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## How do Surrogate Advertisers dodge the Laws?

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*This article discusses the practice of surrogate advertising in India and the laws pertaining to such advertisements in detail. It tries to explain the basic concept of surrogate advertisements and then explore the legal measures governing such ads. Companies continue to advertise the commodities that are banned from advertising. Overall, the purpose is to demonstrate how loopholes frustrate the goal of complete eradication of such ads and propose solutions that address the existing gaps that allow for such evasion.*

**Keywords:** *surrogate advertising, loopholes, legislation.*

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### INTRODUCTION

*"If the law does not punish a definite action or does not tax a definite thing, this is not a loophole. It is simply the law."*

- Ludwig Von Mises

It is interesting to interpret the object and purpose of the legislation, only to find out that the reality is starkly opposite to the legislative intent. The fact that this parallel and contrasting reality has existed for a long time in the context of many issues implies that the government

may have *allowed* the circumvention of laws. Advertisements are aimed to capture the interest of potential customers. Their aim is to sell the product by somehow communicating the advantages of using the product to the people. They intend to influence the opinions and behaviors of the viewers. In a developing country like India, they have a significant impact in shaping the views of people. The alcohol and tobacco products, though indirectly advertised, have the desired impact on the market and get the advertisers what they need: *brand recall*. The Indian government has always tried to lessen the rampant advertisement of such products through legal measures. Even so, by finding gaps in the laws, companies have held on to the practice of surrogate advertising. Whether the rules and guidelines are followed in their letter and spirit is a crucial question.

## SURROGATE ADVERTISEMENTS

Surrogate, in its literal sense, means a substitute. It is often used in connection with surrogate motherhood where the natural mother cannot bear a child herself and instead another woman agrees to do it for the mother. It holds a similar meaning in the context of advertisements. When advertisements of particular products are banned, they are continued to be promoted in the guise of a substitute product.

In simpler words, when laws do not allow advertising of particular products, the advertisers resort to new methods of advertising. For example, there are two products under the same brand name of *Royal Stag*. One is the popular whisky, and the other is Music CDs. Out of the two, advertising for whisky is banned in India, so surrogate advertisement would mean advertising the Music CDs under the same brand name. Since the surrogate product visually resembles the main product in terms of brand name, logo, packaging style, and tag lines, whenever the viewer watches the Music CDs advertisement, an image of another product of the same brand appears in his mind too. This is known as creating brand recall<sup>1</sup> in the viewers' minds. The aim of these advertisements is not to earn revenue by promoting the product but to create this brand recall in the minds of the potential consumers.

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<sup>1</sup> Krishna Veer Vanamali, 'Amitabh Bachchan, pan masala, and the noise around surrogate ads in India' (*Business Standard*, 21 October 2021) <[https://www.business-standard.com/podcast/economy-policy/ amitabh-bachchan-pan-masala-and-the-noise-around-surrogate-ads-in-india-121102100663\\_1.html](https://www.business-standard.com/podcast/economy-policy/ amitabh-bachchan-pan-masala-and-the-noise-around-surrogate-ads-in-india-121102100663_1.html)> accessed 20 January 2022

## ORIGIN

The actual origin of surrogate advertisements can be traced back to Britain,<sup>2</sup> where a bunch of housewives who were determined to fight back against the prevalent domestic violence by their drunk husbands led protests at such a large scale that action had to be taken. Liquor advertising got banned, and surrogate advertising was born. In India, surrogate advertisements gained momentum when the Cable Television Networks Regulation Rules, 1994,<sup>3</sup> were amended in the year 2000 to ban the direct and indirect promotion of cigarettes, alcohol, wine, liquor, tobacco products, or other intoxicants. Banning advertisements of liquor and tobacco products was a big step by the government to suppress the influence of such advertisements and practically diminish the ill effects of these products in general. Nevertheless, the advertisers figured out an alternative way to advertise, which would keep reminding the people of the liquor and tobacco products. The problem is that, despite the regulations in place, the reality did not alter, advertisements continued to surface, people continued to be influenced, and the purpose of the laws stood defeated.

