

A Comparative Study of the Deceptive Advertising in US, Japan and S. Korea

Jae-Yung Cho¹

¹ Department of Advertising and PR, Chungwoon University, Korea

Abstract. The purpose of this study is to discuss the controversial issues of the regulation of deceptive labeling or advertising in S. Korea and suggest the alternatives for improving the Fair Labeling or Advertising Act by comparing with the laws of US, Japan and S. Korea focusing on the definitions and enforcement of deceptive labeling or advertising. In conclusion, the consistency of the application of FLAA is needed and the more specific analyses of the judgment cases by FTC are needed for the future research.

Keywords: Deceptive labeling, deceptive advertising, comparative study

1 Introduction

Deceptive advertising can inflict a loss on consumers as it is difficult to distinguish the truth in advertising from the deception or likeliness of deceiving in advertising. However, it has not been researched much in advertising regulation area how effectively it is regulated to protect consumers and maintain the order of fair market. There were only a few researches focusing on deceptive advertising [1][2] that were approached by the perspective of legal principles. One of them was about comparative study between S. Korea and the US and the other was about improvement of the regulation of deceptive labeling and advertising in S. Korea. Not focused on deceptive advertising, a few researches [3][4] were executed by the more broad sense of unfair labeling and advertising. Although these researches certainly contributed to improve the regulation policy, because they were conducted several years ago and law is bound to be revised, it may be necessary to research with some different views to suggest more specific ideas which are appropriate to current situation.

Thus, it is worthwhile to discuss the definition of deceptive advertising comparing with other countries in their related laws and suggest the alternatives for improving more effective regulating policies to protect consumers and maintain fair market system since how deceptive advertising is defined determines the way to regulate it.

2 Current Situation

All the acts related to advertising without exception include the clauses of prohibiting deceptive advertising in S. Korea. Even though they are dispersed over various acts, it is possible to regulate effectively deceptive advertising by the Fair Labeling and

Advertising Act(hereinafter referred to as 'FLAA') [5] because it is, as a general law, applied to all kinds of labeling or advertising regardless of industrial classifications or media. To the best of regulating deceptive advertising, all the acts should follow FLAA. The application of FLAA falls under the jurisdiction of the Fair Trade Commission (FTC) [6]. The Commission investigates unfair labeling or advertising by recognizing it by its own efforts or receiving a report from other organization, proves its unfairness and issues an administrative punishment autonomously, or reports it to relevant organizations for making them to take a legal step.

2.1 Purpose of FLAA

FLAA was enacted on Feb. 15th of 1999 and enforced as from July 1st of the same year. The enactment of FLAA was based on the fact that increasing unfair labeling or advertising necessitated changes in the policy to protect consumers since their right purchasing decisions became a crucial factor for facilitating market competition due to the changeover from *supply side* to *demand side* market mechanism. Although the regulation of unfair labeling or advertising was originally included as a subparagraph in the Monopoly Regulation and Fair Trade Act [7], but it was not enough to regulate increasing unfair labeling or advertising by it and this caused many difficulties [8].

In accordance with the situational background, the purpose of this Act is to prevent unfair labels and advertisements for products and services which may deceive or mislead consumers in labeling and advertising, and to promote provision of correct and useful information to consumers, thereby establishing order in fair trade and protecting consumers (Article 1 of FLAA). This implies that this Act is not only for preventing unfair labeling or advertising, but also for making business entities actively provide the useful information for consumers to make right decisions.

Therefore, it is generally agreed that FLAA is the general law of labeling or advertising which is applied to all types of business regardless of any industrial categories and its main function is to regulate the unfair labeling or advertising which business entities, etc. shall place that may undermine order in fair trade by deceiving or misleading consumers, or compel other business entities to do so, and facilitate fare trade market system.

