

FREEDOM OF COMMERCIAL EXPRESSION AND HUMAN RIGHTS

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Abstract

In this text we will first ask ourselves how the protection of “freedom of expression” operates in the field of commercial practices, both at the national and comparative and international levels. Then we will see the link between the commercial message and the protection of human dignity, the founding principle of the entire human rights system. Having established this, we will try to analyze the regulatory limits to freedom of commercial expression and its implications. And finally, we will present some ideas of the role that commercial discourse can play to collaborate in the development of the protection of human rights.

Keywords

Freedom. Commercial expression. Human rights.

1. Introduction

The link between market regulation and the protection of human rights involves issues that can be explored from different angles and from a Latin American perspective.

Let us start with some background concepts. Regarding commercial practices, we know that they are all the mechanisms, techniques and methods that serve, directly or indirectly, to facilitate the output of production. Master Rubén STIGLITZ already told us that:

“It is the intermediate section that exists between supply and demand (...) all the measures that are intended to promote the commercialization of products and services and that have advertising as their main data, in addition to all sales incentives” (...)

“Marketing stimulates consumption as it refers to the stage prior to commercialization, that is, through advertising, commercial campaigns consisting of promotions and propaganda. Hence it is

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*stated that without marketing and its components to which we have just referenced, there would be no consumer society.*¹²

As the Argentine author José Ignacio ONDARÇUHU says,

*“Advertising is part of our lives. Currently it is impossible to imagine the human being in everyday life without advertising (...) “the consumer society in which we are immersed did not exist without advertising. Advertising has become, over time, one of the most important components of the market.”*³

To better delimit the scope of our reflection we must point out what we understand by advertising. We chose a definition of the scope of marketing that defines it as:

*“a set of communication strategies designed to share a business solution with an audience of potential consumers. Through visual, sound, or textual resources, advertising seeks to attract and capture the attention of audiences and convince them to purchase a product or service. In addition to publicizing a service or product, advertising seeks to generate more sales, create awareness in new audiences or turn a brand into the favorite option of its consumers, through offers and other dynamics.”*⁴

2. How does the protection of freedom of expression operate in the field of commercial practices, both nationally and comparatively and internationally?

Freedom of expression in the business environment is a right protected by national and international standards.

²STIGLITZ Rubén, “Commercial loyalty, abusive commercial practices and advertising in the Civil and Commercial Code of the Nation,” Special Sup. New Civil and Commercial Code 2014 (November), 11/17/2014, 103- Online Citation: AR/DOC /3842/2014

³ONDARÇUHU José, MISLEADING ADVERTISING, ASTREA, Buenos Aires, 2021, page. 29

⁴SANTOS, Diego “What is advertising: types, characteristics and examples,” in: <https://blog.hubspot.es/marketing/definicion-publicidad>

“From the point of view of the author of the advertising message, it can be stated that commercial advertising integrates freedom of expression, which favors the absence of limits, at the risk of falling into prior censorship⁵.”

Likewise, it is true that:

“Freedom of expression encompasses the freedom to transmit information of all kinds and includes commercial advertising⁶.”

In Argentina, as in many other countries, freedom of expression counts:

“With the protection that both the Constitution and international treaties on human rights provide in Argentine law. Thus, article 14 of the National Constitution provides that “all inhabitants of the Nation enjoy the right to publish their ideas in the press without prior censorship.”⁷

In Constitutional Law, freedom of commercial expression is protected as a manifestation of freedom of expression, at an international and comparative level. It is recognized in most international human rights instruments, such as *the Universal Declaration of Human Rights* (UDHR), approved by the United Nations General Assembly in its resolution A/RES/3/217 of 1948, *the International Covenant on Civil and Political Rights* (ICCPR), 1966, *the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), approved by the Council of Europe, 1950, *the American Convention on Human Rights* (ACHR), of 1969 and *the African Charter on Human and Peoples' Rights* “Banjul Charter” (ACHPR) of 1981.

At the inter-American level, the Inter-American Court of Human Rights has held that freedom of commercial expression is made up of two aspects: one of an individual nature and another of a collective nature. From an individual perspective, companies, advertisers, and the media express their ideas through advertisements and from a collective perspective, consumers have the right to

⁵ARIAS María Paula, XVIII ARGENTINE CONGRESS OF CONSUMER LAW - II NATIONAL MEETING OF CONSUMER LAW PROFESSORS, “Commission No. 3: *Constitutional perspective of information and advertising aimed at consumers*”, 2018.

⁶Idem

⁷Idem

receive those ideas, statements, and advertising expressions to make their decisions. Likewise, with respect to competitors, this freedom contributes to the promotion of competitive practices in the market.⁸

Marketing activity has collaborated for the economic advancement of countries and for the technical evolution of products and services, providing benefits to consumers in terms of options and at the same time providing resources to the State (for the payment of taxes and fees). This has led certain representatives of the business sector to affirm that:

*“Limiting commercial expression is an act that: directly affects the possibility of improving quality and reducing prices of products and services; limits the expansion of the economy; reduces the freedom of entrepreneurship and compromises the freedom and independence of the media.”*⁹

Freedom of expression protects messages of distinct kinds, exchanged through various media. As such, advertising messages constitute a form of communication that can benefit from the protection of freedom of expression.

If we analyze the issue from a European point of view, we see that article 10 of the “Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) regarding freedom of expression states:

“1. Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas, without interference from

⁸GARCIA HUERTA Daniel A, “The advertising discourse from the perspective of human rights,” Journal of the Postgraduate in Law of the UNAM Nueva Epoca, number 1, July-December 2014, in: legalas.unam.mx

⁹World Federation of Advertisers, gathered at the 9th WFA REGIONAL MEETING – LATIN AMERICA, held between July 20 and 21, 2010 in Mexico City DF reported by ANDA (NATIONAL ASSOCIATION OF ADVERTISERS OF COLOMBIA), “Freedom of commercial expression is “essential for economic growth, the independence of the media and the solid construction of democracies ” , at: <https://www.andacol.com/index.php/74-revista-anda/revista-anda-42/437-freedom-of-commercial-expression-is-essential-for-economic-growth-the-independence-of-the-media-and-the-solid-construction-of-the-democracies>

public authorities and without regard to borders. This article does not prevent States from subjecting broadcasting, film, or television companies to a prior authorization regime.

