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ANALYSIS OF LEGAL FRAMEWORK TO REGULATE ADVERTISING AND SURROGATE ADVERTISING OF TOBACCO PRODUCTS

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PREFACE

Tobacco use is a serious health challenge worldwide. Growing, manufacturing, and process of delivering tobacco products all have serious environmental, health, economic, and social consequences. With 268 million active tobacco users, India has been ranked second in tobacco consumption. Nearly 1.35 million tobacco-related deaths happen in India every year. Many studies found tobacco industries using deceptive and illegal measures to attract the public. Youths are being attracted to tobacco on social media platforms and POS through various means of advertisements. False claims such as 'healthy-e-cigarette', 'Herbal Cigarettes' are being made just to promote their products and to extend their market. Also, surrogate advertising are being adopted by the tobacco industry which has put public health at a greater risk. This issue of false, illegal, and surrogate advertisement by tobacco companies needs to be addressed.

The World Health Organization and the policymakers in the country are very serious about the issue of false, illegal, and surrogate advertisements by tobacco companies. Various legislations at the national and international levels have been made to curb these advertisements. Jurisdictional issues, lack of awareness, and ignorance of the law have been proved to be the lacunas in addressing the issue.

The first-ever international public health treaty 'The WHO Framework Convention on Tobacco Control (WHO FCTC)' provides various measures against illegal and false advertisement by tobacco companies. The convention recommends the Parties for a comprehensive ban on advertising, promotion, and sponsorship to reduce the consumption of tobacco products. At the national level, The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003; The Trademark Act, 1999; The Cable Television Networks (Regulation) Act, 1995; The Advertising Standards Council of India and The Consumer Protection Act, 2019 deal with advertisements and surrogate advertisements.

An attempt to familiarise everyone with the relevant provisions of these laws has been made through this book. Analysis of these legislations for control of tobacco made in this book may facilitate a new tool for controlling and curbing tobacco usage in India.

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EXECUTIVE SUMMARY

The tobacco epidemic poses a grave risk to public health globally, being a common risk factor for Noncommunicable Diseases (NCDs) and puts tobacco users at a higher risk for developing severe cases of COVID-19. It is well documented and accepted that the tobacco industry's marketing campaigns aim to replace millions of people who die each year from tobacco-attributable diseases with new consumers.

The tobacco and related products industry's established and calculated global strategy is designed to attract a new generation of tobacco users. The effort and desire to attract the young and gullible to the world of tobacco has always been the objective of tobacco manufacturers- to “catch them young.” Tobacco use is projected as synonymous with adulthood, modernity, affluence, social class norm, elegance, etc. To this end, tobacco and related industries have employed sustained tactics such as using flavours/adulterants; misleading claims of reduced harm; single stick sales, sales in the close vicinity of educational institutions to make tobacco products easily accessible to youth. In addition, tobacco companies use a variety of direct and indirect advertising methods designed to lure the youth towards lifelong dependence. Surrogate advertising, endorsement of tobacco products, corporate social responsibility activities etc., are some of the common methods utilised by tobacco companies.

These strategies have been recognised by the WHO Framework Convention on Tobacco Control ('WHO FCTC')¹ and the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ('COTPA')², which seek to regulate the same. Article 13 of the WHO FCTC and its implementation guidelines require Parties to implement a comprehensive ban on all forms of tobacco advertising, promotion and sponsorship, covering all forms of media. Section 5 of the Cigarettes and Other Tobacco Products Act, 2003 prohibits all forms of advertisement, promotion, and sponsorship and mandates a statutory health warning on all tobacco product packages.

There are numerous domestic legislation, besides the Cigarettes and Other Tobacco Products Act, 2003, which can be utilised to curb advertising, including surrogate advertisement, promotion and sponsorship of tobacco and related products.

- The Trademark Act, 1999³ - Registration of a trademark can be denied if it deceives the public or causes confusion or is similar to an existing trademark, or is likely to cause confusion. Trademarks which are not in use can be removed from the trademark register, which includes trademarks which exist solely for the purpose of surrogate advertising of tobacco products.
- The Emblems & Names (Prevention of Improper Use) Act, 1950⁴, can be utilised to

¹https://www.who.int/fctc/text_download/en/

²<https://legislative.gov.in/sites/default/files/A2003-34.pdf>

³https://legislative.gov.in/sites/default/files/A1999-47_0.pdf

deny the use of names that give an impression that they have government patronage, as often done in case of naming various tobacco products.

- The Cable Television Networks (Regulation) Act, 1995⁵ can be utilised to restrict any direct or indirect tobacco advertisements on cable television networks.
- The Consumer Protection Act, 2019 (CPA)⁶ introduces liability for endorsers and has an extensive framework for penalising misleading advertisements by tobacco and related products companies.
- Under Advertising Standard Council of India (ASCI), the Code of Advertising addresses surrogate advertising by tobacco companies and requires advertisements to be truthful.

In this context, it is important to examine all methods utilised for advertisement, promotion and sponsorship by tobacco and related products' companies and determine if the existing legal framework has sufficient measures to combat them. While the existing legal framework is sufficient to address some of the concerns regarding tobacco advertisements, promotion and sponsorship, with the emergence of new media and technologies and to tackle a plethora of industry tactics, including those specifically targeting the youth, some additional measures are required.

In this background, some recommendations based on an in-depth analysis of various extant domestic legislations which can be used to curb the different forms of direct and indirect advertising of tobacco and related products, specifically devised to circumvent the law and attract the youth, are as follows :

- (i) The registration of trademarks by tobacco companies under the Trademark Act, 1999 should be monitored to ensure that new trademarks are not being used to bypass the prohibition on advertisement under Section 5 of the Cigarettes and Other Tobacco Products Act, 2003. Accordingly, registration of trademarks should be granted to tobacco companies, subject to the condition that the trademark will not be used for any surrogate advertising, promotion or sponsorship of tobacco products.
- (ii) The Cigarettes and Other Tobacco Products Act, 2003, being a later specific law, will prevail over the Trademark Act, 1999, which is an earlier and general law, in case of any conflict between the two.
- (iii) The violation of Names & Emblems (Prevention of Improper Use) Act, 1950 by tobacco companies to be checked and appropriate, timely action must be taken (e.g. '*Rajvilas*,' '*Goa*,' '*Shimla*,' '*UK-Uttarakhandi*' etc.)
- (iv) Corporate Social Responsibility (CSR) activities undertaken by tobacco companies to be scrutinised and appropriate restrictions be placed in order to prevent direct /indirect advertising, sponsorship or promotion.
- (V) Proper enforcement of Information Technology Act, 2000⁷, extant Rules and Government of India notification dated 9 November 2020⁸, to regulate digital media/Over-The-Top (OTT) platforms, to be utilised to check surrogate advertisements by the tobacco industry on these platforms.

⁴https://indiacode.nic.in/handle/123456789/1896?view_type=search

⁵<http://legislative.gov.in/sites/default/files/A1995-7.pdf>

⁶<http://egazette.nic.in/WriteReadData/2019/210422.pdf>

⁷<https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>

⁸<http://egazette.nic.in/WriteReadData/2020/223032.pdf>

- (vi) Surrogate advertising of tobacco products is covered by the unfair trade practice, misleading advertising and endorsers' liability provisions under the Consumer Protection Act, 2019.
- (vii) Existing regulatory bodies and authorities be required to take appropriate measures for the enforcement of ban on all forms of tobacco advertising, promotions or sponsorships of tobacco products.

I. INTRODUCTION

Advertisements have a strong influence on our life and especially on children and youth, with their impressionable minds. Since advertisements provide information and create awareness about the market, our decisions whether to buy a product or not, are often completely influenced by the promotional activities of the companies concerned.

“The effort and desire to attract young and gullible to the world of tobacco has always been the objective of the manufacturers. ‘Catch them young’ is the moto, and use of tobacco products is projected as synonymous with adulthood, modernity, affluence, social class norm, elegance, etc. Ban and prohibition on direct advertisements of tobacco products has prompted manufacturers and traders to adopt indirect methods or surrogate advertisements to achieve the same result. The fear of falling sales, adverse articles and medical and media reports have prompted the tobacco industry to portray tobacco use as glamorous and socially acceptable, by showing pictures and use by stars and reputed actors, as a stress buster, a habit nurtured by intellectuals, a fashion accessory etc. The list is virtually endless.” [Justice Sanjeev Khanna (WP Nos. 187612005), judgment dated 07.02.2008; Amar Singh Z Choudhary v. State of Gujarat (Special Civil Application No. 4848 of 2009, High Court of Gujarat at Ahmedabad, SCA/4848/2009, Oral Order 18/11/2009)]

In India the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ('COTPA') was enacted with the objective to eliminate all direct and indirect advertising, promotion, sponsorship concerning tobacco. The Act prohibits direct and indirect advertising of tobacco products under Section 5. Surrogate Advertising was started by the tobacco industry as a direct consequence of this ban (e.g. Red & White Bravery awards; Wills Lifestyle; Four Square, Water Rafting.) The use of surrogate advertisements by tobacco industries has been recognised by the courts as well.

In Hemant Goswami v. Godfrey Philips & Ors., (C.W.P. No. 313 of 2005), the Punjab & Haryana High Court observed, “Petitioner contends that the institution of the Red and White bravery awards was violative of Section 5(3)(b) of the COTPA 2003. Mr. Hemant Goswami, who appears in person, has raised a very pertinent issue with regard to other violations of the aforesaid Act. We trust that the respondents, will ensure that the provisions of the aforesaid Act are enforced in letter and spirit.”

In Kerala Voluntary Health Services v. Union of India & Ors.,(W.P.(C) No. 38513 of 2010), the Kerala High Court held, “It is true that the indirect advertisement through films and other visual media resorted to by the national and multinational tobacco companies are having greater impact on the society. So, it is only just and proper that appropriate directions are issued to the respondents to prevent indirect advertisements in films and other visual

media. It is also true that scenes depicting the use of tobacco and its allied products often appear in films and other visual media taking advantage of the leeways in the enactments. This can be curtailed only by proper enforcement of the provisions of the COTPA and its allied Rules as well as of the Cinematograph Act and the Guidelines issued there under.

The Legislature, being familiar with local conditions, is primarily, the judge of the necessity of enactments. If there exists a condition or state of affairs requiring the Legislature of the State to exercise its conceded right to enact laws for the protection of health, safety or welfare of the people, State can enact laws. Here, the Parliament in its wisdom has enacted laws to curb the menace arising out of the use of tobacco. The indiscriminate propagation of advertisement through films and other visual media without any proper restrictions, as well as, non-implementation of the provisions of COTPA and its allied Rules as aforesaid, would infringe upon the right to life of the citizen, which is guaranteed under Article 21 of the Constitution of India. If the executing agency fails to implement the provisions of a statute, there is scope for judicial interference. Thus, prayers in this writ petition are relevant.”

