



KP ASSOCIATES

ADVOCATES & CONSULTANTS

HANDBOOK

**GUIDELINES FOR PREVENTION OF MISLEADING
ADVERTISEMENTS AND ENDORSEMENTS FOR
MISLEADING ADVERTISEMENTS, 2022**

K.P. ASSOCIATES

ADVOCATES & CONSULTANTS

ABOUT THE FIRM

KP Associates is a multi service law firm that strives to deliver quality and value to our clients. We believe in forging enduring relationships and give importance to the overall “Client Experience”.

The Firm houses a team of professionals from diverse specializations across major jurisdictions that enables us to assist clients throughout the country and abroad. We advise multinational companies, start-ups, individuals, government and public sector bodies on transactional, regulatory and litigation matters.

We provide innovative and pragmatic legal solutions tailor made to the needs of the client. We believe in investing time, effort and on giving attention to detail to every matter. We exhibit commitment to the excellence that our clients have come to expect of us.

The Firm is guided by its commitment to quality, collaborative culture, and its core values.

The Firm’s logo is represented through a pair of ‘Quotation Marks’, an identification of emphasis on ‘Precision – Exactness’, ‘Teamwork – Conclusiveness’, core values that the Firm embodies.

Prior to the issuance of the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022, the Consumer Protection Act, 2019, allowed for the statutory protection of consumer rights against deceptive or fraudulent advertising. The Act stated that creating false or misleading advertisements would be regarded as an unfair trade practice. In order to supervise the problem of fraudulent or misleading marketing, the Act required the creation of a Central Consumer Protection Authority (CCPA)

In today's times, social media has not only confined as a platform to communicate or disseminate information but also been shaped into a new marketing regime where social media influencers can use their popularity to promote various brands and earn the monetary profits. In spite of existing protection under Consumer Protection Act, 2019 against fraudulent advertising, there was no particular statutory mechanism in place outlining the duties and responsibilities of social media influencers in respect to endorsement of advertisements. In furtherance of which, CCPA released a set of comprehensive guidelines titled "Guidelines on Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022", contouring the due diligence that shall be complied by celebrities while endorsing products irrespective of the platform. Additionally, these guidelines would be the comprehensive framework restraining other digital media and streaming services like Netflix, Hotstar etc. to air any such misleading advertisements.

Therefore, it can vividly be said that the Guidelines seek to protect consumers from being misled with unsubstantiated claims, embellished promises, false information and false claims. Such advertisements violate various rights of consumers such as right to be informed, right to choose and right to be safeguarded against potentially unsafe products and services.

Set out below are a few salient features of the Guidelines:

★ **BROADER AMBIT OF THE TERM 'ENDORSER'**

The Guidelines provide a widest amplitude to the term 'endorser' which include "an individual or a group or an institution making endorsement of any goods, product or service in an advertisement whose opinion, belief, finding or experience being the message which

such advertisement appears to reflect”¹. Thus, it broadens the ambit of ‘endorser’ and moreover, the definition has been kept inclusive which reflects the intention of the legislature that it should not be construed narrowly and envisage probable inclusions in upcoming times.

★ **WIDER APPLICATION**

The Guidelines shall be applicable on all advertisements regardless of form, format or medium i.e., print, television, and digital platforms. Furthermore, it shall be applicable upon a manufacturer, service provider or trader whose goods, product or service is the subject of an advertisement, or to an advertising agency or endorser whose service is availed for the advertisement of such goods, product or service.² This would ensure no escape can be sought by the wrongdoer in order to seep from his culpability.

★ **WHAT WOULD CONSTITUTE NON-MISLEADING & VALID ADVERTISEMENT?**

The term ‘Misleading Advertisement’ has already been defined under the Consumer Protection Act, 2019³ but the Guidelines emanate more clear view of what would constitute non-misleading and valid advertisement which enlist the standards of advertisements that shall be met in order to be considered as valid and non-misleading advertisements.

