

## Surrogate Advertisements: India's Response Towards International Regulations

Barcelona Panda<sup>1</sup>

*Today, advertisements are common in television, radio, sports, arts, music, fashion and street events, adventure tours, contests, give-aways and the internet. The world today has turned into a big market place and the companies are vying with each other to grab the attention of their prime targets, the consumers or buyers. Unless they influence the buyers to purchase their products they cannot expect to achieve a dominant position in the market or at least make decent enough profits to keep the company running.*

But, there are products which have been banned from being advertised due to the addictive nature of the product and the harm that the product ultimately causes to the customer. Products like tobacco, liquor, etc. come in this category. But the producers or manufacturers cannot be expected to spend large sums of money in producing these items and then not advertise their existence just because the government estops them from it or the legislature has come out with certain legislations banning such advertisements. The producers found out ways to circumvent these restrictions and these circumvented methods are known as 'Surrogate Advertisements'.

This article is an attempt to understand the concept of 'Surrogate Advertisement' vis-à-vis the International and National Regulations in place and the prevalence of this practice in the Indian market today.

### Introduction:

*"Let's gear our advertising to sell goods, but let's recognize also that advertising has a broad social responsibility."*

*-Leo Burnett*

'Advertising' is explained as a form of communication intended to persuade an audience (viewers, readers or listeners) to purchase or take some action upon products, ideals, or services. It includes the name of a product or service and how that product or service could benefit the

---

<sup>1</sup> Author is a 4<sup>th</sup> Year Student from Hidayatullah National Law University, Raipur (India).

consumer, to persuade a target market to purchase or to consume that particular brand<sup>2</sup>. Advertising is essentially a thing to induce consumption to make people buy things they do not want<sup>3</sup>. An advertisement is defined as a paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed<sup>4</sup>.

Egyptians used papyrus to make sales messages and wall posters. Lost and found advertising on papyrus was common in Ancient Greece and Ancient Rome. Wall or rock painting for commercial advertising is another manifestation of an ancient advertising form, which is present to this day in many parts of Asia, Africa, and South America. The tradition of wall painting can be traced back to Indian rock art paintings that date back to 4000 BC<sup>5</sup>. History tells us that out-of-home advertising and billboards are the oldest forms of advertising. The 1960s saw advertising transform into a modern approach in which creativity was allowed to shine, producing unexpected messages that made advertisements more tempting to consumers' eyes. The late 1980s and early 1990s saw the introduction of cable television and particularly MTV. Pioneering the concept of the music video, MTV ushered in a new type of advertising: the consumer tunes in for the advertising message, rather than it being a by-product or afterthought. Marketing through the Internet opened new frontiers for advertisers and contributed to the "dot-com" boom of the 1990s. A recent advertising innovation is "guerrilla marketing", which involve unusual approaches such as staged encounters in public places, giveaways of products such as cars that are covered with brand messages, and interactive advertising where the viewer can respond to become part of the advertising message. Guerrilla advertising is becoming increasingly more popular with a lot of companies. This type of advertising is unpredictable and innovative, which causes consumers to buy the product or idea.

In a developing economy like India, advertising has a profound impact on how people understand life, the world and themselves, especially with regard to their values, choices and

---

<sup>2</sup> Advertising, from Wikipedia, the free encyclopedia, available at, <http://en.wikipedia.org/wiki/Advertising>.

<sup>3</sup> Jawaharlal Nehru quoted in *Kyon Na Azmayen? A Brief History of Indian Advertising* [para 2], Vikram Doctor and Anvar Alikhan, *Indian Magazine*, Vol.XVIII(January 1997).

<sup>4</sup> As defined in the Definitions part of the ASCI Code for self-regulation in Advertising.

<sup>5</sup> Bhatia (2000). *Advertising in Rural India: Language, Marketing Communication, and Consumerism*.

behaviour. Advertising is considered to be the cornerstone of our socio-economic system.<sup>6</sup> In India, advertising, both traditional and online, has grown in a major way. There are also hidden advertisements such as showing of cigarette smoking scenes and other tobacco products in films, sponsorship of universities, good-will donations to community events, and advertising of other goods and products bearing the brand name of tobacco products.<sup>7</sup>