In *Pranesh v. Union of India & Ors*, (PIL No. 29633 of 2016), the Allahabad High Court observed, “the other issue highlighted in this petition is that under the provisions of COTPA 2003, advertisements of tobacco and tobacco products is prohibited. In order to overcome the said prohibition, the manufacturers of tobacco products have adopted a novel method. The advertisement put by the manufacturers in the print and visual media are camouflaged in a manner to suggest that they are promoting products which do not contain tobacco, when as a matter of fact the products with identical name and identical packing containing tobacco are available in the market manufactured by the same manufacturers. Thus the real intent is to advertise the product containing tobacco.”

In *Union of India v. Unicorn Industries* (2019 Indlaw SC 924), the honorable Supreme Court noted that “Advertising tobacco products including Pan Masala (PM) containing tobacco is banned in India since May 1, 2004. To bypass this ban tobacco companies are advertising PM ostensibly without tobacco, heavily in all forms of media. PM is surrogate for tobacco products as the money spent on marketing, and advertising is many times of the revenue generated from the sale of PM.”

Tobacco and related industries have employed sustained tactics to attract a new generation of tobacco users by using flavours/adulterants, accompanied with misleading claims of reduced harm and by selling of cigarettes and other tobacco products, in single sticks and in the close vicinity of educational institutions, thereby making tobacco products easily accessible to youth. Direct and indirect or surrogate advertisements of tobacco and related products through endorsements by celebrities who are youth icons, have a strong influence on children and youth, given their impressionable minds.

Definitions⁹

“Tobacco advertising and promotion”: The FCTC 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 either directly or indirectly.”

⁹Centre for Media Studies & Healthbridge, Tobacco Advertising, Promotion And Sponsorship Across South And South East Asia (2009) <[https://healthbridge.ca/images/uploads/library/TAPS_Report_\(final\).pdf](https://healthbridge.ca/images/uploads/library/TAPS_Report_(final).pdf)> accessed 6 September 2020

¹⁰Chandrashekhar Singh, 'Evolution of Surrogate Advertising and its Legal Measures with Special Reference to India' [2015] 11(1) Management Insight 103-107. Rule 7(2) (iii) of the Cable Television Networks Rules 1994 prohibits advertisements which directly or indirectly promote production, sale and consumption of cigarettes, tobacco products and liquor.

Examples include direct advertising on electronic, print and outdoor media, product packaging, point of sale advertising, price discounts, product placement and display at retailers, sales promotions, interned promotions, use of tobacco brand names, logos, or brand identities on non-tobacco products, activities, or events, placement of tobacco products, brands or tobacco use in the entertainment media.

“Brand extension or brand stretching”: This is a marketing strategy through which a firm marketing a product with a well-developed image uses the same brand name in a different product category.

“Brand stretching” in the context of the study occurs when a tobacco brand name, emblem, trademark, logo, or trade insignia or any other distinctive feature (including distinctive colour combinations), is connected with a non-tobacco product or service in such a way, that the tobacco product and the non-tobacco product or services are likely to be associated.

“Brand Diversification”: This occurs when a company attempts to diversify an established brand into a new market or product category, for the purpose of increasing the sale of the existing products and creating greater awareness of the brand in the market (in addition to generating additional earnings through the new product or market).

“Trademark Diversification”: Trademark diversification is an indirect form of advertising that uses the value of a known trademark to promote a variety of products.

“Surrogate advertising”: This refers to duplicating the brand image of one product extensively to promote another product of the same brand name.

Advertising in the context of Tobacco Products

As per Article 13 of the WHO Framework Convention on Tobacco Control (FCTC), it is necessary and imperative to comprehensively ban all tobacco advertising, promotion and sponsorships (TAPS). To achieve this Parties were given five years from the date of enforcement of the FCTC (5th February 2004 for India), to make a comprehensive legislation in accordance with their constitutional principles and are encouraged to go beyond. In India liquor and cigarette advertising was banned, under the Cable Television Network (Regulation) Act and its Rules. Thereafter Section 5 of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) and Rule 2(i), (iii) and (iv) of COPTA Rules, specifically prohibited both direct and indirect advertisement of tobacco products.

'Surrogate advertising' means duplicating the brand image of one product extensively to promote another product of the same brand, thereby defeating the very purpose of ban on advertising of products like tobacco and liquor. To circumvent advertising prohibitions, the brand name of tobacco products is withdrawn from tobacco packets and is being exclusively used to promote other unrelated products. Launching new products with a common brand name i.e. brand extensions is not illegal per se or objectionable in nature. However, when in response to ban on advertisement of certain product categories, which

¹¹Singh & Associates, [2018] 6(5) Indian Legal Impetus
<<https://www.manupatrafast.com/NewsletterArchives/listing/ILI%20Singh%20Associates/2018/May/Vol%20XI%20Issue%20V.pdf>>
accessed 5 September 2020

are not projected directly to consumers but rather masked behind another product under the same brand name, it is problematic. This is done so that whenever there is any mention of that brand, people start associating it with its main product i.e. containing tobacco, which cannot be advertised under the law. This misuse of a name or brand of a product, which cannot be advertised, for marketing, promoting or advertising other products, constitutes a form of “indirect advertisement” i.e. surrogate advertising¹¹.

In *Dhariwal Industries Limited v. Assistant Commissioner of Income Tax*, the Tribunal noted that “As stated earlier, pan masala of all variants is generally sold under the same brand name. The single name for all variants of pan masala affords a significant marketing advantage to the manufacturer. Since there are no restrictions on advertising a consumer product that contains no tobacco, pan masala without tobacco is vigorously advertised and promoted. Pan masala of all variants including gutkha carry the same brand name and therefore get considerable benefit from the unrestricted advertisement and promotion of its non-tobacco counterpart and thereby through surrogate advertising, i.e., duplicating the brand image of one product extensively to promote another product of the same brand. (emphasis supplied) As a result of such high-profile advertising and surrogate advertising, smokeless tobacco use is increasing rapidly in the stratum of society from which it had almost disappeared- among individuals with college education who are in business and in middle and high-level management positions.”

Brand image of one product is duplicated to promote another product of the same brand, to advertise banned products. The surrogate or substitute could either resemble the original product or could be a different product altogether, but it is marketed under the established brand name of the original product. This ploy is being used widely in mass media e.g. Bagpiper Soda, Cassettes and CDs; Royal Challenge Golf Accessories and Mineral Water, Imperial Blue Cassettes and CDs etc. Companies also resort to event sponsorship, event organizing and corporate films. Such integrated marketing strategy is adopted by companies to create brand recall value for the prohibited product but not necessarily to increase sales of the advertised product¹³.

It is clear that advertising of tobacco products can take place in multiple ways. Restricting such advertising often raises questions about the infringement on the right and liberty to trade, which is available to tobacco manufacturers. In *Attorney General v. JTI-Macdonald Corp.*¹⁴, the Canadian Supreme Court dealt with this matter:

“Appeals concern the constitutionality of Canada's laws on tobacco advertising and promotion, under the Tobacco Act, S.C. 1997, c. 13, and the Tobacco Products Information Regulations, SOR/2000-272 (“TPIR”). The main issue is whether the limits certain provisions impose on freedom of expression are justified as reasonable under s. 1 of the Canadian Charter of Rights and Freedoms.

Parliament's objective, once again, is clearly pressing and substantial. As found by Denis J., the evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes. The prohibition on sponsorship by means of names on

¹²2007 Indlaw ITAT 66

¹³Jayant Panvelkar, 'Surrogate Advertising – An Ethical way of promoting Unethical Products' [2018] 1(25) International Journal of Management and Economics 88-94

¹⁴2007 SCC 30 (Canada)

facilities in s. 25 only applies to facilities used for sports or cultural activities, not for all facilities. The aim of curbing such promotion justifies imposing limits on free expression.

127 Nor is the means chosen to achieve the objective disproportionate. The element of rational connection is made out. Placing a corporate name on a list of sponsors or on a sports or cultural facility may promote the use of tobacco in a number of ways. This is clear when the corporate name is connected with the brand name of a tobacco product. (The appellant argued that all the respondents have brand names that include portions of their corporate names; the respondents did not contradict this.) But even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product. Connections may be established in a variety of ways. The corporate name may, without referencing a brand name, nevertheless contain a reference to tobacco. Or the corporate name may have historically been associated with tobacco. The evidence established the tobacco industry's practice of using shell corporations as an element in brand identification. Associations between the parent company and the shell company may persist in the public mind. As a result, the corporate name in the sponsorship promotion or on the building or facility may evoke a connection with the shell company and its brand.

128 Given the nature of the problem, and in view of the limited value of the expression in issue compared with the beneficial effects of the ban, the proposed solution — a total ban on the use of corporate names in sponsorship promotion, or on sports or cultural facilities — is proportional. And in view of the limited value of the expression in issue compared with the beneficial effects of the ban, proportionality of effects is established.

129 I conclude that the impugned sponsorship provisions are a reasonable limit justified under s. 1 of the Charter.”

Studies on Impact of Surrogate advertising of Tobacco products in India

Indo-US study conducted in Delhi and Tamil Nadu-Published in American Journal of Health Behavior, 2008 [sample size-11,642 sixth and eighth graders from 32 schools were surveyed], revealed that nearly half of the children had seen and remembered watching a tobacco advertisement raising serious concerns related to surrogate advertisements, correlating tobacco advertising and promotion with tobacco use, specially among urban youth.

Survey analyzing Global Youth Tobacco Survey (GYTS) 1 data to examine the association between tobacco advertising, counter-advertising and smoking status reveals that, tobacco advertising in India clearly contributes to smoking in youth. A very strong correlation was found between smoking and owning something with a cigarette brand name on it, thereby suggesting that advertising of brand names and not necessarily the cigarettes themselves can also lead to smoking behavior. Similar results were found for bidi advertising and promotions, our findings also suggest that the bidi industry, which is generally seen as a small, local industry without large advertising capabilities, has learned effective marketing techniques from the cigarette industry.

Research done by Salaam Bombay Foundation in 2017, on 3260 children between age group of 12 and 17 years from municipal and private schools, revealed a disturbing trend. When asked to recall the slogan of any tobacco product or brand, 71% children recalled the slogan of Manikchand (guthka) - Oonche log, oonchi pasand, 12% recalled the slogan of Goa (guthka brand), 2% recalled Sanket, 0.4% recalled Shimla while 15 % recalled other brands. 63% could associate product with brand while 37% could not. Children in that age group could clearly disassociate Manikchand Water (surrogate advertising) from Mankichand Gutkha (Impact of Surrogate Advertisements, 2009).

