



Surrogate advertising: A legal perspective

Anchal Kushwaha

Department of Law Student, Amity Law School, Noida, Uttar Pradesh, India

Abstract

Advertisement plays a significant role in the determining the lucrative success of a product or service in capitalist economies of the world. In a country of 1.3 billion, where advertisement to a great extent, furnishes in influencing consumers' buying capacity, Surrogate advertisement feed fallacies attributing to propagandize and endorse the goods which are subjected to advertising bans, instilling the brand amongst the consumers of these illicit products.

Absence of legal framework regarding the surrogate advertisement in India persuades to the continuation of veiled illicit practices.

Hence this paper talks about the exercising legal frameworks, conventions, policies and institutions including the relevant judgements and detailed analysis along with recommendations suggesting the resolutions which can considered in curbing the prevalence of surrogate advertisement industry.

Keywords: surrogacy, advertisement, prohibited, ingrain, framework

1. Introduction

Surrogate Advertising refers to advertisements promoting prohibited goods of one brand, in the guise of another product of the same brand. Surrogate Advertising can be questioned in its legitimacy and ethics, especially when the brand sells goods that have advertising bans. For instance, brands selling alcohol and tobacco often use products like soda, water bottles, apple juice etc. to promote the same brand. Surrogate advertising is done with the intention of a brand-recall, capturing the attention of the consumers and in-graining the brand among users of these prohibited products. Companies manufacturing alcohol and tobacco products often foray into brand extension with the intent of using different products to market their established but banned product.

When consumers view surrogate advertisements, they link it to the banned product. Even though these goods are indirectly projected, they do create an image in the consumer's minds. Products like alcohol and cigarettes are often advertised by closely linked products like club soda, playing cards, Music CDs etc.

Today, India as a nation is the third largest market for liquor in the world^[1]. In 2017 alone, the liquor market made for US\$35 Billion per year as the retail market according to Forbes^[2]. According to a report in The Lancet Journal, who studied 189 countries, between the years 2010 and 2017, the alcohol consumption in India has increased by as much as 38%^[3].

The biggest question that comes to one's mind is the role and the process of evolution of the advertising and marketing sector of the brands over all this time. Earlier, the

television and print media were used to show an attitude and a new lifestyle. Now, however, the audience has changed, what the audience wants has changed and how they see things has also changed. As a result of this, advertising and marketing has made a shift towards digital and social media, giving these extra attentions. "Today, it's the age of everyday heroes rather than mega celebrities and alcoholic brands and tobacco brands are increasingly leveraging this trend," says WAT Consult AVP - strategy and account planning Sabiha Khan^[4].

2. Framework of Laws, Policies and Institutions

a. Laws

Surrogate advertising in India gained prominence post The Cable Television Networks (Regulation) Act, 1995^[5] and Cable Television Network Rules, 1994^[6]. These Rules prohibit the direct or indirect advertising of "cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants" (Raut 2017).

A notification was issued by the Government in 2008^[7], in consonance with the above laws. The notification banned surrogate advertisement of alcohol companies in print, electronic and outdoor media. In 2009, Ministry of Information and Broadcasting allowed advertisements of products even if they shared a brand name with a liquor or tobacco product, if it wasn't a manifestation of the prohibited product^[8]. Such products however must be available easily in the market and the expenditure on advertising must be proportionate to the turnover of the product.

¹ <https://timesofindia.indiatimes.com/business/india-is-3rd-largest-alcohol-market-globally/articleshow/71515747.cms>

² <https://www.forbes.com/sites/krnkashyap/2017/03/27/how-startups-are-catering-to-indias-35b-liquor-market-the-3rd-largest-in-the-world/>

³ <https://economictimes.indiatimes.com/industry/cons-products/liquor/indias-alcohol-intake-up-by-38pc-in-seven-years-lancet-study/articleshow/69231992.cms>

⁴ <https://www.indiantelevision.com/mam/marketing/mam/surrogate-liquor-advertising-time-for-change-171002>

⁵ <http://legislative.gov.in/sites/default/files/A1995-7.pdf>

⁶ <https://main.trai.gov.in/sites/default/files/CableTelevisionNetworksRules1994.pdf>

⁷ https://economictimes.indiatimes.com/articleshow/2878618.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁸ <http://www.mondaq.com/india/x/606974/advertising+marketing+branding/CROSS+BORDER+INSOLVENCY+A+NEW+REGIME>

The Act doesn't explicitly ban surrogate advertising. A brand name or a logo which is also used for cigarettes, tobacco products, wine, alcohol, liquor, or other intoxicants, may be advertised on cable services. The advertisement is acceptable provided that either directly or indirectly via its story, visual, layouts, nuances, colors or typical situations, it does not depict the prohibited product.

