

ABUSIVE ADVERTISING AND HUMAN RIGHTS IN ARGENTINA

Martina L. Rojo¹

Abstract

Companies face great reputational risks if their trademarks and products are associated with hateful or harmful content through "*programmatic advertising*". regulatory reforms addressed at removing harmful content may have implications for human rights (especially free speech) and impacts on the the rule of law because they require Internet platforms to decide what content is harmful without judicial overview. The standards that shall guide the creation of a piece of advertising to prevent its abusiveness are related to the respect of socio cultural characteristics, sensibilities to exaggeration and to bad taste and general levels of social tolerance.

Keywords

Human rights. Abusive advertising. Argentina.

Summary

1. Introduction. 2. General regulation of advertising in Argentina. 3. Abusive advertising in Argentina. 4. Some recent exemples. 5. Conclusions

¹ Full Professor. Universidad del Salvador – Argentina.

1. Introduction

In this important conference on “Human rights: an interdisciplinary approach” organized by the “Humanities and Rights Global Network” at the Università degli Studi di Roma Tor Vergata we presented some interdisciplinary concepts that link “Law and Marketing”, related to advertising, and which are omnipresent symbols of current transnational culture.

As we know, the concept of "transnational culture" grew in the late 80s and early 90s to refer to the “*direct outcome of the internationalization of production and accumulation promoted through standardized development models and cultural forms*”. And clearly, “transnational culture” is related to consumption.

Companies face great reputational risks if their trademarks and products are associated with hateful or harmful content through “*programmatic advertising*” (meaning automated ad placement algorithms). This harmful online content may adversely impact on human rights, such as through the incitement of discrimination, violence or hate speech.

But also, regulatory reforms addressed at removing harmful content may have implications for human rights (especially free speech) and impacts on the the rule of law because they require Internet platforms to decide what content is harmful without judicial overview.²

Moreover, as we have recently seen, the possession and use by companies of private user information, which is necessary for this “*programmatic advertising*”, also has implications for human rights. Internet platform companies and those that advertise on them (which is almost all consumer-facing companies) need to consider how to ensure that their

² ASIL, Online advertising, human rights and the rule of law, at: <https://www.asil.org/event/online-advertising-human-rights-and-rule-law>

online advertising activities are not linked to adverse human rights impacts.

Advertising is the act of getting consumers' attention through media, such as the Internet, direct mail, television, radio, and print. There exist various ways in which advertising can be abused. Business should keep in mind the respect of the rights of consumers and consideration to the cultural environment when launching advertising. However, not all businesses play fair and advertise their products ethically.³

Also “transnational advertising” is the outcome of the “transnational marketing logic” where global advertising campaigns (meaning one single advertising message used in all countries where the product is distributed) are seen as more effective and cost reducing for the businesses.

Related to more vulnerable consumers, for example children, studies carried out in countries such as Venezuela and Mexico explore the relationship between television content, advertising and children's attitudes. Children know more about television personalities than about national heroes and recognized more trademarks for snacks, soft drinks, chewing gum than national symbols or a map of their country⁴.

Advertisements with content which violates the rules of civic coexistence, the preservation of natural environments, disrespect for the dignity of a person, violation of the rights of the children, teenagers, and women, are unacceptable forms of publicity. As well is unacceptable advertising which violates norms or uses linked to the preservation of physical and mental health or to the respect for morals and good customs.

³ MERTES Alyssa, “12 Offensive Advertisements Your Business Can Learn From”, 03-05-2021, at: <https://www.qualitylogoproducts.com/blog/12-offensive-advertisements/>

⁴JANUS Noreen, “Advertising and Global Culture”, available in: <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/advertising-and-global-culture> Article copyright Cultural Survival, Inc (visited 01-09-21)

Relating to gender the problem arises, for example, in the ads of household cleaning products that show mostly women cleaning, implying that the real work of a woman is cleaning the house. These ads released in TV, print and in social media, elicit outraged responses. Relating to males, some ads target men inciting them to act in “manly ways” or to “become a man” with the recognition of non-sensitive or aggressive as the only way males should behave behavior (trying to impose ideas such as “men do not cry”, for example).