Main factors influencing the effect of surrogate advertisements in the minds of the viewers, identifying the association between the demographic profiles of viewers and the impact of surrogate advertisement, reveal that :

- Surrogate commercials have impacted the objective populace to recall and remind the brand image and that the controlled and regulated advertisements to some degree impact and have an effect on the consumers to expend liquor.
- The best factor for consumers to consume liquor and tobacco products is that the celebrities endorse and support such products.
- The surrogate commercials are often repeated because liquor and tobacco companies always want to be at the top of the consumers' mind.
- Young people are particularly affected and driven by surrogate advertising. They are motivated to consume the original products of the company.
- Surrogate advertisements are considered informative and entertaining by people¹⁵

II. EXISTING LEGAL FRAMEWORK FOR REGULATION OF ADVERTISEMENTS

To address the menace of direct and indirect tobacco advertisement, the Government of India, enacted the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ('COTPA'). Its preamble underlines the key purpose of the law as envisaged during the 43rd World Health Assembly i.e. to “impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco”. Though direct advertisements of tobacco products have been eliminated to a large extent in the country, indirect advertising continues unabated, especially in the form of surrogate advertisements and brand extensions. In this regard the current analysis is to look at the existing domestic legislation to ensure a comprehensive ban on tobacco advertisements, including prevention of surrogate advertisements.

The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

An Act to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental there to.

Section 3(a)

“**advertisement**” includes 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;”

a. **Section 5 sub-clause (1)** of COTPA mandates, that:

- No person engaged in the production, supply or distribution of tobacco products shall directly or indirectly advertise their product.
- No person having control over a medium shall directly or indirectly advertise tobacco products through that medium
- No person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of tobacco products.

This should be interpreted to include online advertisements and online sale of tobacco products.

Section 5 sub-clause (2) of COTPA mandates, that:

¹⁵⁴D. Ganesan, Umaya Salma Shajahan, R. Kiruthika, 'Effectiveness of Surrogate Advertising among Viewers' [2019] 9(2) IJITEE 4739-4746”

- No person, shall display or exhibit any advertisement of tobacco products, except advertisement in or on a tobacco package and at their point of sale.

Section 5 sub-clause (3) of COTPA mandates, that:

- No person, shall, promote or agree to promote the use or consumption of tobacco products.
- No person, shall, promote or agree to promote the use or consumption of 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.

Constitutional validity of COTPA Act, 2003 was challenged in Mahesh Bhatt and Kasturi and Sons Vs. Union of India and another¹⁶. The honorable Supreme Court upheld constitutionality of the enactment stating that commercial advertisements are entitled to limited protection under Article 19(1)(a) of the Constitution of India, if they are in public interest. Commercial advertisements of tobacco products are not protected under Article 19(1)(a) of Constitution. Commercial advertisements will include indirect or surrogate advertisements which promote and encourage use of tobacco products. The Apex Court held that restrictions imposed on electronic media and cinematographic films are reasonable and justified. Restrictions imposed on print media to prevent publication of brand names, logos of tobacco products are also in larger public interest and to promote right to life.

b. **Rule 2(e)** of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004

“(e) 'Indirect advertisement' mentioned in section 5 (1) of the Act means:

- (i) The use of a name or brand of tobacco products or marketing, promoting or advertising other goods, services and events;
- (ii) The marketing of tobacco products with the aid of a brand name or aid which is known as or in use as a name or brand or other goods and service;
- (iii) The use of particular colour's and layout and/or presentation those are associated with particular tobacco products; and
- (iv) The use of tobacco products and smoking situations when advertising other goods and services¹⁷.”

Thus, the ambiguity in the Act as to its scope in dealing with surrogate advertisements was taken care of by the above definition of “indirect advertisement” under the aforementioned COTPA Rules, 2004.

In *Health for Million v. Union of India & Ors.*,¹⁸ the Supreme Court vide its order dated 22.07.2013 directed the Central Government and the Governments of all the States to rigorously implement the provisions of the COTPA and COTPA 2004 Rules.

“The consumption of tobacco and tobacco products has huge adverse impact on the health

¹⁶147 (2008) DLT 561. Therein, Court also observed that Constitution of Committee representing diverse voices, interests and groups to look into the cases as to whether there is a case of surrogate advertisement or prohibited advertisement or not, is a reasonable safeguard to prevent abuse of power.
¹⁷Ministry of Health and Family Welfare, 'Notification G.S.R. 345(E)' (31 May 2005) <[http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-345\(E\).pdf](http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-345(E).pdf)> accessed 5 September 2020
¹⁸CA No. 5912-5913/2013

of the public at large and, particularly, the poor and weaker sections of the society which are the largest consumers of such products and that unrestricted advertisement of these products will attract younger generation and innocent minds, who are not aware of grave and adverse consequences of consuming such products. We have no doubt that the Central Government and the State Governments across the country are alive to the serious and grave consequences of advertising tobacco and various products manufactured by using tobacco. They know that the consumption of these products will result in rapid increase in the number of cancer patients and huge proportion of the Budget earmarked for health of the common man will have to be used for treating the patients of cancer.”

We also make it clear that as a sequel to setting aside of the interim order passed by the High Court, the Central Government and the Governments of all the States shall be bound to rigorously implement the provisions of the 2003 Act and the 2004 Rules as amended from time to time”

Thus, the COTPA, 2003 and its Rules, address the nuisance of surrogate advertising of tobacco products and can be used to curb the same.

The Trade Mark Act, 1999

- i. **Section 9 (2)(a)** of the Trade Marks Act, 1999 suggests that registration of trademarks can be refused on various grounds including a trade mark that is of such nature as to deceive the public or cause confusion.
- ii. **Section 11 clause 1** read with sub-clause (b) provides relative grounds for refusal of registration and prevents registration of a trade mark if it is similar to an earlier trade mark or the similarity to an earlier trade mark is likely to create confusion on the part of the public.
- iii. **Section 11 clause 3** prevents registration of a trade mark if use of such trade mark is prevented by virtue of any law or by the law of copyright.
- iv. **Section 47** provides for removal of a registered trade mark from the register and imposes limitations on the ground of non-use.

Section 28 Rights conferred by registration. –

1. Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or service in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.
2. The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.
3. Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trademarks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by

registration of the trademarks but each of those persons have otherwise the same rights as against other persons (not being registered proprietor).

Section 47 Removal from register and imposition of limitations on ground of non-use.-

- (1) A registered trade mark may be taken off the register in respect of the goods or services in respect of which it is registered on application made in the prescribed manner to the Registrar or the Appellate Board by any person aggrieved on the ground either-
- (a) That the trade mark was registered without any bona fide intention on the part of the applicant for registration that it should be used in relation to those goods or services by him, or in a case to which the provisions of Section 46 apply, by the company concerned or the registered user, as the case may be, and that there has, in fact, been no bona fide use of the trade mark in relation to those goods or services by any proprietor thereof for the time being up to a date three months before the date of the application, or
 - (b) That up to a date three months before the date of the application, a continuous period of five years from the date on which the trade mark is actually entered in the register or longer had elapsed during which the trade mark was registered and during which there was no bona fide use thereof in relation to those goods or services by any proprietor thereof for the time being.

Provided that except where the applicant has been permitted under Section 12 to register an identical or nearly resembling trade mark in respect of the goods or services in question or where the tribunal is of opinion that the might properly be permitted so to register such a trade mark, the tribunal may refuse an application under clause

- (a) or clause
 - (b) in relation to any goods or services, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, bona fide use of the trade mark by any proprietor thereof for the time being in relation to any goods or services, if it is shown that there has been, before the relevant date on during the relevant period, as the case may be, bona fide use of the trade mark by any proprietor thereof for the time being in relation to-
 - (i) goods or services of the same description, or
 - (ii) goods or services associated with those goods or services of that description being goods or services, as the case may be, in respect of which the trade mark is registered.
- (2) Where in relation to any goods or services in respect of which a trade mark is registered-
- (a) The circumstances referred to in clause (b) of sub-section (1) are shown to exist

so far as regards non-use of the trade mark in relation to goods to be sold, or otherwise traded in a particular place in India (otherwise than for export from India), or in relation to goods to be exported to a particular market outside India, or in relation to services for use or available for acceptance in a particular place in India or for use in a particular market outside India, and

- (b) A person has been permitted under Section 12 to register an identical or nearly resembling trade mark in respect of those goods, under a registration extending to use in relation to goods to be so sold, or otherwise traded in, or in relation to goods to be so exported, or in relation to services for use or available for acceptance in that country, or the tribunal is of opinion that he might properly be permitted so to register such a trade mark.

On application by that person in the prescribed manner to the Appellate Board or to the Registrar, the tribunal may impose on the registration of the first-mentioned trade mark such limitation as it thinks proper for securing that registration shall cease to extend to such use.

- (3) An applicant shall not be entitled to rely for the purpose of clause (b) of sub-section
- (1) Or for the purpose of sub-section
- (2) On any non-use of a trade mark which is shown to have been due to special circumstances in the trade, which includes restrictions on the use of the trade mark in India imposed by any law or regulation and not to any intention to abandon or not to use the trade mark in relation to the goods or services to which the application relates.

Section 57 Power to cancel or vary registration and to rectify the register.-

1. On application made in the prescribed manner to the Appellate Board or to the Registrar by any person aggrieved, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention, or failure to observe a condition entered on the register in relation thereto.
2. Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to the Appellate Board or to the Registrar, and the tribunal may make such order for making, expunging or varying the entry as it may think fit.
3. The tribunal may in any proceeding under this section decide any question that may be necessary or expedient to decide in connection with the rectification of the register.
4. The tribunal, of its own motion, may, after giving notice in the prescribed manner to the parties concerned and after giving them an opportunity, of being heard, make any order referred to in sub-section (1) or sub-section.
5. Any order of the Appellate Board rectifying the register shall direct that notice of the

rectification shall be served upon the Registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly.

Use of Trade marks for Surrogate Advertisements

Following the prohibition of direct and indirect advertisements for tobacco products, tobacco companies are advertising pan masala and other products as surrogate advertisements for tobacco products. For this purpose, consider the following case studies:

i.

VIMAL- is one of the leading manufacturers of smokeless tobacco products. Some of its trade marks were registered under Class 34 “tobacco products and smokers' articles” (e.g. Pan Masala, Red, Apna, Jhatka and Signature) and some of its other trade marks were registered under Class 31 “betel spices, mouth fresheners and agricultural goods” (e.g. Elaichi, Kesaria and Gold). In December 2019, Maharashtra state government wrote to the Copyright Office of the central government, to provide details of Vimal and products the brand is registered for; seeking trade mark details to understand whether Vimal is registered for “cardamom” or tobacco, before pursuing any legal action. Suspecting surrogate advertising, Maharashtra Directorate of Health Services sought details of three of their trade marks- 'Dane Dane Me Kesar Ka Dum', Vimal (Hindi logo) and Vimal (English logo) from the Copyright Office, stating that the advertisement of Vimal, promoted as a mouth freshener, is being seen as a surrogate advertisement for tobacco products.

ii. BABA- has similarly seen trade marks registered under Class 34 (e.g. 120 Plus, 600 Plus, Baba Gutkha, Baba Bidi, Baba Silver) and some of its other trade marks were registered under Class 31 “agricultural, horticultural and forestry products” (e.g. Elaichi, Sapphire and One)²⁰.

iii. TULSI- has been registered under Class 34 (e.g. Tulsi Royal) and under Class 31 (e.g. Tulsi Royal Khajoor, Tulsi Josh)²¹.

