

## Constitutional Protection of Commercial Advertisements

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### Abstract

Broadly speaking, every presentation for the promotion of products, services or ideas would fall within the meaning of advertising. Although, advertising as a concept is a product of the commercial age, it was in vogue in one form or other throughout centuries. Whether it was a product to be sold, a service to be offered or a precept to be spread, some propagatory means to reach the masses were necessary. However, the form and the content varied according to the audience targeted the advertisements but attempts were always made to use to spot light the message. Self expression or self— advertising is a basic instinct of man as well as other animals. Birds sing, flowers bloom spreading fragrance, poets compose poems, painters paint all for self-advertisement. These are not purposeless exercises by them. Often the motivation is self -promotion by attracting others. Similarly businessmen enjoying the freedom of speech and publicize their goods or services and basic purpose of this initiative is self promotion for commercial gain.

Question arises whether advertising or 'commercial speech ' enjoys the protection of Constitution. For advertisers, part of the problem is that it remains difficult to determine at times what constitutes "Commercial Speech ".The courts attempt to balance the right of the individual to receive a message with the right of an individual or company to send it. In this article an attempt has been made to addresses issues that surround the constitutional protection accorded to commercial advertisements

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## Introduction

From the standpoint of advertising information, sometimes known as the "market competition" model, the economic role of advertising is to provide information to the market place. This model assumes that consumers are quite active, seeking new products and brands; they look to advertising or information and are more price sensitive, which forces advertisers to be more careful about how much they charge for their products. This holds price in check and encourages competition as more companies enter the marketplace, using advertising to create awareness for their offerings.

Advertising is essentially to induce consumption, to make people buy things they do not want<sup>2</sup>. In recent years, the advertising industry has grown by leaps and bounds. The deeper problems connected with advertising come less from the unscrupulousness "deceivers" than from our pleasure in being deceived, less from the desire to seduce than from the desire to be seduced.<sup>3</sup>

Question arises whether 'advertising' or commercial 'speech' enjoys the protection of constitution. Whether the fundamental right to freedom of speech and expression include the right to advertise? Or does traders have right of commercial speech?

Rabindra Nath Tagore wished that stream of reasons should have run all through our land, and the mind should have been without fear and lead forward "into ever widening thought and action". The framers of the Constitution felt inspired with his vision, and therefore, decided to ensure "Liberty of thought, expression, belief and faith....." for all citizens. They gave to the people of India the liberty of thought and discussion, and distinct right to the freedom of speech and expression<sup>4</sup>. This freedom is intended to preserve their right to hold, express and disseminate opinion that is right to say, or to write what they feel. Expression means communication, dissemination, and propagation: including "the right to express one's conviction and opinions freely by word of mouth, writing, printing, painting, and feeling or by any other manner". It thus includes the expressions of one's ideas in any language and through any communicating medium, demonstration or representation such as film, a tape and the like. Its essence is communication with one and all, this is publication and

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<sup>2</sup> Jawaharlal Nehru quoted in *Kyon Na Azmayein? A brief history of Indian advertising* (Para 2), Vikram Doctor.

<sup>3</sup> Daniel J. Boorstin, *The image: A guide to Pseudo - Events in America*, 6 (Introduction), 1961.

<sup>4</sup> Article 19(1) (a)-"All citizens shall have right to freedom of speech and expression".

transmission. Therefore, freedom of expression includes the freedom to talk, converse, communicate, publish or propagate ideas, and their publication and circulation.<sup>5</sup>

Article 19 is a very important article in the Constitution of India. The right to freedom embodied in this article is the product of compromise between the two extremes. When India became independent, there was a demand for the grant of an unfettered freedom. The people of this country were sick of restrictions imposed by the Government during the British days and they would like to finish them all. However, there was also a realization that India was an infant state and she could grow only if there was stability. That was not possible if anyone was allowed to do whatever he wanted to do. It was realized that while people must be given freedom, reasonable restrictions must be imposed on that freedom. It is for this reason that the Drafting Committee of the Constitution chooses a golden mean between the two extremes and the result was the present articles which were later on amended in the year 1951.<sup>6</sup>