Table 1. Correction by the types of unfair labeling or advertising of FLAA

Year	Unfair labeling and advertising				Total
	False or exaggerated labeling or advertising	Deceptive labeling or advertising	Unfairly comparative labeling or advertising	Slanderous labeling or advertising	
1999	309	14	12	7	342
2000	271	3	28	6	308
2001	269	7	6	10	292
2002	231	12	11	7	261
2003	360	15	3	2	380
2004	279	45	7	5	336
2005	288	5	5	4	302
2006	304	13	5	4	326
2007	215	8	8	6	237
2008	281	11	6	6	304
2009	261	11	10	3	285
2010	210	13	7	2	232
2011	222	46	0	5	273
2012	227	14	2	7	250
2013	150	4	6	4	164
2014	144	14	3	4	165
Total	4021	235	119	82	4457
Ratio	90.2	5.2	2.7	1.9	100(%) ¹

(Reconstructed from ‘Statistical Yearbook’ p.69 of 2014 by FTC focusing on FLAA)

2.2 Controversial Issues

In comparison, false or exaggerated labeling or advertising is defined as, untruthfully labeling or advertising or excessively exaggerating the fact respectively (Article 3 (1) of the Presidential Decree of the Act). Unfairly comparative labeling or advertising means labeling or advertising without clearly defining target or criteria for comparison, or with the products, etc. of the relevant business entities having an advantage over the products, etc. of other business entities, etc., or being better than those, without objective grounds (Article 3 (3) of the Presidential Decree of the Act). And slanderous labeling or advertising means the relevant business entities, etc. slander on other business entities, etc., their products, etc. or their disadvantage

¹ Due to rounding off the numbers to the nearest hundredths.

without objective grounds in their labeling or advertising (Article 3 (4) of the Presidential Decree of the Act).

There have been raised the controversial issues with the above considerations that the meaning of deceptive advertising is used as one of the four types of unfair advertising and it has a specific meaning rather than extended general [9][10]. Firstly, a question arises that there are enough rationales of the reasons for classifying unfair labeling or advertising into four types because the types of labeling or advertising were not exclusively distinguished and the standards of judgment of the each type were not consistently applied to cases and sometimes dually applied to one as shown in the judgments by FTC [11][12][13]. This fact is verified that the typology of the unfair labeling or advertising is equivocal, so the boundary of each type of unfair labeling or advertising defined in the subparagraphs of the Article 3 (1) of FLAA is not clear.

Secondly, due to the ambiguity of the definitions of the four types of unfair labeling or advertising, it is questioned that FTC's judgment decisions are not consistent. According to the results of the analyses of the judgment cases [14][15][16], for instance, the cases that had more than two types of unfairness were treated separately, but these were not always, so principles of the judgment were not consistent. The same results were found in false or exaggerated labeling or advertising and deceptive labeling or advertising, that is although the case was included in not only falsity or exaggeration, but also deception, it was treated as only one of them. This may be classified by means of deceiving consumers or making them misunderstood. In other words, the unfairness by obvious and active falsity or exaggeration may be generally classified as false or exaggerated labeling or advertising, but that of more implicit and passive may be classified as deceptive labeling or advertising. But this was not always like that.

Consequently, the classification of the four types of unfair labeling or advertising is not exclusive, and the alternatives for improving the application of the regulation are needed. As a way of finding the alternatives, it might be a good idea to compare the regulations of deceptive advertising in different countries such as US and Japan.

3 Differences of the Definition of Deceptive Advertising

3.1 Definition of Deceptive Advertising in the US Law

By comparison with S. Korea's, the US law regulates all types of unfair labeling and advertising as deceptive advertising. The mainstream of the US law regulating deceptive advertising is commingled with common law, state and federal legislations, and the law enforcement agencies are various like courts, the Federal Trade Commission(FTC), Food and Drug Administration(FDA) or the judicial authority of each state and so on [17][18]. For the discussion of the differences or similarities between S. Korea and US in the definition and enforcement of deceptive advertising, here, the main federal laws are being focused.