From these examples, it is clear that the same brand name and same logo has been used by the same proprietor for products in different classes of trade marks. It is evident that the intent of the proprietor is to bypass the prohibition placed on advertising tobacco products by advertising other goods with the same brand name or logo as the tobacco product. This is a clear case of surrogate advertisement by tobacco companies.

Remedy under COTPA, 2003

The use of trade marks for surrogate advertising is covered by the scope of 'indirect advertising' under COTPA, 2003. Accordingly, tobacco companies can be restricted from surrogate advertising under Section 5 of the COTPA and penalised under Section 22 of the COTPA.

Remedy under the Trademark Act, 1999

For a remedy under the Trade Mark Act 1999, the use of a trade mark for the purpose of surrogate advertising means that it can be removed from the Trade Mark Register as per Section 47 of the Trade mark Act, 1999. The landmark judgment on this provision are given as follows:

I. In *Thukral Mechanical Works v. PM Diesels Private Limited*²², the honorable

Supreme Court held that whether or not a trade mark is being used in a bona fide manner is a question of fact.

- ii. In Venkata Rama Rao Avvas and Others v. American Cyanamid Company and Others²³, the Appellate Board noted that a prerequisite for a person to seek relief under Section 47 is that they should be the "person aggrieved."
- iii. In Hardie Trading Ltd. and Anr. v. Addisons Paint and Chemicals Ltd.²⁴, the honorable Supreme Court noted that there are three conditions which must be fulfilled before a registered trade mark can be removed from the register –
 - (I) That the application is by a 'person aggrieved';
 - (ii) That the trademark has not been used by the proprietor for a continuous period of at least five years and one month prior to the date of application; and
 - (iii) There were no special circumstances which affected the use of the trade mark during this period by the proprietor.

The onus to establish the first two conditions lies on the applicant, while the burden to prove existence of special circumstance is on the proprietor.

- iv. In Kabushiki Kaisha Toshiba v. TOSIBA Appliances²⁵, the honorable Supreme Court held that "The intention to use a trade mark sought to be registered must be genuine and real." The division bench further explained that "when a trade mark is registered, it confers a valuable right. It seeks to distinguish the goods made by one person from those made by another. The person, therefore, who does not have any bona fide intention to use the trade mark, is not expected to get his product registered so as to prevent any other person from using the same." Mere advertising without actual marketing of goods or services is not a bonafide use of trade mark.
- v. In Kellogg Company v. Pops Food Products Private Limited²⁶, the Delhi High Court observed that if there is no intention to use a trade mark for a very long period of time, then there is no bona fide intention to use the trade mark and it can be removed from the register under Section 47 of the Trade Mark Act, 1999.
- vi. In Fedders Llyod Corporation v. Fedders Corporation²⁷, the Delhi High Court noted that mere use of trade mark in advertising or other publication media is insufficient as 'use' because that would give impetus to legal trafficking in trade mark by not using it but keeping it alive by advertisements only, thus it cannot amount to 'use'.
- vii. In Satnam Overseas v. Sant Ram and Company²⁸, the honorable Supreme Court noted that the applicant under Section 47 of the Trade Mark Act, 1999 has to give prima facie evidence about non-use of trade mark during the relevant period of five years and one month before filing the application.

Once prima facie evidence is given, the onus shifts on the proprietor to prove use of the trade mark during the relevant period.

²²(2009) 2 SCC 768

²³2006 Indlaw IPAB 26

²⁴2003 Indlaw SC 756

²⁵Civil Appeal No. 3639 of 2008

²⁶2018 Indlaw DEL 131

²⁷2005 Indlaw DEL 313

²⁸(2014) 14 SCC 782

- viii. In *Imperial Tobacco Co. of India Ltd. v. Registrar of Trade Marks and Another*²⁹, the Calcutta High Court noted that mere spending on advertising or the magnitude of spending is not sufficient proof to show distinctiveness of a trade mark.

Remedy under the Emblems & Names (Prevention of Improper Use) Act, 1950

An Act to prevent the improper use of certain emblems and names for professional and commercial purposes.

Section 3 Prohibition of improper use of certain emblems and names.—

Notwithstanding anything contained in any law for the time being in force, no person shall, except in such cases and under such conditions as may be prescribed by the Central Government, use or continue to use, for the purpose of any trade, business, calling or profession, or in the title of any patent, or in any trade mark or design, any name or emblem specified in the Schedule or any colourable imitation thereof without the previous permission of the Central Government or such officer of Government as may be authorised in this behalf by the Central Government.

Schedule – Item 7:

Any name which may suggest or be calculated to suggest—

- i. The patronage of the Government of India or the Government of a State; or
- ii. Connection with any local authority or any corporation or body constituted by the Government under any law for the time being in force.

Under the Emblems & Names (Prevention of Improper Use) Act, 1950, the use of trade marks by tobacco companies which suggest any government patronage or support can be restricted.

The landmark judgements in this regard are as follows:

- i. In *M/s Sable Waghire & Company v. Union of India And Others*³⁰, the honorable Supreme Court held that:
 - (i) The Parliament has legislative competency under Entry 49 of List 1 and Entry 97 of List 1;
 - (ii) Adding new words to the Schedule is valid as the Parliament cannot be expected to envisage the possibility of improper use of all names and emblems, nor is it possible for them to create an exhaustive list; and
 - (iii) The petitioner's right to trade is not affected by the legislation and it is a reasonable restriction under Article 19(1)(f) and Article 19(1)(g).
- ii. In *K.P. Vijayakumaran v. State of Kerala*³¹ and in *India School Society v. State of Uttarakhand*, the respective High Courts noted that when the name suggests to the public that there is patronage of the State or government, then the name is not valid.

²⁹AIR 1968 Cal 582

³⁰(1975) 1 SCC 763

³¹2014 SCC OnLine Ker 28082

³²2019 SCC OnLine Utt 251

Analysis: *Does prohibiting surrogate advertisements of tobacco products violate the right of a trade mark holder?*

As per Article 16 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) a trade mark holder can prevent others from infringing upon his legal rights i.e. it is worded as a negative right. However, Section 2 (zb) of the Indian Trade Marks Act, 1999 states that the trade mark proprietor has the right to use his trade mark to distinguish his products in the market which includes packaging of his products i.e. it is worded as a positive right. The Trade Mark holder's rights are not absolute. They primarily connote the origin of a product in the market and also act as silent advertisements by displaying the logo and mark of a brand. This secondary function of trademark has not been formally recognised by TRIPS though it is being widely misused for surrogate advertising of products, by strategically placing their trade mark as a means to circumvent laws prohibiting advertisement of certain products (like tobacco and liquor).

To further examine, if a prohibition on surrogate advertisements violates the trade mark holder's right, we can draw parallels with arguments made against plain packaging of tobacco products by Australia at the World Trade Organization (WTO), as violation of trade mark rights was one of the grounds for challenging this law at the WTO. Plain packaging refers to bland, colourless packaging for cigarettes and other tobacco products and generally requires removal of logos, minimal branding and colouring, and warning signs. The Australian Trade mark law is worded similar to the Indian Trade Mark Act, 1999, still its plain packaging law for cigarettes was upheld by the WTO, in the interest of public health.

While hearing Australia's dispute the WTO panel noted paragraph 5 of the Doha Declaration [on the TRIPS agreement and public health, WTO MINISTERIAL 2001: TRIPS WT/MIN(01)/DEC/220 November 2001, adopted on 14 November 2001] wherein 'each provision of the TRIPS Agreement' must be read in the light of the object and purpose of the Agreement, which includes Article 8 of the TRIPS Agreement, as expressed under its objectives and principles. It was reiterated during Australia's plain packaging WTO case, that "WTO Members have further emphasised the importance of public health as a legitimate policy concern in paragraph 4 of the Doha Declaration." India supported Australia's stance on plain packaging for tobacco products in the WTO dispute, therefore the same logic can be extended while interpreting the Indian Trade Mark Act, 1999, in accordance with Articles 7 and 8 of the TRIPS Agreement and the Doha Declaration.

Thus, in line with the interpretation of the TRIPS Agreement and the Doha declaration in the Australian Plain Packaging Decision of the WTO, a trade mark holders' right to use his trade mark is not absolute. In the Indian context, the right of the trade mark holder to advertise can be restricted in furtherance of the right to health, read into the fundamental right to life under Article 21 read with Article 47 of the Indian Constitution, by specific law (such as laws stipulating plain packaging or laws prohibiting advertising of tobacco products).

Further, a specific and later legislation like COTPA, 2003, prohibiting all direct and indirect advertising of tobacco products, will prevail over a general and earlier legislation such as the Trade Mark Act, 1999 and can restrict the trade mark holder's right to advertise his

³³Refer to: *Sharat Babu Digumarti v. State Govt. of (NCT of Delhi)* [2016 Indlaw SC 892]; *Suresh Nanda v. Central Bureau of Investigation* [2008 Indlaw SC 360]; *General Manager, Telecom v. M. Krishan & Another* [2009 Indlaw SC 1082]

³⁴(2004) 7 SCC 68

³⁵AIR 1995 SC 2438

tobacco product under the Act. Trade Mark Act, 1999, also needs to be amended to remove any contradictions in this regard, ending all ambiguities.

Resolving any conflict between the COTPA, 2003 and the Trade mark Act, 1999

The use of trade marks for surrogate advertising of tobacco products is a circumvention of the prohibition under the COTPA, 2003. Any conflict between the two laws can be resolved through the established principle that “a special law prevails over a general law³³”.

Considering that the COPTA, 2003 is a special legislation on tobacco while the Trade mark Act, 1999 is a general legislation applicable to all trade marks, the COTPA, 2003 must take prevalence.

- i. In *Godawat Pan Masala Products I.P. Ltd. and Anr. v. UOI & Ors.*, the honorable Supreme Court held that that COTPA, 2003 is a special law intended to deal with tobacco and its products. It's a comprehensive legislation occupying the whole field of tobacco and its products. It noted that “the objective of the proposed enactment is to reduce the exposure of people to tobacco smoke (passive smoking) and to prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements. This will result in a healthier life style and the protection of the right to life enshrined in the Constitution. The proposed legislation further seeks to implement article 47 of the Constitution which, inter alia, requires the State to endeavour to improve public health of the people.”
- ii. In *Tata Press v. M.T.N.L*³⁵, the honorable Supreme Court held that commercial advertisements which are deceptive, unfair, misleading, and untruthful could be regulated by the government.
- iii. In *Allahabad Bank v. Canara Bank*³⁶, *Ajay Kumar Banerjee v. Umed Singh*³⁷, and *S. Prakash v. K. M. Kurian*³⁸, the honorable Supreme Court supports the propositions that where there is conflict between two central Acts, the endeavour of Court should be to harmonize the two Acts seemingly in conflict. In the case of a direct conflict (repugnancy) between two special statutes, both being special laws, the following rules apply:
 - (i) The later Act will prevail over the earlier Act;
 - (ii) If there is a provision in one of the Acts giving overriding effect then that Act will prevail;
 - (iii) A later Act, even if it is a general Act, can prevail over an earlier special Act, in the case of a repugnancy if there is no express provision to the contrary in the earlier special Act³⁹.
- iv. In *Ashoka Marketing Ltd. And Another v. Punjab National Bank And Others*⁴⁰, i.e. it was held that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein.

