

## JUSTIFICATION FOR REGULATING MISLEADING COMMERCIAL SPEECH

*Anirban Chakraborty*<sup>1</sup>

### Introduction:

Commercial advertisements are an encapsulated communication about a product or service beautifully designed, clear and concise giving an appealing message which is intended to attract the target consumers. Currently in India it is considered as a form of speech recognized as a protected speech under constitutional safeguard of '*freedom of speech and expression*' under Art. 19(1)(a). The Courts have justified protection to commercial speech because it serves consumer right to receive information and maintaining competitive effects of market. However, courts have curbed out misleading commercial speech e.g. "False and misleading advertisements" from the domain of protection afforded to commercial speech under Art 19(1)(a) in public interest. Some scholars oppose this blanket exclusion and argue that such an approach affects the advertising industry and give arbitrary and unfettered powers to regulate commercial speech in disguise of 'curbing false and misleading commercial speech'. It is undisputable that commercial advertisements are beneficial as long as the techniques used in a fair manner. But when these advertisements aim to deceive or adopts fraudulent means it has an adverse impact on the consumers and the economy. In this context the paper argues that it is justified to regulate misleading commercial advertisements based on the three arguments '*theory of imperfect consumer information*'; '*legislative expediency*' and '*balance of convenience*' test and it does not prejudice the constitutional recognition of commercial speech.

### **[I]. Commercial speech to be treated as a protected speech under "Freedom to Speech and Expression": The Constitutional Theory**

Conventionally commercial speech was regarded as no more than soliciting for a sale of a product or a commercial transaction and regarded as not as important as political or other

<sup>1</sup> Assistant Professor of Law, WB National University of Juridical Science, Kolkata, India. E-mail: [anir\\_chak@yahoo.com](mailto:anir_chak@yahoo.com).

forms of speech which are integral to democratic governance and required to be safeguarded from governmental intervention by protection afforded in the constitutional scheme for freedom of speech and expression.<sup>2</sup> The constitutional theories justifying protection of speech and expression argues that constitutional structure of popular self-government would be meaningless without the freedom to discuss issues relevant to self-government. Thus, at a minimum, every democratic constitution requires protecting this freedom and constitutional courts to uphold the process of forming and expressing the will of the majority according to which our representatives must govern without any undue hindrance. But the freedom of speech rationale does not protect a right of individual expression for its own sake but rather seeks to preserve the systemic integrity of our constitutional scheme of self-government.<sup>3</sup> The idea that dominated constitutional theory and judicial interpretation globally on commercial speech interpretation seemed to be based on the argument that ordinary business advertising is part and parcel of the economic marketplace and therefore is excluded from the protections under freedom of speech and expression.<sup>4</sup> As a result, commercial speech was subjected to numerous restrictions that would be usually disallowed for forms of speech protected under freedom of speech and press.<sup>5</sup>

But some constitutional scholars tried to provide counter arguments by implicating the values for protection of free speech to commercial. The most notably contributor of this idea is Prof. M. H. Radish who argued persistently that commercial speech also fulfills the characteristic values e.g. “*contributing of effective self-government*” and “*development of individual self and expression*” and deserves protection under freedom of speech and expression. He argued that “*fundamentally, a commitment to democracy is a belief that people must be free to decide for themselves the best way to live, and that a broad range of discussion must therefore be allowed to take place. Therefore a form of government that recognizes the moral value of self-determination must therefore apply that value uniformly across all issues,*

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<sup>2</sup> At bottom, the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services. In the realm of ideas, the first amendment erects stringent safeguards against governmental restraint. In the economic sphere, by contrast, the majoritarian political process controls. Under the doctrine of commercial speech, ordinary business advertising is part and parcel of the economic marketplace and therefore is excluded from the protections of the first amendment. (See *Thomas H. Jackson and John Calvin Jeffries, Jr, Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 1979)

<sup>3</sup> Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 304-05 (1978); Robert H.Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971);Alex Kozinski&Stuart Banner, *Who's Afraid of Commercial Speech?*,76 VA. L. REV.627, 633 (1990);

<sup>4</sup>*Thomas H. Jackson and John Calvin Jeffries, Jr, Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 1979

<sup>5</sup> Colin R. Munro, *The Value Of Commercial Speech*, 62 CAMBRIDGE L.J. 134 2003