The challenge is made even harder by the fact that market practices are constantly shifting, with “influencers” and “endorsers” complementing traditional channels of advertising. Technology, especially social media, changed the way marketing operates in advertising. The effects of this changes in vulnerable persons such as children or the elderly must be considered.

These ideas allow us to affirm that the relationship between advertising, culture, and the protection of the rights of the persons, especially the more vulnerable people, is something of great social importance.

In some countries, such as Brazil, these issues have been addressed for quite some time. However, in Argentina legal studies and regulation of advertising that targets vulnerable consumers or violates human dignity and human rights is of recent creation.

2. General regulation of advertising in Argentina

Argentina does not have a specific law on advertising. On the contrary there are different regulations that affect advertising in our country, such as the Commercial Loyalty Act, the Consumer Protection Act, and the Trademark Law.

Several industries are also subject to specific laws that govern their advertising and/or have specific provisions that apply in the advertising codes, such as alcohol, tobacco, or food. Also, self-regulation plays an

important role in the Argentine system. With the CONARP⁵ as main self-regulator, the industry conduct code applies to all kinds of advertising.

The advertising phenomenon had not been regulated in a comprehensive way in Consumer Defense Act 24.240 of 1993. Comparative advertising, where the question of commercial loyalty and possible deception of the consumer comes into play; nor abusive advertising, which infringe the system of values prevailing in a society; nor subliminal advertising were regulated in this act of 1993.⁶

There were other laws which regulated some aspects of advertising, such as the Commercial Loyalty Act (Law 22.802, art. 9, misleading advertising later Decree 274/19) or the Audiovisual Communication Services Act (Law 26.522), also we had other laws dealing with special sectors of advertising activity, such as those intended for the promotion and marketing of alcoholic beverages (Law 24.788), cigarettes (Law 26.687) and medicinal products.

Article 4 of the Audiovisual Communication Services Act defines advertising as: "*Any form of message that is broadcasted in an audiovisual media service for a similar remuneration or consideration, or for the purpose of self-promotion, by a public or private undertaking or a natural person in connection with an industrial, craft or professional commercial activity with a view to promoting, for remuneration, the supply of goods or services, including property, immovable property, rights and obligations*".

The source of this concept is found in the European Directive N° 65/ and the Audiovisual Communication Services Act differentiates also non-traditional advertising (NTP) as "*any form of audiovisual commercial*

⁵ Consejo de Autoregulación publicitaria, www.conarp.org.ar

⁶ BIANCHI Lorena, "*La abusividad de las publicidades que incitan un consumo insustentable afectando los bienes ambientales*", Revista de Derecho del Consumidor - Número 3 - Noviembre 2017, 15-11-2017, Cita: IJ-CDLXXXIV-39

communication consisting of including or referring to a product, service or trademark in a manner that appears on a program, in return for similar remuneration or consideration".

3. Abusive advertising in Argentina

A fundamental advance on this topic in Argentina was introduced by the National Civil and Commercial Code in 2015.

Article 1101 c) of the National Civil and Commercial Code of Argentina prohibits abusive advertising, even when it does not define it.

“Abusive advertising” has been characterized as advertising that is based on provoking emotions of fear, discrimination or to exacerbate beliefs or anxieties, or that appeals to dangerous conduct discrimination (directly or through subliminal mechanisms).

In Argentina, there is no law that establishes a general definition for abusive law, notwithstanding it has been said that it is advertising which “*violates basic principles of the prevailing value system encourages social discrimination and violates the principle of social, economic and cultural equality of the sexes*”⁷ That means that abusive advertising is “*advertising which attacks the system of values prevailing in a society*”⁸.

The doctrine in Argentina has considered that abusive advertising mainly violates the right to dignified and equitable treatment of the

⁷BRUN Emiliano, “La Publicidad Prohibida. A propósito de su incorporación en el Código Civil y Comercial”, Diario Consumidores y Usuarios N° 131 – 12/09/2017 DPI, en: <https://dpicuantico.com/sitio/wp-content/uploads/2017/09/Brun-Consumidor-12.9.pdf> (visited 01-09-21)

⁸ BIANCHI lorena, “La abusividad de las publicidades que incitan un consumo insustentable afectando los bienes ambientales”, Revista de Derecho del Consumidor – N° 3 - November 2017 15/11/2017, IJ-CDLXXXIV-39 (visited 01-09-21).