³³AIR 2000 SC 1535

³⁷AIR 1984 SC 1130

³⁸AIR 1999 SC 2094

³⁹When there is an earlier special law and a later general law, numerous judgements have held that there is no "implied repeal" of an earlier special law by a later general law. Any fundamental change/alteration of law can only be carried out by explicit word, or by making provisions which are wholly inconsistent with it. Refer to: *The Pharmacy Council of India v. Dr. S.K. Toshniwal Educational Trusts* [2020 Indlaw SC 245]; *R.S. Raghunath v. State of Karnataka* [1991 Indlaw SC 604]; *Justiniano Augusto De Piedade Barreto v. Antonio Vincente Da Fonesca* [1979 Indlaw SC 165]; *Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey* [1966 Indlaw SC 353] (1990) 4 SCC 406

Thus, any conflict between the COTPA, 2003 and the trade mark holders' rights under the Trade Mark Act, 1999, can be resolved.

The Cable Television Networks (Regulation) Act, 1995

- i. Section 6 of the Act prohibits transmission or retransmission of any advertisement if it does not conform with the advertisement code which has been prescribed in the Cable Television Networks Rules, 1994.
- ii. Rule 7 of the Cable Television Networks Rules, 1994 requires that all advertisements in the cable service shall conform to the laws of the country and no advertisement shall be permitted which inter alia, tends to incite people to breach any law and promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants.

The Advertising Standards Council of India

- i. The ASCI is a non-governmental self-regulatory voluntary organization of the advertising industry in India established in 1985.
- ii. The Code for Self-Regulation (Code) was introduced to ensure that fair advertising practices are followed to meet the best interests of the consumers.
- iii. Any person can file a complaint before the ASCI for a review of the advertisement. The Consumer Complaint Council (CCC) decides whether the complaint is valid, in which case the advertisement is either modified or withdrawn

Relevant Provisions

- I. Chapter I of the Code requires all advertisements to be truthful and to be an honest representation.
- ii. Guideline 3.3 in Chapter III of the Code provides that advertisements towards children should not contain anything which can result in physical, mental or moral harm.
- iii. Guidelines 3.6 in Chapter III of the Code provides that companies should not circumvent the restrictions placed by law for advertisement of certain products.
- iv. The Guidelines for Qualification of Brand Extension Product or Service specifically address surrogate advertisements for liquor and tobacco companies.

As per the June 2020 Press Release by the CCC, it was found that numerous liquor companies had engaged in surrogate advertising - e.g. Promotion of Seagram's Blenders Pride Fashion Tour Music CDs, Jacobs's Creek Music CDs, the Glenlivet Books, the Attraction Sweet Mellow Soda etc⁴¹.

Judgements

- i. In *Common Cause v, Union of India*⁴², the honorable Supreme Court in its order dated 12.07.2017 directed the Central Government to educate the general public about the existence of the grievance redressal mechanism under the ASCI Code for Self-

⁴¹ASCI, 'Press Release: ASCI Looks Into Over 533 Objectionable Advertisements in March-April' <https://ascionline.org/images/pdf/asci_mar_apr_ccc_pr.pdf>accessed 4 September 2020

⁴²W.P. (C) No. 387/2000

Regulation.

- ii. In *Sameer Jain v. Union of India*⁴³, the the Delhi High Court held that the ASCI is a recommendatory body, and thus the MoUs signed with the FSSAI and AYUSH for processing complaints on misleading advertisements is not excessive delegation of power.
- iii. In *Aditya Kumar Jha v. Union of India*⁴⁴, the Allahabad High Court held that the role of the ASCI is to ensure that advertisements are truthful and honest. Further, the test to determine if an advertisement is truthful and honest is the impact it has on a consumer and whether it is likely to mislead them.
- iv. In *Primordial Systems Private Ltd. v. ASCI*, the Delhi District Court held that decisions of the ASCI are binding on non-members also⁴⁵.

The Consumer Protection Act, 2019

An Act to provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental there to.

The Consumer Protection Act, 2019 ('CPA') seeks to protect consumers from misleading advertisements. Under Section 2(28), 'misleading advertisement' has been given a broad definition as an advertisement which amounts to an 'unfair trade practice' as defined in Section 2(47), which includes surrogate advertisement within its ambit.

Further, the CPA, 2019 establishes the Central Consumer Protection Authority, whose purpose is to promote consumer rights and is empowered to handle complaints dealing with misleading advertisements.

Judgements

- I. In *Ludhiana Improvement Trust v. Shakti Coop. House building Society Ltd.*⁴⁶, the honorable Supreme Court held that an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act, 1986 refers to any trade practice which is used for promoting the sale, use or supply of any goods by adopting any unfair method or unfair or deceptive practice, which includes any practice mentioned in Section 2(1)(r) clauses (1) to (6).
- ii. In *Colgate-Palmolive (India) Ltd. v. Anchor Health & Beauty Care Pvt. Ltd.*⁴⁷, the Madras High Court held that there are four types of representations which amount to "unfair trade practice" under Section 2(1)(r)(1) of the Consumer Protection Act, 1986: false representations under sub-clauses (i), (ii), (iii); incorrect representations under sub-clauses (iv) and (v); warranty or guarantee under sub-clauses (vii) and (viii); and false or misleading representations under sub-clauses (vi), (ix) and (x).
- iii. In *Havells India v. Amritanshu Khaitan*⁴⁸, the Delhi High Court held that two elements must be satisfied for an advertisement to be considered to be a misleading advertisement – firstly, it must deceive the persons to whom it is addressed or must have the potential to deceive them; secondly, as a consequence of this deception it

⁴³W.P. (C) No. 9823/2017

⁴⁴2017 Indlaw ALL 95

⁴⁵Saumya Tiwari, 'ASCI decisions binding on non-members, rules Delhi court' LiveMint (New Delhi, 19 August 2019) <<https://www.livemint.com/industry/media/asci-decisions-binding-on-non-members-rules-delhi-court-1566212674146.html>> accessed 4 September 2020⁴⁶(2009) 12 SCC 269

⁴⁷2008 SCC OnLine Mad 627

⁴⁸2015 Indlaw DEL 3133

should be likely to affect the economic behaviour of the public to whom it is addressed or harm a competitor of the advisor.

- iv. In *Struggle Through Pain v. State of Uttar Pradesh*⁴⁹, the Allahabad High Court held that commercial advertisements include indirect or surrogate advertisements, and these are not protected under Article 19 (1) (a) of the Constitution of India. It opined that while sponsoring of cultural, sports, music activities by itself is not prohibited, sponsoring of these activities with the objective to use a well-known liquor brand amounts to surrogate advertisements.
- v. In *United Breweries Limited v. Mumbai Grahak Panchayat*⁵⁰, the National Consumer Disputes Redressal Commission held that surrogate advertisements are particularly impactful on young consumers. Accordingly, for the purpose of neutralising the effect of such advertisements, it directed the contravening party to issue corrective advertisements.

Endorser's liability under CPA, 2019 for Surrogate Advertisement of Tobacco products

The Consumer Protection Act, 2019 seeks to make endorsers including celebrity brand ambassadors, accountable for endorsing products that make misleading or nonfactual claims. This was prompted by the Parliamentary Committee on Food, Consumer Affairs and Public Distribution's report which called for "stringent provisions to tackle misleading advertisements, and to fix liability on endorsers/celebrities," in 2016, and the Ministries of Consumer Affairs and the Ministry of Law approved changes in the Consumer Protection Act.

Definition of "advertisement" under Section 2(1) of CPA, 2019 includes any "endorsement." The Central consumer protection authority is empowered to regulate violation of consumer rights by false and misleading advertisements, under Section 10 (1) of CPA, 2019. Under Section 21(1) and (2) of CPA, 2019, the Central authority can issue directions and impose penalty of upto INR ten lack rupees and penalty of upto INR ten Lakh rupees and penalty of upto INR fifty lakhs for subsequent violations. This provision covers celebrity endorsements as well. If the central authority deems fit, the endorser of a false or misleading advertisement, can even be prohibited from endorsing any product or service, for a period of one year, (and upto 3 years' prohibition from any endorsements, for subsequent violations). The executive wing of the government is empowered to commence prosecution of a celebrity brand ambassador. When a complaint is made by an officer of the Central Consumer Protection Authority, duly authorized by the Chief Commissioner, the court can take cognizance of such an offence.

Thus, the CPA, 2019 penalizes reckless endorsements by brand ambassadors who proceed to exercise their influence on consumers without paying heed to the veracity and truthfulness of claims made by them. Section 21 (5) of the CPA, 2019 places a legal obligation on celebrity endorsers to abide by the common law principles of due diligence and fair play before endorsing a product.

⁴⁹2019 Indlaw ALL 239

⁵⁰(2006) Indlaw NCDRC 212

III. ISSUES

In terms of advertising and surrogate advertising of tobacco products, there are three pertinent issues which arise:

- (i) Online Advertisement and Social Media;
- (ii) Corporate Social Responsibility by Tobacco Companies; and
- (iii) Tobacco Advertising targeting Minors.

Online Advertisements and Social Media

Tobacco companies often use social media sites to promote their brands. Social media platforms such as Facebook, Twitter, Instagram and websites such as Tumblr, Reddit etc. have promotional posts regarding tobacco products⁵¹. For instance there are forums dedicated to E-cigarettes and vaping on Reddit, Instagram and Twitter have many trends relating to smoking. Many series on Netflix and Amazon Prime contain scenes where tobacco brands are depicted and glamorized⁵². All of these lead to promotion of tobacco products. Given that numerous adolescents and children use social media, there is an urgent need to ensure that tobacco promotion does not take place on social media in addition to mass media.

In addition to promotion of tobacco products, they are also sold on these online platforms⁵³. Two factors which facilitate such illegal sales and make regulation difficult are:

- (I) Targeted advertising- Technology enables targeted advertising to youth by social media trends or direct messaging(DMs) and
- (ii) Privacy settings- Targeted advertising enables minors to easily come across content which promotes tobacco products. It can be found through searching for a popular celebrity or influencer, it can be found if it is trending, it can show up in recommendations etc. Further, given that social media platforms allow minors to make private accounts, their guardians may not even be aware about the advertising by tobacco companies. For example, sellers can advertise their products on Instagram and sell it to any person (including minors) who is willing to pay money⁵⁴. These features allow rampant online promotion of tobacco products and pose difficulty in their regulation.