## LEGISLATIVE MEASURES

### 1. The Cigarettes and Other Tobacco Products Act (COTPA), 2003<sup>4</sup>

This act aimed to provide adequate protection to non-smokers from involuntary exposure to tobacco and smoke and to protect people, especially children, from being addicted to tobacco. Section 5 talks about the prohibition of the advertisements of cigarettes and other tobacco products. It lays down the following points -

- a) Tobacco product advertising, both direct and indirect, is banned in all forms of audio, visual, and print media.
- b) Cigarette and other tobacco product manufacturers are prohibited from financing any sport or cultural event.

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<sup>2</sup> Ruchi Gupta, 'Surrogate Advertising in India: Concept and Regulatory Measures' (2014) 4 Athens Conference Paper Series <<https://www.atiner.gr/papers/MKT2014-1213.pdf>> accessed 20 January 2022

<sup>3</sup> Cable Television Networks Regulation Rules, 1994, r. 7(2) (viii)

<sup>4</sup> Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2019, s 5

- c) No tobacco product's trademark or brand name may be marketed in return for a sponsorship, gift, award, or scholarship.
- d) No one may advertise or promise to market any tobacco product, whether under contractual agreements or otherwise.

This section, at first, restricted advertisement only to the marketing of tobacco products done for direct or indirect monetary interests. This understanding was narrow since it did not take within its ambit the promoting of products through brand extension and sponsorships. With an amendment to this act in 2005, the phrase *indirect advertisement* was clarified, and it sealed this lacuna. It was made clear that using a Tobacco product's name or brand for selling, promoting, or advertising any other product or goods would be considered indirect advertising and hence was prohibited.

## **2. Cable Television Networks Regulation Rules (CTNR), 1994<sup>5</sup>**

The CTNR was enacted to regulate the operation of cable television networks in India. It is framed under the Cable Television Networks (Regulation) Act, 1995.<sup>6</sup> As mentioned earlier, these rules did not, in effect, ban the advertisement of such products but only led to the substitution of those products. Hence further amendments were made to this law in 2003 and 2009. Rule 7 (2) (viii) talks about the prohibition of advertisements that directly or indirectly promote:

- cigarettes, tobacco products, wine, alcohol, liquor, or other intoxicants;
- infant milk substitutes, feeding bottles, or infant food.

The provisions were made much stricter with an amendment that was made to this act in 2009 to include specific conditions in which the products may be advertised. The amendment also brought with it the concept of *genuine brand extensions*. It meant that unless advertising brands had a substantial business of the surrogate products, they would not be able to advertise the

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<sup>5</sup> Cable Television Networks Regulation Rules, 1994

<sup>6</sup> Cable Television Networks Regulation Act, 1995

same.<sup>7</sup>In simpler words, if one wants to advertise something on television, that person will have to sell it in the market too.

As per Rule 7 (2) (viii) (A) (v), it is up to the CBFC to certify advertisements of genuine brand extensions. The problem of ambiguity lies in the meaning of genuine brand extensions. It was stated that the surrogate advertisers must have a *reasonable* distribution of the surrogate product in the market. They should have a *substantial* number of outlets. Furthermore, their expenditure on the surrogate product should be *proportionate* to the actual sales turnover of the company. Advertisements of genuine brand extensions were permitted, but such advertisements had to be in compliance with the requirements provided in the rule and the ASCI Code. However, the objective meaning of the words *Reasonable*, *Substantial*, and *Proportionate* was not clarified. In this way, these rules provided an explicit leeway for such surrogate advertisements under the cover of brand extensions.

### **3. Advertising Standard Council of India (ASCI) Code<sup>8</sup>**

Advertising Standard Council of India is a self-regulatory body that governs the advertising industry in India. It has created its self-regulatory code, which implies that the responsibility to comply and enforce the code lies with those who create or publish any advertisement. Those who find advertisements in contravention of this code can file complaints, and the Consumer Complaints Redressal Council reviews the complaints received and acts upon them. Section 6 of the ASCI code is similar to that of CTNR. It prohibits surrogate advertising along with laying down the conditions for deciding whether an advertisement is an indirect advertisement or not. It says that advertisers should not circumvent the restrictions by portraying advertisements for other products in the guise of the product, advertising of which is prohibited. ASCI has also come up with the objective criteria for qualifying certain products

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<sup>7</sup> Ruchi Gupta (n 2)

<sup>8</sup> Advertising Standards Council of India, ASCI Code, 1985

are genuine brand extensions.<sup>9</sup>By Indian standards, it is a relatively high bar, and many big businesses have failed to meet it.