The Cigarettes & Other Tobacco Products (Prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act, 2003 ^[9].

The Act prohibits indirect or direct advertising of tobacco products. COPTA rules also declare the use of a name or brand of tobacco products for promotions or advertising as "indirect advertising".

Section 5(1) of the Act states:

'No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco product'

Section 5(3) of the Act states:

'No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of

- a. Cigarettes or any other tobacco product; or
- b. Any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person'

The Surrogate Advertisements (Prohibition) Bill, 2016

It proposes to put in place a blanket ban on surrogate advertising of tobacco, liquor and other such harmful substances. It even prohibits sponsorship of sports and other events either directly or indirectly by these brands ^[10].

b. Institutions

Advertising Standards Council of India

A voluntary self-regulation body formed to safeguard the viewers against advertising of products that are unacceptable or hazardous to the society. Section 6 of the ASCI code explicitly prohibits surrogate advertising and lays down the criteria for deciding the same. It states that, 'Advertisements for products whose advertising is prohibited or restricted by law or by this code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this code' (Raut 2017).

The advertisement either indirectly or directly, must not depict the prohibited product in any manner.

The Press Council of India under Article 13 (2) (b) of the Press Council Act 1987 ^[11]. Prohibits the publication of advertisements that promote the sale, production or consumption of cigarettes, tobacco products and other

intoxicants, directly or indirectly ^[12].

c. Conventions

Framework Convention on Tobacco Control

The convention provides a framework against consumption of tobacco and exposure to tobacco smoke. Article 13 of the Framework Convention on Tobacco Control ^[13]. deals with establishing a comprehensive ban against any kind of advertising of tobacco. It also deals with restricting advertising that influences the consumer negatively as well as curtailing tobacco sponsored events (Majithia 2015).

d. Judgments

A PIL was filed by Voluntary Health Association of India in 1999 ^[14], requesting the Indian Government to ban ITC Wills from sponsoring the Indian Cricket Team. Their argument being that 2001 World Cup would be watched by millions and Wills being a popular cigarette brand could influence smoking among the Viewers ^[15].

Former Union Health Minister Mr Anbumani Ramadoss had filed a PIL to challenge the name of the Bangalore Indian Premier League Cricket team owned by Vijay Mallya. It was on the grounds that Royal Challengers was an obvious promotion for the liquor brand, Royal Challenge which is produced by Mallya's United Breweries Limited. SC dismissed the petition on the ground that Royal Challengers was different from Royal Challenge.

In 2005, a filmmaker Mahesh Bhatt raised a challenge in the court ^[16]. On the grounds that the ban on tobacco products in advertisements and films was against the Freedom of Speech and Expression under Article 19(1) (a) and it stifled a filmmakers' creative liberties. The Court reiterated the judgement from Hamdard Dawakhana v Union of India ^[17]. (FN), where it was held that,

'It is only when an advertisement is concerned with the expression or propagation of ideas can it be said to relate to freedom of speech. The right to publish and distribute commercial advertisements for promotion of an individual's business cannot be said to be part of the freedom of speech as enshrined in the Constitution. ^[18].'

In this case the court laid out that the Right to Life (and Health) of the people was far greater than the Right to Freedom of Speech and Expression. This was in contravention to the judgement in Tata Press Ltd. v MTNL ^[19]. (FN) in which the court accorded full protection of Article 19(1) (a) to advertisements since they were essential for consumers to make an informed choice.

In United Breweries Ltd. v Mumbai Grahak Panchayat ^[20], the National Consumer Disputes Redressal Commission looked into complaints against advertising of "Bagpiper Soda", "Derby Special Soda" and "London Pilsner Soda" on Western Railways and found that they were mere surrogates and no such sodas were available in the market.

¹²https://economictimes.indiatimes.com/industry/services/advertising/govt-issues-notification-banning-surrogate-liquor-ads/articleshow/2878618.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

¹³<https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf;jsessionid=B26A41CC14F5F44CE6840106AC91D5B6?sequence=1>

¹⁴<https://spicyip.com/2017/01/surrogate-advertisements-the-dark-side-of-trade-marks-part-ii.html>

¹⁵http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=20969

¹⁶WP (C) No.18761 of 2005 and WP (C) No.23716 of 2005

¹⁷SCR 1960 (2)671.

¹⁸1965 AIR 1167, 1965 SCR (2) 192

¹⁹(1995) 5 SCC 139.

²⁰I (2007) CPJ 102 NC.

⁹<http://legislative.gov.in/actsofparliamentfromtheyear/cigarettes-and-other-tobacco-products-prohibition-advertisement-and>

¹⁰<http://164.100.47.4/billtexts/rsbilltexts/AsIntroduced/surogat%2010317-E.pdf>

¹¹<http://presscouncil.nic.in/OldWebsite/act.htm>

A PIL was filed in 2014 by social activist Teena Sharma in the Delhi HC ^[21], seeking to ban surrogate advertisements. It sought that advertisements on brand extension should be certified to be genuine by CBFC. The PIL contended that expenditure on advertising must be proportionate to product sales.

