears when the browser is launched.
- Changing a computer user's default ISP or Internet connection method, as well as any settings associated with these connections.
- Altering a "list of bookmarks used by the computer to access Web pages."
- Altering any "security or other settings of the computer that protect information about the owner or authorized user for the purposes of causing damage or harm to the computer or owner or user."
- "Collecting personally identifiable information through the use of a keystroke logging function."

The SPY Act also addresses Internet consumer privacy issues, particularly the use of information collection programs that are installed on a user's computer to gather information about that user. The Act defines an *information collection program* as one that collects personally identifiable information and either sends the information to anyone other than the computer user, or uses the information to display advertising on that user's computer.[161]

6.17. Children's Online Privacy Protection Act

The Children's Online Privacy Protection Act (COPPA) and the FTC's implementing Rule took effect April 21, 2000. Commercial websites directed to children under 13 years old or general audience sites that have actual knowledge that they are collecting information from a child must obtain parental permission before collecting such information. The FTC also launched a special site at www.onguardonline.gov to help children, parents and site operators understand the provisions of COPPA and how the law will affect them.

6.18. Marketing Frauds

There are several other mechanisms to storm the brains of the consumers luring them with promise of easy money making, such as Multi level marketing, called in short MLM which also known as "network" or "matrix" marketing - is a way of selling goods and services through distributors. These plans typically promise that people who sign up as

[161] See Private Policies and Internet Advertising Law, http://www.verio.com/resource-center/business-guides/internet-law/ last accessed on 19.8.2010

distributors will get commissions two ways - on their own sales and on the sales their recruits have made. Another form of MLM is pyramid scheme, which involve paying commissions to distributors only for recruiting new distributors. Pyramid schemes are illegal in most states because the plans inevitably collapse when no new distributors can be recruited. When a plan collapses, most people - except those at the top of the pyramid - lose their money.

MLMs should pay commissions for the retail sales of goods or services, not for recruiting new distributors. MLMs that involve the sale of business opportunities or franchises, as defined by the Franchise Rule, must comply with the Rule's requirements about disclosing the number and percentage of existing franchisees who have achieved the claimed results, as well as cautionary language. These issues can be understood by browsing for Franchising and Business Opportunity Ventures in FTC website.

Credit and Financial Issues

The Truth in Lending Act requires creditors who deal with consumers to disclose information in writing about finance charges and related aspects of credit transactions, including finance charges expressed as an annual percentage rate. In addition, the Act establishes a three-day right of rescission in certain transactions involving the establishment of a security interest in the consumer's principal dwelling (with certain exclusions, such as interests taken in connection with the purchase or initial construction of a dwelling). The Act also establishes certain requirements for advertisers of credit terms. For this see Truth in Lending Act in FTC site.

Mail and Telephone Orders

Another way of storming the consumers is flooding mails and phones with promotion calls and mails. According to the Mail or Telephone Order Merchandise Rule of FTC, marketer must have a reasonable basis for stating or implying that a product can be shipped within a certain time. If their ad doesn't include a shipping statement, he must have a reasonable basis to believe that he can ship within 30 days.

If he can't ship when promised, he must notify the customer of the delay and the right to cancel. For definite delays of up to 30 days, he may treat the customer's silence as agreement to the delay. For longer or indefinite delays, and second and subsequent delays, he must get the customer's consent. If not, he must promptly refund all the money the customer paid without being asked. *See* Complying with the FTC’s Mail or Telephone Order Merchandise Rule from FTC.

900 Numbers

The 900-Number Rule requires that ads for pay-per-call services disclose the cost of the call. Ads for services that promote sweepstakes or games of chance, provide information about a federal program (but are not sponsored by a federal agency), or target individuals under 18 years of age require additional disclosures. Ads for 900-numbers cannot be directed to children under 12 unless the ads deal with a bona fide education service, as defined by the Rule. *See* Telephone Disclosure and Dispute Resolution Act and Complying with the 900-Number Rule in FTC site.

Telemarketing

Advertisements promoting credit repair, promising loans for a fee in advance, or touting investment opportunities may trigger application of the FTC's Telemarketing Sales Rule if the ad allows consumers to order goods or services by telephone. In general, this Rule does not apply to general media advertisements. This rule will apply to advertising credit repair, advance fee loans, or investment opportunities, or offering to recover money paid in previous telemarketing transactions, etc. Among other things, the Rule requires that certain disclosures be made before a customer pays for the goods or services. The Rule also prohibits material misrepresentations. *See* Complying with the Telemarketing Sales Rule[162].

CAN-SPAM Act of US

The CAN-SPAM Act of 2003 signed into law on December 16, 2003, establishes the United States' first national standards for the sending of commercial e-mail and requires the Federal Trade Commission (FTC) to enforce its provisions. The acronym CAN-SPAM derives from the bill's full name: *C*ontrolling the *A*ssault of *N*on-*S*olicited *P*ornography *and M*arketing Act of 2003. CAN-SPAM defines a "commercial electronic mail message" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." It exempts "transactional or relationship messages." The FTC issued final rules (16 C.F.R. 316) clarifying the phrase "primary purpose" on December 16, 2004. Previous state laws had used bulk (a number threshold), content (commercial), or unsolicited to define spam.

The law permits e-mail marketers to send unsolicited commercial e-mail as long as it adheres to 3 basic types of compliance defined in the CAN-SPAM Act: unsubscribe content and sending behavior compliance:

[162] ibid

CAN-SPAM allows the FTC to implement a national do-not-email list similar to the FTC's popular National Do Not Call Registry against telemarketing, or to report back to Congress why the creation of such a list is not currently feasible. The FTC soundly rejected this proposal, and such a list will not be implemented. The FTC concluded that the lack of authentication of email would undermine the list, and it could raise security concerns.

The legislation prohibits e-mail recipients from suing spammers or filing class-action lawsuits. It allows enforcement by the FTC, State Attorneys General, Internet service providers, and other federal agencies for special categories of spammers (such as banks). An individual might be able to sue as an ISP if (s) he ran a mail server, but this would likely be cost-prohibitive and would not necessarily hold up in court. Individuals can also sue using state laws about fraud, such as Virginia's which gives standing based on actual damages, in effect limiting enforcement to ISPs.