Article 19 in the present form, provides that citizens shall have the right to freedom of speech and expression, to assemble peaceable and without arms, to form associations or unions, to move freely throughout the territory of India, to reside in any part of the territory of India, to acquire, hold and dispose of property and to practice any profession or to carry on any occupation, trade or business. However, the right to freedom of speech and expression, shall not affect the operation of any existing law or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of that right in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to offence.<sup>7</sup>

The freedom of speech and expression protects opinion, although wholly irrelevant, unpopular and unorthodox. It ensures to the minority and non-conformist an unimpaired right to dissent and uninterruptedly to debate, discuss and discourse; and give his ideas a free play. The state is not the guardian of the public mind; neither can it stifle opinion, speech and writing. It must allow unrestricted flow of ideas and ideologies. It is none of its duty to go out of its way in affording protection to the minority opinion against any idea, ideology or doctrine, even if it might be false and dangerous. The people must be given the permission to differ, and to dissent. They should be left to find the truth themselves. It must permit citizen to express his thought or feeling through any medium of his choice by words of mouth,

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<sup>5</sup> Per Govinda Menon J. in K. A. Mohammad Khan v. State of Kerala AIR 1964, Ker. 104 (105)

<sup>6</sup> Ibid.

<sup>7</sup> V. D. Mehajan, Constitutional History of India and Nationalist Movement Part- 11 9, ed,P.75

written words, visuals, device, a newspaper column, a film, or a photograph. The media of expression include advertisement which is extra commercial demonstration<sup>8</sup>.

The commercial advertisements have occupied central stage in the promotion of sale of goods or services. These commercial advertisements were put to use ever since human beings felt need to market their goods. However, the form of these advertisements changed with the progress in technology. It transformed from original drumbeats to highly technology oriented television commercials and now the internet commercials. Whatever be its form and the medium through which these commercials are expressed, the cardinal question for a constitutional lawyer remains the same i.e., whether these commercial advertisement qualify for speech and advertisements qualify for speech and expression as understood in Art 19 of the Indian Constitution.

#### American Experience

The United States Supreme Court found for the first time an opportunity to discuss constitutional validity of the commercial advertisements in *Valentine, Police Commissioner of the city of New York v. Christensen*.<sup>9</sup> The court gave free hand to Governments to regulate advertisements. It was laid down that there are no constitutional restrictions on the Government if it wishes to control advertisements. However, this opinion was later on overruled in *Commara v. United States*<sup>10</sup>. This court called the opinion in valentine as offhand which has not survived reflection and lay down that the profit motive should not be the criterion to uphold the constitutionality the statute.

This expansion of first amendment protection to commercial speech seems to have retreated with the court decision in *Posadas and Fox*. Still commercial speech does enjoy first amendment protection, but not the same as is extended to other forms of speech such as political, artistic and cultural expressions. Nonetheless, this protection by no means is absolute. This was made clear in a landmark decision in *Virginia State Board v. Virginia Citizens Consumers Council Inc.*,<sup>11</sup>

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<sup>8</sup> Hamadard Dawakhana v.Union of India AIR 1960 SC 554

<sup>9</sup> 316 US 52. 62 S, Ct. L.ed. 1262 (1942).

<sup>10</sup> 358 US 498,513-14(1959).

<sup>11</sup> 425 US 748 96 SC 1817, 48 L. Ed. 2d. 346 (1976).

### Over breadth Doctrine

In America, in view of the limited first amendment protection accorded to the commercial speech, the courts have wrestled over the years with a key question: what is/are the appropriate mechanism(s) for determining the constitutionality of commercial speech restrictions? One such mechanism is the first amendment safeguard of over breadth. Over breadth is a term used to describe a situation where a statute proscribes not only what constitutionally may be proscribed, but also forbids conduct which is protected, e.g., by the first amendment safeguards of freedom of speech and press.<sup>12</sup> In US the courts have expressly stated that the over breadth doctrine does not normally apply to commercial speech.<sup>13</sup> This doctrine was challenged in *Board of Trustees of the State University of New York v. Fox*<sup>14</sup>. The regulation challenged addressed limitations of University dormitory use. The challenged regulation stated: "no authorization will be given to private commercial enterprises to operate on state University campuses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstores, laundry, dry-cleaning, banking, barber and beautician services and cultural events.