Set out below the said standards providing that the advertisements:⁴

1. Must be truthful and honest representation.
2. Must not mislead consumers:
 - by exaggerating the accuracy, scientific validity or practical usefulness or the capability or performance or service of the goods or product
 - about the nature or extent of the risk to consumers’ personal security

¹ See Sec. 2(1)(f).

² See Sec. 3.

³ See Sec. 2(28), Consumer Protection Act, 2019.

⁴ See Sec. 4.

3. Must ensure that the claims that have not been independently substantiated but are based merely on the content of a publication do not mislead consumers.
4. Must not suggest that the claims made in such advertisement are universally accepted if there is a significant division of informed or scientific opinion pertaining to such claims.
5. Must be in compliance with any other sector specific law.



CONDITIONS FOR BAIT ADVERTISEMENTS

The term '**Bait Advertisement**' has been defined as "an advertisement in which goods, product or service is offered for sale at a low price to attract consumers".⁵

The Guidelines draw few conditions for bait advertisements which provide that it shall be ensured that there is adequate supply of goods, products or services to meet foreseeable demand generated by such advertisement. Further, such advertisement shall state the reasonable grounds which the advertiser has for believing that he might not be able to supply the advertised goods, products or services within a reasonable period and in reasonable quantities. Similarly, any restriction be it geographical, age-limit on availability of goods/products/services, **must be clearly indicated in such advertisement.**⁶

Most significantly, such advertisement shall not seek to entice consumers to purchase goods, products or services without a reasonable prospect of selling such advertised goods, products or services at the price offered.

An instance of bait advertising can be seen in the case of *Aero Club v/s Rakesh Sharma*⁷, Aero Club was engaged in the business of selling Woodland Brand of shoes and apparels. Despite offering flat 40% discount, as per its advertisement, it charged VAT on the price arrived at after giving the said discount. Aero Club, according to the complainant, had announced a discount of "FLAT* 40%" on selected merchandise in the advertisement, but sold the goods in actual terms at a price which worked out to less than 40% on the MRP, which was held to be an unfair trade practice.

⁵ See Sec. 2(1)(d).

⁶ See Sec. 5.

⁷ RP No. 3477 of 2016



PROHIBITION OF SURROGATE ADVERTISING

The term ‘**Surrogate Advertisement**’ has been defined as “an advertisement for goods, product or service, whose advertising is otherwise prohibited or restricted by law, by circumventing such prohibition or restriction and portraying it to be an advertisement for other goods, product or service, the advertising of which is not prohibited or restricted by law”.⁸

The Guidelines state that no surrogate advertisement or indirect advertisement shall be made for goods or services whose advertising is otherwise prohibited or restricted by law, by circumventing such prohibition or restriction and portraying it to be an advertisement for other goods or services, the advertising of which is not prohibited or restricted by law.⁹

The provision seems to put a blanket ban on surrogate advertising but the explanation attached to the provision managed to create slight vagueness as it states that mere use of a brand name or company name which may also be applied to goods, product or service whose advertising is prohibited or restricted shall not be considered to be surrogate advertisement or indirect advertisement, if such advertisement is not otherwise objectionable as per the provisions set out in these guidelines. For this, the reference has to be drawn from rule 7(2)(viii) of the Cable Television Network Rules, 1994 (as amended in 2000¹⁰ and 2008¹¹), which indicates in what circumstances use of the same brand as used on ‘prohibited’ goods could be advertised in the context of other permissible goods or services. Accordingly, further clarity on the subject would be required.

Evident instance of surrogate advertisements is Imperial Blue’s series of advertisements on music CDs to promote their whisky brand in India where it is banned to advertise an alcohol

⁸ See Sec. 2(1)(h).

⁹ See Sec. 6.

¹⁰ Cable Television Networks (Amendment) Rules, 2000, Ministry of Information and Broadcasting, Notification No. G.S.R. 710(E), dated 8 September 2000.

¹¹ Cable Television Networks (Amendment) Rules, 2000, Ministry of Information and Broadcasting, Notification No. G.S.R. 710(E), dated 8 September 2000.

product. Big brands like bagpiper soda, cassettes & CDs; royal challenge; kingfisher fall under this category.