2. The exercise of these freedoms, which entail duties and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions provided for by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public security, the defense of order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others, to prevent the disclosure of confidential information or to guarantee authority and impartiality of the judicial power.

"The traditional restrictions found in the comparative right to freedom of advertising expression are linked to the protection of children, public health and image and human dignity." ¹⁰

The Court of Justice of the European Communities has illustrated the complementary nature that the protection of commercial advertising can have through freedom of expression. In a decision of December 15, 1982, it recognized that:

" Legislation that limits or prohibits certain forms of advertising and certain means of sales promotion " could " be of such a nature as to limit the volume [of imports] by affecting the marketing possibilities of imported products. " ¹¹

By linking commercial advertising to the economic freedoms enshrined in treaties, he paved the way for their protection. He then clarified

¹⁰Convention for the Protection of Human Rights and Fundamental Freedoms (CEDH), at: <https://www.derechoshumanos.net/Convenio-Europeo-de-Derechos-Humanos-CEDH/articulo10CEDH.htm#:~:text=%2D%20Freedom%20of%20expression%C3%B3n.&text=Every%20person%20has%20right%20to, and%20without%20consideration%C3%B3n%20of%20borders>.

SEE Table of norms and mechanisms for the Protection of Human Rights, at: <https://www.derechoshumanos.net/derechos/index.htm#libertad>

¹¹CJCE, December 15, 1982, Aff. C-286/81, ECR., p. 4575.

this position in a ruling of March 7, 1990, relating commercial advertising to consumer protection:

*" The consumer's freedom is compromised when he or she is denied access to advertising available in the country of purchase " (...) " Community law on consumer protection considers consumer information to be one of the main requirements "*¹²

Thus, the Court ruled that the prohibition of indicating the duration of the offer and the previous price of the good in question in commercial advertising relating to a unique offer was contrary to the free movement of goods¹³.

By constantly referring in his ruling to the need for consumers to be adequately informed about the products they buy, he justifies the censorship of the regulations intended to combat unfair competition. Concern for consumer information therefore makes it possible to justify the protection of commercial advertising, which is in turn necessary for the free circulation of goods. We see emerging in the jurisprudence of the European Court of Justice a connecting relationship between economic freedoms and the consumer's right to information, which benefits commercial advertising and, therefore, freedom of expression.

The two European Courts rule in different legal systems, but the study of jurisprudence shows that both can guarantee the protection of commercial advertising. While the Strasbourg judge protects it through the prism of freedom of expression enshrined in article 10 and with less exhaustive control than other forms of expression considered more substantial, the Luxembourg judge protects advertising to the extent that

¹²CJCE March 7, 1990, Aff. C-362/88, ECR., p. I-00667.

¹³BODA Jean-Sébastien, « *Entre libertés économiques et droits de l'homme : l'ambivalence de la liberté d'expression* », in LIBERTÉS ÉCONOMIQUES ET DROITS DE L'HOMME, CHAMPEIL-DESPLATS Véronique and LOCHAK Danièle, Presses Universitaires de Paris Nanterre, 2011, in : <https://books.openedition.org/pupo/22215?lang=es>

has a genuine commercial aspect, revealing its link with the economic freedoms guaranteed by the Treaties.

Through the primacy given to economic freedoms, Community law aims to maintain the conditions for free and undistorted competition within the single market. However, fundamental rights are not excluded, and the jurisprudence of the Court of Justice tends to ensure their effectiveness.

Freedom of expression is a fundamental freedom, a constitutionally protected freedom, or a human right, depending on the legal system considered. Whatever name is chosen, it enjoys special protection.

The issue becomes more complex when it comes to the extension of this protection to the commercial sphere. The debate on the recognition of freedom of commercial expression as a fundamental freedom is raised there. The place that will be given within the fundamental rights to freedom of commercial expression will depend on the protection granted to the latter.

The challenge of recognizing freedom of commercial expression as a fundamental freedom relates the field of fundamental rights and economic law. This approach in some legal systems even constitutes the completion of work aimed at bringing together fundamental rights and economic law. Law and Economics, as Social Sciences, are in permanent interaction. Rights and freedoms participate in the market economy, and in this the link between fundamental rights and the economy is strengthened.

Freedom of commercial expression is a vector for the dissemination of constitutional law, it is therefore a vehicle for the dissemination of fundamental rights. Freedom of commercial expression illustrates the communicability of constitutional law with other legal matters. It evolves in advertising law, but also in intellectual property law, particularly through trademark law, as well as the law of innovative technologies with the various rights related to the Internet. Thus, freedom of commercial expression allows constitutional law to communicate with other legal matters, generating the constitutionalization of many legal fields, particularly the

process of constitutionalization of private law that occurs in our region of Latin America.

3. Why is this topic related to human rights?

The link between fundamental rights and economic regulation raises various questions. The relationship between the protection of freedom of expression in the advertising field and its limitations is one of them. We know that:

“Advertising messages, in general, have an impact not only on the sale of products, but also influence the learning of behaviors, attitudes and patterns of social interaction and, above all, gender roles.”¹⁴

And, as Carlos TAMBUSI tells us:

“As it has been developed, advertising often puts pressure on the consumer and affects their critical capacity. This is so, in that, sometimes, the advertising bombardment induces and catalyzes the consumerist business, configuring a true “attack,” with influences both on the consumers to whom it is directed, and on the other market agents, who can be competitors with the advertiser.

Therefore, the content of the advertising message must respond to the principles of good faith and commercial loyalty to protect the rights of consumers and competitors.

“Although advertising is not intended to inform but to sell, it tends to emphasize, often grandiosely, the benefits of the product or service, navigating close to the borders of inaccuracy or falsehood. Hence the special consideration that advertising deserves in that it obligates the offeror and is considered included in the contract with the consumer (), which replicates the Civil and Commercial Code.”¹⁵.