Viewing the challenged application of the Universities regulation as a restriction on commercial speech, the appeals court applied the test articulated in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*<sup>15</sup> The four part test designed to determine the constitutionality of a commercial speech regulation is as follows:

1. Is the commercial speech as an illegal activity or is it misleading? If the answer is yes, then the speech can automatically be restricted. If the answer is no, then the following three questions must be answered affirmatively.
2. Is the Government suppressing commercial speech substantially?
3. Does the proposed regulation directly advance the Government interest asserted?
4. Does the proposed regulation go no further than necessary to advance that interest?

The US Supreme Court overturned the appeal court's decision. In doing so, it addressed two key issues which are crucial to determine the application of over breadth doctrine to commercial speech:

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<sup>12</sup> Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, 425 U. S.748(1976)

<sup>13</sup> Bates v. Stale Bar of Arizona, 433. U. S. 350 (1977).

<sup>14</sup> 492 U. S. 469, 1601. Ed. 2d. 388 (1989)

<sup>15</sup> 447U .S.557(1980).

1. The court specifically addressed the over breadth challenge to the resolution; and.
2. The court invalidated the appeal court's interpretation of part 4 of the Central Hudson test.

The four part test was intended to guide the courts in determining whether a commercial speech restriction was constitutional and sufficiently narrowly tailored.

The US court has reaffirmed its position that commercial speech enjoys only limited protection under the first amendment. It has also mentioned the rationale that commercial speech is economically motivated and not easily deterred or chilled;

Therefore, it is not in need of stringent protection such as that provided by the over breadth doctrine.

*The Central Hudson Test was the mechanism established to ensure narrowly tailored, thereby constitutional, commercial speech restrictions. Given the court's reinterpretation of the fourth test that the "regulation must only be reasonable", commercial speech is left -without a stringent guide as to what will or will not constitute an overly broad restriction. The same tests have subsequently been applied in a casino advertising case in Puerto Rico in 1986 The case involved the distribution of shopping flyers on news racks in Cincinnati Ohio and in the right to advertise liquor prices in Rhode Island<sup>16</sup> . In each case, the Supreme Court has gone through the steps of the test to determine whether it is appropriate to regulate and / or prohibit the various forms of commercial speech.*

#### Judicial Trends in India

In India there is no express constitutional protection guaranteed to commercial advertisements. This issue has been debated in India right from 1960. The courts, like other parts of the globe, have not adopted consistent line of reasoning. The opinions have been changed by the courts after realizing that there should be no fetters to dissemination of information. However, there are still various questions left unanswered. Is constitutional protection to commercial advertisements corollary of constitutional guarantee of freedom of speech? Can constitutional protection be extended to commercial advertisements within the letters of Article 19(a).

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<sup>16</sup> Liquor mart e.al. vs. Rhode Island, 1996 116 S. Ct. 1495.

The of *Hamdard Dawakhana v. Union India*<sup>17</sup> is the first case which came up before the Supreme Court in which Constitutional protection to commercial advertisements was debated and decided. In this case constitutional validity of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was challenged on the grounds that unreasonable restrictions have been imposed on freedom of speech.

The preamble of the Act in question provided:

An Act to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connecting therewith.

The petitioners in their writ petition alleged that soon after the Act came into force they experienced difficulty in the matter of publicity for their products and various objections were raised by the authorities in regard to their advertisements. The petitioners contended that the advertisement is a vehicle by means of which freedom of speech guaranteed under Article 19 (1) (a) is exercised and the restrictions imposed by the Act are not covered by clause (2) of Article 19. (1) (a) is exercised and the restrictions imposed by the Act are not covered by clause (2) of Article 19.