In *TV Today Network Limited v Union of India*¹², when considering measures imposed by the MIB on a television channel for airing a supposed surrogate advertisement, the Delhi High Court opined that the advertisement – for a brand of club soda – gave rise to questions of surrogate advertising having occurred as the club soda bottles were marketed under the same brand as, and using similar packing to, All Seasons whiskey products.

★ FREE CLAIM ADVERTISEMENTS

The Guidelines set out that no goods, products or services shall be advertised as ‘free’, ‘without charge’ or use such other terms if:

- the consumer has to pay anything other than the unavoidable cost of responding to such advertisement and collecting or paying for the delivery of such item.
- the consumer has to pay for packing, packaging, handling or administration of such free goods, product or service.
- the cost of response, including the price of goods, product or service which the consumer has to purchase to take advantage of such offer, has been increased, except where such increase results from factors unrelated to the cost of promotion.
- the quality or quantity of the goods, product or service that a consumer shall purchase to take advantage of the offer has been reduced.

The Guidelines inter alia require the free claims to clear the extent of commitment that a consumer shall make to take advantage of a free offer and also not to describe an element of a package as free if such element is included in the package price¹³

¹² W.P. (C) 1971/2021, CM Appls. 5764/2021 and 5765/2021 before the Delhi High Court.

¹³ See Sec. 7.



CHILDREN TARGETED ADVERTISEMENTS

Keeping in view the sensitiveness and vulnerability of children and severe impact advertisements make on the younger minds, several pre-emptive provisions have been laid down on advertisements targeting children. Guidelines forbid advertisements from exaggerating the features of product or service in such manner as to lead children to have unrealistic expectations of such product or service and claim any health or nutritional claims or benefits without being adequately and scientifically substantiated by a recognized body.

The Guidelines further state that Advertisements concerning children shall not take advantage of children's inexperience, credulity, sense of loyalty or condone or encourage practices that are detrimental to children's physical health or mental wellbeing.

The Guidelines inter alia include that such advertisements shall not:

- imply that children are likely to be ridiculed or made to feel inferior to others or become less popular or disloyal if they do not purchase or make use of such goods, product or service.
- include a direct exhortation to children to purchase any goods, product or service or to persuade their parents, guardians or other persons to purchase such goods, product or service for them.
- use qualifiers such as 'just' or 'only' to make the price of goods, product or service seem less expensive where such advertisement includes additional cost or charge
- feature children for advertisements prohibited by any law for the time being in force, including tobacco or alcohol-based products.
- feature personalities from the field of sports, music or cinema for products which under any law requires a health warning for such advertisement or cannot be purchased by children.
- claim that consumption of a product advertised shall have an effect on enhancing intelligence or physical ability or bring exceptional recognition without any valid substantiation or adequate scientific evidence.
- develop negative body image in children

The Guidelines also lay down that an advertisement for junk foods, including chips, carbonated beverages and such other snacks and drinks shall not be advertised during a program meant for children or on a channel meant exclusively for children. Similarly, an impression cannot be given that the goods being advertised are better than the natural traditional food being consumed by children.

In view of this, Central Consumer Protection Authority (CCPA) chief commissioner and additional secretary in the consumer affairs ministry **Nidhi Khare** said: "The guidelines enumerates various factors to be considered in publishing advertisements specifically targeting children." According to the new guidelines, those advertisements will be considered misleading if they claim any health or nutritional claims or benefits without being adequately and scientifically substantiated by a recognised body.¹⁴



RULES ON DISCLAIMERS

The Guidelines stipulate several rules regarding disclaimers in advertisements, for instance, Disclaimers may expand or clarify a claim made in an contradict the material claim made in the advertisement or contradict the main message conveyed by the advertiser or change the dictionary meaning of the words used in the claims received or perceived by a consumer.

The Guidelines further say that no material information shall be hidden with respect to any claim made in such advertisement, the omission or absence of which is likely to make the advertisement deceptive or conceal its commercial intent.¹⁵

Furthermore, the Guidelines draw requirements in respect to language, font, placement, speed and legibility of disclaimers so that it seems clearly visible to a normally-sighted person reading the marketing communication once, from a reasonable distance and at a reasonable speed. Advertisements in contravention of these norms would be treated as 'Misleading'.