One possible solution is to explicitly restrict tobacco companies from promoting their products on social media, and also prohibit social media influencers from promoting these products⁵⁵. For example, in 2019, the UK's Advertising Standards Authority ruled against British American Tobacco (BAT), holding that BAT cannot promote its e-cigarettes on Instagram. It also noted that BAT had paid influencers to promote its Vype e-cigarettes. The

⁵¹Emily T. Herbert, Kathleen R. Case and Steven H. Kelder et al, 'Exposure and Engagement With Tobacco- and E-Cigarette – Related Social Media' [2017] 61(3) J Adolsec Health 371-377; Julia Vassey, Catherine Metayer and Chris J. Kennedy et al, '#Vape: Measuring E-Cigarette Influence on Instagram With Deep Learning and Text Analysis' (Frontiers in Communication, 22 January 2020) <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00075/full>> accessed 5 September 2020; Daniel K. Cortese, Glen Szczyпка and Sherry L Emery, 'Smoking Selfies: Using Instagram to Explore Young Women's Smoking Behaviours' [2018] 4(3) Social Media 2-8

⁵²Monika Arora, Gaurang P. Nazar and Praveen Sinha et al, 'Tobacco imagery in on-demand streaming content popular among adolescents and young adults in India: implications for global tobacco control' [2020] Tob. Control 1-7

influencers used tags such as “#feelingVypeAF” and “#idareyoutotryit”, instead of mentioning that it was a paid promotion⁵⁶. The websites of certain tobacco companies, hotels, restaurants and food delivery platforms^{57 58} actively promote tobacco products. There is no age restriction on accessing the website, which means that minors can also be influenced by the promotion of these products.

It must be noted here that the Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Act, 2019, specifically bans advertisement of e-cigarettes, in all forms of media which covers internet or website or social media.

Information Technology (Intermediaries Guidelines) Rules 2011

The existing IT Rules 2011 can be used to regulate the promotion of tobacco products on social media and other OTTs.

Rule 3 All rules and sections due diligence to be observed by intermediary — The intermediary shall observe following due diligence while discharging his duties, namely : —

- (2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that —
 - b) Is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

Rule 3(2)(e) of the IT Rules 2011, restricts upload of any information that violates any law. This provision read with Section 5 COTPA, 2003 which prohibits tobacco direct or indirect advertisement, promotion or sponsorship, shall have the effect of banning such advertising through OTT platforms.

As direct and indirect advertising of tobacco products is prohibited under COTPA, 2003, intermediaries are required to curtail advertising of tobacco products on their platforms.

- i. In *Shreya Singhal v. Union of India*⁵⁹, the honorable Supreme Court noted that as per Rule 3(2) of the IT Rules 2011, “*an intermediary has to not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2).*”
- ii. In *Swami Ramdev and another v. Facebook Inc. and others*⁶⁰, the Delhi High Court held that Rule 3(2) of the IT Rules 2011 requires an intermediary to remove or disable access to any material which is violative of IT Rule 3(2) upon receiving a court order.
- iii. In *Rishabh Kapur vs Union of India*, the Delhi High Court, held, Ministry of Communication & Information Technology to forthwith prohibit advertisements that directly and indirectly promote the production/sale/consumption of advertisements cigarettes, tobacco products, liquor or promote other intoxicants on the internet.

⁵⁶HM Chaitanya Swamy, 'Coronavirus lockdown: CCB sleuths nab two persons selling tobacco products online in Bengaluru' Deccan Herald (Bengaluru, 24 April 2020) <<https://www.deccanherald.com/city/bengaluru-crime/coronavirus-lockdown-ccb-sleuths-nab-two-persons-selling-tobacco-products-online-in-bengaluru-829196.html>> accessed 5 September 2020

⁵⁷Preeti Soni, 'India's e-cigarettes ban hasn't stopped vaping – it only drove out Juul and Vape' Business Insider (30 May 2020) <<https://www.businessinsider.in/india/news/indias-e-cigarettes-ban-hasnt-stopped-vaping-it-only-drove-out-juul-and-vape/articleshow/76093490.cms>> accessed 5 September 2020

⁵⁸Andrew Rowell, 'Despite being banned, Big Tobacco is still on social media' Independent (3 February 2020) <https://www.independent.co.uk/health_and_wellbeing/big-tobacco-cigarettes-facebook-ban-instagram-influencers-a9309971.html> accessed 5 September 2020

⁵⁹Sara Spary, 'ASA bans 10 e-cigarette Instagram ads as brands continue to fall foul on rules' Campaign (18 December 2019) <<https://www.campaignlive.co.uk/article/asa-bans-10-e-cigarette-instagram-ads-brands-continue-fall-foul-rules/1669058>> accessed 5 September 2020

⁶⁰ITC – Armenteros: Hand Rolled Cigars' <<https://www.itcportal.com/businesses/fmcg/cigars.aspx>> accessed 5 September 2020

⁶¹Godfrey Phillips – Our Brands: Cigarettes' <<https://www.godfreyphillips.com/company/our-brands/cigarettes/>> accessed 5 September 2020

However, these companies have not complied with IT Rule 3(2). The content regulation policies of these companies do not restrict promotion of tobacco products⁶¹, although sale of tobacco products is banned⁶².

Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018

Rule 3(2)(j): Due diligence to be observed by intermediary — The intermediary shall observe following due diligence while discharging his duties, namely: —

- (2) Such rules and regulations, privacy policy terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that —
 - (j) Threatens public health or safety; promotion of cigarettes or any other tobacco products or consumption of intoxicant including alcohol and Electronic Nicotine Delivery System (ENDS) & like products that enable nicotine delivery except for the purpose & in the manner and to the extent, as may be approved under the Drugs and Cosmetics Act, 1940 and Rules made thereunder;

One of the proposed changes to the draft IT [Intermediaries Guidelines (Amendment) Rules] 2018 seeks to explicitly prohibit promotion of cigarettes, tobacco products and ENDS⁶³.

To address the need for stricter regulation of digital/online media platforms, GoI notification dated 9 November, 2020⁶⁴, brings and films and audio-visual programmes provided by online content providers, within the ambit of the Ministry of Information and Broadcasting. This could be a significant step to ensure that tobacco promotion does not take place via OTT platforms, enabling content regulation and towards denormalization of tobacco advertising, promotion and sponsorship. Following the laudable ban on E-cigarettes by the Government in 2019, similar cautionary measures are essential to regulate tobacco advertising, promotion and sponsorship in all media including online/OTT platforms, especially for protecting the youth.

Tobacco Advertising targeting Minors

Minors are particularly susceptible to be lured by the advertisements of tobacco products/tobacco companies. Numerous legislations and policy instruments seek to address this issue: -

- i. Article 13 and Article 16 of the WHO Framework on Tobacco Control provide for prohibition on all forms of advertising, promotion and sponsorship of tobacco products and prohibition of sales to and by minors respectively.
- ii. Section 5 and Section 6 of COTPA, 2003 prohibit advertisement of tobacco products and prohibit sale of tobacco products to minors respectively.
- iii. Section 77 of the Juvenile Justice (Care and Protection of Children) Act, 2015 prohibits giving of tobacco products to minors.
- iv. The Child and Adolescent Labour (Prohibition And Regulation) Act, 1986, prohibits employment of minors in manufacturing and processing of tobacco.
- v. Rule 3(2)(c) of the IT Rules, 2011 restricts any information which harms minors.

⁵⁹2015 Indlaw SC 211

⁶⁰2019 Indlaw DEL 2747

⁶¹'Facebook – Community Standards' <<https://www.facebook.com/communitystandards/>> accessed 5 September 2020; 'Twitter – The Twitter Rules' <<https://help.twitter.com/en/rules-and-policies/twitter-rules>> accessed 5 September 2020; 'Instagram – Community Guidelines' <<https://help.instagram.com/477434105621119>> accessed 5 September 2020

⁶²'Alcohol, tobacco, e-cigarettes to be restricted on Instagram, Facebook' Financial Express (New Delhi, 25 July 2019)

<<https://www.financialexpress.com/industry/technology/alcohol-tobacco-e-cigarettes-to-be-restricted-on-instagram-facebook/1656498/>> accessed 5 September 2020

- vi. The theme of the World No Tobacco Day 2020 was to counter manipulative tactics utilised by the tobacco industry to target minors. This involves addressing attractive designs and flavours of tobacco products, celebrity/influencer sponsorship, indirect promotion in media etc⁶⁵.

There have been numerous cases where tobacco products were sold to children or sold near school premises⁶⁶. In *Bachpan Bachao Andolan v. Union of India*⁶⁷, the honorable Supreme Court observed that there is an increase in the use of drugs and tobacco among children in India. The Honorable Supreme Court gave directions to the Central Government for:

- i. Establishment of a national database and conduct a national survey on drug abuse within six months.
- ii. Formulate a comprehensive national plan within four months to address immediate concerns such as
 - (a) National Action plan for children;
 - (b) Creating an appropriate curriculum for children of all ages to keep away from drugs, alcohol and tobacco;
 - (c) Setting up de-addiction centres;
 - (d) Establishing a standard operating procedure for enforcing Section 77 and Section 78 of the JJ (Juvenile Justice) Act, 2015;
 - (e) Implementing the National Policy on Narcotic Drugs and Psychotropic Substances which has been approved by the Union Cabinet.
- iii. Adopt specific content in the school curriculum under the aegis of the National Education Policy.

Recently Allahabad High Court also noted w.r.t. surrogate advertisements, in *Struggle Against Pain v. State of UP*⁶⁸:

“49...Sponsoring of activities like cultural, sports, music etc. by itself cannot be said to be illegal, unlawful or otherwise prohibited but sponsoring of such events with an objective to use a well-known liquor brand, in our view, would fall within the category of "Surrogate Advertisements". Respondents have not chosen to place on record the quantum of business, they had in the ancillary and incidental items for which they claim that advertisements in question have been published vis-a-vis, the corresponding liquor brands and, therefore, we are not befitted to compare the same to find out whether a prudent Manufacturer or Advertiser would do what is being done by respondents so as to find out whether advertisements in question are surrogate advertisements or not but we are satisfied that some of the advertisements, apparently, are for something else than what is pretended.

50. The alleged products like packaged drinking water, CDs and cassettes etc. are mentioned in such an inconspicuous manner that it is difficult to find out, what product is

⁶⁵The Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 <https://www.prsindia.org/sites/default/files/bill_files/Draft_Intermediary_Amendment_2018.pdf> accessed 6 September 2020 restrict promotion of tobacco products by intermediaries under Rule 3(2)(j). This can be used for regulation of social media in two key ways:

(i) Firstly, social media platforms can be held liable, which means that they will control advertisements.
(ii) Secondly, the content which is available on social media platforms will also be regulated appropriately. The concerns regarding the draft rules are:
(i) The rules raise privacy and free speech concerns. The user agreements of most platforms assure privacy to its consumers, which could be jeopardized by the rules.
(ii) The extent of applicability and enforcement of these rules is also an issue, considering that most platforms are international services.