¹⁴MELO Andrea N, and ASTORINO Julieta, “Gender stereotypes in advertising of products aimed at children in Argentina,” *Ánfora*, vol. 23, no. 40, pp. 17-50, 2016, Autonomous University of Manizales, at: <https://www.redalyc.org/journal/3578/357846226001/html/>

¹⁵TAMBUSI Carlos, “Deceptive advertising in Argentine Law,” *Topics in Business and Consumer Commercial Law*, December 2021, in: <https://bibliotecas.scba.gov.ar/ccyc/pdfley/A138635.pdf>

We can identify “principles” of advertising that include rights, but also duties. As rights we find “freedom (within the framework of the freedom of the market and the regulations that order its development) and “identification” (that the recipient becomes aware that it is commercial advertising, with the purpose of selling, as reverse side of the clandestine and subliminal advertisement).

As duties we find: the truthfulness or exact correspondence between the content of the message and the characteristics of the product or service and loyalty oriented towards the relationship with other businesspeople. All this from public order, since the general interest is committed to the regulated phenomenon, prohibiting abusive advertising that is discriminatory or ignores human rights.

4. What are the limits to the protection of “commercial freedom of expression” and its implications?

Freedom of commercial expression may be subject to legitimate limitations. Firstly, it may be subject to the limitations on freedom of expression in general.

The “United Nations Special Rapporteur for Freedom of Expression” has ruled on the existence of four types of expression that countries must prohibit in compliance with the principles and obligations that govern international human rights law, which are: 1) child pornography; 2) public and direct incitement of genocide; 3) national, racial or religious hatred that promotes discrimination, hostility and violence; and 4) incitement to terrorism.¹⁶

¹⁶UN, Promotion, and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression, submitted to the United Nations General Assembly in

But commercial expression, being linked to consumption as a way of satisfying human needs, contains information aimed at consumers. This aspect differentiates it from the content of non-commercial messages or ideas that are transmitted through the exercise of the right to general freedom of expression. Commercial messages may constitute value judgments or opinions, but they must comply with the requirements of truthfulness and general interest, to prevent consumers from being deceived or mistaken through advertising or from violating human dignity. in said messages.¹⁷

At this time, and although we do not propose to do an in-depth comparative study, we must remember that it has been the Supreme Court of the United States that has developed the characteristics of commercial speech, through the doctrine known as "*commercial speech*." After an initial more restrictive interpretation, the Supreme Court, in the "Virginia State Board of Pharmacy" case of 1976, indicated that "*commercial speech*" fell within the protection granted by the First Amendment since its connection with the market of goods and services did not necessarily distance the message from the realm of ideas and added that the paid nature of advertising did not constitute a sufficiently valid argument to remove it from the protection required by the free manifestation and expression of ideas .¹⁸

But the US Court also held that, although freedom of commercial expression is protected, messages that involve a risk of deception or coercion cannot benefit from protection. And to conduct this control, the

resolution A/66/290 during its LXVI period of sessions, New York, August 10, 2011, pp. 8 to 12.

¹⁷Idem

¹⁸SPANOGLE John A, ROHNER Ralph J., PRIDGEN Dec, SOVERN Jeff, PETERSON Christopher, CONSUMER LAW CASES AND MATERIALS, 4ed, WEST Publishing co, USA, 2013, p. 131

US Court formulated a test based on four main elements of analysis that allow determining the validity of a restriction. This test has been called the “**Central Hudson Test**” (after the case that gave rise to it, *Central Hudson Gas & Electric Corp of 1980*).¹⁹ The test requires that:

1. *Commercial speech is protected, that is, it refers to a lawful activity and is not misleading.*
2. *The governmental or State interest in limiting speech is substantial.*

If both answers are positive, then we must ask ourselves if:

3. *The regulation of commercial speech is related to the government interest pursued.*
4. *The limitation or regulation is not more extensive than necessary to achieve the pursued interest.*²⁰

According to the US Supreme Court, commercial speech does "no more than propose a commercial transaction"²¹ that concerns solely the economic interests of the speaker and his audience.²² An advertisement is a classic example of commercial speech.

Commercial speech restrictions typically distinguish between commercial and non-commercial messages and may make other distinctions based on content. The US Court has historically considered that commercial speech has less protection under the First Amendment of the Constitution than other forms of protected expression, such as political or religious speech.

In the case “*Zauderer v. Office of Disc. Counsel*”²³ the Supreme Court held that a state can compel commercial speech without violating the advertiser's First Amendment rights. Specifically, a state may require an advertiser to disclose certain information " *so long as the disclosure requirements are reasonably related to the State's interest in preventing consumer deception.*"²⁴

¹⁹<https://www.informea.org/es/court-decision/central-hudson-gas-electric-corp-v-public-service-commission-new-york-> Idem SPANOGLE page 133

²⁰Idem SPANOGLE, page 133

²¹*Pittsburgh Press Co. v. Pittsburgh Common on Human Rels.*, 413 US 376, 385 (1973),

²²*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Common*, 447 US 557, 561 (1980).

²³471 US 626, 651 (1985).

²⁴BRANNON, Valerie C. “*Free Speech: When and Why Content-Based Laws Are*

Similarly, in the Republic of Mexico, the Supreme Court of Justice of the Nation has placed commercial advertising at a lower level of protection, so its production may be subject to regulation within much broader limits in the that requirements of truthfulness and clarity are required. The Mexican Court tells us:

*"Although it has been explained that commercial speech deserves constitutional protection, this does not mean that it has the same level of protection as other types of expressions, such as political or artistic expressions; nor that the constitutional analysis of its restrictions must resist the same constitutional scrutiny." (...) "[t]he restrictions on commercial speech do not put at risk representative democracy, nor the autonomy or dignity of the person. Although commercial speech deserves protection as it offers information to the consumer, such value, rather than demanding a protection comparable to that of other types of speeches, explains the intervention of the State to regulate that said information does not violate consumer rights."*²⁵

Also in Europe, measures limiting commercial speech require scrutiny of the rights that they seek to protect, the means used to do so, and whether said means are the least restrictive possible to achieve the desired rights protection objectives²⁶. The principle of proportionality is used as an interpretive tool.