If the message contains only commercial content, its primary purpose is commercial and it must comply with the requirements of CAM-SPAM. If it contains only transactional or relationship content, its primary purpose is transactional or relationship. In that case, it may not contain false or misleading routing information, but is otherwise exempt from most provisions of the CAN-SPAM Act.

Each separate email in violation of the law is subject to penalties of up to $16,000, and more than one person may be held responsible for violations. For example, both the company whose product is promoted in the message and the company that originated the message may be legally responsible. Email that makes misleading claims about products or services also may be subject to laws outlawing deceptive advertising, like Section 5 of the FTC Act. The CAN-SPAM Act has certain aggravated violations that may give rise to additional fines. The law provides for criminal penalties – including imprisonment – for:

- accessing someone else’s computer to send spam without permission,
- using false information to register for multiple email accounts or domain names,
- relaying or retransmitting multiple spam messages through a computer to mislead others about the origin of the message,
- harvesting email addresses or generating them through a dictionary attack (the practice of sending email to addresses made up of random letters and numbers in the hope of reaching valid ones), and
- taking advantage of open relays or open proxies without permission.

6.19. Enforcement of Criminal and Civil remedies

On February 16, 2004, Anthony Greco, 18, of Cheektowaga, New York, was the first person to be arrested under the CAN-SPAM Act of 2003. After pleading guilty, he was sentenced in a closed session.

Within a few months, hundreds of lawsuits had been filed by an alliance of ISPs. Many of these efforts resulted in settlements; most are still pending. Though most defendants were "John Does," many spam operations, such as Scott Richter's, were known. In July 2005, the Federal Trade Commission lodged civil CAN-SPAM complaints against nine companies alleging that they were responsible for spam emails that had been sent by them or by their affiliates. In March 2006, the FTC was awarded its largest victory to date - a $900,000 judgment against Jumpstart Technologies, LLC for numerous violations of the CAN-SPAM act.

6.19.1. Deceptive Commercial Emails

The Federal Trade Commission Act prohibits unfair or deceptive advertising in any medium, including in email. That is, advertising must tell the truth and not mislead consumers. A claim can be misleading if it implies something that's not true or if it omits information necessary to keep the claims from bring misleading.

Other points to consider while marketing through commercial email:

- Disclaimers and disclosures must be clear and conspicuous. That is, consumers must be able to notice, read or hear, and understand the information. Still, a disclaimer or disclosure alone usually is not enough to remedy a false or deceptive claim.
- The promised refunds to dissatisfied customers must be made.

Some marketers send email as a quick and cheap way to promote their goods and services. The claims that marketer made in any advertisement for their products or services, including those sent by email, must be truthful. This means that marketer must honor any promises made to remove consumers from email mailing lists.

If email solicitations claim that consumers can opt-out of receiving future messages by following removal instructions, such as "click here to unsubscribe" or "reply for removal," then the removal options must function as claimed. That means any hyperlinks in the email message must be active and the unsubscribe process must work.

6.19.2. Cyber space is not without boundaries:

Enforcement is possible

Although the number of companies advertising online—and the number of consumers shopping online—are soaring, fraud and deception may dampen consumer confidence in the e-marketplace. But FTC proved that cyberspace is not without boundaries, and fraud and deception are unlawful no matter what the medium. The FTC has enforced its consumer protection laws online to ensure that products and services are described truthfully in online ads and that consumers get what they pay for. Many of the general principles of advertising law apply to Internet ads, but new issues arise almost as fast as technology develops. The same consumer protection laws that apply to commercial activities in other media apply online. The FTC Act's prohibition on "unfair or deceptive acts or practices" encompasses Internet advertising, marketing and sales. In addition, many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising, and therefore, apply to online activities.

6.19.3. Disclosures

Disclosures that are required to prevent an ad from being misleading, to ensure that consumers receive material information about the terms of a transaction or to further public policy goals, must be clear and conspicuous. In evaluating whether disclosures are likely to be clear and conspicuous in online ads, advertisers should consider the placement of the disclosure in an ad and its proximity to the relevant claim. Additional considerations include: the prominence of the disclosure; whether items in other parts of the ad distract attention from the disclosure; whether the ad is so lengthy that the disclosure needs to be repeated; whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and, whether the language of the disclosure is understandable to the intended audience.

To make a disclosure clear and conspicuous, advertisers should:

- Place disclosures near, and when possible, on the same screen as the triggering claim.
- Use text or visual cues to encourage consumers to scroll down a Web page when it is necessary to view a disclosure.
- When using hyperlinks to lead to disclosures,
    - make the link obvious;
    - label the hyperlink appropriately to convey the importance, nature and relevance of the information it leads to;
    - use hyperlink styles consistently so that consumers know when a link is available;

- place the hyperlink near relevant information and make it noticeable;
- take consumers directly to the disclosure on the click-through page;
- assess the effectiveness of the hyperlink by monitoring click-through rates and make changes accordingly.
- Recognize and respond to any technological limitations or unique characteristics of high tech methods of making disclosures, such as frames or pop-ups.
- Display disclosures prior to purchase, but recognize that placement limited only to the order page may not always work.
- Creatively incorporate disclosures in banner ads or disclose them clearly and conspicuously on the page the banner ad links to.
- Prominently display disclosures so they are noticeable to consumers, and evaluate the size, color and graphic treatment of the disclosure in relation to other parts of the Web page.
- Review the entire ad to ensure that other elements—text, graphics, hyperlinks or sound—do not distract consumers' attention from the disclosure.
- Repeat disclosures, as needed, on lengthy Web sites and in connection with repeated claims.
- Use audio disclosures when making audio claims, and present them in a volume and cadence so that consumers can hear and understand them.
- Display visual disclosures for a duration sufficient for consumers to notice, read and understand them.
- Use clear language and syntax so that consumers understand the disclosures.

FTC Commission rules and guides that use specific terms—"written," "writing," "printed" or "direct mail"—are adaptable to new technologies.

