

**ADVERTISING INDUSTRY VS FREEDOM OF SPEECH: NAVIGATING
THE SLIPPERY SLOPES OF A DEVELOPING JURISPRUDENCE**

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Abstract

Advertising acts as a vital organ of all businesses, since many a time profit for a business or industry depends upon advertisements. Therefore it creates a space that can give rise to fraudulence, unhealthy competition and violation of rights. On the other hand freedom of speech and expression is guaranteed by the Constitution of India and other countries such as the United States and the United Kingdom. Thus, advertisements, being a part of the media industry, should be rightfully protected by the Constitution. Judicial decisions in both US and India guarantees the freedom of speech of the advertising industry. However advertisements cannot be allowed to run unfettered without any regulation because it may dupe the consumers or harm the sentiments of the viewers or mislead them. There are statutes and regulating bodies that lay down certain rules that the advertising industry must follow, especially in the case of comparative advertising that seek to destroy the goodwill of a competing company. But it is noticed that, on one hand, advertisements still exploit their rights of freedom of speech due to the lack of any comprehensive statute or monitoring, and on the other hand, sometimes rules are enforced indiscriminately and arbitrarily whereby the Constitutional right is sometimes violated. It is thus important to consider enacting a new legislation for the industry that will keep a balance between both public interest and freedom of speech.

Keywords: Advertising law, right to freedom of speech, competition

Introduction

Advertisement is often the most important part of marketing in any business and the revenue generated from shares and profits rely a great deal on the advertisements. Therefore, it goes without saying that marketing strategies through advertisement may resort to exaggeration or even untruth in order to promote a business. It may cause people to get misled or even be harmful in certain cases due to such misleading information or unrealistic promises, for example, an insurance company may promise returns more than it can actually generate or a health drink company may show unreal growth standards in a child on consuming that particular drink. Moreover certain products, like cigarettes, should not be advertised at all because of it being inimical to health. So it appears prima facie that advertising needs to be controlled and regulated strictly. But on the other hand, advertising is a part of communication media, which is reasonably and to a large extent protected and covered by the Constitutional guarantee of freedom of speech.

In India, freedom of speech and expression is a Fundamental Right according to Article 19 (1) (a) of the Constitution of India which also includes freedom of press or media. In the United States the freedom of speech is protected by the First Amendment. So the question is whether advertising should be brought under this category and given the Constitutional Protection or should this protection be curtailed in the case of advertising. This issue has been dealt from various angles and has seen differing opinions by various courts in both India and United States. In order to arrive at the answer to this question, we need to first look at what 'advertising' is.

Advertising can be defined to be a means of communication with the users of a product or service. Advertisements are messages paid for by the advertisers and are intended to inform or influence people who receive them, as defined by the Advertising Association of the UK.¹ So when it comes to protecting the freedom of speech rights of advertising, the judiciary in the US has divided advertising into the two kinds- commercial speech and non-commercial speech²: one is that which is commercial and profit-making in nature, such as buying a product; and the other is non-commercial one, such as which is used by the government or any agency or organization

¹ *Definition of Advertising*, THE ECONOMIC TIMES <https://economictimes.indiatimes.com/definition/advertising>, last visited Oct.6, 2020.

² R.H.Coase, *Advertising and Free Speech*, 6(1), THE JOURNAL OF LEGAL STUDIES, 1-34 (1977).

to spread social awareness.³ Put simply, expression of commercial interest can be considered as commercial speech.⁴