*"So, for a rule that limits or prohibits a certain form of commercial speech not to violate freedom of expression, it must pursue a legitimate purpose and be appropriate for the achievement of such purpose, necessary or less burdensome than other measures and, finally, proportionate."*²⁷

The jurist and judge of the Argentine Court Ricardo Luis LORENZETTI points out regarding the advertising message that:

"Presumptively Unconstitutional," Congressional Research Service 10—1-23

<https://crsreports.congress.gov/product/pdf/IF/IF12308>

²⁵FILE 1434/2013, Direct protection under review, Minister Arturo ZALDÍVAR LELO DE LARREA (10-22-2014), at: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=151321>

²⁶Idem THURY CONRNEJO

²⁷RUBI I PUIG Antoni, "Commercial advertising and freedom of expression. "The constitutional protection of information in the market." Doctoral Thesis, Pompeu Fabra University. Barcelona, Spain, 2007. In: <https://www.tdx.cat/handle/10803/7303>

“This message contains a commercial purpose, which makes it constitute a subcategory of expression, with much more tenuous protection.”²⁸

In Argentina there has been a relevant case for the issue when the Supreme Court of Justice of the Argentine Nation had to rule on the constitutionality of a provincial law that prohibited the advertising of cigarettes in the Province of Santa Fe²⁹. In said case the Argentine Court said:

“The prohibition on advertising tobacco contained in the law of the province of Santa Fe 12,432 does not affect the freedom of expression of tobacco companies, since the speech that the plaintiff says is affected does not have a close relationship with the functioning of the republican and democratic system, Therefore, there is no constitutional basis to grant it such intense protection as other manifestations of ideas that are part of the necessary participation and deliberation in any democratic society, nor to evaluate the limitations that the laws impose with the particularly strict scrutiny that is usually applied in the matter.”³⁰

For this reason, ONDARÇUHU points out that the control of advertising is beneficial,

“Not only for the consumer as the recipient of the message, but also for competing businesspeople, from the perspective of trade in goods like the one advertised.”³¹

Advertising is thus also an instrument that allows the exercise of free competition, which in Argentina is a constitutionally protected right. This is because advertising constitutes the right to freedom of commerce and industry.

Historically, the consecration of freedom of expression aimed to protect the transmitters of ideas or opinions against interference by public power. It thus went hand in hand with freedom of commerce and industry, by

²⁸LORENZETTI Ricardo Luis, CONSUMIDORES, Rubinzal Culzoni Editores, Santa Fe, 2003, page. 183.

²⁹Nobleza Piccardo Case v. Province of Santa Fe.

³⁰CSJN, “Nobleza Piccardo SAIC and F. c. Province of Santa Fe on declaratory action of unconstitutionality,” 10/27/2015, DJ30/12/2015, 2; The Law Online: AR/JUR/39861/2015.

³¹Idem ONDARÇUHU, p. 33

preserving businesspeople from the intervention of the State and public persons. This liberal conception of freedom of expression is what we find in the jurisprudence studied above.

But for several years, under the effect of the modernization of the means of transmission and the status acquired by communication in society, this freedom also tends to protect the recipients of the messages sent, who can thus be protected from dangers. of the manipulation or standardization of information. This evolution, observed in the second half of the 20th century, constitutes one of the greatest challenges for the contemporary protection of freedom of communication.

This reality has been increased in the digital world. Artificial intelligence with its complex algorithms influences the daily decisions of the consumer. Advertising became highly personalized, using artificial intelligence, with technologies that can, due to their invasive nature, affect fundamental rights of people such as dignity and equality and affect freedoms, such as freedom of choice, and fall into assumptions of “abusive” advertising.

In addition, these predictive programs are programmed by people, who can establish discriminatory biases in them. Thus, artificial intelligence can fall on *“the same prejudices as people.”* And it can even spread these prejudices.

But, in addition, advertising that seeks to promote the sale of a product or service is the source of financing for traditional and digital media. For this reason, in Argentina the most specific regulation about the requirements that advertising must meet is found in the “Media Law” or “Audiovisual

Communication Services Law” of my country, which has a chapter dedicated to advertising that establishes how it must be legally expressed.³²

"Art. 81: Advertising broadcast. Licensees or authorized persons of audiovisual communication services may issue advertising in accordance with the following provisions: (...)

F. Subliminal advertising will not be broadcast, understood to mean that it can produce unconscious stimuli presented below the absolute sensory threshold.

g. "The provisions for the use of language and the protection of minors will be complied with."

h. Advertising aimed at children should not encourage them to purchase products by exploiting their inexperience and credulity.

i. Advertising advertisements will not discriminate based on race, ethnicity, gender, sexual orientation, ideological, socioeconomic or nationality, among others; "They will not undermine human dignity, they will not offend moral or religious convictions, they will not induce behavior that is harmful to the environment or the physical and moral health of children and adolescents."

j. Advertising that encourages the consumption of alcoholic beverages or tobacco or their manufacturers may only be conducted in accordance with the legal restrictions that affect these products.

³²LAW 26522, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/155000-159999/158649/texact.htm>

k. Programs dedicated exclusively to the promotion or sale of products may only be broadcast on audiovisual communication service signals expressly authorized for this purpose by the application authority and in accordance with the corresponding regulations.

l. Advertisements, notices and advertising messages promoting aesthetic treatments and/or activities linked to professional practice in health must have authorization from the competent authority to be disseminated and be in full compliance with the legal restrictions that affect them. to those products or services.

m. Advertising of games of chance must have prior authorization from the competent authority.

n. The implementation of a systematized control mechanism that facilitates the verification of its effective issuance.

ñ. Each television advertising round must begin and end with the identifying sign of the channel or signal, to distinguish it from the rest of the programming.

o. The broadcast of advertising must respect professional duties³³.

We have pointed out that advertising is a manifestation of freedom of expression, but since it refers to the good or service for sale, companies must carefully review its content prior to its broadcast, advertising It must be “*carefully reviewed before being approved for the general public*”³⁴.