- Rules and guides that apply to written ads or printed materials also apply to visual text displayed on the Internet.
- If a seller uses email to comply with Commission rule or guide notice requirements, the seller should ensure that consumers understand that they will receive such information by email and provide it in a form that consumers can retain.
- "Direct mail" solicitations include email. If an email invites consumers to call the sender to purchase goods or services, that telephone call and subsequent sale must comply with the Telemarketing Sales Rule requirements.

6.19.4. Telemarketing Sales Rule

The Federal Trade Commission (FTC) issued the amended Telemarketing Sales Rule (TSR) on January 29, 2003. Like the original TSR issued in 1995, the amended Rule gives effect to the Telemarketing and Consumer Fraud and Abuse Prevention Act. This legislation gives the FTC and state attorneys general law enforcement tools to combat telemarketing fraud, give consumers added privacy protections and defenses against unscrupulous telemarketers, and help consumers tell the difference between fraudulent and legitimate telemarketing.

Telemarketing has been negatively associated with various scams and frauds, such as pyramid schemes, and with deceptively overpriced products and services. Fraudulent telemarketing companies are frequently referred to as "telemarketing boiler rooms" or simply "boiler rooms". Telemarketing is often criticized as an unethical business practice due to the perception of high-pressure sales techniques during unsolicited calls. Telemarketers marketing telephone companies may participate in telephone slamming, the practice of switching a customer's telephone service without their knowledge or authorization.

Telemarketing calls are often considered an annoyance, especially when they occur during the dinner hour, early in the morning, or late in the evening.

6.19.5. Robocalls

A recent trend in telemarketing is to use robocalls: automated telephone calls that use both computerized autodialers and computer-delivered pre-recorded messages in a sales pitch. These often include intentionally deceptive tactics, with computer recorded messages saying things like "Don't panic but this is your final notice" or "We have already attempted to contact you through the mail." These messages are often outright lies, intended to incite concern or fear in the potential customer. Robocalls are known for failing to add numbers to their do-not-call list and repeatedly interrupting individuals at all hours of the day.

6.19.6. Regulation

Telemarketing in the United States of America is restricted at the federal level by the Telephone Consumer Protection Act of 1991 (TCPA) and the FTC's Telemarketing Sales Rule (TSR). The FCC derives regulatory authority from the TCPA, adopted as CFR 64.1200. Many professional associations of telemarketers have codes of ethics and standards that member businesses follow to encourage public confidence.

Some jurisdictions have implemented "Do Not Call" lists through industry organizations or legislation; telemarketers are restricted from initiating contact with participating consumers. Legislative versions often provide for heavy penalties on companies which call

individuals on these listings. The U.S. Federal Trade Commission has implemented a National Do Not Call Registry in an attempt to reduce intrusive telemarketing nationwide. Telemarketing corporations and trade groups challenged this as a violation of commercial speech rights. However, the U.S. 10th Circuit Court of Appeals upheld the National Do Not Call Registry on February 17, 2004.

Companies that use telemarketing as a sales tool are governed by the United States Federal regulations outlined in the TSR (amended on January 29, 2003 originally issued in 1995) and the TCPA. In addition to these Federal regulations, telemarketers calling nationally must also adhere to separate state regulations. Most states have adapted "do not call" files of their own, of which only some states share with the U.S. Federal Do Not Call registry. Each U.S. state also has its own regulations concerning: permission to record, permission to continue, no rebuttaling statutes, Sunday and Holiday calls; as well as the fines and punishments exacted for violations. September 1, 2009, FTC regulations banning most robocall went into effect.

Telemarketing techniques are increasingly used in political campaigns. Because of free-speech issues, the laws governing political phone calls are much less stringent than those applying to commercial messages. Even so, a number of states have barred or restricted political robocalls.

6.19.7. Telephone Sales and Debt collection services

Better Business Bureau of Southern Arizona has advised their members that the Federal Trade Commission (FTC) has recently made significant changes to the laws that regulate telephone sales and debt collection services.

On July 29, the FTC announced via a press release that they have added provisions to the Telemarketing Sales Rule (TSR), broadening the Rule so that it will affect more businesses than it currently does:

> *"The Federal Trade Commission (FTC), the nation's consumer protection agency, has amended the Telemarketing Sales Rule (TSR) to add specific provisions to curb deceptive and abusive practices associated with debt relief services. One key change is that many more businesses will now be subject to the TSR… The new Rule expands the scope to cover not only outbound calls- calls placed to potential customers- but in-bound calls as well- calls they place back in response to advertisements and other solicitations."*

In addition, the new Rule makes numerous changes to the way debt settlement companies are permitted to conduct business:

- Companies must disclose more information than they currently do when entering into a contract with a consumer.
- It's now illegal for firms to charge upfront fees to settle a consumer's debt.
- The Rule includes new provisions defining, and prohibiting debt settlement companies from misrepresenting their services to consumers.[163]

6.20. Auto warranty company case with FTC

The FTC' strict enforcement of these rules can be understood by the example where the Voice Touch, Inc. and its officers and directors settled[164] with the FTC for alleged violations of the FTC's **Telemarketing Sales** Rule which governs **sales** calls made to consumers by telephone. The FTC alleged that Voice Touch violated the TSR and engaged in deceptive and fraudulent marketing practices where it initiated **sales** calls to consumers where Voice Touch: (1) ignored consumers' do not call requests; (2) called consumers on the national "do not call" registry; (3) blocked or failed to transmit accurate caller ID data; (4) failed to make the disclosures required by the TSR; (4) abandoned calls by failing to connect consumers to a **sales** representative within two seconds of the completed greeting to the person answering the call; (5) used prerecorded messages that did not meet the requirements of the TSR; (6) misrepresented material facts regarding their products and services; (7) failed to pay the National registry fees; and (8) made false or misleading statements regarding Voice Touch's affiliation with the consumer's auto manufacturer, that the expiration of the consumer's auto warranty was imminent, and about the information Voice Touch had regarding the consumer's vehicle and recall status. Voice Touch settled with the FTC for $650,000, and the settlement required that Voice Touch permanently cease all **telemarketing** activities or assisting others in **telemarketing** activities.

The FTC's telemarketing sales rule applies to companies who initiate sales calls to consumers. The TSR contains a number of restrictions regarding whom calls can be made to, the timing of calls, the technology which may be implemented, required disclosures, and other procedural requirements. Companies engaging in telemarketing activities should ensure that their procedures and scripts conform to the FTC's rules.

