

SURROGATE ADVERTISING AND THE PROTECTION OF CONSUMER INTERESTS: A LEGAL REVIEW

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ABSTRACT

Advertisement is considered one of the greatest art forms of the twenty-first century. It requires a blend of creativity, technology, and data-driven insights. It is a continually growing area and a critical component of the business landscape that necessitates firms being current on the latest trends and practices to compete in the marketplace. However, with the rise of digital and increased market competition, some advertisers resort to unethical practices to gain unfair advantages by advertising goods that were actually against the law to advertise. Surrogate advertising is the practice of promoting goods via replacement or surrogate goods.

The paper concentrates on the moral implications of surrogate marketing, how it impacts consumers' interests, its legal ramifications, and some recommendations for easing the social difficulties that it causes.

INTRODUCTION

The widely recognized founder of contemporary public relations, Edward Bernays, famously remarked that “a crucial component of a democratic society is the conscious and intelligent manipulation of the organized habits and opinion of the masses.” An invisible government, which is our nation’s genuine controlling force, is made up of those who play with this invisible system of society. The statement of Bernays still holds in the context of advertising even though he may have been speaking of public relations. Surrogate advertising is one such style of marketing that has recently come under fire for possible deceptive tactics.

“Surrogate advertising is the practice of indirectly promoting a product by advertising another product with the same brand name”¹. It’s frequently employed in industries where direct promotion of certain items, such as cigarettes or alcohol, is either prohibited or restricted. Advertisements appear to present some product surrogates, in the sense that the source of either product is not obvious, but people who routinely consume such products are well aware of the brands and may immediately acquire an idea of the product suggested in the

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¹<<https://timesofindia.indiatimes.com/topic/surrogate-advertising/news>> accessed May 13, 2023

commercial. These are "surrogate advertisements" of the product produced at the request of Manufacturers and Sellers of a commodity, a direct conveying of which is not permitted.² Surrogate advertising can be viewed as a method for businesses to avoid restrictions while retaining brand awareness and consumer engagement. A liquor firm, for example, may promote a soda water brand with the same name, logo, or tagline as its alcohol product. Without directly promoting the original product, this might raise brand recognition and association with it. In addition, to tobacco products, betting sites in India have also been known to employ surrogate marketing. For instance, they promote their fantasy sports or online gaming events, all the while keeping the betting part of their enterprise out of the public eye. Some betting sites have also employed celebrity sponsorships and endorsements of sports teams and events as a form of indirect advertising.³

- Kingfisher Soda - The Kingfisher brand, best known for its beer, utilizes the same logo and images in advertisements for Kingfisher Soda, a non-alcoholic beverage.
- Frooti Fizz - Frooti is a popular fruit drink in India, and surrogate advertising has been used to sell a fizzy variant of the drink called Frooti Fizz.
- Bagpiper Soda - A non-alcoholic beverage with the same branding as Bagpiper Whisky, Bagpiper Soda is another example of surrogate advertising in the alcohol industry.
- William Lawson - William Lawson is a Scotch whisky brand that has employed surrogate advertising in India by marketing a music event called "William Lawson's Music Festival," which does not involve liquor.

Above mentioned brands are just a few examples of the several businesses in India that have embraced surrogate advertising.

THE MORAL COMPASS AND ETHICAL BOUNDARIES OF SURROGATE ADVERTISING TECHNIQUES

“Let’s gear our advertising to sell goods, but let’s recognize also that advertising has a broad social responsibility”

– Leo Burnett

²<https://indiankanoon.org/doc/122540615/>> accessed on May 13, 2023

³<https://www.livemint.com/news/india/ib-ministry-prohibits-online-betting-ads-and-surrogates-on-tv-digital-platform-11664815750437.html>> accessed on May 13 2023

Surrogate advertising has been a sensitive topic for a long time. It arose in Britain, where homemakers protested about commercials for alcohol that targeted the men in their lives. Companies got around the restriction by marketing fruit juice and soda under the same brand names.⁴

In India, numerous studies have revealed that liquor marketing directly affects consumers buying decisions, and surrogate advertisements also have an impact.⁵ While some claim surrogate advertising is unethical and misleading, others contend it is an essential marketing tactic. Supporters of surrogate advertising contend that it enables companies to advertise their goods without breaking the law. They assert that it is a way for companies to preserve customer loyalty and brand recognition. While there are many ways that surrogate advertising can be detrimental to consumers –

Misleading: Surrogate advertising may be misleading because it frequently employs the same brand name or packaging as a product that is outlawed. Customers may become confused as a result and think the marketed product is illegal.

Encourage unhealthy habits: Surrogate advertising can indirectly stimulate the consumption of goods like alcohol and tobacco, which can be detrimental to the health of consumers.