3. Analysis

India is a developing economy therefore advertising has a major impact both in terms of values, behavior and revenues. Surrogate Advertising in India is done mainly in liquor and tobacco products as these are banned for advertising purposes. There exist several laws and rules that implicitly or explicitly prohibit advertising for tobacco and other intoxicants. However, companies find a way through these laws. Given the vastness of media networks – print, electronic and television, regulating the content for any sort of association with the prohibited goods under the same brand name is getting to be extremely tedious. Furthermore, given the creative liberties of Ad Makers, such distinctions lack clarity. At the end of the day the brand name finds resonance with the main product of the company rather than its sub-ventures.

Companies exploit the lacunae in existing set of laws and enforcement to carry on surrogate advertising of their prohibited products. Studies have shown that Parag's plain Pan Masala (a non-tobacco product) on just two television channels was 3.8 times its annual sale value ^[22]. It thus becomes clear that such products are being used as surrogates to advertise the *gutka* sold by the brand.

The direct ban on advertisement of liquor and tobacco has forced companies to look for other sponsorship events like awards, fashion show and conferences. The intent is to compensate for the losses arising out of the ban on the advertising of their product by being socially acceptable. For goods generating high revenues, advertising by circumventing the law is the only plausible option. Companies explore other far more glamorous avenues for brand visibility and building, instead of direct advertising. Surrogate Advertising defeats the purpose of banning advertising of prohibited goods. By way of catchy jingles, witty one-liners, bravery awards, and social responsibility themes, they manage to leave a strong association of the brand with the consumers.

With the age of internet, censorship on such advertising is impossible. YouTube videos often contain advertising of various products, given the volume of the content it is impossible to regulate or censor it. Since Brand extension is permitted for other products in the market, regulating it for liquor and tobacco becomes difficult. In the process, Genuine Brand extensions should not be affected, provided the extensions are available sufficiently.

Regulation of advertising fall under ministry of consumer affairs, health, I&B and social justice and environment. Thus it requires concerted, inter-sectoral coordination in order to implement strategies of regulating such advertisements. Adding more legislations will only complicate the existing web of laws and further complicate

the issue.

Banning advertisements is more of the Governments way of dealing with a larger societal problem. Mindsets and attitudes regarding social menaces of drinking, smoking and intoxication need to be taken into account while designing strategies for reduction in smoking and drinking habits. The younger generation falls prey to drinking and smoking largely as result of peer pressure and pre-conceived misconceptions. Advertisements may or may not play a role in this regard. An Indo-US study in the cities of Delhi and Tamil Nadu consisting of 11,642 sixth and eighth graders, found that nearly half the children had seen and remembered a tobacco advertisement ^[23].

Since 1995, India has had an iron hand over ban on liquor and tobacco advertisements on any media platforms. Upon research by Indian Ministry of Health, it was found that smoking cigarettes and consuming alcohol has an adverse effect on the health of a person. In response to this, the ban was enforced to clamp down on these activities.

However, due to the significant increase in the nation's population, sales of these products saw an exponential increase. To account for this, the need of alternative options for advertisements was thrust upon the companies. This led to the creation of what is called surrogate advertisements, in India. Major brands dealing in liquor in India promote products that are completely unrelated with that which is their main product. They advertise mineral water, Club Sodas, CDs and playing cards, which end up implanting the name of the brand into the consumers' heads.

The first brand to do this was none other than Bagpiper. In its advertisements, it incorporated the slogan, 'Khoob jamega rang, jab mil baithege teen year, aap, main, aur Bagpiper.' Back in 1993, famous actors of the time, Jackie Shroff, Dharmendra, and others, endorsed Bagpiper and used this slogan when advertising for the 'soda' campaign.

India's loved beer, Kingfisher, is produced by United Breweries Limited (UBL). It also happens to control 60% of India's beer manufacturing capabilities. It is also a leader in the market holding a share of more than 50% of national market. This explains the various events, other entities, and sporting tournaments that it invests in. The Head of Marketing, Mr. Samar Singh Shekhawat, tells us that the expenditure of the industry in marketing has gone up, in the case of beer and other spirits. He adds that most major players are vying for leveraging platforms but television is still the best, as it has a higher salience and visibility of the brand. While sales are still up, UBLs biggest revenue generator is in the form of associations and sponsorships. So much so, in fact, that it spends 6-7% of the net revenue on marketing, yearly.