### **Meaning of surrogate Advertisement:**

The literal meaning of ‘Surrogate Advertising’ is duplicating the brand image of one product extensively to promote another product of the same brand. Surrogate advertising is when an advertisement has the logo or brand of another company advertised within it. One essential function that surrogate advertising does is that of brand recall and not necessarily an exercise in increasing sales. The product shown in the advertisement is called the ‘surrogate.’ The surrogate could either resemble the original product or could be a different product altogether, but using the established brand of the original product. The sponsoring of sports/cultural/leisure events and activities using a liquor brand name also falls in the category of surrogate advertising. The best example of this can be cited in a petition filed in 1999 before the High Court of Delhi by the Voluntary Health Association of India, where a ban was sought on the sponsorship of the Indian cricket team by the Wills brand of cigarettes manufactured by ITC. The appearance of the Wills logo on the sports apparel worn by the cricketers facilitated the repeated telecasting of that logo to millions of viewers.. During the pendency of this petition, ITC voluntarily withdrew its sponsorship of the Indian cricket team in 2001 citing the reason that it did not want to derail the genuine efforts of the government and that it did not want to take undue advantage of its position in the Indian Economy<sup>8</sup>.

Similarly, the Ex-Union Health Minister Mr. Anbumani Ramadoss had challenged the name of the Bangalore Indian Premier League (IPL) cricket team, “Royal Challengers”, which was such an obvious and blatant form of surrogate advertising for liquor brand “Royal Challenge”. But, the Supreme Court of India has since pointed out that the team was not named

---

<sup>6</sup> “Online Advertising in India: Regulations: Self and Otherwise”

<sup>7</sup> Policy Interventions: A Comprehensive Ban on Advertising

<sup>8</sup> ‘ITC plays Good sport, exits sponsorship’, Hindu BusinessLine, February 9, 2001.

‘Royal Challenge’, the liquor brand, but “Royal Challengers”.<sup>9</sup> ‘Only those who drink can be attracted by these things,’ the bench observed in a lighter vein, alluding to the fact that a name would not have any effect on non-drinkers. Understanding the gravity of the situation, the Indian Broadcasting Foundation (IBF) has started to take on the surrogate liquor advertisements. It ruled that if liquor companies promote any juice, mineral water or soda, these should be shown in a proper manner and not as trimmings to liquor advertisement.

The problem occurs when heavy advertising is done so that the customers do not forget their liquor & tobacco brands, for which advertisements are banned. These methods are extensively used by the tobacco and liquor industry, for the simple reason that the normal advertising of their products have been banned by the national legislations. The advertisements for such new products are placed under the category of “Surrogate Advertisements” only when it can be proved that such advertisement has been done with ulterior motives. For Example: we have ‘Wills Lifestyle’ where ‘Wills’ is possibly the most famous cigarette brand of tobacco major Indian Tobacco Company Ltd., there is ‘Kingfisher Airlines’ where ‘Kingfisher’ is a popular brand of beer of liquor major United Breweries.

### **Surrogate Advertisement Background-Situation In India:**

In the Indian context surrogate advertisement is done mainly in the tobacco and liquor industry. This is because the advertising of these products has been explicitly banned as they are considered to be products that put adverse affect on the mind of the consumers and lead them to use substances that have an addictive effect and create discomfort for members of the general public who do not prefer using these substances. In India the situation started turning bad since 1975 when the government came out with the Cigarettes (Regulation of Production, Supply and Distribution) Act which made it mandatory to display a statutory health warning on all packages and advertisements of cigarettes.

The tobacco and liquor industry used various media to promote and push their product among selected audiences by sponsoring sports and cultural events such as international cricket, television programmes, and advertisements in newspapers, magazines, transport vehicles, etc. The tobacco and liquor industry in India is increasingly investing in and extensively advertising

---

<sup>9</sup>Shivani Bhardwaj, Surrogate advertisements: A new judicial concern

non- tobacco products by the same brand name. Attractive schemes such as bravery awards, filmfare awards have also been conducted by several tobacco companies, indirectly promoting their products.<sup>10</sup>

This was subsequently followed by the Kerala High Court for the first time banning smoking in public places in the state under a PIL filed before it under Art.226 of the Constitution of India<sup>11</sup>. This was followed suit by the Supreme Court in *Murli S. Deora v/s Union of India and Ors.*<sup>12</sup> wherein the Supreme Court extended the ban on smoking in public places to a nationwide level. The court while delivering the judgment categorically stated that Art. 21 of the Constitution of India provides that none shall be deprived of his life without due process of law. Realising the gravity of the situation and considering the adverse effect of smoking on non-smokers and passive smokers the court laid down a list of ‘public places’ and directed the centre as well as the state to implement its directions.