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163 **http://tucson.bbb.org/article/ftc-updates-telemarketing-sales-rule-to-affect-more-businesses-21416 last accessed on 19.8.2010**

[164] USA**,** June 21 2010, Winston & Strawn LLP, http://www.lexology.com/library/detail.aspx?g=55a52fa3-ffdb-49e9-89e5-5d9fb6cd0e37

6.21. Another case on SMS

A federal district court in Chicago recently held that SMS messages that are sent to consumers without their consent could violate the Telephone Consumer Protection Act. This decision echoes many of the conclusions in a previous Ninth Circuit opinion and underscores the importance of getting express consent from consumers before sending SMS messages. “Mobile marketers would be well-advised to get express consent before sending text messages to consumers,” said Gonzalo E. Mon, attorney at Kelley Drye & Warren LLP, Washington. “Unless they get consent, marketers are likely to face complaints, lawsuits and significant settlement costs.

For the Chicago lawsuit the defendant is Selling Source, a company that provides Web design, hosting, Internet marketing and ecommerce services.

Plaintiff Sadat Abbas and a group of consumers with similar complaints brought this putative class action against defendant Selling Source in the Circuit Court of Cook County, Illinois.

Mr. Abbas alleges that Selling Source sent him and others like him unsolicited SMS text messages from an automatic telephone dialing system (ATDS) in violation of the TCPA.

Selling Source removed the suit, and the matter is presently before the court on Selling Source's Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

According to Wikipedia, the Rule 12(b)(6) motion is how lawsuits with insufficient legal theories underlying their cause of action are dismissed from court.

For example, assault requires intent, so if the plaintiff has failed to plead intent, the defense can seek dismissal by filing a 12(b)(6) motion.

Selling Source urges that the court should dismiss Mr. Abbas' complaint because: (1) he failed to make a short and plain statement of the claim showing that the pleader is entitled to relief as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure, (2) Mr. Abbas failed to allege that he was charged for the SMS message he received, which Selling Source maintains is required to state a claim under the TCPA, (3) he failed to allege that the equipment that sent the subject SMS message was an ATDS, (4) the TCPA does not apply to SMS messages like the ones allegedly sent by Selling Source because a text message is not a "call" within the meaning of the statute and is not otherwise proscribed by the TCPA,(5) as applied, the TCPA would violate the First Amendment, and (6) as applied, the TCPA would be void for vagueness.

Although there were some technical deficiencies, the court is allowing the plaintiff to redraft the complaint so the case is going to go forward.

Additionally, the court has already said that the TCPA applies to SMS messages, which is not a surprise since the FCC found that SMS messages are indeed calls and that this should guide the court's interpretation of the TCPA.

Here is the relevant part of the FCC order regarding SMS and the TCPA:

> *We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number.*
>
> *Both the statute and our rules prohibit these calls, with limited exceptions, to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.*
>
> *This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.*

6.22. Opting for opt-in

"This case is not a departure from previous cases," Mr. Mon said. "In most respects, the court's conclusions are very similar to the conclusions in the Satterfield case. "In fact, the Chicago court cited the Satterfield opinion various times," he said. "In both cases, the courts determined that the TCPA applies both to voice calls and text calls. And in both cases, the courts determined that whether the equipment used to send the messages is covered by the TCPA depends on the capabilities of the equipment, not on how the equipment was used. "The only thing that's new about this decision is the determination that the TCPA applies even if the recipient was not charged for the call. "But since most text messages are subject to some charges, that part of the ruling will not change things for most marketers. Again, the bottom line is that marketers must absolutely get consent from consumers before they send them text messages."[165]

[165] http://www.mobilemarketer.com/cms/news/legal-privacy/5735.html last accessed on 19.8.2010

6.23. Truth in Caller ID Act

Truth in Caller ID Act (S. 704) was introduced in 2007 makes it unlawful to transmit misleading or inaccurate caller ID information. Direct Marketing Association fully supported the efforts of the Committee to enact legislation prohibiting caller ID spoofing. Spoofing is a malicious practice that undermines caller ID as a useful verification device, and when used for illegitimate purposes, can cause harm to both consumers and businesses.

The caller ID is an important enhancer of two-way communication between people making and receiving calls. Caller ID will provider consumers with choice and control over their telephone. It alerts a consumer as to the identity of a caller and allows the consumer to choose whether to answer a call from a marketer offering a product or service of interest. Tying the act of transmitting misleading caller ID information with an intent standard appropriately identifies the offending act while ensuring that businesses are not liable for simple mistakes or other instances where changing the caller ID information is appropriate. [166]

6.23.1. Law to Regulate Ads in UK

Like violence, advertising is supposed to have a particular effect on the minds of younger and less educated audiences. In the UK the situation is complex, as each medium is governed by a different regulatory body:

- Non-Broadcast Advertising is dealt with by the Advertising Standards Authority
- UK TV Advertising complaints are referred to the OfCom
- All advertising in the UK is subject to the Committee of Advertising Practice's Code (known as the CAP Code) and also to the Code of the European Advertising Standards Alliance.

All this leads to a maze of rules and regulations which must be negotiated by an agency seeking to produce a campaign. There are extremely strict rules regarding the advertising of tobacco (banned), alcohol (going that way), medicines/medical services and products aimed specifically at children.

6.23.2. Selling through Sexual content

Advertisers jump at sexual content to promote the products. It is a truth universally acknowledged that Sex Sells. Ad agencies have been utilising this principle for as long as

[166] http://www.the-dma.org/cgi/disppressrelease?article=955%20%20%20%20%20%20 last accessed on 19.8.2010

they have been advertising, successfully persuading the consumer that sexual attractiveness is a benefit of a plethora of products and services, from the obvious (lipstick) to the surreal (washing powder). The need to be sexually desirable does appear to be paramount in the world of women's magazines and certain zones of TV advertising. We also need to ask the question, however, how much sex sells, and how much offends and therefore alienates the consumer? Advertising Standards Authorities, censors and, more importantly, big distributors should keep a tight rein on how much advertising may utilise sex, but there are increasing doubts about their effectiveness. As with violence, continued exposure to sexual imagery desensitizes, and advertisers seek to gain attention for their products by providing imagery that is continually more explicit. And, inevitably, the very explixitness of these ads generates a great deal of free publicity.[167]

6.23.3. EU Law to curb Misleading and comparative advertising

European legislation regulates comparative advertising and protects consumers and those involved in commercial, industrial, craft or professional activity, and the public interest in general, against misleading advertising and its unfair consequences. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising is the law in force now. Its aim is to control misleading advertising in the interests of consumers, competitors and the general public. In addition, it also lays down the conditions under which comparative advertising is permitted.