It was laid down that an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19 (1) (a) which it seeks to aid by bringing it to the notice of public. When it takes the form of commercial advertisement which has an element of trade and commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas social, political or economic or furtherance of literature or human thought; but, as in the present case, the commendation of the efficacy, value and treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described its creative part and it was being used for the purpose of furthering the business of the practitioners and has no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements and advertising an individual's person business is a part of freedom of speech guaranteed by the Constitution<sup>18</sup>. It was held that the advertisements prohibited by Section 3 of Act of, 1954 relate to commerce and trade and not to the propagation of ideas. The advertising of prohibited drugs or commodities of

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<sup>17</sup> AIR 1960 SC. 554

<sup>18</sup> Id. at 563

which the sale is not in the interest of the general public which cannot be speech within the meaning of freedom of speech and would not fall within Article 19 (1) (a).<sup>19</sup>

It is submitted that the above judgment of the Supreme Court is erroneous. To say that information that is not in the interest of general public cannot reap the benefits of guarantee enshrined in Article 19 (1) (a) is one thing, but to say that information with the motive to promote commercial interest of the general public cannot qualify for the "speech" so as to enjoy the constitutional guarantee of freedom is entirely different.

The importance of information to the operation of efficient markets is by now fairly well accepted. For the proper utilization of money and right purchasing decision, the consumer must have information<sup>20</sup>. Advertising is a medium of information and persuasion, providing much of the day to day education and facilitating the flexible allocation of resources necessary to free enterprise economy. Neither profit motivation nor desire to influence private economic decision necessarily distinguishes the peddler from the preacher, the publisher or the politician<sup>21</sup>. However, this should not be interpreted to mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of information necessary for sub serving public good from that which is false, deceptive or misleading.

The above cited opinion of the Supreme Court was borrowed from the US Supreme Court expressed in *Valentine v Christensen*<sup>22</sup>, wherein it was laid down that the Constitution imposes no such restraint on Government as respects purely commercial advertising. It is amusing to note that this judgment had already been disapproved when our apex court quoted<sup>23</sup> it with approval. In *Cammarano v. United States*,<sup>24</sup> it was stated:

*Valentine v. Christensen*<sup>25</sup> ruling was casual, almost offhand and it has not survived reflection. That freedom of speech of the press directly guaranteed against encroachment by the federal Government and safeguarded against state action by the due process clause of the fourteenth Amendment, it not in terms or by implication confined to discourse of a particular kind and nature. Those who make their living through exercise of first Amendment rights are

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Developments in the law - Deceptive Advertising (1967) 80 Har. L. Rev. 1027.

<sup>22</sup> Supra Note 8.

<sup>23</sup> Quoted at 563 Supra Note 7.

<sup>24</sup> Supra note10

<sup>25</sup> Ibid

*no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.*

The Supreme Court in *Indian Express Newspaper Bombay Ltd., v. Union Territory of India*<sup>26</sup> over ruled the *Hamdard Dawakhana* Case and held that the observations made in that case are too broadly stated. In this case, the majority of petitioners were certain companies. Their shareholders and their employers were engaged in the business of editing, printing and publishing of newspapers.

The petitioners alleged that the imposition of Custom duty has compelled them to reduce the extent of the area of the newspaper and consequently has adversely affected their revenue from advertisements. This indirectly impinges their constitutional guaranteed freedom of speech and expression.

In meeting the above contentions, the Government while relying on the decision in *Hamdard Dawakhana* has pleaded in defense of its action that the right to publish commercial advertisement is not the part of freedom of speech and expression. The Supreme Court carefully considered the decision in *Hamdard Dawakhana's* case. It was held that "the main plank of decision was that the type of advertisement involved in that case did not carry with it the protection of Article 19 (1) (a). On examining the history of the legislation, the surrounding circumstances and the scheme of the Act which has been challenged in that case namely the Drugs and Magic Remedies (Objectionable Advertisement) Act 1954(21 of 1954) the court held the object of that Act was to prevent self medication and self treatment by prohibiting instrument which may be used to advocate the same or which tend to spread the evil. It was further held that there is no doubt that some of the observations referred to above go beyond the needs of the case and tend to affect the right to publish all commercial advertisements. Such broad observations appear to have been made in the light of the decisions of the American court in *Lewis J, Valentine v. F. J. Christensen*, But it is worthy of notice that the views expressed in this American case have not been fully approved by the American Supreme Court itself in subsequent decisions.

In view of the above explicit stand of the American Supreme Court, the Indian Supreme Court held that the observations made in *Hamdard Dawakhana's* case (supra) are broadly stated and Government cannot draw much support from it. It was thus conclusively

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<sup>26</sup> AIR 1986 SC 515.

held that all commercial advertisements cannot be denied the protection of Article 19(1) (a) of the Constitution merely they are issued by businessmen<sup>27</sup>.

