Freedom of Speech in Advertising and Defamation

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Abstract

Background/Objectives: This study examines the general concepts regarding freedom of speech and intrusion on personal rights in advertising focusing on defamation. Methods/Statistical Analysis: This study analyzed precedents and theories about the issues. And related theoretical publications, theses, collection of precedents, and the Internet data were collected and analyzed for the study. Findings: This study examined the coordinating principles in law when there is a conflict between freedom of expression in advertising and the right of reputation focusing on precedents. In precedents related to advertising, there were frequent cases of defamation that involve conflicts between freedom of expression and mental personal rights. According to the analysis of the law and precedents, requirements such as truthful fact and relationship with the public interests weaken the illegality while false facts and the purpose of slander strengthen the illegality. Also, political opinion advertising has wider range of exemption from responsibility due to its public character while commercial advertising has narrow range of exemption. Application/Improvements: This study suggests that when making advertising in the future, we need to learn and know about the legal regulations related to personal rights to prevent the lawsuit.

Keywords: Advertising, Defamation, Freedom of Speech, Personal Right, Right of Reputation

1. Introduction

Recently, the importance of personal rights including right of respect is being emphasized. This is expected to bring constant change in our society in the future intertwined with the social trend that puts emphasis on rights and freedom of individuals. Accordingly, it is expected that when making and running advertising, the issue related to conflicts with personal rights of individuals will be more emphasized in the future. The freedom of speech including advertising and protection of personal rights of individuals are the key concepts that constitute the democracy.

Freedom of speech is considered necessary in the development of democracy. Historically, freedom of speech is the basic theory that has limited the state power and the sovereign power in the development of modern state, playing a important role in the establishment of liberal nation. As the freedom of speech in democratic politics is the freedom of seeing, hearing, speaking and criticizing, it is regarded as the lifeline of democratic politics and works as a compositional principle that forms opinions of people. Also, in the age of informatization, media is an essential entity in people's right to know and a recognized institution to serve people's right to know. However, media's approach and report can deliver unnecessary information, which can lead to ethical problem that intrude on personal rights of individuals. Especially when there is sensational report on criminal cases, the victims and suspects can be stigmatized and lose chance of fair trial. Therefore, media need to pay more attention to expressions that can damage honor.

Generally, freedom of speech and protection of personal rights have conflicting nature, and it is essential to coordinate freedom of speech and personal rights of individuals in a norm-harmonious way. The conflict between advertising and personal rights can bear more complicated situations than one between media and personal rights. It is because one more element is added to the advertising: the question of whether or not advertising can enjoy the freedom of speech like general media. Regarding the freedom of speech in advertising, the prob-
problem that up to where the limitations exist and from where it should be limited is a very important problem and also a challenging task.

In most nations, freedom of speech and publication is recognized as a basic right of human being, but the problem of whether or not advertising belongs to the media is interpreted differently depending on nations, periods, or individuals. Therefore, freedom of speech in advertising is being regulated case by case without uniform standards. However, in a situation where the effects of advertising is more deeply embedded in every day’s life of individuals while the necessity of securing personal rights of individuals is growing, conflicts and coordination between advertising and personal rights of individuals need to be dealt with in terms of development of advertising industry and protection of personal rights of individuals. Especially right of respect is the essential element in the protection of personal rights that belongs to mental freedom constitutionally, and among other personal rights, there has been frequent conflicts with freedom of speech in advertising.

In this context, this study examines the general concepts regarding freedom of speech and intrusion on personal rights in advertising focusing on defamation and examines how the freedom of speech in advertising and the right of respect are mediated when they have conflict. Also, this study aims to investigate how it is different from the conflict between the media and the right of respect. For this, this study analyzed precedents and theories about issues. And related theoretical publications, theses, collection of precedents, and the Internet data were collected and analyzed for the study.

2. Freedom of Speech in Advertising

The question of whether or not advertising is the media is an important matter in solving conflicts between advertising and personal rights. Freedom of speech in the media is the important criterion that helps to judge when there is a conflict between report by the media and personal rights of individuals. In America, upon conflicts between media report and personal rights of individuals, when a government official or public figure as a plaintiff cannot prove the actual malice, or when it is judged as a fair comment, they can be exempted from obligation in terms of guaranteeing freedom of speech in the media.

Regarding the freedom of speech in advertising, the problem that up to where the limitations exist and from where it should be limited is a very important problem and also a challenging task. In most nations, freedom of speech and publication is recognized as a basic right of human being, but the problem of whether or not advertising belongs to the media is interpreted differently depending on nations, periods, or individuals. Therefore, freedom of speech in advertising is being regulated case by case without uniform standards.