6.23.4. Misleading advertising

Misleading advertising is advertising which, potentially or actually, misleads or affects the judgment of the consumer or which, for these reasons, is detrimental to a competitor. The essential components which decide misleading nature of advertisement are:

- the characteristics of the goods or services;
- the price;
- the conditions governing the supply of the goods or the provision of services;
- the nature, qualities and rights of the advertiser.

6.23.5. Comparative advertising

“Comparative advertising” is defined as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. There is a need to establish criteria to determine whether a comparative advertisement is permitted

[167] http://www.mediaknowall.com/as_alevel/Advertising/advertising.php?pageID=regulate last accessed on 19.8.2010

since comparative advertising, when it is not misleading, can be a legitimate means of informing consumers of what is in their interest. Comparative advertising is permitted if the following conditions are met:

- it is not misleading;
- it compares goods or services meeting the same needs or intended for the same purpose;
- it objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price;
- it does not create confusion in the market place between the advertiser and a competitor;
- it does not discredit or denigrate the trade marks, trade names or other distinguishing signs of a competitor;
- for products with designation of origin, it relates to products with the same designation;
- it does not take unfair advantage of the trademark or other distinguishing sign of a competitor;
- it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

6.23.6. Remedy

In order to combat misleading advertising and illicit comparative advertising, the EU Member States provided to those persons or organisations with a legitimate interest to:

- bring a court action against such advertising;
- bring such advertising before a competent administrative body to rule on the complaints or to institute the appropriate legal proceedings.

6.24. Advertising Standards Authority of UK (ASA)

In UK an independent authority "the Advertising Standards Authority (ASA) is regulating advertising across all media, including TV, internet, sales promotions and direct marketing. ASA's role is to ensure ads are legal, decent, honest and truthful by applying the Advertising Codes.

6.24.1. Broadband Speed Claims probed by ASA

The latest invasion on minds of netizens is the broadband speed claims, most of which are false. The ASA has asked the Advertising Code writing bodies (CAP and BCAP) to review broadband speed claims in advertisements as part of a wider look at advertising in the telecommunications sector. The aim is to provide better clarity for consumers and the work is well under way. Many of us will have seen advertisements for broadband claiming that the service speed is "up to" a certain MB per second. But the actual service consumers experience is often different.

All of this means that when a speed is advertised, the only speed that can be independently verified is the speed at which the broadband leaves the telephone exchange. And this is the speed that is claimed in advertisements. The information ads provide can influence our purchasing decisions. Current advertising policy acknowledges that consumers will look into products before spending their money. This works alongside Ofcom's Code which requires broadband providers to tell their customers what speed they can expect to achieve when they sign up to a particular service.

Broadband advertisements can lead to complaints, particularly when someone feels they have been misled about the speed of the service. The ASA asked the CAP and BCAP to conduct a separate review. Ofcom's research report confirms that, although the average speed experienced by UK consumers has increased by over 25% in the past year, there is also a growing gap between the advertised and actual speed delivered to customers. CAP and BCAP's overriding aim is to provide guidance that will bring advertisers up-to-speed on how to advertise their services and, importantly, will protect consumers from being misled.[168]

6.24.2. Internet and Telephone packages

Technological revolution in communication increased scope for and changed the nature of advertisements. The dawn of the Internet saw phone lines being connected to computers which in turn has led to the subsequent broadband revolution. As a result, broadband and phone packages have proliferated. With many companies now providing the two services together the market has never been more competitive and consumer choice has never been greater. It is this fierce battle for customers that has seen advertisers making increasingly attractive low cost offers and claims about connection speeds and line rentals. Unfortunately, in the rush to lure customers to a particular brand, advertisements have sometimes made claims that have turned out to be misleading.

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[168] http://www.asa.org.uk/Resource-Centre/Hot-Topics/Broadband-advertising.aspx, last accessed on 19.8.2010

6.24.3. Free and Cheap Talk

'Free', 'Concessions', 'Rebates' and 'Slashing of Prices', 'Discounts' are the expressions we frequently hear in any market. One of the most frequently used words being thrown around by advertisers in the broadband and telephone market at the moment is 'free'. Though it is said 'caveat emptor' as a principle is old and now consumers have rights, the need for 'buyers beware' is always increasing. Although there is nothing illegal for advertisers to call something free, there are strict advertising rules surrounding the use of the word and advertisers do not always get it right. The ASA formally investigated and upheld 145 complaints from members of the public and industry competitors about Carphone Warehouse's multi-media ad campaign for its TalkTalk telephone package that offered "free broadband forever". Those who contacted the ASA objected that the offer was misleading because it suggested that the broadband was free when it involved a contractual commitment to a calls package. They also thought the claim that broadband was "free forever" couldn't be substantiated. Lastly, they did not think it was sufficiently clear that the availability of broadband was dependent on being connected to a qualifying telephone exchange and for those that weren't it would cost a further £10 per month for the broadband service. The ASA upheld the complaints on all three points. It considered that the broadband was a constituent part of the package and only available as an option to people who paid a connection charge to sign up and who continued to pay a monthly charge. Because the ASA did not consider that broadband could be described as free it also considered describing it as "free forever" to be misleading. The ASA also found that even if TalkTalk could call their broadband free they could not substantiate the "forever" claim. Because people who had signed up to the offer would continue to pay £20.99 a month it meant that broadband would become "inclusive" after a reasonable period of time rather than "free". Lastly on the issue of availability, the ASA ruled that TalkTalk had not made sufficiently clear to consumers that the broadband service was only available without an extra charge to homes that were connected to a TalkTalk exchange. Those that were not would have to pay an extra £10 per month for the broadband service. As a result of the ASA ruling TalkTalk were told that their ads must not be broadcast or published again in their current form.

