

# Surrogate Advertising: Softly promoting hard products

## A CHALLENGE TO LAW

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### Introduction:

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

*Leo Burnett*

Advertisements have a strong influence in our life. We like them because they provide information and create awareness about the market. Our decisions whether to buy a product or not, is often completely influenced by the promotional activities of the companies concerned. Therefore, due to the widespread adverse impact that advertisements of unhealthy products like tobacco, liquor can cause, Indian government has always endeavoured to curb or atleast restrict rampant advertisements of such products by appropriate legislations, orders and directives.

### Origin:

As a reaction to the directive of Government to ban advertisements of products that are adverse to health, the major companies of liquor & tobacco sought other ways of endorsing their products. They have found an alternative path of advertising through which they can keep on reminding the people of their liquor/tobacco brands: they have introduced various other products with the same brand name. Launching new products with common brand name is known as **brand extension**, which can be carried out for:

- related products (e.g.: Tata Salt and Tata Tea) or
- unrelated products (e.g.: Tata Tea and Tata Indica).

The problem occurs when heavy advertising is done so that the customers do not forget their liquor & tobacco brands, for which advertisements are banned. The advertisements for such new products are placed under the category of "Surrogate Advertisements". 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.

### **Merits of Brand Extension:**

Strong trademarks mean a combination of positive product attributes mainly reliability and quality. Branding decisions for new product category have to consider the appropriateness of the fit between the product and the trademark, in terms of association, attribute and connotation. And here, the government is free to put companies under a scanner to determine if their umbrella branding strategy is transparent and genuine. But brand extension across products should be permitted, except when the purpose clearly is to encourage consumption of a product whose promos are prohibited by law.

### **Surrogate advertisement by Tobacco and Liquor industry**

**Examples from tobacco industry** - Red & White bravery awards, Wills lifestyle, Four Square white water rafting, etc **Examples from liquor industry** - Bagpiper soda and cassettes & CDs, Haywards soda, Royal Challenge golf accessories and mineral water, Kingfisher mineral water, White Mischief holidays, Smirnoff cassettes & CDs, Imperial Blue cassettes & CDs, Teacher's achievement awards etc.

### **Legislative Measures:**

**The Cigarettes & Other Tobacco Products (Prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act, 2003:** This Act was enacted to implement measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco; It was also considered expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by **article 47 of the Constitution; Section 3(a) of the said act defines 'advertisement' as including: 'any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas'**

**Interpretation:** Surrogate advertisements clearly come under the definition as it involves making the tobacco labels clearly visible to people through other products by the same name. Moreover the public is always reminded orally of the tobacco's brand name through the advertisements of such other products. So such advertisements are liable to be a subject matter of this Act and therefore subject to its restrictions.

**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 products.'*

**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.’*

**Demerit:** This section restricts advertisement, promotion of tobacco products for direct/indirect pecuniary benefit. It is narrow since it doesn't take within its ambit the scope of promoting tobacco through brand extension and sponsorships.

**The Ministry of Health and Family Welfare made certain amendments to the above act in 2005, stating that the word ‘indirect advertisement’ mentioned in Section 5(1) would mean:**

- The use of a name or brand of tobacco products for marketing, promotion or advertising other goods, services and events;
- The marketing of tobacco products with the aid of a brand name or trademark which is known as, or in use as, a name or brand for other goods and service;
- The use of particular colours and layout and/or presentation those are associated with particular tobacco products; and
- The use of tobacco products and smoking situations when advertising other goods and services.

**Merit:** It's a comprehensive definition and the amendment has taken care of the legal lacuna pointed out above.

**Advertising Standard Council of India (ASCI) code:**

ASCI is a voluntary self-regulation council, registered as a not-for-profit Company under section 25 of the Indian Company Act. It's formed to safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large.

**Section 6 of the said code states:** *‘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. In judging whether or not any particular advertisement is an indirect advertisement for product whose advertising is restricted or prohibited, due attention shall be paid to the following:*

*(a) Visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner.*

*(b) The advertisement must not make any direct or indirect reference to the prohibited or restricted products.*

*(c) The advertisement must not create any nuances or phrases promoting prohibited products.'*

**Interpretation:** It specifically prohibits surrogate advertising and lays down guidelines which qualifies it to be so, namely - Whether the legal product under a tobacco brand, sought to be advertised, has been produced in reasonable quantities or not.