In America, regarding advertising expressions or commercial speech doctrine, which is freedom of speech in advertising, there has been debate since mid 1970s over if freedom of speech in advertising can be unconditionally enjoyed like freedom of public opinion guaranteed by the First Amendment. However, United States Supreme Court ruled that not all advertising can be protected under the First Amendment, arguing that the three basic requirements below need to be met for legal regulations.

- The government needs to claim the substantial state’s interests to justify the regulations.
- The government needs to demonstrate that the regulation of the advertisement is the improvement of state’s interests.
- The interests of the state and the regulation of the government need to have reasonable fit.

These principles have been made relatively recently and still have room for development. In fact, the court’s decision has substantially changed the protection contents for commercial advertisements, and the judicial decision toward the commercial advertisements is greatly affected by the judge’s dispositions and philosophy. Freedom of speech in advertising is not greatly acclaimed by the US Supreme Court judges. Also, if we take a look at the precedents related to advertising, in judging freedom of speech in advertising, “whether or not the message affects the formation of public opinion”, “commerciality of advertisement”, and “interests of the public” are the important criteria for the judgement. In Korea, freedom of speech is protected under constitution. The problem is how advertising is related to the freedom of speech in the media stipulated by the constitution. On this issue, since there is no precedent in the Supreme Court, which is the highest interpretation institution on constitution, nor interpretations by the Constitutional Court, we will examine the opinions of constitution and communication scholars. According to the discussion on advertising regulations, since advertising is a creative activity and
an expressive action, freedom of advertising as a expressive action needs to be guaranteed. On the contrary, some argue that since advertising is intrinsically a commercial activity, different from the normal creative work or expressive action in that advertising is the tool for private interests rather than public benefits, proper regulations are inevitable.

In the midst of this discussion, freedom of expression in the advertisement tends to be expanded recently, but it is not widely recognized as much as the freedoms of the media that deals with the public opinion\(^1\). In addition, in product advertisement among various kinds of advertisements, freedom of expressions is limitedly guaranteed compared to the political advertising or opinion advertising. It is because limitless advertising expressions can represent the interests of a certain advertiser rather than those of consumers or general public, and many constitution scholars share the opinion that minimum regulations to protect the interests of majority of good consumers are necessary. According to the, the advertising cannot be understood in terms of freedom of expression but of freedom of business.

As opposed to this argument, communication scholars majoring in advertising studies\(^1\) claim that advertising is the basic right, which includes freedom of speech, freedom of expression, freedom of business, and freedom of choosing jobs. It has the complicated characteristics ranging from privileged status of rights to mental freedom as its best priority to the rights to economic freedom as the second best priority, so it needs to be developed at constitutional level and in terms of legal and administrative level, the regulations need to be reduced. On this issue\(^2\) argued that freedom of expression and regulations on advertising to protect rights of individuals are not opposite concepts and can be compatible.

In discussing the freedom of expression in advertising, the essence is whether or not advertising can enjoy the freedom of expression that the media is enjoying, which depends on how the basic concept of advertising is understood. Early concept of advertising predominantly supported the idea that advertising is a part of economic activities and needs to be included in economical criterion. Therefore, the concepts and theories related to advertising were focused on the economic behaviors, and did not put emphasis on non-economic areas such as art, politics, or public services. However, entering the late 20th century, advertising started to be regarded as a form of mass communication that provides opinions and market information and its new role started to be recognized\(^3\). Especially, new forms of advertising such as political advertising and opinion advertising had its foundation of freedom of expression compatible\(^4\). Like this, freedom of expression in the advertising has become an important issue as the concepts of advertising in terms of artistic aspect that seek creativity, advertising as a type of communication, advertising as a social institution to establish and maintain society are being emphasized.

3. Freedom of the Press and Defamation

The concept of personal rights is very comprehensive. Personal rights are rights that are acknowledged to protect interests of social life that cannot be detached from the character of the right holder, such as life, body, freedom, honor, chastity, portrait, and privacy. And it is defined as the total entity of personal interests such as freedom, honor and body that belong to the character. Also, it is defined as the total entity of interests that is protected from the third party for its free development, targeting at the personal traits that are composed of two aspects; one is physical aspects such as life, body, health, and freedom and the other is mental aspects such as honor, portrait and privacy.

