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Application Problems Of Commercial Speech Doctrine In CIS Countries: On The Example Of Russia And Uzbekistan

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ABSTRACT

This article analyzes the application of the Commercial Speech Doctrine in CIS countries such as Russian and Uzbekistan. The article shows that the commercial speech doctrine was implemented as a constitutional principle of information freedom; however Federal Advertising law of Russia gives priority to the public health rather than commercial speech protection. The article concludes that, in CIS countries, especially in Uzbekistan and Russia, the government interest to control commercial information flow has become superior to that of competitor and consumer interests. The presence of strict legal standards in those countries causes unreasonable government interference in free commercial speech of advertisers and restricts the flow of commercial information. Therefore, they are unnecessary and excessive to proper regulation of misleading advertising. Hence, the main principle of the commercial speech doctrine on the limitation of government intervention does not work in practice.

KEYWORDS

Commercial speech, First Amendment, misleading advertising, legal standards, government intervention, constitution, regulation, competitor, consumer, public interest

INTRODUCTION

I. Emergence Of The Commercial Speech Doctrine

The theory of advertising regulation started with the "Free Speech" clause of First Amendment to the US Constitution. The purpose of the First Amendment was to protect free speech from the government intervention and to limit the government power to regulate such "market of ideas".[1] The First Amendment stated that "Congress shall make no law ... abridging the freedom of speech or of the press ...".[2] Initially, First Amendment protected press but no broadcast and did not take into account audiences' right on information. Later, "Fairness doctrine" filled the gap adding the issue on individual rights of broadcasting and public interests with the emphasis on balance of interests.[3] Thus, the new standard of First Amendment covered commercial speech as other forms of expression. Commercial speech has been protected under the First Amendment since a free flow of commercial information is important to the proper allocation of sources in free market.[4] However, there is still a question as whether commercial speech is protected to the same extent as other speeches.

The issue of the protection availability of the commercial speech caused to distinguish "protected" and "unprotected" commercial speeches. As the mechanism of this distinction, the US Supreme Court adopted "two-level" theory of the First Amendment,[5] which consisted of identification level and application level.[6] The ground for identification level was "motivation-based model" that focused on determining the motive and source of advertising. The application level was based on "marketplace orientation" approach which implemented by content test and balancing of

interests. However, content test, originally, served to identify the motivation of advertising, later when the US Supreme Court added market-orientation model, the content test has been used as the standard for evaluation of commercial advertising.[7]

As a result of analyzing the US Supreme Courts cases,[8] Professor Cohen suggested three possible testing standards for determining the protect ability of commercial speech: primary motive, source and content of the advertisement.[9] First, the primary motive test focuses on the motive of advertisers rather than its content, and therefore it determines that profit motivated advertising should be protected by the First Amendment, on the other hand the advertising designed to circumvent the law is out of the protection. However, primary motive cannot serve as an identifying principle in higher or lower level of protection for commercial speeches. Second, the source test focuses on the person producing the advertisement but emphasizes the person values rather than motives. It is unreasonable to distinguish source standard from primary motive, because they are both directed to identify commercial sources of advertising. Third, the content of speech is more valuable for consumer rather than liberty of speaker. According to the content test, if the content of speech is commercial in nature, in other words if advertisement proposes commercial transaction, it can be protected by the First Amendment. However, the advertisement with false, deceptive or misleading content and advertising concerning illegal transactions are out of the protection.[10]

Unlike truthful commercial speech,[11] false and misleading advertising is considered to be "unprotected" under the First

Amendment.[12] The question in what extent should government regulate "unprotected" advertising led the US Supreme Court to adopt more sophisticated approach instead of two level theory. According to this approach, after determination whether an advertisement is commercial speech, as the next step, court should evaluate whether the government interests behind the regulation outweighs the First Amendment value of speech.[13] In other words, the US Supreme Court gave priority to reasonableness of regulation as a rationale for the permissible regulation of misleading advertising. The Central Hudson test provided the analysis for identification of the reasonableness standard as followings: first, the court should determine whether the government interest in regulation is substantial; second, the court should decide whether the regulation directly advances the government interest; finally, the court should determine whether the regulation is more restrictive than necessary to protect the government interests.[14] The last one is more important, because the government can manipulate the economic choice of consumers by curbing their access to information.[15] Thus, government must prove a "reasonable fit" between the interest and the regulation.[16]

The crucial standard in the regulation of unprotected commercial speech is "balancing competing societal interests", because in this type of advertisement government has more power to intervene in economic freedom of speech. Thus, interests of government, competitors and consumers should be taken into account and the balance of interests must be provided by government appropriately. The Government interest is to provide free flow of commercial information for proper allocation of sources and to protect vulnerable part of society such as children and elderly people.