FREEDOM OF SPEECH OF ADVERTISING MEDIA: WHAT THE JUDICIARY SAYS

The US has experienced a great deal of dilemma in settling the question of whether advertising should be protected by freedom of speech. In *Valentine vs. Christensen*⁵, it was seen that the US Supreme Court had deliberated on the nature of an advertisement, whether it is commercial or not, since commercial advertising is not protected by the rights guaranteed in the First Amendment but non-commercial ones are.⁶ However, this decision has been challenged in many subsequent cases, one of which is *Cammarano vs. United States*⁷. In this case the Court argued that the First Amendment is not "confined to discourse of a particular kind" and it was more or less established that all advertising is protected by the First Amendment.⁸ In *Pittsburgh Press Co. vs. Pittsburgh Commission on Human Relations*⁹ it was further solidified that commercial speech has an unequivocal right as any other speech to enjoy the protection of the First Amendment. However, *Bigelow v. Virginia*¹⁰ overturned the previous judgments that accorded protection to commercial advertising and held that it is an error to consider commercial advertisement to be entitled to receive the First Amendment protection. But the Court effectively did not strip all commercial advertisements of the Constitutional Protection and left the demarcations where the line should be drawn for future discussion.

There have been many subsequent judicial decisions that changed the outlook towards commercial advertisement but these are the few decisions that had primarily influenced the decisions made by the Indian Courts in the issue whether advertising can be brought under the protection of Article 19 (1) (a) of the Constitution of India. The first important case related to

³ *The Editors of Encyclopedia Britannica, Advertising communication, BRITANNICA (Nov.13, 2019) <https://www.britannica.com/topic/advertising>, last visited Oct. 6,2020.*

⁴ *Akhil Deo, Joshita Pai, Commercial Speech: A Variant or a Step-Child of Free Speech, MANUPATRA, (2014) http://docs.manupatra.in/newsline/articles/Upload/63D1F65A-AEB2-4F4A-B849-FADE67B56A6B.1-a__constitution.pdf last visited Oct 6,2020*

⁵ *Valentine v. Christensen, 316 U.S. 52 (1942) rev'd 122 F.2d 511 (2d Cir.1942).*

⁶ *R.H.Coase, Advertising and Free Speech, 6(1), THE JOURNAL OF LEGAL STUDIES, 1-34 (1977).*

⁷ *Cammarano v. United States, 358 U.S. 498 (1959).*

⁸ *Id.*

⁹ *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).*

¹⁰ *Bigelow v. Virginia, 421 U.S. 809 (1975).*

advertising is that of *Hamdard Dawakhana vs. Union of India*¹¹, which followed the *Chrestensen* judgment of the United States, and it was stated that the advertisements in the instant case relate to commerce or trade and not to propagating of ideas; and advertising and sale of prohibited drugs or commodities is not in the interest of the general public cannot be speech within the meaning of freedom of speech and therefore would not fall within Article 19(1) (a). However in the *Indian Express Newspapers vs. Union of India*¹², the opinion in *Hamdard Dawakhana*¹³ was overturned by the Supreme Court of India and it was held that all commercial advertisements cannot be denied the protection of Article 19 (1) (a) of the Constitution merely because they are issued by businessmen. In *Bennett Coleman & Co. vs. Union of India*¹⁴ also it was observed that the curtailment of advertisement is a breach of the fundamental right under Article 19 (1) (a) although it was more from a trading and economic point of view. This judgment and the *Indian Express*¹⁵ judgment were decisively used by the Supreme Court of India in the landmark case *Tata Press Limited vs. Mahanagar Telecom-Nigam Limited*¹⁶. The Court said “Advertising is considered to be the cornerstone of our economic system... Without advertising, the resources available for expenditure on the ‘news’ would decline, which may lead to an erosion of quality and quantity.”¹⁷

Therefore it was held by the Apex Court that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution and thus the long debate was finally put to rest in the country.

FREEDOM OF SPEECH BUT WITHIN THE LEGAL LIMIT

If advertising is covered by the fundamental right of freedom of speech and expression, it is to be considered whether anything and everything can be shown, written and then disseminated or published in advertisement, without any regulation. Even the Freedom of Speech clause comes with ‘reasonable restrictions’ in the Indian Constitution.¹⁸ It is not only important to protect

¹¹ *Hamdard Dawakhana (Wakf) Lal Kuan vs. Union of India* (1960) A.I.R. 554 (India).

¹² *Indian Express Newspapers vs. Union of India* (1986) A.I.R. 515 (India).