*lest it engage in the business of selectively shaping and forming private thoughts*".<sup>6</sup> Prof. Radish articulated that "*consumer experience with a scheme of unrestricted price advertising might influence political opinion toward the desirability of legal regulation.*"<sup>7</sup> According to this argument any kind of experience may affect the formation of political opinions and advertising is also politically significant because it enables consumers to make more informed political judgments on whether such advertising should be allowed.<sup>8</sup> It was also argued that "*protection of commercial speech fosters accountability in the political sphere.*"<sup>9</sup>

### [III]. Doctrine of Commercial Speech under Art. 19(1)(5): Judicial Recognition

The '*doctrine of commercial speech*' in Indian context emerges out of Art 19(1)(a). The issues of granting of protected speech status under Art 19(1)(a) to commercial advertisement has been also subjected to judicial interpretation by the Supreme Court of India. The first case where the issue of recognition of commercial advertisement as a protected speech under Art 19(1)(a) was *HamdardDawakhana v. Union of India*<sup>10</sup> where a statute restricting "objectionable" and "unethical" advertisements with respect to drugs was challenged and the Supreme Court by a five bench decision held that '*an advertisement is also a form of a speech*', but "*those advertisement which are intended to primarily promote the interest of trade and commerce does not qualify to be protected under Article 19(1)(a)*

This decision was initially interpreted to mean that the court has declined to recognize 'commercial speech' within the protected category of speech under Art. 19(1)(a). However, this position was clarified by the court subsequently. In the *Indian Express Newspapers Bombay Private Limited v. Union of India*<sup>11</sup> the Supreme Court explaining that actual scope of the decision of *HamdardDawakhana*<sup>12</sup> mentioned that it was primarily dealing with advertisement relating to prohibited drugs, to prevent self-medication and self-treatment and not

<sup>6</sup> Martin H. Redish& Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 258 (1998). The authors proposed a theory that rests on a right to self-fulfillment, and the justification for free speech. The first principle which leads to the normative conclusion of self-government, the belief in the integrity of the individual's power of reason, leads also to the conclusion that the development of the mind is an important goal in itself.

<sup>7</sup> Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434-58 (1971).

<sup>8</sup> Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 383 (1979) ("[T]he economically motivated speaker is often the most likely to raise important issues). See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1082-83 and Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591,602 (1982).

<sup>9</sup> Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9-10 (2000)

<sup>10</sup> AIR1960SC554

<sup>11</sup> 1985 SCR (2) 287, wherein the a writ petition under Art 32 of the Constitution of India was filed to challenge the validity of the imposition of import duty on newsprint imported from abroad under Section 12 of the Customs Act, 1962

<sup>12</sup>*HamdardDawakhana v. Union of India* AIR1960SC554

with the entire domain of commercial advertisements and held that *HamdardDawakhana*<sup>13</sup> holdings should be limited to only such subset of commercial advertisements. This decision of *Indian Express Newspapers*<sup>14</sup> was firmly established by the Supreme Court of India in the case of *Tata Press Limited v. Mahanagar Telephone Nigam Ltd.*<sup>15</sup>. The Supreme Court concluded that “*commercial speech is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the constitution.*” The Court held that such a conclusion warrant judicial support because *firstly*, advertisements were essential towards keeping prices down in a market economy; *secondly*, advertisements provided a crucial source of revenue to newspapers, and a free media was the life-blood of democracy; and *thirdly*, by maintaining the free flow of information, advertisements were necessary for consumers to make an informed choice.

However in *Tata Press*<sup>16</sup> the court clarified that protection of a speech under Art 19(1)(a) is not unlimited; and advertisements could be also subject to regulations. It held that “*deceptive, unfair, misleading and untruthful*” commercial speech which will not be protected because it would be hit by Article 19(2). Relying on its earlier decisions and decisions of Constitutional Courts of United States it held categorically that It held that “*deceptive, unfair, misleading and untruthful*” commercial speech which will not be protected because it would be hit by Article 19(2).

### **III. Regulation of Commercial Speech on account of ‘false or misleading’: Its criticisms**

In India Courts have viewed that commercial speech informs of public interest, and it is for this reason warrants protection under Art 19(1) (a) of the Constitution of India. But the Court has clarified that this protection is *subject to justified* restriction either on the conditions laid down in Art. 19(2) or is reasonable in the interest of public at large.<sup>17</sup> Regulation of ‘false and misleading’ commercial speech has been upheld as justified in the public interest at large.

