

A WOLF IN SHEEP'S CLOTHING: FAQ ON SURROGATE ADVERTISING



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What is Surrogate Advertising?[1]:

Surrogate advertising as the name suggests, is a method of promoting commodities or goods and services which are not legally authorised to be advertised directly in India. These are basically alternative advertisements for tobacco products, alcohol, narcotic drugs, betting games and other similar products that cannot be directly marketed owing to legal prohibitions.

Recent Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (Consumer Guidelines) issued by the Central Consumer Protection Authority define **“Surrogate Advertisement”**[2] to mean 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.

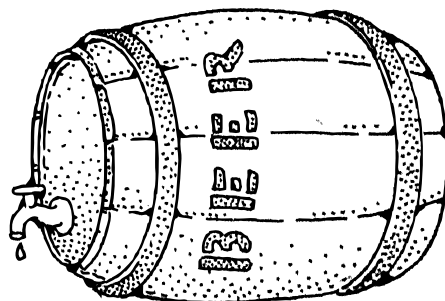
Possible examples:

Remember the jingle **"Ooh La Lala Le O"**? It has come to be associated with a well-known brand (Kingfisher), the King of Good Times. While this commercial advertisement marketed 'Brand's (Kingfisher's) Packaged Drinking Water,' could a layman identify the brand ('Kingfisher') with packaged drinking water? One wonders what is the actual product being sold?

When and how did Surrogate Advertising emerge as a Marketing Strategy?

The concept of Surrogate advertising came into India in the mid-1990s after the Cable Television Networks (Regulation) Act, 1995[3] read with Cable television Rules, 1994, came into force, which banned advertising liquor, tobacco and cigarette products directly.

Before 1995, there was no specific ban on such advertisements, but the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975[4] made it mandatory to display a statutory health warning on all the product packages and advertisements.



[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2] https://consumeraffairs.nic.in/sites/default/files/CCPA_Notification.pdf

[3] <https://www.indiacode.nic.in/bitstream/123456789/1928/1/A1995-07.pdf>

[4] https://indianrailways.gov.in/railwayboard/uploads/directorate/security/rpf/Files/law/BareActs/cigaretts_act1975.html

It is widely known that repeatedly viewing such advertisements could influence the young minds harmfully. A glaring example of this pertained to sports sponsorship by Wills and ITC, when Wills logo was to appear on sports clothing worn by cricketers during the 1999 world cup. The Voluntary Health Association of India's petitioned the Delhi High Court in 1999[5] against alleged surrogate advertising by Wills brand of ITC Company. During the case, the counsel representing Union of India mentioned a bill tabled in Parliament proposing a complete ban on tobacco advertising. Consequently, the court halted the petition. Pursuant to that, ITC voluntarily terminated[6] its sponsorship of the Indian Cricket Team in 2001, stating the desire not to derail the Government's genuine efforts and not to take unfair advantage of its position in the Indian economy.

Thereafter, by various notifications and implementation of Acts, the government undertook an exercise to stop liquor and tobacco companies from advertising their products directly. This was done to reduce the impact of these advertisements on people and to make these harmful products less popular, and to reduce fascination about these products in the minds of the general public.

What Legislations have to say on Surrogate Advertisements?

A. **The Consumer Protection Act, 2019**, aids surrogate advertising by addressing misleading advertisements. It defines "**misleading advertisement**" in **Section 2(28)(2)**, covering false descriptions, false guarantees, misleading nature, and deliberate concealment of vital information.

The latest Consumer Guidelines prevent misleading advertisements and endorsements, and more information on the same can be obtained in one of our previous articles;

<https://www.linkedin.com/feed/update/urn:li:activity:6980871612308828160/>

These Consumer Guidelines cover various aspects of misleading ads, specify conditions for valid ads, and explicitly ban surrogate or indirect advertisements under Rule 6.

Prohibition of surrogate advertising:

- Surrogate or indirect ads are not allowed for goods or services whose advertising is prohibited or restricted by law. This means you can't tweak the rules by making it seem like you're advertising something else.
- An ad is considered surrogate if it hints, directly or indirectly, that it's for the restricted product or if it uses branding associated with the restricted product.
- However, the prohibition shall not apply in cases where the brand or company name is used for other non-restricted products like Pan Parag Candy, Radha Sounf etc. which can still cause confusion in minds of people and is not otherwise objectionable as per these guidelines.

B. The latest Advertising Standards Council Of India (ASCI Code) supports surrogate advertising through **Chapter III**. It allows the use of a brand or company name linked to a restricted product to advertise unrestricted products, but only if it's a genuine brand extension. To determine genuineness, two factors are considered:

1. Adequate production and sale of the unrestricted product to justify the advertising scale.
2. Avoidance of hints or cues that might link the ad to the restricted product, directly or indirectly.

It can be said that surrogate advertisements are generally used in cases of products for which direct advertisements are prohibited.

C. The Cigarettes and Other Tobacco Products (prohibition of Advertisement and regulations of trade and Commerce, Production, Supply and Distribution) Act 2003 (COTPS)[7] under section 5 prohibits the advertisement of Cigarettes, tobacco and its products by direct and indirect means.

D. The Cable Television Network Rules (1994) through **Rule 7(2)(viii)**, which sets conditions for distinguishing genuine brand extensions from surrogates. These conditions include:

- Display of only the unrestricted product
- Avoidance of direct or indirect references to prohibited products
- Prohibition of phrases or nuances promoting the prohibited product
- Prohibition of using layouts, colours, or presentations associated with prohibited goods
- Avoidance of situations typical to prohibited goods in advertisements. Additionally, such brand extension advertisements must receive certification from the Central Board of Film Certification before telecast

(These conditions apply specifically to liquor or tobacco advertisements on cable TV.)