6.24.4. More hassle-less speed

A TV ad and a national press ad promoting Bulldog's broadband and phone package both claimed "Up to 8 meg broadband". In this instance "Meg" stands for megabits and the speed it is delivered in is measured in megabits per second or Mbps. So 8 meg broadband is a service that enables speeds of 8 megabits per second. A competitor and members of the public objected that the ads were misleading because the broadband speed quoted was not achievable or available for a significant number of people within the geographic areas where the service was available.

The investigation into these complaints raised some interesting questions about how the advertising codes are interpreted and applied by the ASA. Bulldog argued that their "up to" claim was in line with previous guidance and rulings by the ASA and clearly indicated that the top speed might not be achieved by all users. The ASA acknowledged this point but considered that "up to" was an adequate qualification in ads for 1 Mbps and 2 Mbps services – where the attainable speeds were close enough to those advertised so as not to affect the customers' experience in any meaningful way.

What became apparent, however, is that higher speed services, such as the "up to 8 meg" promoted in this particular ad, are not attainable for all customers due to restrictions in technology. The broadband speed that people can achieve is dependent on how close they are to a local exchange. The further away they are from an exchange the slower the broadband speed will be. Beyond 3km the achievable speed drops rapidly because the signal is weakened by line length and quality. Because a significant proportion of Bulldog customers could not achieve speeds close to the headline "8 meg" the ASA considered that "up to" was not an adequate qualifier in ads for higher speed services.

The ASA upheld the complaints against Bulldog and told them to indicate prominently in future ads that top speeds varied significantly, in particular because of a user's distance from their local exchange. This also served as an agenda setting ruling for the sector as a whole and all advertisers wanting to make this kind of claim in the future will have to take note of the ASA's findings.

Broadband and telephone packages, with high speed services and low cost offers, are being advertised in abundance. Consumers may feel spoilt for choice and find that in most instances the package they choose more than satisfies their user needs. However, if advertisers want to promote their services then they have to ensure they do not mislead the public with claims that are not as good as they appear to be.

The seismic shifts in technology that have enabled consumers to take advantage of and enjoy high speed Internet connections in their homes have also created a world of advertising opportunities. It is the ASA's role to ensure that advertisers comply with the rules so that when consumers take advantage of their new broadband and telephone package they do not do is use their phone or computer to contact us and complain about advertising in this sector.[169]

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[169] For more details see http://www.asa.org.uk/Resource-Centre/Hot-Topics/Internet-and-telephone-packages.aspx, last accessed on 19.8.2010

6.25. Australia

Telemarketing in Australia is restricted by the Australian Federal Government and policed by the Australian Communications and Media Authority (ACMA). Australian Federal legislation provides for a restriction in calling hours for both Research and Marketing calls.

In 2007 a Do Not Call Register was established for Australian inbound telephone numbers. The register allows a user to register private use telephone numbers. Australian Federal Legislation limits the types of marketing calls that can be made to these registered telephone numbers; however, research calls are allowed. Other exemptions include calls made by charities and political members, parties and candidates.

Inbound telemarketing is another major industry. It involves both live operators and IVR—Interactive Voice Response. IVR is also known as audiotext or automated call processing. Usually, major television campaigns and advertisers use toll-free telephone number that are answered by IVR service bureau. Such service bureaus have the technology and call capacity to process the large amounts of simultaneous calls that occur when an toll-free telephone number is advertised on television.

6.26. Some frauds perpetrated on consumers

Some of the frequent scams that hit the email ids and office fax machines or mobiles of the people world over are listed here, to emphasize the need to educate the people, to identify, punish and prevent such scamsters.

- **Earthquake scam:**Latest among the frauds is the Fake Haitian Earthquake disaster scams explaining to find out how to donate safely to the Haiti earthquake relief effort.

- There was another scam called "**Your Car Warranty Has Expired**" Scam- which was sued by American FTC.“This is one of the most aggressive telemarketing schemes the FTC has ever encountered,” said FTC Chairman Jon Leibowitz.

- Some are **tax scams**, while others are Celebrity Scams. Netizens have to check whether that email really from favorite TV or movie star, Sports hero or other celebrity as claimed by the mail or SMS. Nigerian lottery scams are numerous and every day almost every mail is hit by dozens of lottery win mails. In India, millions of people are falling and lured by the duping lottery mails. Cyber police station in Hyderabad reported at least three persons come with a complaint of losing lakhs of rupees by responding to the mails of winning lottery. Canada and UK are also no exceptions. There they provide the list of legitimate and legal lotteries along with

discovered illegal and fraudulent lottery companies for the knowledge of the consumers.

- **Promotion Scams and Rip-offs:** Email users all of a sudden receive mails saying you are "instant winner" or that you are guaranteed to have won one of several prizes? They might have collected the email id when people drop their visiting cards at stores, etc. Often, this is a legal way for marketing companies to harvest name, address, email and phone number details of people to suck them into to a legal rip-off.

- **Scams against the hearing-impaired:** Scammers are equal-opportunity criminals; if a person has a handicap, they'll do their best to convince him into thinking there is a special grant or lottery just for that!

- **Astrology and psychic schemes** sent from an overseas based psychic, clairvoyant or astrologer offering fortune telling books, reports or a talisman for a fee.

- **Banking scams** such as ATM Scams - Crimes at the Bank Machine,

- Buying, Selling, Shopping and Auctions Online and Off,

- **Auction Frauds -** Do you use Ebay or PayPal, or other auction websites? There are pages on internet to explain selling scams on the internet.

- **Classified Ad Scams** - Online classified ad websites like Craig's List (craigslist.org and craigslist.org.uk) and newspapers have enabled millions of individuals to connect buy and sell a great variety of personal merchandise, but the scammers are operating there, just as everywhere else.

- **Fake checks from fake buyers** - If you have something to sell, whether you are one person selling a used item or a business, there's a scammer waiting for you, as long as you are willing to take a check for more than the price of the item.

- **Fake checks - from fake lotteries, EBay buyers and others** - Just because someone sends you or gives you a real-looking check, don't assume it is legitimate. And attempting to cash it can land you in jail!