¹⁴<https://www.outlookindia.com/business/government-gives-special-focus-on-protecting-children-from-misleading-ads-in-new-guidelines-news-201583>.

¹⁵ See Sec. 11.

For instance, In *FITJEE v. Indian Institute of Technology Delhi*¹⁶, the Hon'ble Court directed the display of disclaimer at all the places where the advertisements are displayed.



DUE DILIGENCE

The Guidelines require that any endorsement in an advertisement must reflect the genuine, reasonably current opinion of the individual, group or organisation making such representation and must be based on adequate information about, or experience with, the identified goods, product or service and must not otherwise be deceptive.¹⁷

The Guidelines further augment the scope of provision by covering foreign professionals by elucidating that where, Indian professionals, whether resident in India or otherwise, are barred under any law for the time being in force from making endorsement in any advertisement pertaining to any profession, then, foreigner professionals of such profession shall also be not permitted to make endorsement in such advertisement.

Simply, this implies that brands can ask an undertaking from their endorsers of the fact that they have actually used the products or services they are promoting. Endorsers would need to be very diligent before endorsing goods, products or services, in order to escape from any liability. As a result of the Guidelines, it will be intriguing to see if endorsers start seeking ASCI Advisory on advertising before endorsing any brand which yet seems a tough nut to break.

¹⁶ LPA 509/2018 CM APPL. 37148/2018.

¹⁷ See Sec. 13.



DISCLOSURE OF MATERIAL CONNECTION

The Guidelines require to disclose any material connection between the endorser and the trader, manufacturer or advertiser of the endorsed product that might materially affect the value or credibility of the endorsement and the connection is not reasonably expected by the audience, such connection shall be fully disclosed in making the endorsement.¹⁸

For an instance, if a celebrity acquires equity stakes in any brand which he promotes then the guidelines will require him to disclose such fact otherwise the advertisement shall be considered as 'Misleading'.



DUTIES OF MANUFACTURER, SERVICE PROVIDER, ADVERTISER & ADVERTISING AGENCY

The Guidelines enumerate several duties of manufacturers, service providers, advertisers and advertising agencies to ensure that the claims made in advertisements are substantiated, backed by the appropriate and truthful source and the consumers are not exploited in any manner.¹⁹

It further states that obvious untruths or exaggerations are intended to amuse or catch the eye of consumers are permissible subject to the condition they are clearly seen as humorous or hyperbolic and not likely to be understood as making literal or misleading claims for the advertised product.

Suffice it to say, the intent of legislature is to reduce the grey areas available to advertising players in the industry as far as possible so that a broader protection can be provided to the consumers.

¹⁸ See Sec. 14.

¹⁹ See Sec. 12.



PENALTY FOR CONTRAVENTION OF THE GUIDELINES

THE Guidelines, in order to keep a check on misleading or false advertising practices, allowed for levying penalties to the tune of **INR 10 lakhs** on manufacturers, advertisers and endorsers. In cases of subsequent violations, the penalty could go up to **INR 50 lakhs**.²⁰

The Guidelines also indicate that an endorser can be **prohibited from making advertisements** for up to **1 year** which can extend to **3 years** if there is subsequent violation.²¹

Though no separate authority has been established vide the said Guidelines, the powers of investigation and enforcement shall be exercised by the Central Consumer Protection Authority (CCPA).

The aforementioned Guidelines are pathbreaking because of satiating the significant consumer protection gaps while explicitly outlining advertiser’s duties. It also makes a comprehensive attempt to discourage the endorsements of unsubstantiated advertisements which could affect the public interest adversely.

Additionally, one of the most notable upcoming shifts in India is the need that social media influencers disclose whenever their advertisements are sponsored and that too with due diligence. Now the eye must be on the proper implementation of the law and hopefully the same doesn’t remain a toothless tiger.

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²⁰ See Sec. 21(2), The Consumer Protection Act, 2019.

²¹ See Sec. 21(3), The Consumer Protection Act, 2019.