¹³ *Hamdard Dawakhana, supra*.

¹⁴ *Bennett Coleman & Co. vs. Union of India* (1973) 2 S.C.R. 757 (India).

¹⁵ *Indian express, supra*.

¹⁶ *Tata Press Limited vs. Mahanagar Telecom-Nigam Limited* (1995) A.I.R. 2438 (India).

¹⁷ *Tata Press Limited vs. Mahanagar Telecom-Nigam Limited* on 3rd August 1995, *INDIAN KANOON*, <https://indiankanoon.org/doc/752455/>, last visited on Oct.7, 2020.

¹⁸ *INDIA CONST. Art. 19, Cl. 2.*

advertisements and advertisers' rights but also the consumers' rights. Therefore there are certain laws and regulating bodies that control the indiscriminate advertising in order to protect consumers from fraud and injury.

In the UK, there is the Code of Non-broadcast Advertising and Direct and Promotional Marketing for non-broadcast advertisements, sales promotions, and Code of Broadcast Advertisement that regulates all other kinds of advertisement and their regulatory body is Advertising Standards Authority that oversees that the rules laid down by the Codes are maintained. The Federal Trade Commission in the US has the Division of Advertising Practices that regulates advertising and protects consumers from being deceived. The FTC has laid down various rules such as advertising directly to children, health related advertising, online advertising etc.¹⁹

India has seen a fair share of controversial advertising and it has also been noticed that rules are often enforced indiscriminately and without the correct appreciation of the idea or art behind the advertisement. One of the most famous among them was 1995 advertisement for Tuff Shoes, which featured models Milind Soman and Madhu Sapre wearing nothing but shoes, with a python wrapped around their bodies. The advertisement was banned and the models were charged with indecent behaviour in a court.²⁰

In India there is no single or compact legislation governing advertising. However there are many laws and statutes that relate to advertising in India.

- The Cable Television Network Rules, 1994 provides in S.7 the 'Advertising Code'. This Code contains several rules that must be followed in broadcasting advertising such as no advertisement shall be permitted which derides any race, caste, creed and nationality or tends to incite people to crime, cause disorder or violence, or breach of law or glorifies violence or obscenity in any way. Social evils like dowry and child marriage cannot be permitted in advertising. Advertising

¹⁹ Advertising and Marketing, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing>, last visited Oct.7,2020.

²⁰ Anurag Verma, 12 Indian Print Ads And TV Commercials That Landed Into Controversy, HUFFPOST (Nov. 15, 2016 11:25am IST), https://www.huffingtonpost.in/2016/11/15/12-indian-print-ads-and-tv-commercials-that-landed-into-controve_a_21606114/.

cannot promote sales of harmful products like cigarettes or products like baby food. It cannot hurt religious sentiment, put children in danger etc.²¹

- Drug and Magic Remedies (Objectionable Advertisement) Act, 1954 is the legislation that was relied upon in the judgment of *Hamdard Dawakhana*²². It prohibits advertisement of drugs for miscarriage, correction of menstrual disorder etc. It also prohibits advertisement that gives false impression or makes a false claim about a drug. No advertisement can claim any magic remedies in Sections 4 and 5.²³
- The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, strictly prohibits advertisement of cigarettes and other tobacco products (S.5).²⁴
- Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 prohibits in S.22 advertising of facilities for pre-natal sex determination available at any laboratory or clinic.²⁵
- Food Safety and Standards Act, 2006, provides in S.24 that no advertisement shall be made of any food which is misleading or deceiving.²⁶
- Young Persons (Harmful Publications) Act, 1956, prohibits advertising of any “harmful publication” which means a portrayal of the commission of offences or any act(s) of violence or cruelty or any incident of a repulsive or horrible nature [S.3(c)].²⁷
- The Indecent Representation of Women (Prohibition) Act, 1986 prohibits advertisement representing women in an indecent manner which means depiction of a woman’s figure or body in a manner that is derogatory or denigrating to them.²⁸