#### 4. Framework Convention on Tobacco Control (FCTC) by WHO<sup>10</sup>-

By establishing a framework for tobacco control measures, this convention by the World Health Organisation aims to safeguard current and future generations from the severe health, social, environmental, and economic repercussions of tobacco smoking and exposure to tobacco smoke. India is a party to this convention and had ratified it on 5<sup>th</sup> Feb 2004. It defines Tobacco advertising and promotion as "any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either *directly or indirectly*." and Tobacco sponsorship as "any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either *directly or indirectly*."

This treaty recognizes that a comprehensive ban on advertising such products is necessary and imperative. It encourages the parties to introduce *comprehensive legislation* that bans all tobacco advertising, promotion, and sponsorships. Despite being a party to this convention, India's progress towards achieving its objectives is not significant. We have introduced laws but also have let in exceptions. We still find Bollywood celebrities doing such advertisements<sup>11</sup>, and we still find an IPL team's name similar to the brand name of a whisky.<sup>12</sup> Overall, indirect advertisements continue to be shown.

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<sup>9</sup> John Sarkar, 'Surrogate Ads face stricter rules' (*The Times of India*, 16 January 2021) <<https://timesofindia.indiatimes.com/business/india-business/surrogate-ads-face-stricter-rules/articleshow/84461613.cms>> accessed 20 January 2022

<sup>10</sup> Framework Convention on Tobacco Control, 2003

<sup>11</sup> 'Celebs endorse pan masala despite ASCI's bitter stance against surrogate ads' (*Exchange 4 Media*, 12 October 2021) <<https://www.exchange4media.com/advertising-news/celebs-endorse-pan-masala-despite-ascis-bitter-stance-against-surrogate-ads-116237.html>> accessed 20 January 2022

<sup>12</sup> Gokul Krishnamoorthy, 'Opinion: Three cheers for hypocrisy' (*Financial Express*, 21 May 2021) <<https://www.financialexpress.com/brandwagon/opinion-three-cheers-for-hypocrisy/2256030/>> accessed 20 January 2022

## 5. Central Consumer Protection Authority (CCPA) Guidelines, 2020 (Draft Guidelines)<sup>13</sup> -

According to these standards, products and services whose advertising is otherwise forbidden may not pass themselves off as ads for goods and services that are not prohibited. With the introduction of this draft, manufacturers have to keep a tab on the production of the surrogate products too. These standards explicitly say that advertising of the product created and disseminated must be in reasonable numbers, taking into account the scope of the marketing in issue, the medium employed, and the market targeted. It is again quite evident that surrogate advertisements will still exist if they qualify the given parameters. The CCPA would likely refer to ASCI's objective criteria<sup>14</sup> to ascertain what would constitute a reasonable quantity. The CCPA guidelines define surrogate advertisements and provide for penalties and damages. If CCPA assumes certain powers of the self-regulatory ASCI, surrogate advertisements can be restricted with much more ease. This might be a defining moment for the industry.

### SUGGESTED MEASURES

If a brand is in a category where advertising is prohibited, it should be prohibited from promoting itself in any manner.

- The Comprehensive legislation that the FCTC treaty envisages should be introduced. It must provide for the ban of all the direct and indirect advertisements of tobacco and alcohol products and look forward to achieving this in reality.
- It should be ensured that the names of the tobacco and alcohol brands and their logos are not visible during sponsored events.
- A mechanism for the effective implementation of international and national regulations must be established. As mentioned earlier, ASCI is a self-regulatory body. It can only pull up advertisers for violations if it receives a complaint from the public. It needs to be acknowledged that no matter how many laws we introduce in this arena, there will

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<sup>13</sup> Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020

<sup>14</sup> John Sarkar (n 9)

exist a number of people who would not even be aware of such laws. Expecting such people to file complaints about surrogate advertisements is not correct. Moreover, even if they do complain, by the time action is taken, the harm is already done. The Advertising Standards Council of India should be given more authority to encourage it to take action against false and misleading ads and to monitor clever legal evasions.