consumer, guaranteed by article 42 of the National Constitution, article 8 bis of the Consumer Defense Law, arts. 1097 and 1098 of the Civil and Commercial Code of the Nation and the set of rights, principles and values recognized by the National Constitution and international human rights treaties with constitutional rank in accordance with article 75, Paragraph 22 of the National Constitution.⁹

The Code in Article 1102, states that consumers affected by the advertising prohibited in the preceding rule, or those who are legally legitimate to do so, may request the judge to stop the illegal advertising or to put in place corrective notices and, where appropriate, of the conviction.

And if the advertisement prohibited by the Civil and Commercial Code is also prohibited by other rules (general or particular for some types of goods or services) which also expressly provide or allow for other judicial actions or administrative complaints - aimed at their cessation and punishment and compensation for the damage caused by their dissemination.

The concept of abusive advertising enshrined in art. 1101 c) is broad.

Due to the process of “constitutionalizing” and “conventionalization” of Private Law, the rule does not exhaust itself; it must be integrated, not only with constitutional principles, but also with those principles arising from Human Rights Treaties.¹⁰

⁹ BAROCELLI, Sebastián, “La regulación de la publicidad en el Código Civil y Comercial”, Revista de Derecho del Consumidor – N° 1 – November 2016, IJ Editores, 30/11/2016

¹⁰ VILA ORTIZ Clara, “La publicidad abusiva en el Código Civil y Comercial y la incidencia de los Derechos Fundamentales del Consumidor en su configuración”, Revista de Derecho del Consumidor – N° 10 - April 2021, 29/04/2021, IJ-MCXLIH-429.

In abusive advertising, the right to fair and dignified treatment of the consumer, guaranteed by the Argentine Constitution in article 42, art. 8 bis of the LDC and art. 1.097 and 1.098 of the CCC and the set of rights, principles and values recognized by the National Constitution and international human rights treaties with constitutional rank according to art. 75 inc. 22 CN is violated.

There are also various cases of abusive advertising that can be found in art. 72 of Act 26522, Audiovisual Communication Services Act. This article establishes that those who produce, distribute, broadcast or in any way obtain benefits for the transmission of advertising shall ensure compliance with the following legislation:

- a) Law N° 26.6873 on tobacco advertising
- b) Law N° 24.788 on combating alcoholism.
- c) Law No 25.280, approving the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.
- d) Law No 25.926 on guidelines for the dissemination of health-related topics.
- e) Law No 26.485 on comprehensive protection to prevent, punish and eradicate violence against women in areas where they develop interpersonal relations.
- f) Act No 26.061 on the comprehensive protection of the rights of children and adolescents and their complementary and/or amending legislation

- g) laws and regulation of health protection.
- h) laws and regulation preventing discriminative behavior.

We may characterize as abusive, advertising that impairs human dignity or induces behavior harmful to the environment or to the health of individuals and the integrity of children or adolescents. And finally, those advertisements which, without being listed in the foregoing cases, are contrary to the dignity of the human person and to respect for his or her most personal rights may also be regarded as abusive advertising.

Authors include as abusive, what is known as “subliminal advertising”, also prohibited by Audiovisual Communication Services Act (Law 26.522), in art. 81° inc. f): “*Subliminal advertising shall not be issued, understood as meaning that it is capable of producing unconscious stimuli presented below the absolute sensory threshold*”. The characteristic of this type of advertising is that it acts on the public or recipient without being consciously perceived, thus affecting the principle of the acceptability of the advertising message and the right to recognize advertisements.

4. Some recent examples

In 2004, a yogurt advertisement by one of the biggest national food companies (SANCOR) showed child tricking his mother by paying a person of short stature (person with dwarfism) to eat what he doesn’t like so he can directly eat his dessert (such yogurt). The ad caused a wave of complaints and controversies by parent’s associations. So, Alicia Pierini, ombudswoman from Buenos Ares City asked the company to remove the ad from the air based on the commercial as discriminatory and that it

"*highlighted negative values*" such as lies and bribes. It was also said that the ad showed a minor in illicit behavior, which is contrary to the legislation.¹¹

In 2005 a cellular phone company called CTI published an ad which aimed to stimulate and promote cell phone consumption among children. It showed a photograph of a child with a cell phone and with a title at the top that said: "YOU MAY NOT DO YOUR HOMEWORK. BUT YOU CAN'T BE WITHOPUT YOUR CTF".