The above list is not exhaustive. In the Consumer Protection Act, 1986, the definition of “unfair trade practice” also includes misleading advertisements about sales and discounts. The

²¹ *The Cable Television Network Rules, 1994, Central Government, 1994(India).*

²² *Hamdard Dawakhana, supra.*

²³ *Drug and Magic Remedies (Objectionable Advertisement) Act, 1954, No.21, Act of Parliament, 1954 (India).*

²⁴ *Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, No.34, Act of Parliament, 2003 (India).*

²⁵ *Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, No.57, Parliament of India, 1994 (India).*

²⁶ *Food Safety and Standards Act, 2006, No.34, Act of Parliament, 2006 (India).*

²⁷ *Young Persons (Harmful Publications) Act, 1956, No.93, Act of Parliament, 1956 (India).*

²⁸ *Indecent Representation of Women (Prohibition) Act, 1986, No.60, Act of Parliament, 1986 (India).*

contravention of any of the above laws is an offence and penalties and punishments for such breach of law are prescribed in the respective statutes

The laws have been enforced over the years in various cases. In the year 2007 two advertisements of men's underwear were banned by the Ministry of Information and Broadcasting for being 'indecent, vulgar and suggestive'.²⁹ In 2011, a Wild Stone deodorant advertisement was heavily censored for showing a woman in indecent lights and containing obscene content.³⁰ However there is no single guideline that has been followed or uniformity in such enforcements. However it has to be kept in mind that it is not upto individual citizens to call for banning of certain advertisements that has not been found to contravene any of the existing laws of the land. The recent Tanishq advertisement that showed inter-community marriage of a Hindu woman in a Muslim family, came under controversy and a large number of people called for banning of the ad over social media and ultimately the advertisement had to be taken down. Such acts violate the fundamental right of Freedom of Speech and Expression guaranteed by the Constitution of India and the judiciary must rectify such violations on an urgent basis.

REGULATING ADVERTISEMENTS: THE ASCI CODE

In India the regulating authority of advertisements is Advertising Standards Council of India (ASCI), a non-statutory tribunal that was established in 1985 for self-regulation in advertising in order to ensure ethical advertising practices.³¹ They have developed the 'Code for Self-regulation of Advertising Content in India', also known as the 'ASCI Code', that includes guidelines for advertising content, dealing with complaints and fast-track complaint handling procedure.

The Code has four broad categories for formulating advertising standards. The first one is that there should be honest and truthful representation in any advertisement which will benefit both consumers and competitors and to safeguard against misleading advertisements. Secondly, the Code will maintain the standards of advertising policy by ensuring that there is nothing vulgar or indecent that is being represented and does not breach the standard moral codes of society.

²⁹ Anurag Verma, *12 Indian Print Ads And TV Commercials That Landed Into Controversy*, HUFFPOST (Nov. 15, 2016 11:25am IST), https://www.huffingtonpost.in/2016/11/15/12-indian-print-ads-and-tv-commercials-that-landed-into-controve_a_21606114/.

³⁰ Dean Nelson, *India bans overtly sexual deodorant ads*, THE TELEGRAPH (May 27, 2011), <https://www.telegraph.co.uk/news/worldnews/asia/india/8541292/India-bans-overtly-sexual-deodorant-ads.html>.

³¹ Sunaina Kapoor, Neeraj Dubey, *Regulating Advertisements in India*, PSA (2009), <https://psalegal.com/wp-content/uploads/2017/01/TMT-Bulletin-Issue-III11062009042225PM.pdf>, last visited Oct 8, 2020.