But this view has received wide criticism especially from economists. Economists have increasingly come to recognize that, because advertising reduces the costs of obtaining information, it enhances economic performance. J. Howard Beales has observed that “[W]hat consumers know about competing alternatives influences their choices. Better information

<sup>13</sup>*HamdardDawakhana v. Union of India* AIR1960SC554

<sup>14</sup>*Indian Express Newspapers Bombay Private Limited v. Union of India* 1985 SCR (2) 287

<sup>15</sup> AIR 1995 SC 2438, wherein Union of India sought a declaration that they alone have the right to print/publish the list of telephone subscribers and permanent injunction restraining the Tatas, their agents and servants from printing and/or publishing and/or circulating the "Tata - Pages" being violative of the Indian Telegraph Act, 1885 (the Act) and the Indian Telegraph Rules, 1951 (the rules).

<sup>16</sup>*TataPress Ltd v. Mahanagar Telephone Ltd.*, AIR 1995 SC 2438

<sup>17</sup>*Mahesh Bhatt & Kasturi and Sons v. Union of India*, 147 (2008) DLT 561

*about the options enables consumers to make choices that better serve their interests.*<sup>18</sup> They have argued that the public interest that is served by commercial speech out way the justification for giving blanket power to states to regulate commercial speech merely they may be false or misleading. According to Adam Thiere “[A] renewed regulatory crusade against advertising and marketing efforts will hurt consumer welfare since it will likely raise prices, restrict choice, and diminish marketplace competition and innovation-both in ad-supported content and service markets and throughout the economy at large”.<sup>19</sup>

Some critics<sup>20</sup> have criticized theregulatory approach as too simplistic and emphasized that requires more reasoned justification. These critics view that like any other advertisement which is aimed at the sale of a product or service, a false advertisement is also aimed at enticing consumer patronage, in fact it does so with an unfair advantage. They have arguedbased on critical literature on advertising competition and its effects on consumer behavior and market performance states that every advertisement acts as a device to persuade consumers by means of intangible and/or psychic differentiators. The proponent of this view states that advertising creates differentiation among products which at times may not be real. This is especially true for most "feel" products, such as luxurious goods, cosmetics, apparels and accessories, soft drinks, etc.<sup>21</sup> The impact of aggressive advertising strategies generate buying problems as there are numerous similar types of products which are advertised in the market. But producers lay great emphasis on minor differences in the formula or technique of advertised goods. Therefore, the basic aim of a false advertisement is the same as a truthful one. To say that false- advertising is not commercial speech is to ignore what makes speech commercial.

It has been further argued thatCourts in India have affirmed that ‘commercial speech’ is a protected speech under Art 19(1), but mentioned that such a protection is not absolute. Courts haveregulation of misleading commercial speech based on the justification that such ‘falsity and misleadingness’ hits the conditions of Art.19(2). However, ‘falsity’ or ‘deception’ is not a ground mentioned for restricting speech protected under Art 19(2). It is also generally observed that ‘falsity’ alone cannot be tenable ground for restricting freedom of speech. Even in the traditionally unprotected area of libel, falsehood alone is not sufficient test for non-

<sup>18</sup> J. HOWARD BEALES & TIMOTHY J. MURIS, STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING 7 (1993) at p.8

<sup>19</sup> Adam Thiere, Advertising, Commercial Speech, and First Amendment Parity, 5 CHARLESTON L. REV. 503 2010-2011

<sup>20</sup> Susan J. Knapp, Commercial Speech, the Federal Trade Commission and the First Amendment. 9 MEM. ST. U. L. REV. 1 1978-1979

<sup>21</sup>Bibek Banerjee and SubirBandyopadhyay, Advertising Competition under Consumer Inertia, 22 MARKETING SCIENCE( 2003), pp. 131-144

protection under the current law. There is a legitimate fear that basing liability only on falsity of the statement alone would inhibit the exchange of ideas and has an inadvertently stifled or chilling effect on communications of speech freely in the society. But ‘falsity’ alone have been a reasonable ground to induce state regulation of commercial speech.