Emotional exploitation: Surrogate advertising can also make use of consumers' emotions by associating the brand with specific feelings or ideals, such as joy or excitement, without really promoting the goods. This may have an impact on customers' decision-making processes and cause them to take actions that are not ideal for them.

Wasteful spending: Consumers may be persuaded by surrogate advertising to purchase goods they may not require or desire, which can result in a loss of resources.

By deceiving, fostering bad habits, preying on emotions, and encouraging excessive expenditure, surrogate advertising can go against the interests of the consumer.

Every coin has two sides; a total ban on surrogate advertising might hurt the market since there would be fewer businesses to oversee it. Since alcohol and tobacco companies aren't allowed to promote directly either, a comprehensive and complete prohibition on surrogate advertising could likewise hurt these industries' major economic contributions.

⁴<<https://pradeepsmehta.com/surrogate-advertising-needed-a-spirited-attack/>> accessed on May 14, 2023

⁵< https://iaeme.com/MasterAdmin/Journal_uploads/IJM/VOLUME_11_ISSUE_3/IJM_11_03_044.pdf > accessed on May 13 2023

LEGAL LANDSCAPE OF SURROGATE ADVERTISING

The Indian government passed the *Cigarette Promotion Act in 1975*, requiring cigarette companies to include health warnings on cigarette packaging and ads.⁶

The Cable Television Networks (Regulation) Act of 1995 (CTN Act): The Government of India and the health ministry continued to press for tighter limits on tobacco and alcohol advertising until it was completely prohibited in 1995. To avoid sending out the erroneous impression about the recognized negative health effects of tobacco and alcohol, the government outlawed their advertising. The CTN Act of 1995 made such advertisements unlawful.⁷ But as the population grew, so did an exponential expansion in the sales of alcohol and tobacco. Due to this, companies were forced to use supplementary methods of marketing, which eventually led to the birth of the proxy advertising concept in India.⁸

The COTPA Act: The Cigarette and Other Tobacco Products Act (COTPA) was enacted by the Government of India in 2003 and “forbids, among other things, direct or indirect promotion of tobacco goods or cigarettes by those involved in their manufacturing, supply, or distribution, as well as by those in control of the media; promoting the use of any brand of cigarettes or other forms of tobacco in exchange for a sponsorship, gift, award, or scholarship given or promised to be offered by another individual.”⁹

FCTC Act: The World Health Organization (WHO) ratified *the Framework Convention on Tobacco Control* in 2003¹⁰. It has been approved by 181 nations as of May 2023.¹¹ Its primary goal is to safeguard the financial, communal, physical, and ecological impacts of smoking and tobacco use for both the present and the future. The FCTC constitutes a collection of principles and suggestions for putting tobacco consumption reduction measures into action, including raising tobacco pricing, controlling tobacco advertising, promotion, and sponsorship, adopting smoke-free legislation, and assisting those tobacco patients who want to quit. Article 13 of the FCTC requires countries to prohibit all types of tobacco advertising, promotion, and sponsorship, including indirect or surrogate advertising. The recommendations for implementing Article 13 go on to state that any type of communication,

⁶ The Cigarette Promotion Act in 1975

⁷ The CTN (Regulation) Act of 1995, s 7

⁸ <https://www.irjmets.com/uploadedfiles/paper/issue_9_september_2022/29776/final/fin_irjmets1662843965.pdf> accessed May 13, 2023

⁹ COTPA Act 2003

¹⁰ FCTC Act 2003

¹¹ <https://treaties.un.org/pages/ViewDetails.aspx?chapter=9&mtdsg_no=IX-4&src=TREATY>

Last accessed May 13, 2023

commercial or otherwise, that promotes tobacco products, whether directly or indirectly, shall be forbidden.¹²

Based on a notification provided on August 9th, 2006, the following criteria must be met for an article to be advertised on cable service under *The Cable Television Networks (Regulation) Act, 1995*:

- “The visuals in the storyboard or commercial must solely depict the products being advertised and not any type of illegal activity.
- The commercial cannot directly or indirectly make any allusion whatsoever to the forbidden goods.
- The advertisement cannot incorporate any syntax or subtext that endorses illicit products;
- The advertisement must refrain from any use of certain colors, designs, or representations connected to commodities that are forbidden;
- When promoting other products, the advertisement must avoid using scenes that are typically used to advertise illicit commodities.
- Before being broadcast, transmitted, or retransmitted, The Central Board of Film Certification must assess and authorize that each of these commercials fits the bill for exhibiting in front of the wider community.”¹³

ASCI code: ASCI (*Advertising Standards Council of India*) is an autonomous body in India that was legally authorized as a nonprofit organization under Section (25) of the Company Act.¹⁴ The primary goal of ASCI is "To preserve and strengthen the public's faith in advertising" It protects consumers from deceptive or damaging advertisements while regulating advertising content and ensuring fair competition. To qualify for brand extensions, ASCI has offered the following guidelines:

- The good or service needs to be registered with the appropriate government agency, such as the *Trade Marks Registry (TM)*, *Food and Drug Administration (FDA)*, *Central Value Added Tax (CENVAT)*, *Value Added Tax (VAT)*, or *Food and Safety Standards Authority of India (FSSAI)*.¹⁵

¹²Supra 10

¹³<<http://student.manupatra.com/Academic/Studentmodules/Media-And-Telecommunication-Laws/CableTVRegulationAct1995.htm>> accessed May 14, 2023

¹⁴<<https://www.ascionline.in/about-us/>> accessed on May 13, 2023

¹⁵<<https://www.ascionline.in/the-asci-code-guidelines/>> accessed May 13, 2023

- The market share of the surrogated item, as determined in major cities where the item is advertised, must account for a minimum of 10% of that of the primary brand.¹⁶
- The good or service in question should generate more than Rs 5 crore in sales annually for the entire country of India, or Rs 1 crore in selling annually for each state where circulation is in place.¹⁷
- Proper certificate must be obtained from a reputable organization, such as AC Nielsen, etc before any promotion.¹⁸

However, the guidelines released by the Advertisement Standard Council of India (ASCI) were unable to persuade firms to adhere because the lack of authorities to penalize or initiate criminal proceedings if necessary was a flaw of the self-regulation framework.

Central Consumer Protection Authority: By section 2(49) of the Consumer Protection Act of 2019, fraudulent, deceptive advertisements constitute unfair trade practices against consumers because they continually influence them into purchasing redundant items.¹⁹The Central Consumer Protection Authority was established in 2019 to control issues that are brought on by seller misconduct that affect the legal rights of the consumer. The Central Consumer Protection Authority (CCPA) put out certain standards on June 9, 2022, essentially hindering surrogate advertising, restricting deceptive commercials, and defending consumers from unfair business exercises. The new guidelines define the term 'surrogate advertisement' for the first time in Indian legislation 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".²⁰It includes provisions for stiff penalties for anyone who violates crucial information. Advertising Guideline's section 6(2) further claims that "advertising shall be considered a surrogate advertisement or indirect advertisement if such advertisement implies or indicates to consumers, either directly or indirectly, that it is a commercial for products, services, or goods whose advertising is forbidden or limited by law, or such advertisement uses any brand

¹⁶Ibid 15

¹⁷Ibid 15

¹⁸Ibid 15

¹⁹ CPA Act of 2019 s 2(49)

²⁰<https://consumeraffairs.nic.in/sites/default/files/CCPA_Notification.pdf> accesses May 13, 2023

title, logo, shade, design, or appearance connected with such prohibited or constrained goods, products, or services.”²¹

For breaking advertising guidelines, the CCPA has issued notices to several products, including Kamla Pasand, Vimal Pan Masala, Rajnigandha, Seagram's Imperial Blue (alcoholic beverage), and Sterling Reserve (alcoholic beverage). Six online betting applications were also sent notices by the CCPA for breaking advertising rules by running substitute advertisements on news sites, in addition to tobacco and alcohol corporations.²²

Despite the new regulations' implementation, they nevertheless have certain significant flaws. "Provided that mere use of a brand name or company name which may also be applied to goods, products, or services whose advertising is prohibited or restricted shall not be considered to be a surrogate advertisement or indirect advertisement if a such advertisement is not otherwise objectionable as per the provisions outlined in these Guidelines," reads clause 6 verbatim.²³ It is deafeningly mute on the topic of brand extension and sponsorship, unlike ASCI. But this section may permit marketers to forego marketing with the same brand identities. Sandeep Goyal, Managing Director of Rediffusion, had to comment that the recently released guidelines fail to address the idea of brand extensions, which is permitted by law.²⁴ Consumer protection is a notion that the industry encourages but the disconcerting lack of clarity in varying interpretations across the board. Additionally, it's widely accepted that a restriction on all forms of advertising invariably results in the discovery of loopholes posed by flexible licenses, which frequently results in deceptive advertising.

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KEY LEGAL PRECEDENTS

In 1999, the *Voluntary Health Association of India* petitioned the Delhi High Court for an injunction opposing the backing of the Indian cricket team by the ITC. According to the PIL, lots of people would watch the upcoming 2001 World Cup, and such commercials will tempt people to smoke. As a token of goodwill, ITC halted its sponsorship of all cultural and sporting activities in 2001.²⁵

²¹ Ibid 20

²² Timsy Jaipuria, "CCPA issues show-cause notices to 6 online betting apps over surrogate ads" *cnbc tv* October 19 2022

²³ Supra 20

²⁴ Shambhavi Anand & Sagar Malviya "liquor brands get notice over surrogate advertising", *economic times*, October 7 2022

²⁵ <<https://www.itcportal.com/media-centre/press-releases-content.aspx?id=248&news=ITC-decides-voluntarily-withdraw-sports-sponsorships&type=C>> accessed May 13, 2023

In *Mr. Mahesh Bhatt And Kasthuri And..vs Union Of India 2008*²⁶, Mahesh Bhatt and Kasturi and Sons filed a lawsuit against the Indian government, challenging the COTPA Act of 2003 which outlawed explicit tobacco sales promotion. However, the court strictly prohibited the advertisement of tobacco and other products.