³³<http://servicios.infoleg.gob.ar/infolegInternet/anexos/155000-159999/158649/norma.htm>

³⁴BILARDI Juan A., “Legal aspects of advertising,” 03-08-2018 Citation: MJ-DOC-12752-AR | MJD12752, in: <https://aldiaargentina.microjuris.com/2018/08/23/aspectos-legales-de-la-pauta-publicitaria/>

ONDARÇUHU states: *“Advertisers, under the pretext of freedom of expression, do not have the right to violate, through any of their advertising expressions, the fundamental norms of the Constitution or other laws, nor the values implicit in them - consisting of the right to honor, personal intimacy, one's own image, dignity. Likewise, they also do not have the right to deceive the public or, in general, to alter the transparency or proper functioning of the market.”*³⁵

For this reason, there are specific legal regulations that define the requirements that advertising content must meet.

In the case of Argentina, express protection was provided to consumer rights in art forty-two of the National Constitution of 1994. In addition, the laws that contain regulations related to advertising are: the Consumer Defense Law; the Law on Defense of Competition; the Commercial Loyalty Law; the National Law to Combat Alcoholism; the Trademark Law; the Law on Protection of Personal Data (Habeas Data); the Law of Comprehensive Protection of Women; the Audiovisual Communication Services Law; the Argentine Food Code, among others, to which we must also add specific provisions for certain categories, resolutions and provincial and municipal regulations.

Carlos TAMBUSI tells us regarding Argentina that:

“In our domestic sphere, the advertising environment enjoys a notorious lack of specific regulation, which must be supplemented with other regulations such as those indicated, or by self-regulation through business ethical parameters, the legislator having always been “cautious” on this topic, so pretext of protecting freedom of expression. Advertising must respect in all its forms both the Constitution and the rest of the legal order, without diminishing the right to freedom of expression in matters of advertising and the protection of the freedom of commerce that this activity expresses. This constitutional value does not

³⁵Idem ONDARÇUHU, p. 40

*prevent the contribution of the new Code from necessarily being combined with other future regulations that defend the harmonious game between freedom and the duty to provide adequate information*³⁶.

In Argentina, particular importance had been given to misleading advertising, from a regulatory perspective that sought to guarantee market transparency. Thus the art. 8 of the Consumer Protection Law states:

*“Effects of Advertising. The details formulated in advertising or in prospectus announcements, circulars or other means of dissemination bind the offeror and are considered included in the contract with the consumer.”*³⁷

And article 11 of the Commercial Loyalty rule states:

“Misleading advertising. It is prohibited to make any kind of presentation, advertising or propaganda that, through inaccuracies or concealments, could lead to error, deception or confusion regarding the characteristics or properties, nature, origin, quality, purity, mixture, quantity, use, price, marketing conditions or production techniques of personal property, real estate or services”³⁸.

And regarding the standard of interpretation, Argentine jurisprudence and doctrine have indicated that:

³⁶ TAMBUSI Carlos, “*Deceptive advertising in Argentine law,*” *Topics in Business and Consumer Commercial Law*, December 2021, in:

<https://bibliotecas.scba.gov.ar/ccyc/pdfley/A138635.pdf>

³⁷LAW 24240, <https://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/638/norma.htm>

³⁸Decree 274/2019, <https://www.boletino oficial.gob.ar/detalleAviso/primera/205888/20190422>

“In order to analyze the deceptive capacity of an advertising advertisement, it must be taken into account that it does not resort so much to parameters such as the “good father of a family” or diligent man frequently applied in tort or contractual law, but rather to less rigid standards. , taking into account the characteristics of the audience to which the advertising is directed.”³⁹.

“To determine that an advertising message is misleading, it is not enough that what it states is false or constitutes a lie; It is enough that it has the potential to mislead the consumer in the decision he is going to make regarding the acquisition of the goods or services offered in the market, thus affecting not only the freedom and economic interests of the consumer, but also transparency in hiring.”⁴⁰

But since the enactment of the Civil and Commercial Code in 2015, the vision of linking advertising with human rights has advanced, since the prohibition of misleading advertising was added to that of “abusive and dangerous” advertising. Article 1101 of the Code tells us:

"Advertising. Any advertising that:

a) contains false indications or indications of such a nature that they mislead or may mislead the consumer when they relate to essential elements of the product or service.

b) makes comparisons of goods or services when they are of such a nature that they mislead the consumer.

³⁹National Chamber of Commercial Appeals, room B «Saldivia, María F. c. Sprayette SA», 6/30/2003, RCyS 2003, 815, La Ley, 2003-F, 626.

⁴⁰FELICE María Florencia (2008), “Deceptive Advertising”, in: <https://www.idcp.jursoc.unlp.edu.ar/index.php/doctrina/84-publicidad-enganosa> (Institute of Constitutional and Political Law, Faculty of Legal and Social Sciences, UNLP).

c) is abusive, discriminatory or induces the consumer to behave in a manner that is harmful or dangerous to their health or safety.”⁴¹

In Argentina, the emphasis was placed on the prohibition of advertising that maintains unacceptable values.

“For a social group (abusive and discriminatory advertising) or for an individual (advertising contrary to consumer health or safety)”⁴².

And in order to reduce the amount of illicit advertising and its harmful impact, the Argentine legislator gives consumers, in addition to the tools they had to protect themselves in their particular case, “the details formulated in the advertising or in advertisements, prospectuses, circulars or other means of dissemination are considered included in the contract with the consumer and bind the offeror” (art. 8 of the LDC and 1103 CCN). Instruments to request the cessation of illicit advertising and publication, at the expense of the defendant, of correcting notices (art. 1102 CCN)⁴³.