#### **IV. Regulation of ‘Misleading Commercial Speech’ is justified - The Arguments:**

In the contemporary market place it is incontrovertible reality that commercial speech is a powerful channel of communication. But when this medium is used to persuaded consumer by employing ‘*unethical*’, ‘*false*’ or *deceptive*’ means e.g. exaggeration, pseudo-scientific statements, misleading names or terms, misleading labels, testimonial letters, comparative prices, and use of premiums, prizes, it only confuses the consumers. Such deceptive communications cannot promote any benefit to consumers or society and necessarily the same requires to be prohibited by state regulation. It is an exaggeration by critics of ‘*regulation of commercial speech*’ when they say that such regulatory measures will affect the growth of advertising industry or have adverse impact on consumer economy. If the consumer interest is given the paramount emphasis in the protection of advertising, false or misleading advertisement has little to offer when weighed against such interest. Rather than increasing knowledge, false advertising decreases it. Misinformed consumers will make inappropriate choices reducing consumer welfare. According to development economist like Greenwald and Stiglitz have showed that whenever information is imperfect or markets incomplete. Thus, the notion that markets, by themselves, lead to efficient outcomes has, today, no theoretical justification: no one believes that the conditions under which that statement is true are satisfied.<sup>22</sup>

Secondly, Regulations of misleading commercial speechis justified based on expediency argument and offer an understanding that non protection of false and misleading advertisement is an expediency based on the realization that a great deal of consumer protection legislation<sup>23</sup>have considered it to be unfair trade practice and have adopted stringent regulation to curve such practice and penalize persons and firms indulging in such practice. Where consumers suffer harm or loss as a result of the misleading marketing practices of

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<sup>22</sup> Bruce Greenwald and J. E. Stiglitz, “Externalities in Economies with Imperfect Information and Incomplete Markets,” QUARTERLY JOURNAL OF ECONOMICS, 1986, Vol. 101, No. 2 (May), pp. 229-264

<sup>23</sup> Food Safety and Standards Act,2006; The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production, Supply and Distribution) Act, 2003; Drugs and Cosmetics Act, 1940; Drugs and Magic Remedies(Objectionable Advertisements) Act, 1955; Indecent Representation of Women (Prohibition) Act,1986; The Lotteries (Regulation) Act,1998; Securities and Exchange Board of India Guidelines for Advertisement by Mutual Funds, 1996; Competition Act,2002; Insurance Regulatory and Development Authority Act, 1999.

traders, the basic harm that is suffered arises from the fact that they do not get what they expected to get from the particular transaction. This harm can be manifested through both physical and economic harm. Physical injury can arise, for example, where products or health treatments are unsafe, contrary to the representations of the trader. Consumers may suffer economic loss in a variety of ways, primarily because the goods or services acquired do not have the value expected due to misrepresentations on the attributes or benefits of the goods or services. In addition, consumers might also incur out-of-pocket expenses, repair costs, and loss of earnings and loss of time spent on resolving problems.<sup>24</sup>

*Most importantly*, regulation of false and misleading advertising can be justified on account of the '*balancing of interests approach*' theory.<sup>25</sup> Primary reason behind giving commercial speech the constitutional status of protected speech under Art. 19(1)(a) is to ensure the public interest in the free flow of commercial information. Courts have generally emphasized that when speaking of the value of commercial speech, is not so much on the economic interest of the disseminator of the information, as on the consumer interest in receiving the information. In the decision of *Tata Press* the Supreme Court has observed that

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 than the businessman who is behind the publication. An advertisement giving information regarding a lifesaving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.<sup>26</sup>

False and misleading advertising negates this interest by misleading, instead of informing, the public. If the consumer interest is given the paramount emphasis in the protection of advertising, false or misleading advertisement has little to offer when weighed against such interest. Rather than increasing knowledge, false advertising decreases it. It can lead the consumer to wonder what, if anything, to believe. Once suspicion falls on advertising, even

<sup>24</sup> United Nations, *General Assembly Consumer Protection*, Resolution No. 39/248, 9 April 1985. On the guidelines, see D. Harland, 'The United Nations Guidelines for Consumer Protection' (1987) 10 JOURNAL OF CONSUMER POLICY 245; D. Harland, 'Implementing the Principles of the United Nations Guidelines for Consumer Protection' (1991) 33 J I L 1189.