Former Health Minister Anbumani Ramadoss filed a PIL before the Supreme Court in 2008, alleging that Vijay Mallya, owner of the IPL Bangalore team, was advertising an alcohol brand manufactured by his company using the team's name.²⁷The Supreme Court bench held that “*the team was not named 'Royal Challenge', the liquor brand, but 'Royal Challengers, only those who drink can be attracted by these things.'*”

In the case of *United Breweries Limited vs. Mumbai Grahak Panchayat*,²⁸ UBL has been sued by the Mumbai Grahak Panchayat. According to the allegation, UBL used surrogate advertising to promote its alcoholic beverages under the Kingfisher brand. The advertisements included the Kingfisher brand logo and were broadcast during sporting events, but instead of advertising alcoholic beverages, they advertised mineral water, soda water, and other non-alcoholic beverages. The Mumbai Grahak Panchayat claimed that the advertisements were deceptive and breached the ASCI Code. UBL, on the other hand, claimed that the advertisements did not promote alcoholic beverages and hence did not breach any laws or rules. The court supported in favor of Mumbai Grahak Panchayat. The court ordered UBL to comply with ASCI's code and remove the surrogate advertisements

CRACKING DOWN ON SURROGATE ADVERTISING: STRATEGIES FOR EFFECTIVE CONTROL AND REGULATION

Amending and strengthening laws: Governments can enact tougher laws and regulations to prohibit surrogate advertising. Companies that break these regulations may also face harsh fines. The Trade Marks Act might have to be amended to prohibit surrogate commercials for many goods under one brand label. The primary law governing trademarks and brand names in India is the Trade Marks Act. A clause that forbids using a brand name or logo to promote any item unrelated to the core product for which it is registered could be included in the proposed amendment. This would successfully stop businesses from employing surrogate advertisements to promote unrelated products utilizing the popularity and awareness of their brand names. To enable the successful execution of the surrogate advertisement ban, further

²⁶<<https://indiankanoon.org/doc/38142746/>> accessed May 13, 2023

²⁷<<https://www.mondaq.com/india/advertising-marketing--branding/606974/surrogate-advertisements-in-india>>accessed May 13, 2023

²⁸<<https://indiankanoon.org/doc/1989453/>> accessed May 13, 2023

laws and regulations might need to be adopted or updated in addition to the Trade Marks Act. For instance, regulatory agencies and groups for advertising standards may need the authority to keep an eye on and sanction businesses that break the law. The creation of new technology or techniques to recognize and track surrogate advertisements across several media channels, such as television, print, and social media, may be necessary to enforce the ban.

Increased surveillance: It's important to keep an eye on advertisements to make sure they abide by the law. Ads can be closely monitored by regulatory agencies, and those that appear to be implicitly pushing items may face punishment.

Consumer education: It's important to educate consumers on the strategies businesses employ to market their goods. Consumers can learn how to avoid being affected by such commercials by participating in educational efforts that explain how they are being targeted. Overall, enacting a ban on the use of substitute product marketing under a single brand name would necessitate a thorough and well-resourced effort from legislators, regulators, and industry stakeholders. The promotion of transparency and fairness in advertising as well as consumer protection from misleading or dishonest marketing techniques are just a few advantages that could result from such a restriction.

CONCLUSION

Surrogate advertising is a marketing tactic that indirectly promotes a product through advertising for a different product having a similar brand name, logo, or packaging. While surrogate advertising can be useful for growing brand awareness and sales, it can also be misleading and deceptive to customers who are unaware of the underlying goal behind the advertisements. To safeguard consumers from such deceptive practices, governments, and regulatory agencies have enacted legislation and rules that limit surrogate advertising and demand unambiguous labeling and disclosure of the genuine product being advertised. These safeguards serve to ensure that people are not duped into acquiring things they do not desire or require. As a customer, you should be aware of these advertising strategies to make informed purchasing decisions. Consumers can make decisions that match their values and tastes by understanding the underlying nature of things being sold and going past the flashy advertising. Finally, consumer protection is an important component of any advertising plan, and it is the responsibility of both advertisers and consumers to ensure that advertising practices are fair, ethical, and transparent.