

Deceptive commercial speech and advertising

Literature



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According to the commercial speech doctrine, only deceptive speech that is considered commercial may be regulated. General deceptive speech is not commercial, may not be regulated. When deciding what may and may not be regulated, it is important to understand the subtle differences in what is considered commercial and non commercial speech. An analyzation of false advertising would give further understanding to the notion of commercial speech and how it may be degenerative to a society when untruthful.

Commercial Speech

According to the Supreme Court, the definition of commercial speech is a “ combination of a core notion surrounded by a penumbral boundary defined on the basis of three characteristics” (Howard, 1991). This “ core notion” of commercial speech is “ speech which does ‘ no more than propose a commercial transaction’” [1] Beyond this notion exists a body of commercial speech identified in the Bolger v. Youngs Drug Prods. Corp. 1983 case by whether the speech is as an advertisement, whether the speech refers to a specific product, or whether the speaker is economically motivated. 2]

Although individually these characteristics are insufficient to establish speech as commercial, the combination of all three offers a strong argument

for describing commercial speech. Advertising The Merriam-Webster dictionary lists an advertisement as something that is shown or presented to the public to help sell a product or to make an announcement. In short advertising may be described as a public notice published in the press or broadcast over the air.

Many societies receive a bulk of their daily information from advertisements selling physical products, attempting to sway opinions, and introducing new ideas. The increase in media technology has opened a doorway to deliver a constant stream of information including advertisements that may be biased or altogether misleading. Current social network sites allow users to “like” or “check-in” to retailers and offer their own perception of goods and services. These social networks allow for the “word of mouth” method of advertising to increase in effectiveness due to the widespread availability of technology.

Commercial speech is typically given limited First Amendment protections; however, there exists two types of commercial speech that are exempt from any protection whatsoever. Advertising that is false, misleading, or deceptive is given no protection by the government. Advertising that shows cases unlawful goods or services will also receive zero protection from the government (Pember & Calvert, 2011). Doctrine The Commercial Speech Doctrine was developed to outline which protected commercial speech may be regulated.

While little to no rights are granted to misleading ads or unlawful goods and services, protected commercial speech may also be subject to regulation if: there is substantial state interest to justify regulation, there is evidence that

the regulation directly advances this interest, or there is reasonable fit between the state interest and the government regulation (Pember & Calvert, 2011). Before a state decides to regulate commercial speech that has presumed protection under the First Amendment, that state must assert a reasonable cause for wanting to regulate the speech.

For example: a billboard that is blocking the view of drivers on the street nearby would be reasonable cause for regulating that speech. The state must next prove that this regulation of speech has directly effected the interest at which it was aimed. For example: the removal of the billboard must show a decrease in traffic violations in the area. Finally, the state must show that the regulation of commercial speech has been narrowly tailored to fit a specific interest. For example: the regulation involving the removal of a billboard must be specific to that particular billboard.

Following these guidelines allows for a state to regulate commercial speech that is not misleading or unlawful in goods or services.

Fraud, Falsity, and Misleadingness

In 1981, J. Edward Russo, Barbara L. Metcalf, and Debra Stephens identified three approaches to unjust advertising. Each view parallels the three components of advertising communication. " Fraud focuses on the advertiser and assumes a deliberate intent to create false beliefs about the product. Falsity in advertising refers to the existence of a claim-fact discrepancy. Misleadingness focuses exclusively on consumer beliefs" (Russo, Metcalf, & Stephens, 1981).

Advertisers who display low ethics and advertise deliberate misinformation are guilty of fraud; however, it remains an impractical approach. Proving a “deliberate intent” to mislead through an advertisement is difficult and may be irrelevant to the harm caused to consumers. Although, major industry regulator, the National Advertising Division (NAD) of the Better Business Bureau, does not generally require proof of fraud to remove an ad from publication, this does not apply in all situations (Russo, Metcalf, & Stephens, 1981). Falsity in advertising occurs when a claim is made that is not documented with fact.

For example: a company advertises that a product will fly, but the product does not fly. Falsity is easily verified by proving that a discrepancy exists between advertisement and reality. Insufficiency of falsity occurs when an ad generates a consumer belief of falsity, even though one has not been directly stated. Misleadingness, the third view, focuses entirely on what consumers believe. “A demonstration of misleadingness requires the observation of false consumer beliefs in conjunction with exposure to the ad” (Russo, Metcalf, & Stephens, 1981).

If an ad is believed to be in violation of this, it must prove that there is a direct relation between the release of the ad and change in societal belief. The Federal Trade Commission refocused its approach to misleadingness by focusing little on the actual message and more on the resulting consumer beliefs.

References

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