- **Fake online stores** - Is that website offering fantastic prices legitimate? There is a need to check. State agencies and experts should help.

- **Pet scams** - Photos of cute puppies that are stranded, free to a good home It's a scam!

- **Shopping scams** - "Win a Free Laptop", "refer friends and take 1 offer" and get a free computer. These shopping "deals" are no bargain!

- Computer viruses, Worms and Other Malware
- **Spyware, Adware and other malware –** Without knowing what they, how they work and what can be done to protect the pc one should not believe these ads.
- Comic Relief - The Funny Side of Scams -**Entertainment in the World of Scams** - looking for humor and a laugh? There are scams behind even these announcements,
- Con Men / Con Games, **Confidence scams** - Not all scams and scammers appear in email, a letter or a phone call. Some approach you where and when you least expect them: in church, at school, in a grocery store or gym.
- **Counterfeit Products,** Counterfeit Shoes: Nikes (and Others)
- Debt collection scams
- **Education Scams** - Quick degree scams - "Get your degree in 30 days!" "No studying required", "Turn your experience into a degree". Sure, they're accredited and the degree is legal and meaningful. And we have some swampland to sell you, too.
- Email Scams and Spam, **Email Spams**- Endless unsolicited help in getting a cheap mortgage, enlargening your genitals, buying viagra or cheap drugs, software or losing weight. Many of these also contain worms and viruses! And don't think for a moment that the "sent from" or "reply to" addresses are real.. or really who sent it.
- How to Stop Spam almost forever! You don't have to face an inbox full of porn, spam, scams and junk every day.
- **Nigerian Scams: Money Transfer / Advance Fee Fraud / Bank account scams / Fake Business deals (419 scams)**, such as letters, emails or faxes notifying the recipient that the sender requires help in transferring a large sum of money through your bank account (for reward) usually from Nigerian and Dutch sources. There are many variations on this scheme, including the fake business deal: "I need a business partner in the U.S.", types of money laundering, and others.
- **Fake cashier's checks**, Jobs Scams, Poor widows and orphans of super wealthy diplomats, Generals, Presidents and whatever... with millions in an account that you can help get!, Lawyers and Barristers with Dead Clients Bank Accounts (they could give lawyers a bad name), Government officials, bankers, insurance managers and account managers, all with dead rich clients, Foreign business deal scams - need a partner or rep where you live (lucky you!), Religious scams - "Oh, for the love of Christ...", Fake grants, loans and credit card applications (take our millions, please!),

Miscellaneous: No classifications - It's hard to figure out WHAT the scam of these gibberishy emails are supposed to be! Are some more varieties of scams online.

- **Extortion Scams:** Death Threat Extortion Scams: Not satisfied with trying to con money from victims, some scammers are trying death threats and extortion scams. See this page for more information and sample emails, Scams written in languages other than English, such as En Español - Haga clic aquí para ver descripciones en español, In French - Scams in French.

- Fake Organization Scams,

- **Fake government agencies, non-existent charitable organizations** and other fake groups and entities - there are a host of scammers who create legitimate sounding organizations that do not exist or exist only on paper. Before donating or paying some organization, one need to check.

- False or **deceptive advertising** and defective products

- Defective product investigations, exaggerated product claims, product scams and check if a particular company or product has been investigated for false advertising, defective products or other trade issues? Just search the Federal Trade Commission's (FTC) database to understand the fraud.

- **Fax Scams**, Are junk faxes and fax scams with names like "vacation memos" and "stock tips" might pile up on company's fax machine? One needs to check whether fax machine spew out junk advertising?

- **Grants – Fake,** The fake grant scam is a variation of the counterfeit check passing scam, college scholarship, grant and loan scams.

- "Green Card Lottery" Its real name is the Diversity Lottery and scams abound for it. In fact there are far more scams than legitimate websites and services.

- House, Home and Apartment Scams,

- **Home repair scams** - Just because they advertise in the yellow pages, drive a business van, or look like a technician, should not believe them to be genuine.

- Mortgage scams,

- Identity Theft and Credit Reports,

- **Check your credit report, for free!** Freeze your credit, **Credit card account information thefts Identity Theft**, **Phishing** - fake emails and fake websites

pretending to be your bank, credit card company or other agency, and asking for your private account information, and latest scam. **Pharming** is that website the one you think it is... or a fake?

- Investing, Retirement, Loans, Debt Collection and Other Financial Scams,
- **Debt collection scams and unfair collection practices**, **Investment and Retirement Scams - The "Free Lunch Seminar" Scam**, **Fake bills and invoices** - "Pro forma" invoicing: You get a bill that looks real, but either you never ordered the product or service, or they're not really the company you bought it from.
- **Loan Scams** - Did you receive a phone call, email, letter, or respond to an ad that said they approve loans for anyone, regardless of credit history? It is a scam! **Scholarship, Student Loan and Financial Aid scams**, **Stock and investment scams**,
- Money Making, Income, Get-Rich and "Passive Residual Income" Scams,
- **Get rich scheme and scam websites, Multi-Level Marketing** - they may disguise themselves by selling a small amount of overpriced, hyped products many are illegal pyramid schemes,
- Phone scams, **Phone and collect call scams** - Have you received collect calls which you may not have even accepted, but got hit with a charge on your phone bill?
- **Webmastering /** Web development Scams -Domain name / registration scams- if you have a domain name, sooner or later you will receive one of these scams, Search engine spam- You click on a link in Google looking for some information and you go to a website that has nothing but more links to other websites... and lots of advertisements. You've been spammed!
- **Work-from-Home scams**, Tell your boss to jump in a lake. Easy data entry at home. Medical transcription. Be crazy-like-a-fox, or just go-here-next... Yes, work from home is possible; for the scammers who think up these work-from-home scams to sell con you! There are a very few work from home programs that appear to be legitimate.[170]

All these scams are not confined to limits of one country or within some borders. Since email invites mails from any quarter of the world, people anywhere are threatened from anywhere. Most of these scams could fall under general criminal law of fraud and if the

[170] http://www.consumerfraudreporting.org/ last accessed on 19.8.2010

originators of scam are caught, they could be convicted. They also might be categorized as consumer rights violations. A few guidelines from Advertisement Associations and councils will not be enough. In India there is a need for safeguards for netizens and mobile users against the onslaught of lottery scamsters invading through emails.