For its part, in European countries the protection of freedom of expression and communication derived from the Declaration of the Rights of Man and of the Citizen, and from Art 10 of the European Convention on Human Rights, apply to the advertising message. But as advertising has become omnipresent, limits have been set on the content of the commercial message. These rules are based on the principle of respect for human dignity and respond to demands of truthfulness and decency. This will derive both

⁴¹https://leyes-ar.com/codigo_civil_y_comercial/1101.htm

⁴²IRIGIOYEN TESTA Matías, “Consumer *law: contributions from economics and behavioral sciences*,” LA LEY 07/31/2023, 1, Citation: TR LALEY AR/DOC/1598/2023

⁴³Idem IRIGIOYEN TESTA

from the application of substantive law and from legal and regulatory deontological rules ⁴⁴.

In Spain, the law that regulates illicit advertising is Law 34/1988 (General Advertising Law of 11-15-88), according to its article 3, advertising that violates human dignity is illegal.⁴⁵

“a) Advertising that violates the dignity of the person or violates the values and rights recognized in the Spanish Constitution, especially those referred to in its articles 14, 18 and 20, section 4. The above provisions will be understood to include: advertisements that present women in a humiliating manner, either using their body or parts directly as a mere object unrelated to the product that is intended to be promoted, or their image associated with stereotypical behavior that violates the foundations of our legal system, helping to generate the violence referred to in Organic Law 1/2004, of December 28, on Comprehensive Protection Measures against Gender Violence and Organic Law 10/2022, of September 6, on the comprehensive guarantee of sexual freedom . Likewise, any form of advertising that contributes to generating violence or discrimination in any of its manifestations against minors, or promotes stereotypes of a sexist, racist, aesthetic, or homophobic or transphobic nature or by reasons of disability, as well as that which promotes prostitution”⁴⁶

In the event of illicit advertising, those who consider themselves affected can demand that the advertising cease and sue for damages. As in other countries, self-regulation plays an active role in Spain, through an organization that detects advertisements that may violate human dignity. Despite this, there are companies that choose to risk sanctions, since the

⁴⁴BAUER Camille, « *Ethique et liberté d'expression publicitaire* » ; LEGICOM 1996/1 (N°11), PAGES 36 A 40, Ed. Victoires Editions, ISSN 1244-9288, DOI 10.3917/legi.011.0036, translated by the author of this article.

⁴⁵Articles 14, 18 and 20 of the Spanish Constitution

⁴⁶<https://www.boe.es/eli/es/l/1988/11/11/34/con>

controversy that illicit advertising can generate in some cases is greater than the visibility they could achieve with less provocative campaigns.⁴⁷

For its part, in France, an important norm that regulates freedom of expression in advertising is Decree 92-280⁴⁸, which states:

“Advertising must comply with the requirements of truthfulness, decency, and respect for the dignity of the human person. It cannot affect the credit of the State (art 3).

“Advertising must be free of any discrimination based on race, sex, nationality, disability, age or sexual orientation, any scene of violence and any incitement to behavior harmful to health, the safety of people and property or the protection of the environment. (art 4).

“Advertising must not contain any element that could offend the religious, philosophical or political convictions of viewers.” (Art 5)

“Advertising must be designed considering the interests of consumers. Any advertising that implies, in any form, false allegations, indications or presentations or that misleads consumers is prohibited” (art 6).

“Advertising must not cause moral or physical harm to minors. To this end, you must not:

1° Directly incite minors to purchase a product or service by exploiting their inexperience or gullibility”; 2° Directly incite minors to persuade their parents or third parties to purchase the products or services in question; 3°. Exploit or alter the special trust that

⁴⁷Direct Marketing Editorial “28 examples of censored advertising”, 07-15-21, in: <https://www.marketingdirecto.com/marketing-general/publicidad/25-ejemplos-de-publicidad-censurada>

⁴⁸Decree n°92-280 of 27 March 1992 pris pour l'application des articles 27 et 33 de la loi n° 86-1067 du 30 septembre 1986 et fixant les principes généraux définissant les obligations des éditeurs de services en matière de publicité, de parrainage et de télé-achat

minors have in their parents, teachers or other people; 4th. Presenting minors without reason in a dangerous situation.” (art 7).⁴⁹

6. How can the legal and deontologically produced commercial message help protect human dignity, the founding principle of the entire human rights system?

There are two fundamental aspects that cannot be ignored by those who make up the advertising industry: the changing and competitive scenarios in which they conduct their activity, and the responsibility that falls to them for the effects that their messages have on society.

For some time now, the concepts of Corporate Social Responsibility (CSR) or Sustainability have begun to be taken increasingly into account by consumers when choosing a service or product. For this reason, companies have begun to take care of the reputation of their brands, conducting more careful communication of current standards and ethics, added to samples of respect towards competition and consumers, whether they are inside or outside the “target,” of the specific advertising message in question.

Thus, we speak of “Responsible Advertising” as that which is created based on principles that are: legality, truthfulness, honesty, commercial loyalty, decency, and social responsibility, that is, complying with the law and respecting the fundamental values of society. in a broad sense.

⁴⁹ <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000346165>, translated by the author of this article.

But advertising also exerts an influence on society due to its key role in financing the media. We cannot ignore that advertisers can pressure the media about what information to provide to the public.

“Sometimes, advertisers may pressure journalists not to write about controversial topics or may try to influence what they say. This can affect freedom of the press. “Advertising can also affect the way women, girls and minorities are represented”⁵⁰.”

Since the end of the 19th century, three functions have been detected that the media (first the written press, then cinema, television and then digital media) exercise on society with respect to consumption: education for consumption, the implementation of a social imaginary and the normalization of merchandise, as the French sociologist Anthony GALLUZZO explains it to us⁵¹

However, GALLUZZO also tells us, advertising is a factor that combines with others to explain the level of sales and consumer behavior. There are other variables, what is called “marketing mix” that must also be considered, although they are less noticeable, such as the play of forces with the distributor, promotion techniques, price, packaging, all these factors condition the reception of the advertising message, as well as the socialization of consumers and the ideas and values rooted in their culture (social and demographic factors).⁵²

⁵⁰“Understanding *and evaluating the world of advertising*,” Paulinanezinvestigacion, 11-19-2020, at <https://medium.com/@paulinanezinvestigacion/entender-y-evaluar-el-mundo-de-la-publicidad-f59014cde90f>

⁵¹GALLUZZO Anthony, *La fabrique du consommateur. Une histoire de la société marchande*, Ed. La Découverte, Paris, 2020, 2023, p. 94, translation of the author of this article

⁵²GALLUZZO Anthony, pages 165-166.