Thirdly, it will regulate the content of advertising so that it is not harmful or hazardous to society, particularly minors, 'to a degree unacceptable to society at large'³². Finally, the Code is there to ensure fairness of competition, so that the consumer is informed of the choices that he has in the market regarding a particular product and that there is no plagiarism. The ASCI monitors the advertisements and also handles complaints received by them. The Consumer Complaints Council (CCC) acts as the examining body that deals with the complaint as well as the response given by the advertiser. But the advertisements are not pre-approved or pre-censored and the power of the CCC only starts after a complaint. In 2011 The I&B pulled up ASCI for its apparent failure to ban deodorant advertisements which continue to depict women as objects of desire and in a very poor light flagrantly violating the laws aimed at ensuring decency and high standards of ads in the country.³³

COMPARATIVE ADVERTISING: PROTECTING GOODWILL OF COMPETITORS

Comparative advertising is covered by the last category which provides that comparisons should be factual and accurate and there should be neither artificial advantage nor should there be denigration and attack on any other product or brand. No advertisement should try to destroy the goodwill of a competing company. It is seen through judicial decisions that comparative advertising that denigrates another product or company and can cause losses by creating a doubt in the minds of the consumers about that particular product are considered unlawful. In *Dabur India Limited vs. Emami Limited (2004)*³⁴ it was alleged that through a T.V commercial of Himani Sona-Chandi Amritprash, the defendant sought to disparage the product of the plaintiff, namely, Dabur Chayawanprash by asking viewers not to take Chawanprash in summer. It was held that when the defendant is propagating in the advertisement that there should be no consumption of Chayawanprash during the summer months, it is also propagating that the plaintiff's Chayawanprash should not also be taken during the summer months as it is not good for health and instead Amritprash, which is the defendant's product, should be taken. Such an advertisement is clearly disparaging to the product of the plaintiff as there is an element of

³² *The Code for Self-regulation of Advertising Content in India, ASCI (1985)*,
https://www.ascionline.org/images/pdf/code_book.pdf

³³ *Ashish Sinha, I&B ministry directs ASCI to act against indecent deo advts on TV, FINANCIAL EXPRESS (May 26 2011, 09:10am)*, <https://www.financialexpress.com/archive/ib-ministry-directs-asci-to-act-against-indecent-deo-advts-on-tv/795466/>, last visited on Oct 8, 2020

³⁴ *Dabur India Limited vs. Emami Limited (2004)*, 2004 (29) P.T.C. 1 Del (India).

insinuation present in the said advertisement. Similarly, the still ongoing case of *Reckitt Benckiser (India) Ltd. vs. Hindustan Unilever Ltd (2020)*³⁵ was regarding a television commercial of 'Lifebuoy' which allegedly depicts a child being sick because of the usage of 'Dettol' as an antiseptic liquid in bathing water. It was held by the Delhi High Court that it is clear that the advertisement aims at denigrating the product of the plaintiff by indicating to existing and future customers that the product of the plaintiff is ineffective and therefore an injunction to stop the advertisement was granted to prevent any loss or injury to the interests of the competing manufacturer or seller, with any active disparagement of a competing product being impermissible.³⁶

Conclusion

The advertising industry is one of the most profitable industries because of its tie-ups with big and small companies and brands and in the competitive market, success is ensured for those who have the means to advertise their products effectively. Although the advertising media enjoys the constitutional guarantee of freedom of speech, like any other industry the advertising industry too has to work under the purview of law and breaking rules should invite adequate punishment. Still there is a gamut of advertisements still out in the world that do not conform to the rules, and their presence is felt online especially. The reason can be attributed to the fact that is no board that can preview an advertisement before it is released, lack of a single comprehensive legislation, and lack of monitoring online content and social media.

Suggestion

It is important to consider enacting a statute dedicated to the advertising industry that will also contain the provisions for online or internet advertising and the rules that would regulate them. However, while framing these rules, what the legislature also needs to keep in mind is that the fundamental right of freedom of speech is not violated. It is vital that a balance needs to be maintained and there is a dire need of a new legislation and reform in advertising rules in India.

³⁵ *Reckitt Benckiser (India) Ltd. vs. Hindustan Unilever Ltd (2020) CS(COMM) 629/2016 AND CS(OS) 237/2018 & IA No.4428/2018 (India).*

³⁶ *Reckitt Benckiser (India) Ltd. vs. Hindustan Unilever Ltd on 13 May, 2013, INDIAN KANOON, <https://indiankanoon.org/doc/62246857/>*