Competitor's interest is freedom to advertise products and services, which is inherent in competitive market economy. Consumers have a right to receive commercial information, to get free access to the information and to know about product and services which is called "public interests".[17] Here, the role of advertising is to provide public with accurate commercial information about the availability of goods and services.[18] However, it is very difficult to keep a balance competing interests because it depends on the regulation degree for different types of advertising.

II. Commercial Speech Doctrine As Basis For The Less Strict Regulation

Commercial speech doctrine focused on the protection of commercial advertising from government intervention. The Virginia Pharmacy case (1976) states that the commercial advertisement is protected by the First Amendment.[19] However, Central Hudson case (1980) clarified that false advertising falls out of constitutional protection.[20] If courts at the first step of Central Hudson tests find that an advertisement is deceptive or for illegal products, this advertisement can be regulated or even prohibited.[21] However, the government intervention to this type of advertising must be limited.[22]

The complexity of misleading advertising regulation refers to conflicts among the competing interests of competitors, consumers and government. Although the commercial speech doctrine primarily declared government interest, some theories were developed to protect other interests in advertising market.[23] For instance, to protect competitor interests, Free Speech Theory implied that an advertiser (trader or competitor) has the freedom to convey a commercial speech in order to sell its

product.[24, p. 41-43] Consumer interests were put forward by Access Theory, according to which every single consumer has a right to access information in order to make purchasing decision.[24, p. 47-48.] The government, as a regulator, has an interest to provide free flow of commercial information.[25] Thus, the regulation of misleading advertising needs to keep a balance of competing interests by taking into account free speech of advertiser, consumer access information as well we the government interests. The US Supreme Court, in order to find "golden balance" among the interests of advertiser, consumers and regulator, put forth three main questions: (1) How much regulation is permissible? (2) How should government protect consumers from misleading advertising? and (3) What method of regulation can be applied towards misleading advertising?

To answer these three questions, the judges of the US Supreme Court discussed governmental control concerning advertising regulation and developed three main approaches on this issue. First, judge Thomas stated that the ban, as a way of regulation, is per se impermissible. He evaluated suppressing advertising as an impermissible means of suppressing demand for goods. Moreover, any government interest in "keeping users of the product ignorant in order to manipulate their choice in the marketplace" is not only impermissible, but also per se illegal.[26] Second, judge Stevens was against applying strict scrutiny for truthful and non-deceptive advertising. He suggested that the misleading advertising should be a subject for "less than strict scrutiny" instead of intermediate scrutiny, and the regulation should substitute two-tier review such as consumer protection and disclosure of beneficial information.[27] Third, judge O'Connor suggested direct regulation as an

alternative means. According to O'Connor, each commercial speech case should be regulated directly with a narrowly tailored approach to the facts of the case in order to reach an effective regulation. The judge emphasized the efficiency of regulation rather than its method, because the direct regulation refers to clarify legal standards of misleading advertising. All these approaches of judges expressed judicial skepticism of government efforts to impose strict restrictions on advertising in order to manipulate consumers' behaviors by controlling their access to commercial information.[28]

As a result of their discussions, majority if judges on the Supreme Court support "less strict" regulation of deceptive advertising, because non-strict scrutiny might hobble the consumer protection mechanism, strict scrutiny might restrict advertisers' commercial free speech.[29] Moreover, any such regulation is subject to two conditions. First, the government must choose less restrictive means of regulation in order to maximize the net benefits of speech. Second, regulation could not extend as far as a ban.[30] However, the US Supreme Court could not clearly describe what is less restrictive regulation of misleading advertising. Some theories tried to make clear this issue, but they did it in cross-disciplinary fields such as law and economics. For instance, the "Equilibrium Model of False Advertising", proposed by Andrew Rhodes and Chris Wilson (2016), suggests an equilibrium between advertising in competition and social welfare, which involves levels of penalty, levels of false advertising, benefits from advertising and its effects on public policy.[31] According to the model, severe penalties can stop false advertising; however that decreases advertising information and limits consumer access to information in the market. On the other hand, light penalties permit false

advertising to continue and thus increase the informativeness of advertising. However, full information here can lose the persuasive effect of advertising. Thus, the model proposes a moderate penalty system for false advertising where incentives for novelty in competition are high, product quality technology is relatively healthy, and the interests of both manufacturers and consumers can be kept in balance by ensuring economic efficiency.