“Likewise, *with media diffusion, a well-perceptible national and international consumer culture develops certain brand names replace the names of objects and some slogans are transformed into proverbial phrases.*”⁵³.

As we pointed out, the digital era has brought profound changes in the design of the advertising message. The advertising model on the Internet and social networks is programmatic purchasing⁵⁴ that consists of “*an automatic process that allows you to buy space on different media and web pages from the same control panel, searching for specific audiences and users*”⁵⁵.

But society has become more critical of the advertising messages that companies present. Gender equality and the protection of children and older adults are key issues today⁵⁶.

Companies had to react to this reality and changed their advertising strategies. Instead of shooting messages to large audiences from mass media to large audiences, there is now the possibility of reaching specific niches with greater purchasing potential. New concepts and strategies have appeared in digital marketing that respond to this new reality, such as “hyper segmentation.” Companies have learned to know their customers better, detect their needs and interests and thus create specific segments and reach them with relevant messages⁵⁷.

⁵³GALLUZZO, p. 106.

⁵⁴Same QAGLIA

⁵⁵ROCA MARTINEZ Claudia “*What is programmatic purchasing? Everything you need to know,*” IEBS Digital School, 07-07-23, at: <https://www.iebschool.com/blog/que-es-la-compra-programatica-publicidad-online-social-media/>

⁵⁶FORERO Tatiana, “*Stereotypes in advertising: What they are, what they are and how they have evolved*”

09-21-19, in

<https://rockcontent.com/es/blog/estereotipos-en-la-publicidad/>

⁵⁷Ditto FORERO

“Content marketing,” with techniques that seek to attract consumers with valuable content instead of overwhelming sales messages, is an example. Increasingly, companies allocate part of their budgets to generating content that resolves doubts and provides relevant information for their potential clients.⁵⁸

Companies had to abandon prejudiced stereotypes in the face of a more critical and demanding society⁵⁹. The use of stereotypes in advertising is old. Stereotypes in advertising are ideas used to represent diverse groups of people. Since the beginning of the evolution of advertising activity, they have been detectable. According to the RAE dictionary, a stereotype is an “image or idea commonly accepted by a group or society with an immutable character⁶⁰.”

Although there are stereotypes that are not offensive⁶¹, because they do not represent a culture, sex, or belief, in general, the most common stereotypes have a negative connotation because they are associated with the dissemination of prejudices about the population and their roles in society⁶².

Stereotypes are based on false or simplistic conceptions about groups of people, which do not consider the particularities of individual people. They simplify the characteristics and ignore the particularities of

⁵⁸LOWPOST, “*How does advertising influence people?*,” 05-31-16, in:

LOWPOST <https://lowpost.com/influencia-publicidad/>

⁵⁹Idem FORERO

⁶⁰<https://www.rae.es/desen/estereotipo>

⁶¹For example, the chef with the mustache

⁶²PERUVIAN INSTITUTE OF ADVERTISING, “*7 common examples of stereotypes in television advertising*”, 06-26-2020, at: <https://www.ipp.edu.pe/blog/estereotipos-en-la-publicidad/>

people; They segment audiences broadly based on incorrect prejudices and reinforce predetermined social roles.⁶³

In the case of advertisements aimed at children, repetitions of gender stereotypes (boys “warriors” and girls “princesses”) were common.

But in the digital age, the risk of using stereotypes in advertising that generated "segmentation shortcuts" and communicated wrong messages to audiences that were not very receptive or directly reactive against them became more evident. In Argentina, in the last five years, advertising directed towards a neutral audience (without gender distinction) has increased considerably. In the childhood and adolescent audience, they went from 40% to 75%.

The companies detected that the social climate demanded advertising that did not associate certain products with a certain gender, to promote childhoods and adolescence that grow up without stereotypes.⁶⁴ This has seen how some companies have modified the use of stereotypes in advertising. Instead of repeating them, advertisements now show different lifestyles, expressions of reality and potential promoters of greater social inclusion.⁶⁵

In Argentina the Advertising Self-Regulation Council (CONARP), made up of the Argentine Chamber of Advertisers (CAA) and the Argentine Advertising Association (AAP), also created a “Code of Ethics and Advertising Self-regulation”, made up of a set of standards that seek to guide companies and agencies towards the concept of “Responsible

⁶³Ditto FORERO

⁶⁴SZULIEWICZ Talía, “What *advertisements tell us about gender stereotypes in childhood*,” AMBITO, 02-27-22, at: <https://www.ambito.com/informacion-general/genero/que-nos-dicen-advertising-stereotypes-childhood-n5380800>

⁶⁵Idem FORERO

Advertising”, which respects the sensitivity of consumers. Self-regulatory organizations have even argued that respecting deontological rules would be “ *the best defense of the right to freedom of commercial expression, by making the intervention of regulatory organizations unnecessary*” and that “ *self-regulation, between the State and the market* ”, is the most appropriate tool to guarantee Responsible Advertising from within the industry, stimulating the development of its own criteria, and in accordance with its ethical values⁶⁶. ”

Commercial discourse with its massive reach and persuasive character generates mechanisms of identification and association, through symbolic engineering work, via image and representation⁶⁷. So,

“Thanks to the proper use and implementation of the aforementioned characteristics, the situation of human rights within society can show significant changes for the benefit of different groups and people in vulnerable situations”⁶⁸.”

As the preamble of the “Code of Ethics and Advertising Self-Regulation”⁶⁹ of the CONARP (Advertising Self-Regulation Council) of Argentina points out:

“Respect for the freedom and dignity of the human person must be the duty of every professional directly or indirectly related to social communications. This obligation commits him to become aware of his role in society and to assume the defense of the highest moral and civic values, not exhausting the messages in the appearance of things and arriving, instead, at their essence”⁷⁰.

