

United States of America

Q151

The impact of advertising restrictions on trademarks

Introduction

Although there are advertising restrictions for specific lawful goods and services in the United States, the overall regulatory scheme has been conducted through a self-regulation model as opposed to a government regulation model. The main reason for this approach is the long-standing U.S. tradition of free enterprise and free speech as embodied in the U.S. Constitution, which in its First Amendment protects freedom of speech. This protection has not been limited to public discourse on political issues and extends to advertising as well.

The strong judicial support for the First Amendment is best stated by the late U.S. Supreme Court Justice Oliver Wendell Holmes, who said in 1919, "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe..." **Abrams v. United States**, 250 U.S. 616, 630 (1919). In the landmark case of **Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council**, 425 U.S. 748 (1976), the U.S. Supreme Court clearly established advertising as a form of "commercial speech" to be protected under the U.S. Constitution. As the court stated, "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." 425 U.S. at 765. The U. S. Supreme Court set forth a four-part "commercial speech" test in **Central Hudson Gas & Electric Corp. v. Public Service Com.**, 447 U.S. 557 (1980) to determine whether the appropriate balance was created between the individual's right to free speech and the government's right to regulate commerce. The **Central Hudson** test is: (1) the speech must be non-misleading and concern lawful activity, (2) the government must assert a substantial interest, (3) the government interest must be directly enhanced by the regulation, and (4) the regulation must not be more extensive than is necessary. This four-part test is still applied, including in recent commercial speech cases such as **44 Liquormart v. Rhode Island**, 517 U.S. 484 (1996). Accordingly, in the U.S., the presumption is clearly in favor of the advertiser (trademark owner), not the regulator (government).

The self-regulation model followed in the U.S. permits advertisers to police their own conduct, and is conducted in many organizations, at many levels. One of the best known examples of self-regulation is the Better Business Bureau (BBB), which operates a National Advertising Division (NAD) and a National Advertising Review Board (NARB). These quasi-administrative bodies operated by a neutral, non-profit entity have been quite successful in the area of self-regulatory dispute resolution. Moreover, television networks have their own advertising review procedures which must be completed before an advertisement is aired.

In response to the specific questions on this issue concerning the U.S., the U.S. Group answers as follows.

1. Restrictive advertising measures for certain products or services

1.1 The Groups are firstly invited to indicate whether, in their respective country, there are specific legislations restricting the exercise of advertising in relation to certain products or services.

The Groups will put forward in summary fashion the content of such rules and will specify the particular products or services to which such provisions relate.

The principal U.S. agency which regulates all advertising is the Federal Trade Commission (FTC) pursuant to its authority in the FTC Act, and in particular, Section 5 of such Act (15 U.S.C. § 45). The FTC reviews advertising for issues of (1) unfairness, (2) deception, and (3) substantiation to ensure that commercial advertising is not deceptive or misleading. Many states also have consumer protection agencies, sometimes called "Little FTCs", which protect consumers at the state level. Section 43(a) of the Trademark Act (15 U.S.C. §1125(a)) allows private action by prohibiting commercial advertising or promotion which "misrepresents the nature, characteristics, qualities, or geographic origin" of the goods, services, or commercial activities. Section 43(a) has become a powerful tool for competitors to fight false and misleading advertising generally.

In addition, the U.S. has advertising guidelines concerning specific goods and services, both at the federal level as