⁶⁴<https://cabSection.gov.in/amentment.php?page=4>

⁶⁸<<https://www.who.int/news-room/events/detail/2020/05/31/default-calendar/world-no-tobacco-day-2020-protecting-youth-from-industry-manipulation-and-preventing-them-from-tobacco-and-nicotine-use>> accessed 5 September 2020

being advertised and, therefore, message is clear that advertisement is for well-known brand for larger item than what is lesser known. The purpose of advertisement in such a manner is obviously to make and ensure that customers do not forget the branded liquor, for which, advertisements are meant. It is a kind of negative advertisement also which apparently has promotion skill than prohibition.”

Corporate Social Responsibility by Tobacco Companies

Corporate Social Responsibility ('CSR') refers to any form of contribution by tobacco companies to any event, activity, or individual commonly in exchange for the promotion of the companies' brand(s) or corporate identities, with the aim, effect, or likely effect of promoting a tobacco product or tobacco use, either directly or indirectly.

Companies often engage in CSR activities as a means to improve their goodwill among the general public and the government. This enables them to promote their brand and products as consumers have a positive outlook of companies which contribute positively to the society. Tobacco companies also engage in CSR⁶⁹. For example, a leading Indian tobacco company, ventured into other business lines including apparels, hospitality, processed food including biscuits, and academic exercise books for children. It also launched an Information Communication Technology (ICT) initiative called 'e-Choupal' that apparently offers farmers online farming solutions and marketing outlets for farm inputs and produce. The initiative, widely promoted through media, has fetched the company several national and international CSR honours⁷⁰.

Recognising the fact that engagement of tobacco companies in CSR activities promotes tobacco products, the following international guidelines and domestic circulars have sought to regulate the same:

- I. Recommendation (6) of the Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control⁷¹ requires states to “Denormalize and, to the extent possible, regulate activities described as “socially responsible” by the tobacco industry, including but not limited to activities described as “corporate social responsibility.”
- ii. The CBSE issued a circular on 7th January 2015, which prohibited schools from participating in any activity affiliated with tobacco companies⁷².
- iii. The Ministry of Corporate Affairs issued a circular on 16 May 2016 which noted that CSR activities by companies cannot contravene other laws, which includes the provisions of COTPA, 2003⁷³.

Thus, international organisations and regulatory bodies are cognizant of the dangers posed by allowing tobacco companies to engage in CSR activities, as these also lead to indirect promotion of their brand and goods.

⁶⁹WHO, Tobacco Industry and Corporate Responsibility...An Inherent Contradiction <https://www.who.int/tobacco/communications/CSR_report.pdf> accessed 5 September 2020

⁷⁰Kasmin Fernandes, 'The ultimate report on CSR of ITC Limited' (The CSR Journal, 12 May 2020) <<https://thecsrjournal.in/itc-csr-report-india/>> accessed 6 September 2020; N Hirschhorn, 'Corporate social responsibility and the tobacco industry: hope or hype?' [2004] 13 Tobacco Control 447-453

⁷¹The Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry <https://www.who.int/fctc/guidelines/article_5_3.pdf> accessed 6 September 2020

⁷²Central Board of Secondary Education, 'Circular No. Acad-03/2015' (7 January 2015) <http://cbseacademic.nic.in/web_material/Circulars/2015/03_Circular_Tobacco.pdf> accessed 5 September 2020

⁷³Ministry of Corporate Affairs, 'No. 05/01/2014-CSR' (16 May 2016) <https://www.mca.gov.in/Ministry/pdf/General_circular05_16052016.pdf> accessed 5 September 2020

IV. CONCLUSION

Tobacco companies use a variety of direct and indirect advertisement methods, designed with special emphasis to attract minors and youth. These strategies have been recognised by the World Health Organization's Framework Convention on Tobacco Control and the Cigarettes and Other Tobacco Products Act, 2003, which seek to regulate the same. In addition to the Cigarettes and Other Tobacco Products Act, 2003, there are numerous domestic legislations which can be utilised to curb advertisement, promotion and sponsorship of tobacco products:

- (i) The Trademark Act, 1999 – A Trade mark registration can be denied if it deceives the public or causes confusion or is similar to an existing trade mark or is likely to cause confusion and trade marks which are not in use can be removed from the Trade Mark Register, which includes trade marks which exist solely for surrogate advertising.
- (ii) The Emblems & Names (Prevention of Improper Use) Act, 1950 can be utilised to deny trade marks which give an impression that they have government patronage.
- (iii) The Cable Television Networks (Regulation) Act, 1995 can be utilised to restrict tobacco advertisements on cable television networks.
- (iv) The Code of Advertising adopted by the Advertising Standards Council of India (ASCI) addresses surrogate advertising by tobacco companies and requires advertisements to be truthful.
- (v) The Consumer Protection Act, 2019 introduces liability for endorsers and has an extensive framework for penalising misleading advertisements.

Three major contemporary issues have been highlighted which require careful scrutiny – online advertising and social media; targeting of minors by tobacco companies; and corporate social responsibility.

Recommendations

It is clear that advertising of tobacco products is done in numerous ways – through surrogate advertising, brand stretching, use of trade marks, corporate social responsibility, promotion on various forms of media, celebrity endorsements and through social media influencers etc. While the existing legal framework is sufficient to address some of these concerns, with emergence of new media and technologies and in order to tackle a plethora of industry tactics including those specifically target the youth, other measures are needed:

- i) The registration of trade marks by tobacco companies should be monitored to ensure that new trade marks are not being used to bypass the prohibition on advertisement under Section 5 of the COTPA, 2003. Registration of trade marks should be granted to tobacco companies, subject to the condition that the trade mark will not be used for

any surrogate advertising, promotion or sponsorship of tobacco products.

- ii) The Cigarettes and Other Products Act, 2003 , being the later specific law, will prevail over the Trade Mark Act, 1999, which is an earlier and general law.
- iii) Violations of the Emblems and Names (Prevention of Improper Use) Act, 1950, by tobacco companies to be checked and appropriate timely action must be taken (e.g. 'Rajvilas')
- iv) Corporate Social Responsibility (CSR) activities by tobacco companies should be subject to scrutiny and appropriate restrictions should be placed in order to prevent indirect advertising, sponsorship or promotion of all forms of tobacco products.
- v) Proper enforcement of the Information Technology Act, 2000, extant Rules, Guidelines and Government of India notification dated 9 November, 2020, for regulating Over The Top (OTT) platforms, to check surrogate advertisements of tobacco products via online platforms.
- vi) Surrogate advertisements are covered by unfair trade practice, misleading advertisements and endorser's liability provisions under the Consumer Protection Act, 2019.
- vii) Existing regulatory bodies should be required to take appropriate measures for the enforcement of the ban on all forms of tobacco advertising promotions and sponsorships of tobacco products.

V. BIBLIOGRAPHY

International Conventions

1. WHO Framework Convention on Tobacco Control

Cases

1. Abdul Azeez v. State of Kerala, 2018 SCC OnLine Ker 14529
2. Aditya Kumar Jha v. UOI, 2017 Indlaw ALL 95
3. Ajay Kumar Banerjee v. Umed Singh, AIR 1984 SC 1130
4. Allahabad Bank v. Canara Bank, AIR 2000 SC 1535
5. Ashoka Marketing Ltd. And Another v. Punjab National Bank And Others, (1990) 4 SCC 406
6. Attorney General v. JTI-Macdonald Corp., 2007 SCC 30 (Canada)
7. Bachpan Bachao Andolan v. Union of India, (2017) 1 SCC 653
8. Colgate-Palmolive (India) Ltd. v. Anchor Health & Beauty Care Pvt. Ltd., 2008 SCC OnLine Mad 627
9. Common Cause v. Union of India, W.P. (C) No. 387/2000
10. Fedders Llyod Corporation v. Fedders Corporation, 2005 Indlaw DEL 313
11. General Manager, Telecom v. M. Krishan & Another, 2009 Indlaw SC 1082
12. Godawat Pan Masala Products I.P. Ltd. and Anr. Vs UOI & Ors., (2004) 7 SCC 68
13. Hardie Trading Ltd. and Anr. v. Addisons Paint and Chemicals Ltd., 2003 Indlaw SC 756
14. Havells India v. Amritanshu Khaitan, 2015 Indlaw DEL 3133
15. Health for Million Vs. Union of India & Ors., CAno. 5912-5913/2013
16. Imperial Tobacco Co. of India Ltd. v. Registrar of Trade Marks and Another, AIR 1968 Cal 582
17. India School Society v. State of Uttarakhand, 2019 SCC OnLine Utt 251
18. Jayakumar v. State of Kerala, 2018 SCC OnLine Ker 4989
19. Justiniano Augusto De Piedade Barreto v. Antonio Vincente Da Fonesca, 1979 Indlaw SC 165

20. K.P. Vijayakumaran v. State of Kerala, 2014 SCC OnLine Ker 28082
21. Kabushiki Kaisha Toshiba v. TOSIBA Appliances, Civil Appeal No. 3639 of 2008
22. Kellogg Company v. Pops Food Products Private Limited, 2018 Indlaw DEL 131
23. Ludhiana Improvement Trust v. Shakti Coop. Housebuilding Society Ltd., (2009) 12 SCC 269
24. M/s Sable Waghire & Company v. Union of India And Others, (1975) 1 SCC 763
25. Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey, 1966 Indlaw SC 353
26. Muhammedkutty v. State of Kerala, 2017 SCC OnLine Ker 29688
27. National Bell Co. (P) Ltd. and Anr. v. Metal Goods Mfg. Co. Ltd. and Another, PTC (Suppl) (1) 586 (SC)
28. R.S. Raghunath v. State of Karnataka, 1991 Indlaw SC 604
29. Riyas v. State of Kerala, 2017 SCC OnLine Ker 29900
30. S. Prakash v. K.M. Kurian, AIR 1999 SC 2094
31. Sameer Jain v. UOI, W.P. (C) No. 9823/2017
32. Satnam Overseas v. Sant Ram and Company, (2014) 14 SCC 782
33. Sharat Babu Digumarti v. State Govt. of (NCT of Delhi), 2016 Indlaw SC 892
34. Shreya Singhal v. Union of India, 2015 Indlaw SC 211
35. Struggle Through Pain v. State of Uttar Pradesh, 2019 Indlaw ALL 239
36. Suresh Nanda v. Central Bureau of Investigation, 2008 Indlaw SC 360
37. Swami Ramdev and another v. Facebook Inc. and others, 2019 Indlaw DEL 2747
38. Tata Press v. M.T.N.L, AIR 1995 SC 2438
39. The Pharmacy Council of India v. Dr. S.K. Toshniwal Educational Trusts, 2020 Indlaw SC 245
40. Thukral Mechanical Works v. PM Diesels Private Limited, (2009) 2 SCC 768
41. Union of India v. Unicorn Industries, 2019 Indlaw SC 924
42. United Breweries Limited v. Mumbai Grahak Panchayat, (2006) Indlaw NCDRC 212
43. Venkata Rama Rao Avvas and Others v. American Cyanamid Company and Others, 2006 Indlaw IPAB 26
44. Vijayappan v. State of Kerala, 2020 SCC OnLine Ker 3300