[7] <https://cbfcindia.gov.in/cbfcAdmin/assets/pdf/COTPA.pdf>

How Surrogate Advertising is used? and Case studies:

Liquor, paan masala, cigarettes etc. have become the prominent players in the game of advertisement industry and have also come up with catchy advertisements especially when it comes to display of surrogate advertisements. The companies excel at creating an appealing outward image, but they employ subtle strategies to impact individuals' decisions and behavioural patterns and this conflict brings out some interesting case studies.

Royal Challengers

There was a dispute about the name of a cricket team in the Indian Premier League (IPL) called "Royal Challengers." Some people believed it was a way to indirectly advertise a liquor brand called "Royal Challengers."

When this matter reached the Supreme Court, the Court made a light-hearted comment. They said that the team's name was "Royal Challengers," not "Royal Challenge,"^[8] which is the liquor brand. The Court dismissed the petition saying, only people who drink alcohol would think of it that way.

However, liquor companies sometimes bend the rules. For example, when they advertise something like apple juice, they make it seem related to alcohol, which can confuse people. This raises concerns about these indirect alcohol promotions.

Delhi High Court: TV Today Network Limited Vs. Respondent: Union of India^[9]

This case revolves around a dispute concerning an advertisement for "All Seasons" Club Soda, which the respondent alleges is surrogate advertising for "All Seasons" Whisky due to the similarities in the bottle design and layout. The Ministry of Information and Broadcasting issued a show cause notice to the petitioner, and after considering the response, directed the petitioner to run an apology scroll on the channel.

The petitioner challenged the order, arguing that it had taken due diligence to ensure the advertisement was for club soda and not whisky. The key issue was the resemblance in the bottles.

The Court noted that there were no clear regulations on penalties for violations of advertising codes. It considered the bottle designs and acknowledged the potential surrogate advertising concerns but found that the entire order need not be stayed. Instead, the court reduced the frequency and duration of the apology, directing the petitioner to run a 10-second apology every hour between 8:00 a.m. to 8:00 p.m. on two specific days.

^[8][SC dismisses PIL against 'surrogate' liquor ad | India News - Times of India \(indiatimes.com\)](#)

^[9] W.P. (C) 1971/2021

The Court also instructed the Ministry to provide information on any uniform policy for imposing penalties related to the Programme Code or Advertising Code violations. The case was scheduled for a further hearing on 5th July 2021.

After this judgement, the Consumer Ministry also issued a specific notification to the voluntary bodies like Advertising Association of India, Indian Broadcasting Foundation, Broadcasting Content Complaints Council, News Broadcasters and Digital Association, Advertising Standards Council of India, PHD Chamber of Commerce and Industry, Federation of Indian Chambers of Commerce and Industry, Confederation of Indian Industry, ASSOCHAM etc. on 31st August 2022[10] and directed strict compliance by specifically recording an observation that many alcoholic spirits and beverages are being advertised under the garb of music CDs, club soda and packaged drinking water whereas the chewing tobacco and gutkha has taken the veil of fennel and cardamom. Moreover, many such brands are employing major celebrities that accentuates the negative impact on the impressionable youth amongst others. The Consumer department urged the self regulatory bodies to ensure strict compliance.

National Consumer Dispute Redressal Commission: UNITED BREWERIES VS MUMBAI GRAHAK PANCHAYAT[11]

In the said case, the appellant, United Breweries and Western Railway were accused of engaging in unfair trade practises by prominently displaying/exhibiting false, deceptive and surrogate advertisements on the coaches of Western Railway trains. The Commission investigated complaints regarding 'Bagpiper Soda', 'Derby Special Soda' and 'London Pilsner Soda' marketing on coaches of Western Railways trains. The Commission discovered after additional investigation that there were absolutely no such sodas in the market! The advertisement's facts directly correlated with the whiskey/beer being produced by the corporations, demonstrating that they were only acting as substitutes. The NCDRC directed the companies to replace the existing advertisements with corrective advertisements and slogans such as “Keep Liquor Away from Young Generation India’s No. 1-Only Natural Fruit Drink Limbu Paani, Nariyal Paani, Yehi hai Apna Alag Andaz” on the railway coaches at their own cost.

[10] pib.gov.in/PressReleaselframePage.aspx?PRID=1855766

[11] 2006 SCC OnLine NCDRC 90 : (2007) 1 CPJ 102 (NC)

Looking forward, what are the key takeaways?

The government bans ads for certain products to protect public health, but these banned products are often indirectly promoted, mainly because they are crucial for the economy. Advertisers are increasingly using these tactics, sometimes influencing the enforcement of rules due to their power.

In today's business world, companies spend heavily on advertising, which not only showcases products but also shapes our choices. Responsible advertising is essential. Consumers must be aware about ads and recognize their true intent to strike a balance between promoting products and safeguarding health and rights.

Whether we're picking a shampoo or a car, ads play a big role. So, it's crucial for companies to be responsible in their ads. Surrogate advertising, which is similar to false representation, is a concern, especially for young people. Despite laws being in place, companies are using sneaky "surrogate advertisements" to keep promoting harmful products, undermining the bans.

While the Consumer bodies are doing their bit, awareness regarding surrogate advertising is crucial for all to make a choice that's fit!

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