⁶⁶CLARIN, “In search of responsible advertising,” 04-14-2015, in: https://www.clarin.com/marketing-y-publicidad/consejo-publicitario-agencias-publicidad-responsable-autoregulacion_0_HJOXpsKvQe.html

⁶⁷Idem GALLUZZO, p. 167.

⁶⁸Idem GARCIA HUERTA

⁶⁹<http://www.conarp.org.ar/codigo.html>

⁷⁰<http://www.conarp.org.ar/codigo.html>

Self-regulation in the advertising sector may prove to be a feasible and effective instrument for preventing conflicts and avoiding damaging the reputation of companies and of the advertising industry itself. But the role of Law in this issue continues to be essential.

At the international level, the initiatives of the “Working Group on the issue of human rights and transnational corporations and other companies” (also known as the “Working Group on business and human rights”), which was established by the Council of Human Rights in 2011. Its mandate is to promote, disseminate and apply the [Guiding Principles on Business and Human Rights](#)⁷¹. The group is also mandated to exchange and promote good practices and lessons learned on the application of the Guiding Principles, and to evaluate and make recommendations thereon.”⁷²

From this group the “Guiding Principles” have emerged. *Implementation of the United Nations framework to “protect, respect and remedy”*⁷³ which applies to all States and all companies and is structured in three pillars.

Pillar number 1 refers to the state's duty to protect human rights, which entails a general obligation to protect against human rights violations committed in its territory and/or jurisdiction by third parties, including companies. This involves responding appropriately to prevent, investigate, punish, and remedy such abuses through appropriate policies, regulatory activities, and prosecution. Pillar II addresses the responsibility of companies to respect human rights and address negative consequences on

⁷¹<https://www.ohchr.org/es/publications/reference-publications/guiding-principles-business-and-human-rights-implementing>

⁷²<https://www.ohchr.org/en/special-procedures/wg-business>

⁷³UNGP, “Implementing the United Nations “Protect, Respect and Remedy” framework, p. 1, in: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_sp.pdf

human rights in which they have any involvement. The proposed mechanism to fulfill this responsibility is human rights due diligence, which makes it possible to identify, prevent, mitigate, and respond to the negative consequences of its activities on human rights. Finally, pillar III comprises a group of principles focused on access to reparation mechanisms.

In the field of advertising, such principles can be applied in the following way. Firstly, with respect to the “Principle to Protect” it can be interpreted that it is up to the State to prevent abuses and violations of human rights by everyone, including companies, through appropriate measures, regulatory activities, and judicial action. The State must go even further and promote public policies and laws that guarantee the promotion of human rights through advertising companies. Regarding the “Principle of Respect” it is directly up to companies to respect human rights, this implies acting with due diligence to not violate the rights of third parties and repair the negative consequences of their activities. In the field of commercial advertising, they must corroborate that their commercial messages do not affect the rights of people or competitors and that they do not generate a harmful effect on society. The “Principle of Remedy” implies access by the victims to effective means of reparation, both judicial and extrajudicial.

Indeed, advertising that complies with the standards and is created and implemented following ethical principles of respect for human dignity can collaborate in the elimination of discrimination and the reduction of prejudices and stereotypes related to gender, racial or sexual orientation and identity.⁷⁴

⁷⁴Idem, GARCIA HUERTA

UN Women, the United Nations organization dedicated to promoting gender equality and the empowerment of women, has promoted a partnership with the “Unstereotype Alliance ” to collaborate to eradicate harmful stereotypes in advertising and in the media to contribute to the creation of a more equal world and empower people in all their diversity (gender, class, age, ability, ethnicity, religion, sexual orientation, language, education, etc.), using advertising as a powerful tool to drive positive change.⁷⁵

The Argentine chapter of “Unstereotype *Alliance* ” was joined by UN Women together with allied organizations, such as “Women in Advertising”, the “Argentine Chamber of Advertisers”, and large mass consumption brand companies in 2022, after establishing this initiative in Mexico , Brazil, United Kingdom, Nigeria, Turkey, Kenya, South Africa, United Arab Emirates, India, Australia and Japan.⁷⁶

María Noel VAEZA, regional director for the Americas and the Caribbean, UN Women pointed out in 2022:

"Confronting gender stereotypes and biases is an urgent step to fight against the inequalities and discriminations that derive from a macho and sexist culture that puts women's rights and opportunities at risk. The Alliance against Stereotypes is a powerful tool to call on the business sector

⁷⁵For more information about the Unstereotypealliance, see: www.unstereotypealliance.org.

⁷⁶BUDASOFF Ariana, “How UN *Women works together with large companies so that advertisements show more diversity and less sexism*,” INFOBAE, 8-6-22, at: <https://www.infobae.com/americas/soluciones/2022/06/08/how-un-women-works-together-with-large-companies-so-that-advertising-shows-more-diversity-and-less-sexism/>

to use the power of advertising and communication in favor of positive cultural change that improves the lives of women and girls⁷⁷.

Concluding thoughts

It is therefore key to put aside the adversarial conception that contrasts the regulation of advertising from the perspective of human rights with the full exercise of freedom of commercial expression.

Compliance with standards positions companies as responsible actors in their role in society and in the market. This generates a positive image of your products, services, and brands, which results in increased sales.

Companies and advertising agencies must continue to be aware that an exercise in “Responsible Advertising,” which works positively in the promotion of human rights, will generate as a side effect an improvement in their corporate image and, consequently, more profits. This implies not only not violating the norms and protection of human rights, but also promoting respect and tolerance in advertising messages.

From the Law we find that the development and progress achieved both at the level of international organizations and at the level of regional and constitutional courts in distinct parts of the world, provide us with

“UN Women launches the Argentine national chapter of the Unstereotype Alliance to eradicate harmful stereotypes in Argentine advertising,” 04-26-2022, at: <https://lac.unwomen.org/es/stories/noticia/2022/04/un-women-launches-the-argentine-national-chapter-of-unstereotype-alliance-to-eradicate-stereotypes-in-advertising>.

essential guidance to use when analyzing and interpreting the exercise of freedom of commercial expression from a human rights approach.