It was in response to this judgment that the govt. came out with the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (the “COTPA”). The constitutionality of this legislation was challenged in *Mahesh Bhatt and Kasturi and Sons v/s Union of India and Anr*<sup>13</sup>. One of the Petitioner’s is a reputed writer, director and producer of Films and Television Programmes while the other one is engaged in the publication of the news paper ‘The Hindu’. The Petitioner’s claimed that the amended Rules violate freedom of Speech and Expression guaranteed under article 19 (1) (a) of the Constitution of India and are not protected under article 19 (2). Petitioner stated that business and use of Tobacco is legal and is not res extra commercium.

The Issues raised by the Petitioner’s were that, whether the central government is empowered to legislate the said Act and the said Rules and should the use of tobacco be allowed and shown in newspapers in films and electronic media because citizens of this country have freedom to speak and express themselves. The findings of the court were that, “Commercial

---

<sup>10</sup> “Report on Tobacco Control in India- Executive Summary”, Edited by K. Srinath Reddy and Prakash C. Gupta,

<sup>11</sup> Writ Petition 24160 of 1998.

<sup>12</sup> (2001) 8 SCC 765

<sup>13</sup> (2008) Bus.L.R 366 Del, 147.

advertisements are entitled to limited protection under Article 19(1) (a) of the Constitution if they are in public interest. Commercial advertisements of tobacco products are not expressions protected under Article 19(1) (a) of the Constitution. Commercial advertisements will include indirect or surrogate advertisements which promote and encourage use of tobacco products”<sup>14</sup>. The court also held that, “Restrictions imposed on electronic media and cinematographic films are reasonable and justified. Restrictions imposed on the print media to prevent publication of brand names, logos of tobacco products are also in larger public interest and to promote Right to Life. The Rules also provide for constitution of a committee representing diverse voices, interest and groups and therefore adequate safeguards have been provided to prevent harassment. Individual cases of abuse of powers can always be struck down by Courts”<sup>15</sup>.

### **National and International Regulations:**

#### **1. Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (“COTPA”):**

Section 5 of the act prohibits the advertisement of “Tobacco Products” by both direct and indirect means. From a general look at the advertisement scene it appears that direct advertising is not carried out by the tobacco companies. However, the new trend appears to be that the names of tobacco products are used to promote other products which are in no way related to tobacco, and this may be termed as surrogate advertising. In order to bring it out of the purview of violation of this legislation and its rules, the brand name is withdrawn from the tobacco packets and is exclusively used in unrelated products. But then the point to be considered here is that the brand name so being used will be etched in the memory of the common man as a brand of tobacco earlier available in the market and produced by a certain company.

Sub-paragraph (i), (ii), (iii) and (iv) of Rule 2 of COPTA Rules, clearly sets out that the use of a name or brand of Tobacco Products for marketing, promoting or advertising other products would constitute a form of “indirect advertisement”. Accordingly, the

---

<sup>14</sup> See, Para 56(A)

<sup>15</sup> See, Para 56 (C) & (D).

surrogate advertising carried out by tobacco companies would constitute a form of indirect advertisement and would consequently be prohibited under section 5.

**2. The Cable Television Networks (Regulation) Act, 1995 (“CTNA”):**

The CTNA was enacted to regulate the operation of cable television networks in India. Rule 7 (1) of the Cable Television Network Rules, 1994 (the “CTN Rules”), enacted under the provisions of section 22, provides 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 subscribers*”. Rule 7(2)(viii)(a) provides that, “*No advertisement shall be permitted which promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants*”

**3. The Advertising Standards Council of India (“ASCI”):** The ASCI is a voluntary self-regulation council, which has drawn up a Code of Conduct to control the content of advertisements with a view to achieve fair advertising practices. The Code applies to all forms of advertisement, that is, to newspapers, magazines, television, radio, cinema and posters, amongst others. Clause 6 of the Code provides that advertisement of products for which advertising has been restricted should not circumvent the restriction by purporting to be advertisements for other products, the advertising for which is not prohibited. This clause also lays down the criteria for deciding whether an advertisement is indirect advertisement.