Surrogate advertising works really well for market kingmakers who have been around for years. These companies have the motivation, and the money for such schemes. The issue lies here with the new ones. It sounds good to sponsor tours dealing with fashion and sporting events; yet can these low capital companies handle it? They miss out on communication of their brand and on the visibility that could've been. "It is a challenge for the new entrants and the agencies because, as a new brand, they first have to create brand awareness, inform about the product details, flavor, taste, brand ethos and spirit which they want

²¹<https://www.livemint.com/Politics/xpnnXvMo01OmTWRE2C0mM/PIL-against-surrogate-advertising-filed-in-Delhi-high-court.html>

²² Sushma C, Sharang C. Pan masala advertisements are surrogate for tobacco products. Indian J Cancer [serial online] 2005 [cited 2019 Dec 13]; 42:94-8. Available from: <http://www.indianjancer.com/text.asp?2005/42/2/94/16699>

²³ <https://m.economictimes.com/industry/services/advertising/surrogate-ads-luring-kids-intosmoking/articleshow/3093034.cms>

to convey to the consumers. A new player will not be able to communicate well with surrogate and takes years to build the brand image -- first through word of mouth promotion," as said by the iProspect India branch head, Mr. Krishna Kumar Revanur.

Surrogacy emerged and it was a messiah for liquor promotion but it had its own drawbacks. While it ensures that the brand tag is in the minds of the people, it doesn't necessarily target the *right* people. Advertising Blender's Pride with a tour dealing in fashion or some bottled water needs to be conducted in such a way that it gets promoted to the right areas *and* doesn't hurt the image of the brand. Mr. Pranav Sabhaney, Director, Strategy and Planning, at Dentsu Webchutney said, "No creative person ever wants to be told that this is the boundary that you have to work around but it is an interesting challenge for the creatives as they know they have to work with restrictions, yet find the best communication possible. The constraint might irritate creatives at some point as spirits is an interesting sector to work on but they don't have an opportunity to do anything."

Mr. Sheikawat adds, "It is complex and challenging since we are not allowed to display the product, mention the word liquor or beer or show consumption in the campaign, and that is the reason why agencies that work on such products have been agencies that have worked with those brands for the last 20-25 years. It's a very complex, hard task and takes a lot of money to build brand imagery in India, as opposed to the other parts of the world."

Should the rules in India be more liberal and accommodative so as to allow for promotion and advertisement in a healthier way? In response to the school of thought stating that adults ought to be given freedom to choose and do as they see fit, the Chief Creative Officer and Managing Director, Publicis Worldwide, Mr. Bobby Parwar says, "The fake rules and regulations by the government for the liquor industry are not great, and while I do understand that when you advertise these products freely, underage people will get to see it but the government needs to find a way around it. It is sheer hypocrisy of the government which states that you can sell liquor and build your brand but you can't advertise it."

To add to Mr. Parwar's words, Mr. Krishna Kumar notes, "If the government allows the product to be sold in the country but not advertise it that means the government is following dual standards." UBL spends 20% of budget on the television as compared to a paltry 10% on digital platforms. Now, changes are being made, in the form of the hiring of a digital agency as well as having a designated team that has been allocated towards digital work. It leverages on other digital platforms, delivering readymade, user-generated content and social media.

Mr. Sheikawat concludes, "The audience today is not interested in brand advertising or brand stories but are only interested in stories that suit their line of thinking, and are looking for content and narratives that involve them." It still remains true that while the ban may be lifted or it might be here to stay, the fact of the matter is that companies still have numerous ways to get around it, in all honesty, while creating memorable advertisements that immediately draw in the minds of the audience.

4. Recommendations

- Surrogate Advertising should be expanded in its coverage to include newer forms of media like the

internet, emails, and apps.

- Develop stricter screening methods and penalties for those Ads and Companies which undertake surrogate advertising for products not in existence.
- For sponsorship of events, the logos of such brands may not be allowed for open display.
- A regulation instead of prohibition of advertisements of banned goods that do not show themes that encourage but rather just promote the concept of the product, could be explored as a solution.
- Consumer Awareness programs to generate opinion on ill-effects of harmful substances like tobacco, alcohol etc.
- ASCI should be given more power to take action on companies for violation of the rules as well to keep stricter scrutiny on false and misleading advertisements
- Greater involvement of all stakeholders as well civil society organizations to take steps to combat the perils of surrogate advertising.

5. Conclusion

Since Government allows harmful products to be sold and but not advertise them, Companies that manufacture them will always find ways to build up the brand as well win consumers. The globalized world will face increasing concerns of advertising of such hazardous products. Given the plethora of new marketing gimmicks that are available, it will become highly improbable and possibly impossible to protect consumers from surrogate advertisements of prohibited goods. In this light, the Government will have to tighten the laws as well as educate the general public. It will also have to put in place institutions that monitor as well punish groups and individuals for violation of the established norms.

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