We need to examine the principles that are taken into consideration when the freedom of speech and personal rights clash in America. If we examine the developmental stages of the media law in America, in order to balance the freedom of speech and public interests there were theories and principles; 1. Theory of prohibition of pre-regulation 2. The principle of dangerous tendency 3. Theory of clarity and the principle of excluding the assumption of constitutionality 4. The principle of clear and present danger 5. Principle of choosing the regulation methods at a minimum level 6. Principle of balanced interests. First, theory of prohibition of pre-regulation is the ban on the permission of assembly and association and the prohibition of censorship in the media and publication. Second, the principle of dangerous tendency is the theory that we can limit the expressions that can intrinsically do harm to the nation and society.

Third, theory of clarity and the principle of excluding the assumption of constitutionality is the theory that the legal stipulations that regulate expressive actions need to be clear and it denies the assumption of constitution-
ality of the law that intrudes on freedom of expression. When law that regulates freedom of expression is unclear, it is void for vagueness. Fourth, the principle of clear and present danger claims that when performing posterior regulations on the freedom of expression, there should be clear and present danger.

Fifth, principle of choosing the regulation methods at a minimum level claims that when regulating freedom of expression, we need to choose less restrictive alternative considering that freedom of expression has superior status to other rights to freedom. Last, principle of balanced interests claims that when freedom of expression clashes with various social interests, then there will be balancing test on the purpose, status, and realization method, and in this case, the range of regulation should be determined by doing balancing test of the social interests, availability and values that will appear between guaranteeing freedom of expression and regulations of expression.

Personal rights are people’s basic rights that are protected under constitution, but we need to also protect free activities of the media to maintain and develop democratic society. Also, freedom of speech is guaranteed as the basic rights under constitution (Article 21), and when there are inevitable conflicts between the two, the court applies adjustment criteria. Here, by examining the precedents in the media inside and outside of the nation related to defamation, we will investigate how the conflicts between freedom of speech and the right of respect are solved and what its meaning is.

Honor is “the objective evaluation from the society on personal values such as personality, valuable behavior, fame, and credit” and “social evaluation of a person’s value”, which constitutes a part of personal rights that are basic rights constitutionally. Defamation is “a total action that degrades the social value of the honor owner”. The big characteristic of Korean law on defamation is that not only false statements but also truthful contents and expressions can be regarded as defamation. The criminal law Art. 307, Clause 1 stipulates that “a person who damaged honor of another person by showing unnecessary information will be put into jail for less than 2 years or fined under 5 million won”.

And when damaging other people’s honor intentionally or by accident, it will constitute the illegal actions by civil law, and the person will take the responsibility of damage compensation (Civil Law Article 750,751). But it stipulates that “if the purpose of it is only for public interest, that act is not illegal”. It shows that the supreme court applies circumstances precluding wrongfulness by criminal law Article 310 to the civil law trials. The order is seen in the civil law cases, but it seems like the Korean supreme court has the similar logic in the criminal law cases. Also, the court judges the illegality of defamation with the three criteria such as public nature, truthfulness, and reciprocality.

The concept of “personal rights” that is gaining more importance has made the constitution have some important stipulations on the protection of honor. We can suggest the basis of articles in law; the rights to seek dignity, value and happiness (Constitution Article 10), secrecy and freedom of privacy (Constitution Article 17), freedom of speech and publication/prohibition of defamation and damage compensation (Constitution Article 10, Clause 4) Defamation act is stipulated in criminal law Article 33, and can be punished by criminal law. However, we cannot deal with the problems with personal rights by regulating constitutionally or by criminal case law. The question of how the intrusion on personal rights are admitted, what kind of claims occur caused by intrusion on personal rights and what its limitations need to be treated in judicial field. Here, civil case law Article 750, 751, and 764 work as an important judicial means of relief.

Especially “honor” in terms of constitution is the key element of protecting personal rights that belong to mental freedom. Civil law Article 764 stipulates that the court can order “proper disposal for recovery of honor” by the claim from the victim. And it is very uncommon to stipulate in constitution that the victim can claim for damage compensation when the honor and rights were intruded (Constitution Article 21 Clause 4), and this kind of stipulations were possible because the damage caused by the media and publication is serious.

Furthermore, civil law aims to compensate for the damage through damage compensation. The fact that the court can order “proper disposal for recovery of honor” as well as the damage compensation is more unusual considering the basic structure of the civil law responsibility principle. As the principles were stipulated as a way of recovering the damaged honor, it is important to establish the legal interpretation to correspond to it.