In *TATA Press Ltd. v Mahanagar Telephone Nigam Ltd.*,<sup>28</sup> the Supreme Court went ahead by extending the protection of Article 19 (1) (a) not only to advertisers but also consumers. It was laid down that this Article guarantees not only the freedom of speech and expression; it also protects the rights of the individual to listen, read and receive the said speech. So far as the economic needs of citizens are concerned, their fulfilment has to be guided by their information disseminated through the advertisements. The protection of Article is available to the speaker as well to the recipient of the speech<sup>29</sup>.

This issue was also discussed by the Supreme Court in *Sakal Papers (p) Limited v. Union of India*.<sup>30</sup> That case arose out of a constitutional challenge to the validity of the Newspaper (Price and Page) Act, 1956 which empowered the Government to regulate the prices of newspapers in relation to their pages and size and to regulate allocation of space for advertisements. The court held that the curtailment of advertisements would be hit by Article 19(1) (a) since it would have a direct impact on the circulation of newspapers.

Again, Section 3(1) of the act in so far as it permits the allocation of space to advertisements also directly affects the freedom of circulation. If the area for advertisements is curtailed the price of the newspaper will be forced up. If that happens, the circulation will inevitably go down. This would be no remote, but a direct consequence of curtailment of advertisements.....

If, on the other hand, the space for advertisement is reduced, the loss or close down or raise its price. The object of the Act in regulating the space for advertisements is stated to be to prevent 'unfair' competition. It is thus directed against circulation of a newspaper. When a law is intended to bring about this result there would be a direct interference with the right of freedom of speech and expression guaranteed under Article 19(1) (a)<sup>31</sup>.

The above observation recognizes the importance of advertising in making free flow of information through press. In *Bennett Coleman and Co. v. Union of India*<sup>32</sup>, the Supreme Court reaffirmed that advertisements are essential for circulation of any newspapers and any restraint on advertisements would affect the fundamental rights of propagation, publication

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<sup>27</sup> Ibid.

<sup>28</sup> AIR 1 995 SC 2438.

<sup>29</sup> Id. At 2448.

<sup>30</sup> AIR 1962 S.C 305.

<sup>31</sup> Supra n. 33 paras 33-34, p. 313

<sup>32</sup> (1972) 2 SCC 788: AIR 1973 SC 106.

and circulation under Article 19 (1) (a). Since the decision in *Hamdard Dawakhana*<sup>33</sup>, there has been a sea-change in the economy and advertising has come to acquire a vital role not only in shaping public choices but also in influencing the economy as a whole. In the present economy, where new products continue to flood the market everyday and generate cut throat competition, the importance of advertising which may give one product an edge over another, has grown by leaps and bounds. Also, it is advertising which effectively sustains the media, whether it be the print media or broadcasting. Other forms of entertainment such as sports events and motion pictures also receive financial backing from corporate sponsors. In *Tata Press v. Mahanagar Telephone Nigam Ltd.*,<sup>34</sup> the Supreme Court recognized the invaluable role of advertising in the economy:

*Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent on mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Apart from the lifeline of the free economy in a democratic country, advertising can be viewed as the life blood of free media, paying of the costs and thus making the media widely available. The newspaper industry obtains 60/80% of its revenue from advertising. Advertising pays a large portion of the costs supplying the public with newspaper. For a democratic press the advertising 'subsidy' is crucial. Without advertising, the resources available for expenditure on the 'news' would decline, which may lead to an erosion of quality and quantity. The cost of the 'news' to the public would increase, thereby restricting its 'democratic availability'.<sup>35</sup>*

The Supreme Court reiterated the importance of advertising and its nexus with the circulation of newspapers in *Hindustan Times v. State of U.P.*<sup>36</sup>. In this case, the Supreme Court struck down an order issued by the state Government of U.P. under Article 162 of the Constitution directing a deduction of 5% from bills payable to newspapers with a circulation of above 25,000 copies for publication of Government advertisements. The object of the deduction was to implement a pension and social security scheme for full-time journalists. The court held that advertisements in newspapers play an important role in generating revenue and have a direct nexus with circulation. Advertising revenues enable newspapers to

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<sup>33</sup> (1972) 2 SCC 788: AIR 1973 SC 106.