6.27. New Law against Misleading Advertisements

The Food Safety and Standards Act of 2006 (FSSA) came into force from Aug 5, 2011 making it at par with the international standards. It is aimed at ensuring improved quality of food for the consumers and to censure misleading claims and advertisement by those in food business.

Section S 2 (zf) of FSSA defined that " misbranded food" means an article of food-(A) if it is purported, or is represented to be, or is being-(i) offered or promoted for sale with false, misleading or deceptive claims either; (a) upon the label of the package, or (b) through advertisement….

Section 52 imposes penalty for misbranded food. It says: Penalty for misbranded food.- (1) Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is misbranded, shall be liable to a penalty which may extend to three lakh rupees.

S 52(2) The Adjudicating Officer may issue a direction to the person found guilty of an offence under this section, for taking corrective action to rectify the mistake or such article of food shall be destroyed.

S 24, FSSA imposes restrictions on advertisements and prohibits certain unfair trade practices. It says:

Restrictions of advertisement and prohibition as to unfair trade practices-(1) No advertisement shall be made of any food which is misleading or deceiving or contravenes the provisions of this Act, the rules and regulations made thereunder.

Sub clause (2) says: No person shall engage himself in any unfair trade practice for purpose of promoting the sale, supply, use and consumption of articles of food or adopt any unfair or deceptive practice including the practice of making any statement, whether orally or in writing or by visible representation which-

The FSSA says: There can be no false representation

- (a) falsely represents that the foods are of a particular standard, quality, quantity or grade- composition;

- (b) makes a false or misleading representation concerning the need for, or the usefulness;

- (c) gives to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof: Provided that where a defence is raised to the effect that such guarantee is based on adequate or scientific justification, the burden of proof of such defence shall lie on the person raising such defence.

It is an offence under FSSA. Food Safety Officer shall be liable to a penalty which may extend up to one lakh rupee if he / she is found to be guilty of an offence under section 39 of the Act. Provided that in case the complaint made against the Food Safety Officer is false the complainant shall be punish with fine which shall not be less than fifty thousand rupees and may extend to one lakh rupees.

Penalty for misleading advertisement is: Section 53: Penalty for misleading advertisement- (1) Any person who publishes, or is a party to the publication of an advertisement, which- (a) falsely describes any food; or (b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees.

Redefine misleading

At present, misleading advertisements are treated as unfair business practices. It requires a sharper definition in Consumer Protection Act. In M.R.Ramesh VS M/S Prakash Moped House and Others, (RPNo 831 of 2001) the apex consumer court warned against advertisements that use fine print to hide crucial information pertaining to products and services, thereby misleading the consumer.

If "free gift" is promised, it should really be so. If the manufacturer is recovering either fully or even partly, the cost of free-gift, it becomes a false or a misleading claim, coming under the definition of 'unfair trade practice'. Section 53 (2) says that in any proceeding the fact that a label or advertisement relating to any article of food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food shall not preclude the court from finding that the contravention was committed.

Similarly, Section 29 of Drugs and Cosmetics Act, 1940 imposes a penalty for use of Government Analyst's Report for advertising. It says: Whoever uses any report of a test or analysis made by the Central Drugs Laboratory or by a Government Analyst, or any extract from such report, for the purpose of advertising any drug shall be punishable with fine which may extend to five hundred rupees.

Section 9 defines the misbranded drugs. It says: … a drug shall be deemed to be misbranded--- (a) if it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is;

It will be ‘misleading’ (b) if it is not labelled in the prescribed manner; or (c) if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular manner.

It will be ‘misbranded cosmetics. “ …a cosmetic shall be deemed to be misbranded, -- (a) if it contains a colour which is not prescribed; or (b) if it is not labelled in the prescribed manner; or (c) the label or any container or anything accompanying the cosmetic bears any statement which is false or misleading in any particular. S 17C

The problem of advertisements misleading consumers continues to be serious world over and in India especially, despite several legislations like Food Safety and Standards Act, Consumer Protection Act and the Drugs and Cosmetic Act. The copywriters and ad agencies use all their intelligence to mislead the consumers. In India, advertisements for cigarettes, liquor, pan masala, products that are harmful to the public continue to find a place on television channels despite the ban imposed by the government, according to Union Minister.

New Law to Regulate Ads

At present there is no comprehensive legislation to cover the entire activity of misleading advertisements relating to every product and service. There are several fragmented pieces of legislation confined to specific products. Hence the Consumer Affairs Ministry, contemplating the framing of a new law to curb of misleading advertisements, has started country-wide consultation with all stakeholders. The new law would allow consumers to seek legal action against false claims made by companies in their advertisement. The government is trying to set up National Consumer Protection Agency (NCPA) to monitor and penalize companies that make misleading claims in their advertisements. The NCPA, under the consumer affairs ministry, would be empowered to take severe action, including recall of the product and slapping cases against the firms.

Investigating Agency

Flooded with growing consumer complaints over misleading advertisements, especially relating to health and nutritional benefits and the get-rich schemes, the government is planning an investigating agency to curb the practice. The Consumer Protection Act allows the Govt. to order probe into specific complaints and take to courts. Such a probe agency help as the consumer courts cannot collect evidence. Government can be a complainant in such cases.

Nutraceutical Market

Another major area is the misleading advertisements related to nutrition in food supplements, cosmetics and herbal products promising immediate magical health benefits. Some of the advertisements are covered by Drugs and Magic Remedies law, while most of the misleading advertisements are not tackled by any law. It will be difficult for the victims to file general

cases and prove their problems to seek remedies. The Indian market for nutraceutical products that combine the benefits of nutrition with pharmaceuticals was worth $1 billion a few years ago. Globally, the market for nutraceuticals is pegged at around $124 billion and growing.

The misleading advertisements will violate consumer's right to information about the product or services, and unduly influence his choice leading to financial loss and mental agony. Wrong claims about health cures and drugs will be more dangerous. There is a need for comprehensive protective legislation to offer remedies to victims of misleading advertisements.