The key in defamation lawsuit is how to coordinate the right of reputation, which is the constitutional benefits on victims’ part (plaintiff, prosecutor), and the freedom of speech and the rights to know that are constitutional benefits of the defendant. In America, before
1960, strict responsibility principle was applied to protect the right of reputation rather than freedom of speech and publication in the defamation case by general law. Even though there were considerable reasons for believing it as true at that time, the person who reported should take the responsibility of verifying the truthfulness in the truth counterargument. And the plaintiff didn’t need to verify the intentionality of the defendant and if the defendant cannot verify the truthfulness, the defendant held all the responsibility. The truth counterargument was absolutely acknowledged and defamation was an issue only in the false statements.

And in 1964, there was a ground-breaking precedent by the state supreme court on the case of New York Times Co. v. Sullivan (the chief of police office in Montgomery city in Alabama), and since then the argument that freedom of speech needs to be protected first than the honor of public figure became the general tendency of the US State Supreme Court. Since then, there were a couple of precedents and the standards for the media’s exemption to be established. Today, the media report in America can be exempted from responsibility when the report is true, the government officials or public figures, who are plaintiffs (victim), cannot prove the actual malice, and it is regarded as fair comments.

In Korea, criminal law Article 307 contains the stipulation on the defamation. But criminal law Article 310 says, “when the actions in criminal law Article 307 Clause 1 are truthful and only for public interests, there will be no punishment”, which is the special circumstances precluding wrongfulness. This stipulation is trying to coordinate the conflicts between the freedom of speech that our constitution guarantees and personal rights of reputation, which is the constitutional benefit. To protect the rights to know and freedom of speech, the practice in Korea in applying the criminal law Article 310 is expanding the range of exemption of the defendant in defamation cases caused by the media report. The attitude toward precedents are established like following; even if the report is wrong, when there are considerable reasons for the media to believe its truthfulness, the illegality is precluded and fact on the public figure needs to be deemed widely as the fact on the public interests.

4. Advertising and Defamation

Defamation means damaging reputation, which is one of the protection benefits in illegal act law of civil law. That is, the civil law Article 750 (stipulations on illegal act) stipulates that “a person who did harm to other person with illegal act intentionally or by accident has the responsibility of compensating for the damage.” and Article 751 Clause 1 says “a person who damaged body, freedom, or honor of others or gave other person mental pain has the responsibility of compensating for damage other than property.” This shows that a person who damaged reputation of others have responsibility of compensating not only for proprietary damage but also mental damage. Among personal rights, conflict with the freedom of expression in advertising happens frequently in defamation law suit and there are precedents related to it. Here, we will examine the precedents related to advertising regarding defamation, and investigate how the conflict between freedom of expression and right of reputation is resolved and what its meaning is.

What is important in the coordinating principle when dealing with the conflicts between the freedom of expression in advertising and defamation is the truth and degree of illegality of the reputation damaging advertisement? Even though advertising activity is considered defamation act by appearance and there is intentionality and fault with the person, responsibility for defamation is not formed when there is no illegality. The problem of when the intrusion on trust and reputation has illegality raises a very subtle and challenging question. We can see a criterion from the stipulation on defamation in criminal law. That is, damaging other people’s reputation by showing truthful facts has weak illegality whereas damaging other people’s reputation by showing false information has strong illegality.

Also, when the reported facts are related to the interests of the public, it will have weaker illegality than one related to private matter. In this respect, the criminal law Article 310 is valid in that it stipulates “if the reported fact was truthful in defamation act and for the interests of the public, the illegality of the act is eliminated”.

But for the criminal law Act 309 (defamation through publications, etc.) that the act of damaging reputation of others through newspaper, magazine, radio, and other publications, Criminal law Act 309 is not applied. And there is a precedent that for the defamation act through publication for purpose of slander, the illegality will not be eliminated even though it is only for public interest. Therefore, even if an advertising in publications is regarded as defamation act and there was intentionality and fault, the responsibility for defamation is not formed.

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when it has truthfulness and public character and as long as there is not purpose of slander.

In short, when an advertisement damages reputation of a certain individual and the person who made the advertisement has the purpose of slander, it has illegality. And even when there is no purpose of slander, if truthfulness or public character does not exist, it has illegality, too. As political opinion advertisement has a lot to do with the interests of the public, the range of illegality becomes narrower. And for an advertising related to religious criticism, the range of illegality becomes narrower, too. However, for commercial advertisements, there are few cases that are related to the interests of the public, so if there is a purpose of slander or expressions contrary to truthfulness, illegality is acknowledged.