<sup>34</sup> AIR 1960 SC. 554.

<sup>35</sup> (1995) 5 SCC 139.

<sup>36</sup> (2003)1 SCC 591.

meet the cost of newsprint and other financial liabilities. Advertising also enables the reader to purchase a newspaper at an affordable price<sup>37</sup>. The owner of a newspaper was not liable to undertake the burden of the impugned tax which was struck down as unconstitutional<sup>38</sup>. The bargaining power of the state and newspapers in matters of release of advertisements was unequal and that any unjust condition on newspapers would be in violation of Article 14 of the Constitution as also Section 23 of the Contract Act.

#### Advertising as a facet of the right to information

A vital aspect of advertising that makes it part of Article 19 (1) (a) is that it facilitates the dissemination of information about who is selling what product and at what price. Advertising enables the citizen to make well-informed and intelligent economic choices. More important than the right of expression of the advertiser is the right of the recipient to the information which he receives from the advertisement. The Supreme Court observed in *Tata Press v. Mahanagar Telephone Nigam Ltd.*<sup>39</sup>

*Examined from another angle, the public at large has a right to receive the "commercial Speech". Article 19(1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfilment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1) (a) is available to the speaker as well as to the recipient of the speech. The recipient of "commercial speech" may be having much deeper interest in the advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.*<sup>40</sup>

#### Reasonable Restrictions

An advertisement within the permissible limits, i.e., which does not disparage the goods, services or trade of another by giving false or misleading facts, is a medium which promotes competition and does not hinder it.

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<sup>37</sup> Ibid, para 33-38, pp. 601-04.

<sup>38</sup> ibid, paras 27 - 30, 00. 601 - 02.

<sup>39</sup> (1995) 5 SCC 139.

<sup>40</sup> Id. para 24, p, 156 (SCC).

The following statement of the Monopolies and Restrictive Trade Practice Commission outlines the importance of advertisements<sup>41</sup>.

*“When to advertise, where to advertise and how much to advertise, these are the questions properly within the management of every company”. It cannot be the subject matter of a judgment by the commission as to where and as to how much a particular company should advertise. Advertising is a well recognized market strategy. In a competitive market, it has a definite role to play. Different companies manufacturing the same or similar products have to compete for the attention of consumers. This they can do by indulging in advertising. The extent of advertisement required in a particular field or for a particular product will naturally depend upon the nature of the field and the nature of the product. It cannot however, be doubted that advertising serves the need for information about the identity and the location of the seller, about the types of goods, available in the market and the terms of the sale of the products. Advertisement may be persuasive, it may be educative. It cannot be said that an advertiser should insert an advertisement once or twice and leave it to the consumer to decide it. The advertiser has to repeat the message relating to his product over and over again because the class of consumers is a fluctuating.*<sup>42</sup>

Where to advertise, when to advertise, how to advertise, what to advertise itself demands that there is a need to regulate commercial advertisements by imposing restrictions. But these restrictions cannot be arbitrary, fanciful and capricious. They have to be reasonable. The term "reasonable restrictions" has been interpreted by the Supreme Court of India on various occasions. In *Chintaman Rao v. State of Madhya Pradesh*<sup>43</sup>, the Supreme Court observed that "the determination by the legislature of what constitutes the reasonable restriction is not final or conclusive. It can be reviewed by courts. In the matter of Fundamental Rights, the High Court and Supreme Court acts as a watch dog for the rights guaranteed by the

Constitution and in exercising its functions, it has a power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Constitution". It is not possible to formulate an effective test which could enable a person to pronounce any

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<sup>41</sup> Society for Civil Rights v. Colgate Palmolive (I) Ltd., (1991) 72 Camp. Cas. 80.98.

<sup>42</sup> Avtar Singh; Law of Consumer Protection.

<sup>43</sup> AIR 1951 SCI 18; 1950 SCR 759.

particular restriction to be reasonable or unreasonable. All the attendant circumstances have to be taken into consideration. It is not possible to dissociate the actual content of the restriction from the manner of its imposition or the mode of putting it into the practice. In the words of the Supreme Court, "the nature of the right alleged to have been infringed, the underline purpose of the restriction imposed, the extent and urgency of the evils sort to be remedied their by, the disproportion of the imposition, the prevailing conditions at the time, all enter into judicial verdict.