III. An Integrated Model Of Restriction Of Commercial Speech: Ground For Regulation Methods

The US Supreme Court's "An Integrated Model of Restriction of Commercial Speech" proves the ineffectiveness of the ban.[32] The model examined the integration of information and competition effects of promotional bans and concluded that negative effects from the banning of misleading advertising are greater than non-advertising promotions. According to the model, bans or more restrictive regulation of misleading advertising makes information more costly, and consequently consumers who do purchase products or services make worse-informed decisions. Thus, a ban is a blunt weapon for regulating deception, and causes consumers to lose useful information and reduce competition. Therefore, the model deduced that no means of a ban are available to control deception, but the correction of commercial speech can be true, and less restrictive means be effectively control advertising.

Moreover, commercial speech should be only regulated when problems related to deception outweigh the benefits. The government does not have the power to completely prohibit commercial advertising on the ground that it is potentially misleading. In addition, the distinction of advertising message and advertising phrase is important in proper

regulation of misleading advertising, because the advertising message cannot be totally banned, but some advertising phrases can be prohibited if they have the capacity to mislead the public.[33]

There are two main regulative standards under the less restrictive regulation of advertising: "content-based" and "non-content" ("method" based) regulation. Content-based regulation addresses how to evaluate and restrict the content of advertising messages. Non-content based regulation focuses on controlling the time, place and manner of regulation in order to provide the free flow of commercial information. Content-based regulation causes more controversy than non-content based because it restricts the content of advertising messages. These regulation methods arise the question of what aspect of advertising should the government regulate: the message of advertising or the harms of advertising.[34] At first glance, both aspects seem crucial for evaluation since the content has communicative impact and harm shows the potential damage of advertisement. However, the content is more important in choosing a proper regulative standard for misleading advertising.

As mentioned above, "non-content based" regulation controls the time, place and manner of advertising for the purpose of ensuring the proper allocation of sources in economy through providing free flow of commercial information. However, in applying such restrictive regulation, the government must open alternative channels of communication,[35] since the primary goal of government regulation is to guarantee fair and open access to the means of communication.[36] To conclude, the integrated model proved the effectiveness of content-based regulation concerning misleading advertising; however it could not

clearly describe direct regulation, which refers to the identification of legal requirements for misleading advertising.

IV.

Article 29 of the Constitution of the Russian Federation establishes freedom of expression and freedom of information, which are the basis for commercial speech and consumer access to information. According to this constitutional principle, every person has the right to search, access, and disseminate information through any lawful means.[37] However, this constitutional freedom can be restricted by Government intervention. In particular, Article 55 of the Constitution states that the rights and freedoms of a person can be limited by federal law only in order to ensure the protection of the constitutional regime and security of the country, moral basis of the society, or the rights and legitimate interests of the people. Thus, the article determines the constitutional basis for the restrictions of advertising in the Russian Federation.

The application of the constitutional principle can be illustrated by the Procter & Gamble case. Procter & Gamble Ltd. company complained to the Constitutional Court of the Russian Federation that Article 20 of the Federal law "On Advertising" violates its constitutional rights and freedoms of speech. In accordance with this article, the textual, visual or sound use of children images in advertising is prohibited.[38] This article, in the applicant's opinion, violated the right to search, access, and disseminate the commercial information, as declared in Article 29 of the Constitution. The background of the complaint is related to the applicant's unsuccessful attempts to invalidate the decision of the Moscow Arbitration Court and cease and desist order of the Federal Antimonopoly Service (FAS) to stop violation

of Article 20 of the Federal law "On Advertising".[39] In particular, paragraph 2 of Article 20 of the Federal law "On Advertising" protects children from information and materials harmful to their wellbeing.[40] However, the Constitutional Court gives priority to public policy rather than commercial speech. The Court, in its decision of October 5, 2000 (No. 215-0), considered that the argued Article of the Advertising law was established by the legislature in order to protect the health, rights and legitimate interests of citizens and did not contradict Article 55 of the Constitution. In this regard, the complaint was rejected since the Constitutional Court decided that there was no violation of Articles 29 and 55 of the Constitution.[41]

V. Implementation Of Commercial Speech In The Constitution Of The Republic Of Uzbekistan

Uzbekistan attempted to implement commercial speech doctrine as constitutional principle for freedom of speech, opinion and expression.[42] In accordance with Article 29 of the Constitution of Uzbekistan, everyone has the right to seek, obtain and disseminate any information. This personal freedom and right may be restricted if (1) it is directed against constitutional system, or (2) there is involvement of state secret and other related secrets, or (3) in some other instances specified by the law.[42] Uzbek scholars interpreted "some other instances specified law" as information in the field of consumer protection law and competition law. They explained that any information with misleading character is prohibited by law.[43] In general, Uzbekistan guaranteed the commercial speech activity as a freedom of economic activity. Article 53 of the Constitution declares that the state guarantees freedom of economic activity, entrepreneurship with due regard

for the priority of consumers' rights.[44] However, the Constitution does not show what kind of guarantees commercial speech owners will have.