The representative federal legislations are the section 43(a) of the Lanham Trademark Act(Lanham Act), that is the federal trademark law and the section 5 of the

Federal Trade Commission Act(FTC Act). Lanham Act was established mainly for regulating trademarks in 1946 and the section 43 is about false designations of origin, false descriptions, and dilution forbidden. The paragraph (1) of the section 43(a) of the Act is as follows: Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which; is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person; or in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act [19].

As stated above, the Act regulates the all deceptive acts in commercial advertising or promotion as far as they relate to causing confusion, mistake, or deception and misrepresenting regardless of their intentions. Thus, Lanham Act is the law for regulating deceptive advertising by defining the deception in advertising as broad meaning.

The FTC was established on the basis of the FTC Act which was legislated in 1914 [20]. The main purpose of the establishing of FTC is to regulate unfair methods of competition and to outlaw unfair acts or practices that affect commerce. The amendment of the section 5 of FTC Act based on the Wheeler-Lea Act brought out the extension of FTC's power. The Commission regulates not only the unfair competitions in business entities, but their deceptive advertising acting on consumers. Currently, the Commission has the leading authority in regulating unfair advertising despite there are many authorities having jurisdiction of it.

3.1 Definition of Deceptive Advertising in Japan

The general law of labeling or advertising in Japan is the Premium and Representation Act(PRA) [21]. PRA was legislated in 1962 as an exemption law of the Prohibition of Private Monopoly and Securing Fair Trade Act(PPMSFTA), and therefore if the cases in related to representations occur, PRA is applied to the greater part of them, but PPMSFTA is not many. PRA is enforced on the representations to consumer, and PPMSFTA is enforced on the representations not included in PRA.

Deceiving representations of the qualities, contents or prices of products or services is strictly regulated by PRA, and at the same time it limits the highest amount for preventing excessively providing giveaways. The term *representation* in this Act means advertising or representation such as the qualities, contents, prices etc. of products or services in order that business entities or business entities' organizations may attract consumers. More specifically, all commercial activities are included such as labeling written on, attached to containers or packages of products or services, bulletins in places of business, and advertising through flyers, newspapers, magazines, TV and Internet etc.

Thus, PRA is broadly applied to all representations of the products and services to

consumers including advertising by the various media. The meaning of *representation* in PRA implies ordinary representation and advertising that is different from *label* in FLAA which is distinguished from *advertising* as mentioned earlier.

3 Conclusions

As a way of suggesting the alternatives to improve the judgment, it is assumed that false or exaggerated labeling or advertising and deceptive labeling or advertising are classified by the ways to deceive or mislead consumers, which the former is by the more explicit or overt ways as untruthfully or exaggeratingly labeling or advertising and the latter is by the more implicit or allusive ways as concealing, suppressing or minimizing facts. On the other hand, the unfairly comparative labeling or advertising and slanderous labeling or advertising are assumed to be classified by the matters mentioned in the labeling or advertising, meaning that they compare unfairly or slander without the objective grounds with mentioning together the products or services of the relevant business entities etc. and those of other business entities, or only those of other business entities in labeling or advertising.