- The advertising laws in India do not extend to the internet and digital media.<sup>15</sup> This is another opportunity for the industry to exploit the absence of regulations. Alcohol and tobacco products can be directly advertised here.<sup>16</sup> This difficulty might be rectified if the CCPA guidelines take effect because the scope of advertising covered includes advertisements on the internet, including in electronic media, and so would include deceptive advertisements produced on the internet or electronic media.

## CONCLUSION

Surrogate advertisements are problematic on various levels. They often link their brands with the ideas of success, future, friendship, nostalgia, fame, memories with childhood friends, traveling, and celebrating.<sup>17</sup> They show that the celebrities that advertise for the particular product favor it. Such advertisements have a significant impact on the viewers. Even if the viewers find the advertisements of brand extensions legitimate, in reality, we rarely find surrogate products, like Mineral water, Music CDs, Glasses, and Soda in the market. In addition, it can be debated whether a *substantial* number of outlets selling such products exist. It seems logical to say that India has taken ample measures to implement the advertising ban effectively. There are so many laws, yet none is helping in cracking down on surrogate advertisers when cases are so evident. Taking measures only by introducing rules and

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<sup>15</sup> Anil Upadhyay & Anay Shukla, 'Indian Law on advertisement of brand extensions of alcohol and tobacco products and how it poised to become tough' (*Lexology*)

<<https://www.lexology.com/library/detail.aspx?g=0f7aa496-2ee9-49d1-85d0-b91e677e5ec0#:~:text=Questions%3F-Indian%20Law%20on%20advertisement%20of%20brand%20extensions%20of%20alcohol%20and,it%20poised%20to%20become%20tougher&text=Under%20CTNR%2C%20satellite%20TV%20channels,wine%2C%20cigarettes%20and%20tobacco%20products>> accessed 21 January 2022

<sup>16</sup> Abha Shah, Suraj Sanghani & Jhelum Roy, 'Surrogate Advertising' (*Naik Naik & Company*, 8 March 2021) <<http://naiknaik.com/surrogate-advertising.html>> accessed 21 January 2022

<sup>17</sup> Gokul Krishnamoorthy (n 12)

regulations is not enough. The laws are weak, and they require reinforcement. This is the challenge that India faces. Companies are stretching their influence and are trying to become socially relevant; for example, the brands Bacardi and Kingfisher have further extended their brands to conducting major concerts and commercial airlines, respectively.

There is no doubt that the government benefits from such advertisements being broadcast. In the year 2019 alone, Indian states together earned about Rs. 2.25 trillion from taxes on alcohol.<sup>18</sup>In the year 2020, they earned Rs. 356 billion from taxes on cigarettes.<sup>19</sup>However, there needs to be the legislative will to make comprehensive laws that ban these advertisements in letter and spirit. The intent of the legislature while drafting the legislation must be seen in its enforcement too. The legislature has performed only a half-hearted job in controlling the menace of surrogate advertising. It should do away with the loopholes and must ensure that the laws are followed in a lively manner. The laws on surrogate advertising need provisions that make it practically impossible for the companies to use alternate methods to make use of their brand names and undermine the credibility of the legislation. Given the prevalence of surrogate advertising, now is the time to confront the issue directly.

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<sup>18</sup> 'How India binges on its booze economy' (*Livemint*, 14 May 2020)

<<https://www.livemint.com/news/india/how-india-binges-on-its-booze-economy-11589392012055.html>>

accessed 20 January 2022

<sup>19</sup> 'Tax revenue from cigarettes across India from financial year 2011 to 2020' (*Statista*, 17 June 2021)

<<https://www.statista.com/statistics/697947/tax-revenue-from-cigarettes-india/>> accessed 20 January 2022