Legislative Instruments

1. Cable Television Networks (Regulation) Act 1995
2. Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules 2004
3. Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003
4. Consumer Protection Act 2019
5. Emblems & Names (Prevention of Improper Use) Act 1950
6. Information Technology (Intermediaries Guidelines) Rules 2011
7. Juvenile Justice (Care and Protection of Children) Act 2015
8. Surrogate Advertising (Prohibition) Bill 2016 <<http://164.100.47.4/billstexts/rsbilltexts/AsIntroduced/surogat%2010317-E.pdf>> accessed 5 September 2020
9. The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 <https://www.prsindia.org/sites/default/files/bill_files/Draft_Intermediary_Amendment_2018.pdf> accessed 6 September 2020
10. Trade mark Act, 1999

Guidelines

1. The Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry <https://www.who.int/fctc/guidelines/article_5_3.pdf> accessed 6 September 2020

Reports

1. Centre for Media Studies & Healthbridge, Tobacco Advertising, Promotion And Sponsorship Across South And South East Asia (2009) <[https://healthbridge.ca/images/uploads/library/TAPS_Report_\(final\).pdf](https://healthbridge.ca/images/uploads/library/TAPS_Report_(final).pdf)> accessed 6 September 2020
2. Singh & Associates, [2018] 6(5) Indian Legal Impetus <<https://www.manupatrafast.com/NewsletterArchives/listing/ILI%20Singh%20Associates/2018/May/Vol%20XI%20Issue%20V.pdf>> accessed 5 September 2020
3. WHO, Tobacco Industry and Corporate Responsibility...An Inherent Contradiction <https://www.who.int/tobacco/communications/CSR_report.pdf> accessed 5 September 2020

Government Documents

1. Ministry of Health and Family Welfare, 'Notification G.S.R. 345(E)' (31 May 2005) <[http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-345\(E\).pdf](http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-345(E).pdf)> accessed 5 September 2020
2. Central Board of Secondary Education, 'Circular No. Acad-03/2015' (7 January 2015) <http://cbseacademic.nic.in/web_material/Circulars/2015/03_Circular_Tobacco.pdf> accessed 5 September 2020
3. Ministry of Corporate Affairs, 'No. 05/01/2014-CSR' (16 May 2016) <https://www.mca.gov.in/Ministry/pdf/General_circular05_16052016.pdf> accessed 5 September 2020

Journals

1. Amit Yadav, Pamela Ling and Stanton Glantz, 'Smokeless tobacco industry's brand stretching in India' [2020] *Tob. Control* 1-3
2. Chandrashekhar Singh, 'Evolution of Surrogate Advertising and its Legal Measures with Special Reference to India' [2015] 11(1) *Management Insight* 103-107
3. Daniel K. Cortese, Glen Szczyпка and Sherry L Emery, 'Smoking Selfies: Using Instagram to Explore Young Women's Smoking Behaviours' [2018] 4(3) *Social Media* 2-8
4. Emily T. Herbert, Kathleen R. Case and Steven H. Kelder et al, 'Exposure and Engagement With Tobacco- and E-Cigarette – Related Social Media' [2017] 61(3) *J Adolsec Health* 371-377
5. Jayant Panvelkar, 'Surrogate Advertising – An Ethical way of promoting Unethical Products' [2018] 1(25) *International Journal of Management and Economics* 88-94
6. Julia Vassey, Catherine Metayer and Chris J. Kennedy et al, '#Vape: Measuring E-Cigarette Influence on Instagram With Deep Learning and Text Analysis' (*Frontiers in Communication*, 22 January 2020) <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00075/full>> accessed 5 September 2020
7. Monika Arora, Gaurang P. Nazar and Praveen Sinha et al, 'Tobacco imagery in on-demand streaming content popular among adolescents and young adults in India: implications for global tobacco control' [2020] *Tob. Control* 1-7
8. N Hirschhorn, 'Corporate social responsibility and the tobacco industry: hope or hype?' [2004] 13 *Tobacco Control* 447-453

Newspapers and Blogs

1. 'Alcohol, tobacco, e-cigarettes to be restricted on Instagram, Facebook' *Financial Express* (New Delhi, 25 July 2019) <<https://www.financialexpress.com/industry/technology/alcohol-tobacco-e-cigarettes-to-be-restricted-on-instagram-facebook/1656498/>> accessed 5 September 2020

2. Andrew Rowell, 'Despite being banned, Big Tobacco is still on social media' Independent (3 February 2020) <https://www.independent.co.uk/health_and_wellbeing/big-tobacco-cigarettes-facebook-ban-instagram-influencers-a9309971.html> accessed 5 September 2020
3. HM Chaithanya Swamy, 'Coronavirus lockdown: CCB sleuths nab two persons selling tobacco products online in Bengaluru' Deccan Herald (Bengaluru, 24 April 2020) <<https://www.deccanherald.com/city/bengaluru-crime/coronavirus-lockdown-ccb-sleuths-nab-two-persons-selling-tobacco-products-online-in-bengaluru-829196.html>> accessed 5 September 2020
4. Kasmin Fernandes, 'The ultimate report on CSR of ITC Limited' (The CSR Journal, 12 May 2020) <<https://thecsrjournal.in/itc-csr-report-india/>> accessed 6 September 2020
5. Preeti Soni, 'India's e-cigarettes ban hasn't stopped vaping – it only drove out Juul and Vape' Business Insider (30 May 2020) <<https://www.businessinsider.in/india/news/indias-e-cigarettes-ban-hasnt-stopped-vaping-it-only-drove-out-juul-and-vape/articleshow/76093490.cms>> accessed 5 September 2020
6. Sara Spary, 'ASA bans 10 e-cigarette Instagram ads as brands continue to fall foul on rules' Campaign (18 December 2019) <<https://www.campaignlive.co.uk/article/asa-bans-10-e-cigarette-instagram-ads-brands-continue-fall-foul-rules/1669058>> accessed 5 September 2020
7. Saumya Tiwari, 'ASCI decisions binding on non-members, rules Delhi court' LiveMint (New Delhi, 19 August 2019) <<https://www.livemint.com/industry/media/asci-decisions-binding-on-non-members-rules-delhi-court-1566212674146.html>> accessed 4 September 2020

Websites

1. 'Facebook – Community Standards' <<https://www.facebook.com/communitystandards/>> accessed 5 September 2020
2. 'Godfrey Phillips – Our Brands: Cigarettes' <<https://www.godfreyphillips.com/company/our-brands/cigarettes/>> accessed 5 September 2020
3. 'Instagram – Community Guidelines' <<https://help.instagram.com/477434105621119>> accessed 5 September 2020
4. 'ITC – Armenteros: Hand Rolled Cigars' <<https://www.itcportal.com/businesses/fmcg/cigars.aspx>> accessed 5 September 2020
5. 'Twitter – The Twitter Rules' <<https://help.twitter.com/en/rules-and-policies/twitter-rules>> accessed 5 September 2020
6. <<http://smokelesstobaccocontrolindia.com/baba/>> accessed 6 September 2020
7. <<http://smokelesstobaccocontrolindia.com/vimal/>> accessed 6 September 2020

8. <<http://smokelesstobaccocontrolindia.com/wp-content/uploads/2020/08/tulsi.pdf>> accessed 6 September 2020
9. ASCI, 'Press Release: ASCI Looks Into Over 533 Objectionable Advertisements in March-April' <https://ascionline.org/images/pdf/asci_mar_apr_ccc_pr.pdf> accessed 4 September 2020

VI. ANNEXURES

ANNEXURE-I: CONSUMER PROTECTION ACT 2019

This contains the relevant provisions of the CPA 2019 regarding misleading advertisements:

Section 2(7)

"consumer" means any person who—

- (i) Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) Hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation. —For the purposes of this clause, —

- (a) The expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;
- (b) The expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;

Section 2(9)

"consumer rights" includes, —

- (i) The right to be protected against the marketing of goods, products or services which are hazardous to life and property;
- (ii) The right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

Section 2 (28)

"misleading advertisement" in relation to any product or service, means an advertisement, which—

- (i) Falsely describes such product or service; or
- (ii) Gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or
- (iii) Conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or
- (iv) Deliberately conceals important information

Section 2 (47)

"unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely: —

- (i) Making any statement, whether orally or in writing or by visible representation including by means of electronic record, which—
 - (a) Falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
- (vii) Not issuing bill or cash memo or receipt for the goods sold or services rendered in such manner as may be prescribed;

Following from the fact that the transaction by a consumer can be online as well, online sale of tobacco products would be included within the ambit of 'unfair trade practices' under the Consumer Protection Act 2019.

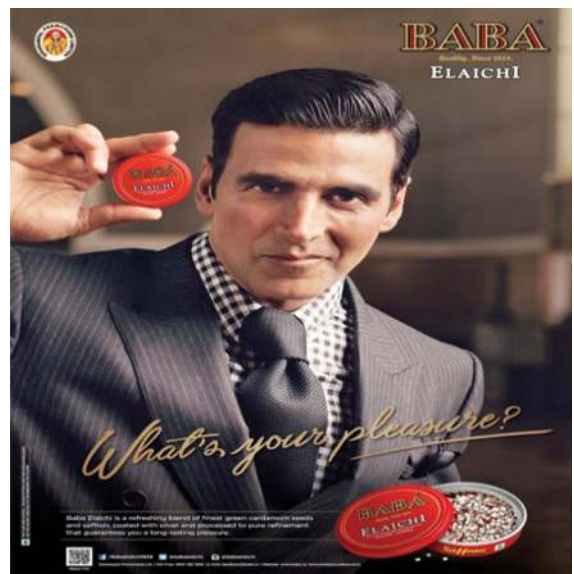
Section 18 (1)

The Central Authority shall—

- (a) Protect, promote and enforce the rights of consumers as a class, and prevent violation of consumers rights under this Act;
- (b) Prevent unfair trade practices and ensure that no person engages himself in unfair trade practices;
- (c) Ensure that no false or misleading advertisement is made of any goods or services which contravenes the provisions of this Act or the rules or regulations made thereunder;
- (d) Ensure that no person takes part in the publication of any advertisement which is false or misleading.

Section 89, any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence, be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

ANNEXURE-II: IMAGES OF ADVERTISING AND SURROGATE ADVERTISING OF TOBACCO PRODUCTS







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