Since, the Uzbekistan's government regulates commercial advertising with the special act, law on Advertising (Advertising law),[45] the law attempted to answer three main questions of the commercial speech doctrine towards misleading advertising regulation: (1) How much regulation is permissible? (2) How should government protect us (competitors and consumers) from misleading advertising? (3) What method of regulation can be applied towards misleading advertising? To answer the first question, Uzbek legislature states that the aims of Advertising law are to manage information flow, to develop business and consumer culture, and to prevent misleading advertising.[46] Moreover, Advertising law imposes only administrative surcharge for improper advertising.[47] It means that Uzbekistan chose less strict regulation for misleading advertising. However, regarding the second question, this research cannot state that Uzbekistan implemented direct regulation because legal standards for identification and evaluation of misleading advertising are ambiguous and tangled. As for the third question, the Advertising law offers alternative choices for regulatory methods such as content-based as well as non-content regulation, and this ambiguity causes confusion and misapplication regarding regulatory methods. Consequently, non-content regulation has become a superior method because it gives the Government an opportunity for to unreasonably intervene in commercial speech of entrepreneurs at any time.

CONCLUSION

The main theory of advertising regulation based on Commercial Speech Doctrine, that is the doctrine developed by the US Supreme Court to protect commercial speech under the First Amendments of the US Constitution. Accordingly, the commercial speech doctrine determined three main questions to regulate misleading advertising: (1) How much regulation is permissible? (2) How should government protect competitors and consumers from misleading advertising? (3) What method of regulation can be applied towards misleading advertising?

To answer these questions the US Supreme Court developed an Integrated Model of Restriction of Commercial Speech. The model concluded that the regulation of misleading advertising should be less strict, direct, and content-based. Less strict regulation connotes that even misleading advertising does not enjoy constitutional regulation; it should not be totally banned. Indeed, strict regulatory policy towards misleading advertising can suppress true information. Direct regulation means that regulation should be directed to identify and eliminate deceptive statements from commercial messages. Finally, content-based regulation should be applied towards misleading advertising because deceptive messages in advertisement are determined by textual analysis of its context.

However, the commercial speech doctrine and its integrated model cannot clearly describe direct regulation, which refers to legal standards for misleading advertising. The doctrine and its model cannot answer to the question how to identify deceptive message in advertisement. The reason for this uncertainty is the distinct nature and complexity of legal standards. There is no unique legal requirement that can be applied to all

deceptive claims. Moreover, it is impossible to identify deception in advertisement without applying economic and cognitive theories that have an impact on legal requirements. Furthermore, the doctrine and its model focus on regulation in respect of government and business interests, but do not consider public interests. Later, consumerism became a main part of misleading advertising regulation and considers three key questions as criteria. First, can consumers comprehend advertising information? Second, how much information should be provided to consumers? Third, in what format should advertising information be supplied to consumers?

Thus, effective regulation of misleading advertising depends on clear legal standards, which should include not only government regulation of deception as business practice, but also criteria that involve public interests and consumer protection issues.

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7. See *Bigelow v. Virginia*, 421 U.S. 809 (Supreme Court 1975).
8. See *Valentine v. Chrestensen*, 316 U.S. 52 (Supreme Court 1942).; *Bigelow*, 421 U.S. 809.; *Bates v. State Bar of Ariz.*, 433 U.S. 350 (Supreme Court 1977).
9. Cohen, "Advertising & the First Amendment:" 61.
10. Advertising which requires additional information, disclaimers or warnings also to be considered as unprotected commercial speech. See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (Supreme Court 1976).
11. The truthful and non-misleading commercial speech is usually evaluated on basis of "listener is self-determining agent", because true information is necessary in listener's decision making capability. See Sullivan, "Cheap Spirits, Cigarettes, and Free Speech:" 156.
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21. According to the *Central Hudson* test, if advertisement is not deceptive, courts should ask three questions about states interest behind the regulation, which are actually next three steps in test: (1) is that interest is substantial one? (2) Does the regulation really further that interest? (3) Does the regulation abridge no more speech than necessary? See Siegel, *Communication Law in America*, 2014, 362.
22. The reason for such regulation was explicitly economic: advertising would lead to lower price for consumers. See Bergh and Paccès, *Regulation and Economics*, 2012, 140.
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