There was a precedent in America related to defamation in 1964 when there was a Supreme Court order on New York Times Co. v. Sullivan that political advertising and editorial advertising are under protection of Amendment Article 1. The case was about both defamation and political advertising. It was a historical order that applied the Amendment Article 1 to political advertisements for the first time in US history, giving freedom of expression to advertisements and affecting a lot of similar cases later in the future. In this case, The US Supreme Court judged that political advertising and editorial advertising are under protection of Amendment Article 1 and explained, “Discussion over public issues shouldn't be restricted. It needs to be done powerfully and in an open field. The discussion can involve attacks on government officials that are aggressive, pungent, and sometimes so acute to the point where people might feel offended”.

In Korea, there was a criminal law case on the advertisement of the Pasteur Dairy Co. Ltd., which used the test results conducted by Korea Consumer Agency in their advertisement, and the case was to judge the advertisement was defamation by criminal law. The court ruled that the advertisement was guilty of defamation because the contents of the advertisement make average people believe that the opinions of the Korea Consumer Agency are all wrong or distortion of truth. The advertisement used insertion, exaggeration, and assumption instead of refuting the test result of the Korea Consumer Agency with specific and theoretical basis. So, the court ruled that the contents of the advertisement contained false information as a whole even though it has partial truth in it.

Also, in the legal case of Namyang Dairy Co. Ltd., versus Pasteur Dairy Co. Ltd., Pasteur argued that their advertisement is based on truth and was conducted for the purpose of people's health and the public interest, not for maligning Namyang. The court ruled that advertisement of Pasteur Dairy give the consumers wrong impression that Pasteur has sound business ethics while other existing dairy companies are unethical, only seeking profits without considering health of people. The court judged that the advertisement was for slander.

In religious advertisement, main issue is how to coordinate the conflicts caused by the two benefits of the law, between guaranteeing freedom of expression and religion and guaranteeing personal rights such as personal reputation. Regarding this matter, precedents indicate that we need to consider the general conditions of the critical actions such as the benefits gained by the critical action, the range of the value and announcement, and methods of expression. And at the same time, we need to consider the degree of intrusion on reputation of other people, which has been damaged or has a possibility of being damaged due to the criticism. In religious advertisement, to guarantee the freedom of religious criticism and expression, the precedent shows more strict attitude toward it than the commercial advertisement in recognizing the illegality.

### 5. Conclusion

So far, focusing on precedents, we have examined the coordinating principles in law when there is a conflict between freedom of expression in advertising and the right of reputation. In precedents related to advertising, there were frequent cases of defamation that involve conflicts between freedom of expression and mental personal rights. If we examine the law and precedents, requirements such as truthful fact and relationship with the public interests weaken the illegality while false facts and the purpose of slander strengthen the illegality. Also, political opinion advertising has wider range of exemption from responsibility due to its public character while commercial advertising has narrow range of exemption. For religious advertising, in acknowledging the illegality, stricter interpretation is applied than commercial advertising to guarantee the freedom of religious criticism and expression.

Then, we need to examine what kind of coordinating legal principles are applied in the media and advertising when there is a conflict with personal rights. The analysis
results focusing on precedents show the tendencies below. First, both the media and advertising has the higher chance of exemption when the contents are all true. Especially in political advertising or opinion advertising, when the contents are false, the illegality gets strong.

Second, the political advertising and opinion advertising have a lot to do with public interests, which give them higher chance of exemption from responsibility. However, in commercial advertising, since there are very few cases where public interests are involved; illegality is acknowledged when there is a purpose of slander or defamatory expressions that are against truthfulness. When we take a look at the precedents related to advertising, we can see that commercial advertising are regarded as activities to provoke desire for purchase targeting at many and unspecified people, so the freedom of expression is partially deferred here, while political and opinion advertising are regarded as one that belongs to freedom of expression, so stronger principles of freedom of expression is applied.

As examined so far, we can see the range of exemption from responsibility is narrow in case of advertising compared to the media when there is a conflict with personal rights. We might think that advertising has more limitations in freedom of expression compared to the media, but mostly it stems from the basic difference between the media and advertising. In conclusion, when making advertising in the future, we need to learn and know about the legal regulations related to personal rights to prevent the possibility of lawsuit caused by intrusion on personal rights. Through this understanding, we can prevent the advertisers from being timid due to ignorance of related law and encourage more creativity in advertising.

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