References

1. Korea Economic Law Association: A Report of the Improvement of the Regulations of Deceptive Labeling or Advertising. FTC, Seoul (2009)
2. K. J. Lee: The Regulation of Deceptive Representation and Advertisement with a Special Emphasis on the Comparative Research on the U.S. Law. Economic Law Review, vol. 10, no. 2, pp.157--175. Korea Economic Law Association, Seoul (2011)
3. S. J. Sung: Study on Improvement of Act on Fair Labeling and Advertising, Korea Legislation Research Institute, Sejong City, S. Korea (2011)
4. Y. H. Son: The Regulation on the Misleading Representations and Advertisement in Japan with Special Emphasis on Act on Prohibition of Private Monopolization and Maintenance of Fair Trade and Act against Unjustifiable Premiums and Misleading Representations. Business Law Review, vol. 25, no. 2, pp.381--413. Korea Business Law Association, Seoul (2011)
5. Fair Labeling and Advertising Act,
<http://www.law.go.kr/lsSc.do?menuId=0&p1=&subMenu=1&nwYn=1§ion=&tabNo=&query=%ED%91%9C%EC%8B%9C%E3%86%8D%EA%B4%91%EA%B3%A0%EC%9D%98%20%EA%B3%B5%EC%A0%95%ED%99%94%EC%97%90%20%EA%B4%80%ED%95%9C%20%EB%B2%95%EB%A5%A0#undefined>
6. Korea's Fair Trade Commission, <http://www.ftc.go.kr/>
7. Monopoly Regulation and Fair Trade Act,
<http://www.law.go.kr/lsSc.do?menuId=0&p1=&subMenu=1&nwYn=1§ion=&tabNo=&query=%EB%8F%85%EC%A0%90%EA%B7%9C%EC%A0%9C%20%EB%B0%8F%20%EA%B3%B5%EC%A0%95%EA%B1%B0%EB%9E%98%EC%97%90%20%EA%B4%80%ED%95%9C%20%EB%B2%95%EB%A5%A0#undefined>
8. H. S. Park: The Regulation of Unfair Labeling or Advertising Focusing on the Fair Labeling and Advertising Act. Trial Materials: The Problems of Economic Laws, vol. 87, pp. 629--759. Office of Court Administration, Seoul, Korea (2000)

9. Korea Economic Law Association: A Report of the Improvement of the Regulations of Deceptive Labeling or Advertising. FTC, Seoul (2009)
10. K. J. Lee: The Regulation of Deceptive Representation and Advertisement with a Special Emphasis on the Comparative Research on the U.S. Law. Economic Law Review, vol. 10, no. 2, pp.157--175. Korea Economic Law Association, Seoul (2011)
11. J. Y. Cho: A Study on the Unfairness of the Comparative Labeling and Advertising Activities in the Judicial Precedents. Korean Journal of Communication and Information, vol. 39, pp. 428--472. Korean Association for Communication and Information Studies, Seoul (2007)
12. Korea Economic Law Association: A Report of the Improvement of the Regulations of Deceptive Labeling or Advertising. FTC, Seoul (2009)
13. K. J. Lee: The Regulation of Deceptive Representation and Advertisement with a Special Emphasis on the Comparative Research on the U.S. Law. Economic Law Review, vol. 10, no. 2, pp.157--175. Korea Economic Law Association, Seoul (2011)
14. J. Y. Cho: A Study on the Unfairness of the Comparative Labeling and Advertising Activities in the Judicial Precedents. Korean Journal of Communication and Information, vol. 39, pp. 428--472. Korean Association for Communication and Information Studies, Seoul (2007)
15. Korea Economic Law Association: A Report of the Improvement of the Regulations of Deceptive Labeling or Advertising. FTC, Seoul (2009)
16. S. J. Sung: Study on Improvement of Act on Fair Labeling and Advertising, Korea Legislation Research Institute, Sejong City, S. Korea (2011)
17. K. J. Lee: The Regulation of Deceptive Representation and Advertisement with a Special Emphasis on the Comparative Research on the U.S. Law. Economic Law Review, vol. 10, no. 2, pp.157--175. Korea Economic Law Association, Seoul (2011)
18. S. J. Sung: Study on Improvement of Act on Fair Labeling and Advertising, Korea Legislation Research Institute, Sejong City, S. Korea (2011)
19. <http://www.bitlaw.com/source/15usc/1125.html>
20. K. J. Lee: The Regulation of Deceptive Representation and Advertisement with a Special Emphasis on the Comparative Research on the U.S. Law. Economic Law Review, vol. 10, no. 2, pp.157--175. Korea Economic Law Association, Seoul (2011)
21. Y. H. Son: The Regulation on the Misleading Representations and Advertisement in Japan with Special Emphasis on Act on Prohibition of Private Monopolization and Maintenance of Fair Trade and Act against Unjustifiable Premiums and Misleading Representations. Business Law Review, vol. 25, no. 2, pp.381--413. Korea Business Law Association, Seoul (2011)