**4. Framework Convention on Tobacco Control (FCTC):** India ratified the Convention on 5<sup>th</sup> Feb. 2004 and the Convention came into force on 27<sup>th</sup> Feb. 2005. The convention seeks to protect present and future generations from devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures.

**Article 1. Definitions:**

“**Tobacco Advertising and Promotion**” means 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;

“**Tobacco Sponsorship**” means 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;

**Article 13** of the convention is titled as Tobacco advertising, promotion and sponsorship. This article recognizes the fact that a comprehensive ban is necessary and imperative. The framework gives the parties the freedom to introduce a comprehensive legislation banning all tobacco advertising, promotion and sponsorship in accordance with the constitutional principles of the parties. The time limit granted to the members is 5 years from the date of the convention coming into force. For India the convention came into force on 5<sup>th</sup> Feb.2004. The parties are also encouraged to go beyond the convention obligations and implement appropriate measures for achieving the objective.

### **The Debate**

India has taken ample measures to implement the advertising ban effectively. However, the ban on indirect advertisements of tobacco products has suffered a serious setback due to legal challenges and inadequate enforcement. Cigarette companies are engaged in using surrogate advertising and brand stretching. They are sponsoring and contributing to organize events such as fashion shows, music and bravery awards etc. through which they are trying to be socially acceptable.<sup>16</sup> Their only objective is to compensate the losses arising out of the ban on advertisements of one particular product (i.e. liquor). The companies can always claim that the order is being implemented and advertisements of liquor are banned, but the objective of the Government behind imposing the ban is not fulfilled. It's a new weapon of Proxy War.<sup>17</sup>

The banning of surrogate advertisements has become a very controversial and sensitive issue. The producer companies feel that while the government allows them to do business on the one hand and taxes a huge chunk of their profits and takes it as its revenue, it does not allow them to conduct their business in a profitable manner on the other hand by banning one of their most important weapon of increasing sales 'advertisement'. However, some analysts are of the opinion that the ban has in fact turned out to be advantageous for domestic players. According to a WTO agreement signed in March 2001, MNC's had unrestricted license to sell their products. After the ban, these MNC's would not have access to the quickest and most effective form of

---

<sup>16</sup> Effective Implementation of the WHO Framework Convention on Tobacco Control through the MPOWER Policy Package, TFI Newsletter, Vol. 3 No. 1, 2010.

<sup>17</sup> Shivani Bhardwaj, Surrogate advertisements: A new judicial concern



advertising – the TV, so the new brands that are there even in the market would not be widely popular and hence the already existing domestic brands will be under less of a threat of losing their market share. The ban on surrogate advertising has affected even media companies, as they have lost a substantial revenue generating client base as a result of the ban. According to broadcasters, the government should put in place a ‘reasonable’ policy, which somehow strikes a balance between the social and monetary aspects of the business which are engaged in the tobacco and liquor industry.<sup>18</sup>

### **Conclusion & Suggestions**

Surrogate advertisements are not only misleading, but also false and dishonest in many cases. This method is used by the corporates because the legislations that are in place as of now perform only a half hearted job in controlling this menace. If the legislature and the government really wants to get a death grip on this menace it should implement its intentions in a more spirited manner and it should be done without the customary loopholes. If the government really wants to tackle the problem it should either ban the products completely and remove it from the market or make some provision which makes it practically impossible for the companies to use circuitous methods to make use of their brand names and make a mockery of the legislations. With surrogate advertising so widespread, this is the moment to tackle the problem head-on.

Some of the measures that can be taken up are: i) making transparent laws banning surrogate advertisements for different products under a single brand name, by amending the Trade Marks Act;

ii) providing teeth to the Advertising Standards Council of India to enable it to take action against false and misleading advertisements, and keep a close vigil over clever evasion of the law, instead of just issuing notices and making the guilty mediums issue apology scrolls and advertisements;

iii) establishing a national coordinating mechanism for effective implementation of international and national regulations and commitments is highly essential.

---

<sup>18</sup> 'The relationship between tobacco advertisements and smoking status of youth in India', by Shah PB, Pednekar MS, Gupta PC, Sinha DN. Asian Pac J Cancer Prev. 2008 Oct-Dec;9(4):637-42.

iv) creating a consumer awareness programme to help people understand surrogate advertisements and the way they are being used; and

v) requiring advertising agencies to have full knowledge of the products under the same brand for which they are promoting advertisements, and taking legal actions against those agencies which design surrogate advertisements.