However, this freedom is not absolute, unlimited and unfiltered at all times and in all circumstances for the reason that an unrestricted freedom of speech and expression would amount to an uncontrolled license. If it were wholly free even from, reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the advertisers. In an organized society the rights of press have to be recognized with its duty and responsibility towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of advertising press freedom must not be thrown open for wrong doings. If an advertiser publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by court of law<sup>44</sup>. The law which confers arbitrary and uncontrolled power upon the executive the matter of regulating trade or business cannot be held reasonable. Restrictions must be reasonable both from substantive and procedural point.

A state legislature is within its power to decide what should be the proper penalty for failure to comply with a particular provision of law. The penalty cannot be said to be unreasonable merely because it is more drastic than What is prescribed by some other legislature in another country<sup>45</sup>.

The test of reasonableness has to be applied to every individual statute attacked and no abstract or general principles of reasonableness applicable in all the cases can be laid down. What is required is that the limitation imposed upon a person in the enjoyment of a right must not be arbitrary or excessive and beyond what is required in the interests of the public. There must be a proper balance between the freedom guaranteed and the social control permitted by Article 19.

In *Ashwin Jajal v. Municipal Corporation of Greater Mumbai*<sup>46</sup>, the Bombay High Court held that restrictions can be laid down for commercial advertisements. The present

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<sup>44</sup> SCC 1996 Vol. 6. P. 468.

<sup>45</sup> Id.

petition seeks to highlight environmental and health hazards likely to be caused by illuminating hoardings and advertisements by neon lights.

The court held that keeping in view the environmental and health hazards and nuisance value, it is always open to the authorities to regulate advertisement in a reasonable manner to the extent permissible<sup>47</sup>. It is held in *Blue Nile Advertising Private Ltd. v. Commissioner of Bangalore, Mahanagar Palika*<sup>48</sup> that there is no prohibition club to have recreational activities but state authorities have right to take appropriate action against advertisements of illegal games of betting, wagering etc. In *Manoj Upadhyay v. Medical Council of India*<sup>49</sup>, it was held that power and reaches of the media, both print as well as electronic for dissemination of advertisements, is tremendous. It has to be exercised in the interests of public goods. A free press is one of very important pillar on which the foundation of Rule of Law and democracy rests. At the same time, it is also necessary that freedom must be exercised with utmost responsibility.

In view of the Supreme Court decision in *Tata Press Ltd, v. Mahanagar Telephone Nigam Ltd*,<sup>50</sup> the ruling in *Hamdard Dawakhana* case<sup>51</sup> has now a limited application that is prohibiting an obnoxious advertisement and cannot be applied to advertisements in general. The court has held that commercial speech is a part of the Freedom of Speech and expression guaranteed under Article 19(1) (a) of the Constitution. The commercial speech cannot be denied the protection of Article 19(1) (a) of the Constitution merely because the same are issued by businessmen. Describing the advertising as the cornerstone of India Economic System, the judges said that low prices for consumers are dependent upon mass production. Mass production is dependent upon volume of sales, and volume of sales is dependent upon advertising,

#### Conclusion

Commercial advertisements have both positive and negative effects on the consumers. A consumer is the asset of the nation and thereby he is having every right for the choice of the products, and that is possible when the product is advertised. It is the constitutional right of the consumers to receive information relating to the products and the goods, and no one can restrict this right except as provided under the constitution. Commercial advertisements have

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<sup>46</sup> AIR 1999

<sup>47</sup> Id. At 37.

<sup>48</sup> AIR 2005 Kant. 189

<sup>49</sup> AIR 2005 SC 2473.

<sup>50</sup> Supra note 27.

<sup>51</sup> Supra note 16.

been held by the Supreme Court of India within the definition of freedom of speech and expression under article 19(1) (a) of the constitution. But the Supreme Court of India at the same time made it clear that if Commercial advertisement relating to products is misleading and false it can be regulated by the govt. So long as Commercial advertisements relating to products are correct there is no problem. But the problem arises only when the advertisements are misleading and false.