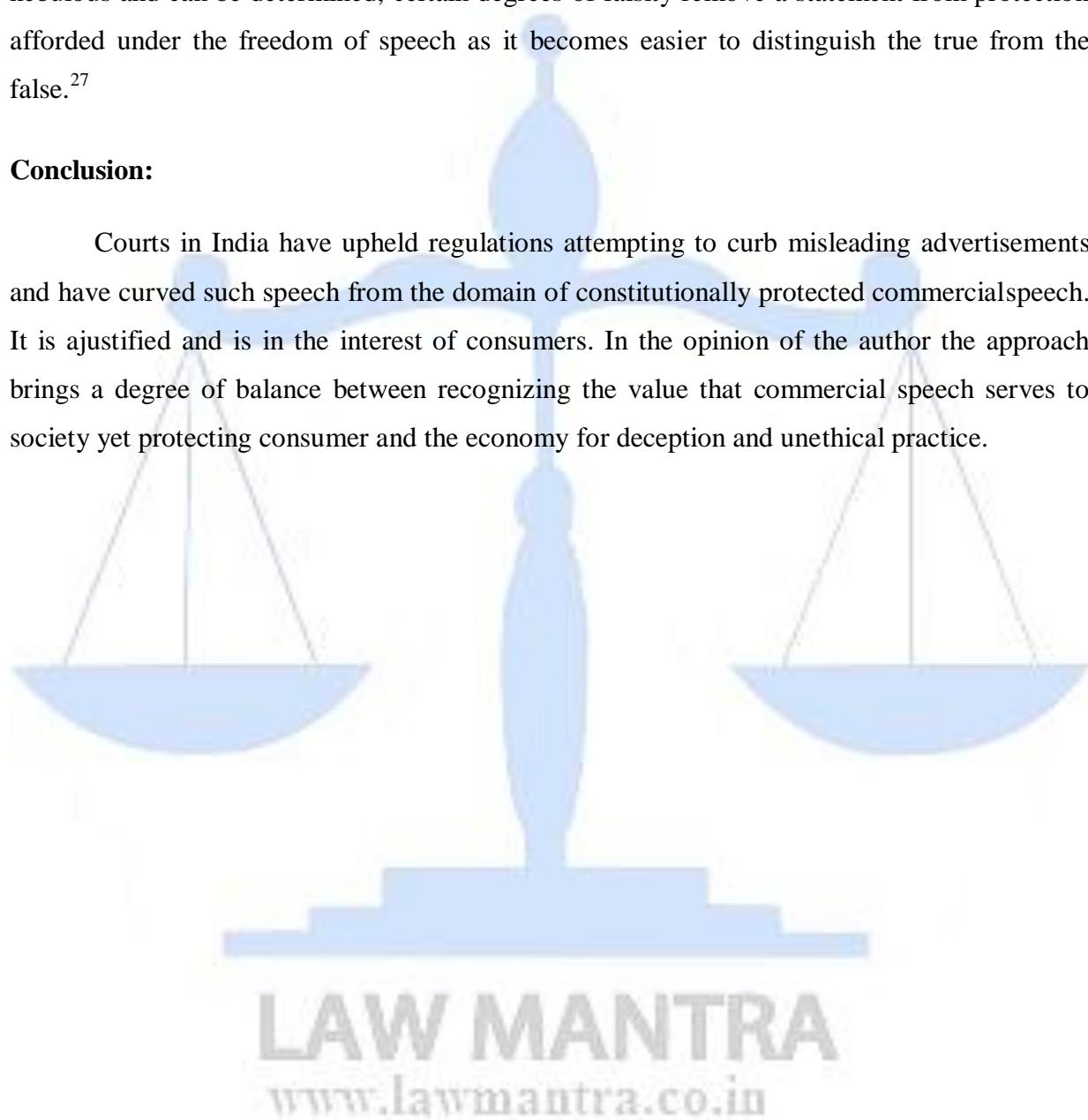
<sup>25</sup> Susan J. Knapp, Commercial Speech, the Federal Trade Commission and the First Amendment. 9 MEM. ST. U. L. REV. 1 1978-1979

<sup>26</sup> *TataPress Ltd v. Mahanagar Telephone Ltd.*, AIR 1995 SC 2438

truthful advertising is placed at a disadvantage in fulfilling the public interest of informing, since the information it imparts will not be believed or will be suspect. So the '*balancing of interest approach*' is a dominant justification for distinct treatment to 'false and misleading advertisement'. It can be stated that where the truth or falsity of a particular statement is not so nebulous and can be determined, certain degrees of falsity remove a statement from protection afforded under the freedom of speech as it becomes easier to distinguish the true from the false.<sup>27</sup>

### **Conclusion:**

Courts in India have upheld regulations attempting to curb misleading advertisements and have curbed such speech from the domain of constitutionally protected commercial speech. It is justified and is in the interest of consumers. In the opinion of the author the approach brings a degree of balance between recognizing the value that commercial speech serves to society yet protecting consumer and the economy for deception and unethical practice.



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<sup>27</sup> Susan J. Knapp, Commercial Speech, the Federal Trade Commission and the First Amendment. 9 MEM. ST. U. L. REV. 1 1978-1979