In 2018, a federal judge ordered the suspension of the "Colorados" ("Redheads") campaign from Burger King on the grounds that it was discriminatory and caused a "*deterioration of the personal image*" of those with red hair in front of others. It was an advertisement based on a somewhat generalized superstitious believe in Argentina which states that red haired people bring bad luck. The ad invited red haired persons to go to Burger King restaurant and to buy a hamburger and they will take another one as a gift. The judge accepted a precautionary measure and ordered that "*immediately*" the company Fast Food Sudamericana S.A. (the company that has the rights for the development of the Burger King brand in Argentina) to suspend the advertising campaign in all types of media. The lawsuit was initiated by lawyer Matías Daniel Arregger a redhaired person himself. He said that basic elementary rights and principles that make human condition, personality, moral integrity, honor and equality without discrimination were violated by the ad. In this case, the content of the advertising was illegitimate because it was based on the physical characteristics of persons, and it linked such characteristics to a situation of mockery that make reasonable the affectation of the human rights for

¹¹ <https://www.lanacion.com.ar/sociedad/piden-que-se-retire-un-aviso-televisivo-nid617011/>

stigmatizing. (ARREGGER, MATIAS DANIEL c/ FAST FOOD SUDAMERICANA SA s/AMPARO¹²

In the Summer of 2020, an advertisement for a new beer variety of the Brahma trademark generated strong comments of repudiation on social networks that characterized the spot as "*machist*". Faced with the rejection, the brewery decided to remove the advertisement and issued a statement asking "apologies" before any intervention of the authorities.

A voice in off said: "*Beer, we all like it, but you, you think it's bitter. And you sit outside, sipping on colorful drinks. Don't despair. This summer brings you Brahma Lime: a Brahma with a touch of Lime, less bitter*", while a young woman in a bathing suit is seen drinking juice on the beach among a circle of young men who are drinking beer. Then another young woman takes out her glass and several other persons take the lady by the arms to drag her to the sea against her will, making her walk along a footbridge of people who push her while opening her way to the sea, where a man receives her while the voice on off says: "*Come on, my queen, it's time for your beer baptism!*" and in a sort of initiation ritual, the man inside the sea takes the waist of the young woman and submerges her under the water while making her take a sip of the beer.

This ad caused big controversy, for example the ombudsman of the Buenos Aires province said: "*These advertising is not only discriminatory, but it also deepens the epidemic of alcoholism in young people*". For multiple criticisms it received, the beer company Brahma retired the ad and published an statement saying: "*Regarding our Brahma Lime commercial, from Brahma we apologize. On the way to changing old models there are right and wrong. And this was a mistake.*" (see <https://www.lanacion.com.ar/sociedad/levantan-publicidad-brahma-criticada-machista-empresa-pide-nid2323351/>).

¹² Poder Judicial de la Nación JUZGADO CIVIL Y COMERCIAL FEDERAL 4, Judge José Luis Cassinerio, case 64047/2018

5. Conclusions

Two important norms act in Argentina as lighthouses to protect human dignity, and they are the guides to distinguish legal and illicit advertising:

Article 8 bis of Act 24240 which states: *“Providers shall ensure conditions of care and dignified and equitable treatment for consumers and users. They should refrain from engaging in behavior that places consumers in embarrassing, humiliating or intimidating situations.”*

And article 1098 of de CCyCom: *“Suppliers must give consumers fair and non-discriminatory treatment. They may not differentiate based on patterns contrary to the constitutional guarantee of equality, in particular that of the nationality of consumers. Providers shall ensure conditions of care and dignified and equitable treatment for consumers and users. They should refrain from engaging in behavior that places consumers in embarrassing, humiliating or intimidating situations”.*

But generally speaking, the standards that shall guide the creation of a piece of advertising to prevent its abusiveness are related to the respect of socio cultural characteristics, sensibilities to exaggeration and to bad taste and general levels of social tolerance.