- Whether in the disputed advertisement, there are any direct/indirect clues to the promotion of the restricted product i.e. tobacco or not.

### **The Prohibition of Publication or Telecast of Vulgar, Obscene and Surrogate Advertisements and Re-mix songs by Print and Electronic Media Bill, 2004:**

Though the bill hasn't yet seen the light of the day, the broad framework has been laid down by the legislature and given to the executive to frame the details under delegated legislation. It was initiated to provide for *'total ban on the publication of .....surrogate advertisements showing substitutes of products, particularly of liquor and tobacco products by magazines, newspapers, etc. and telecasting of .....surrogate advertisements.....so as to protect the Indian culture and values.....'*

For the first time, a legal definition of **'surrogate advertisements'** has been attempted through **Section 2(d)**, which states: *'an advertisement which shows a substitute product in the guise of the real one which otherwise cannot be legally advertised through the print and electronic media.'*

**Section 3** prohibits the publication by print media and telecasting of surrogate advertisements and provides that violators of the said provisions shall be punished accordingly.

### **Issues for concern:**

- In a significant policy shift, the government has in principle decided to permit non-liquor and non-tobacco advertisements of Kingfisher and Wills brands on TV channels. This is despite the fact that the **Cable TV Network Rules, 1994 Rule 7(2) (viii)** **prohibits direct or indirect consumption, sale or production of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants.**

Recently, the Information and broadcasting ministry has assured the people that all surrogate advertisements would soon be barred from appearing in any form of media and stricter measures of surveillance to identify such advertisements would be put in place.

- Manufacturers further reduce the chances of young people failing to get the message by sponsorship of sports teams and events and music concerts having particular appeal to the young.

## **Suggestions for measures to be taken:**

**1) Amendment to Cable Television Act made under Networks (Amendment) Rules, 2006 states that no advertisement which violates ASCI standards are to be allowed.** But it has been noticed that despite legislations aiming at direct prevention of surrogate advertisement, no strict adherence could be observed as is evident in the ITC case above. Providing teeth to the ASCI to enable it to take action against false and misleading advertisements and keeping a vigil over close evasion of law is a step to be taken.

## **2) FCTC (Framework Convention on Tobacco Control):**

It is a convention developed by World Health Organization (WHO) as a model to be adopted by any country desirous of enforcing strict anti-tobacco rules within its domain. **Article 13 of the convention talks about tobacco advertising, promotion and sponsorship:** It provides that even if the constitution doesn't permit a comprehensive ban on tobacco advertising, it can resort to other ways too like

- Prohibiting advertisements which create an erroneous impression on consumers.
- Restrict use of direct/indirect incentives encouraging public use of tobacco.
- Restrict media advertising in a period.
- Restrict tobacco sponsorships of public events.

India can follow the detailed guidelines with respect to surrogate advertisements given in this convention. In **2001, Indian Tobacco Company (ITC) had voluntary withdrawn the Wills Sports sponsorship of the Indian cricket team** when the Government had first proposed a ban on advertising through legislation.

## **3) Other Methods:**

- Measures may also be considered to ensure that brand names or logos of tobacco products are not visible, even if such brands support international events.
- Making transparent laws banning surrogate advertisements for different products under a single brand names, for instance by amending the Trade Marks Act(9);
- Calling on the ASCI address complaints received from consumers against surrogate advertisements and take appropriate actions immediately;
- Creating a consumer awareness programme to help people understand the negative impact of surrogate advertisements;
- Adopting strict laws to penalise those companies featuring surrogate advertisements without any real existence of the product;

- 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.

- Bans against surrogate advertisement should also spread its net to include the new electronic media like the Internet, e-mail, pagers and CD-ROMS, print and outdoor media, asking them to adhere to advertisement codes and not encourage surrogate advertisement.

- Youth led campaigns appealing the government for a comprehensive ban on tobacco advertising through NGOs such as HRIDAY (Health Related Information Dissemination Amongst Youth)-SHAN (Student Health Action Network), created a supportive environment to enforce tobacco control measures. These examples show that role of NGOs should be recognized and they should be given more autonomy to work on such issues.

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