

ADVERTISING FORBIDDEN BY THE CIVIL AND COMMERCIAL CODE | MISLEADING ADVERTISING.  
COMPARATIVE ADVERTISING, WHEN IT IS MISLEADING. ABUSIVE, DISCRIMINATORY AND DANGEROUS  
ADVERTISING

By Marcelo E. Gallo

The new Civil and Commercial Code of the Nation deals with the information and advertising addressed to consumers in the 2<sup>nd</sup> Section, of Title III (Consumer Contracts) of Book Third (Personal Rights).

Within this framework and insofar as it is relevant here, the Code forbids, in its Section 1101, subsection a) misleading advertising<sup>1</sup>, in its subsection b) comparative advertising, when it is misleading<sup>2</sup> and in its subsection c) abusive advertising, discriminatory advertising and advertising that leads consumer to behave in a way that damages or endangers health.

Next, in section 1102, it provides that the consumers affected by the advertising forbidden in the preceding regulation or those who are legally entitled to apply from the judge the suspension of the illegal advertising, as well as the publication, in charge of the defendant, of rectifying notices and, as applicable, of the judgment.

The advertisings forbidden by the Civil and Commercial Code of the Nation are in addition forbidden by other general or special regulations for some types of goods or services – I will refer to some of them in this work – which also expressly set forth, in some cases and in other at least allow, other legal actions – or administrative claims – tending to their suspension and punishment and the compensation of the damages generated by their broadcasting.

**a) Prohibition of misleading advertising**

The regulation of subsection a) of section 1101 of the Civil and Commercial Code of the Nation, which forbids the so-called misleading advertising, is – let's say – supplemented by other general regulations.

---

<sup>1</sup> When forbidding the advertising that “a) contains false indications or of such nature that lead or may lead the consumer to a mistake, when they fall on essential elements of the product or service”

<sup>2</sup> It forbids advertising that compares goods or services when the nature thereof is such that they lead the consumer to a mistake.

In the first place, through the so-called Act 17,011, that included in the Argentine legal system the Paris Convention for the protection of Industrial Property, dated March 20, 1883.<sup>3</sup>

Section 10 bis of the Paris Convention, in its subsections 2) and 3), sets forth that every competition act contrary to the fair use in industrial or commercial issues (subsection 2) and which must be especially forbidden, constitutes an unfair competition act, insofar as it is relevant here: “1<sup>st</sup> Any act of such a nature that creates confusion, whatever the mean is, with the establishment, products or the industrial or commercial activity of a competitor... 3<sup>rd</sup> The indications or statements which use, in the practice of business activities, may lead the public to a mistake on the nature, manufacturing manner, features, skill in employment or the number of goods.” (Subsection 3).

This type of illegal advertising regulates also section 11 of Emergency Decree 274/2019, on Fair Commercial Practices, which under the title “Misleading advertising” forbids the performance of any kind of presentation, of publicity or advertising which through inaccuracies or concealments may lead to a mistake, deception or confusion with respect to the features or properties, nature, origin, quality, purity, mix, quantity, use, price, commercialization conditions or manufacturing techniques of personal property, real property or services.

Subsection a) of section 10 of decree 274/2019 sets forth in turn that to lead to mistake on the existence or nature, manufacturing or distribution manner, main features, purity, mix, fitness for use, quality, quantity, price, sale or purchase conditions, availability, results that may be expected from their use and, in general, on the attributes, benefits or conditions corresponding to the goods and services constitute unfair competition acts.

Subsection b) of said section 10 forbids leading to mistake with respect to the business origin of the activity, establishment, goods or inherent services, in a way that it is considered that they have an origin different from the corresponding one.

Subsection h) provides for another way of deception, the imitation of goods and services or business initiatives when it generates confusion as regards the origin of the goods or services or involves an improper use of a third party’s reputation or effort.

Finally, subsection i), that forbids denigration acts when they are based on false statements.<sup>4</sup>

---

<sup>3</sup> At the time of the inclusion, with the review of Brussels dated December 14, 1900, of Washington dated June 2, 1911, of The Hague dated November 6, 1925, of London dated June 2, 1934 and of Lisbon dated October 31, 1958.

<sup>4</sup> I) Denigration acts: “undermine the image, credit, fame, prestige or reputation of another competitor, unless the statements are accurate, relevant and true.” In the same sense, paragraph 2<sup>nd</sup> of subsection 3) of section 10 of the Paris Convention

The general regulation of the first paragraph of section 4<sup>th</sup> of Act 24,240<sup>5</sup>, on Consumer Defense, that sets forth the duty to inform of the suppliers of good and services, could in addition be used by the Enforcement Authorities of the regulation to repress misleading advertising.

As regards food, misleading advertising is forbidden also by several regulations of the Argentine Food Code and by Provision 4980/2005 of the National Administration of Drugs, Foods and Medical Devices (ANMAT). For example, sections 221 and 222 of the Argentine Food Code<sup>6</sup> and sections 2.9.e) and 2.9.k) of Annex III of Provision ANMAT 4980/2005.<sup>7</sup>

#### **b) Prohibition of comparative advertising, when it is misleading**

The regulation of subsection b) of section 1101 of the Civil and Commercial Code of the Nation forbids misleading information when the comparison leads the consumer to a mistake.

Misleading advertising – now defined by section 15, first paragraph of decree 274/2019<sup>8</sup> - is regulated in addition by the Fair Commercial Practices regime. To be considered legal it shall comply with the following conditions:

- a) It shall not lead to a mistake, deception or confusion between the advertiser and a competitor or between the property of the advertiser and those of a competitor.
- b) It shall compare goods that satisfy the same needs or have the same purpose.

---

forbids “2nd False statements, in the practice of business activities, tending to discredit the establishment, products or industrial or commercial activity of a competitor”.

<sup>5</sup> “Information. The supplier is compelled to inform to consumer in a true, clear and detailed manner all matters related to the essential features of the goods and services that it supplies, and the commercialization conditions thereof.”

<sup>6</sup> Setting forth, respectively that: Section 221 - (Resolution of the Ministry of Health 2343, 19/4/80) (Ratified by the Joint Resolution of the Ministry of Health and Environment 149/05 and of the Secretariat of Agriculture, Livestock, Fishing and Food 683/05) “In the advertising carried out through any means the definition, composition and name of the product set forth in this Code shall be observed.” and Section 222 - (Resolution of the Ministry of Health 2343, 19/4/80) (Ratified by the Joint Resolution of the Ministry of Health and Environment 149/05 and of the Secretariat of Agriculture, Livestock, Fishing and Food 683/05) “The labeling and advertising of the products contemplated in this Code when as from the sanitary-bromathological standpoint the same can cause an error, deceit or confusion in consumer is forbidden.”

<sup>7</sup> Setting forth, also respectively that: “2- Every advertising or publicity of food shall not:... 2.9 Include phrases and /or messages that:... e) Tend to mask the specific properties of the product... k) Use words, signs, names, symbols, emblems, illustrations or other graphic representations that turn said information false, incorrect and/or insufficient or that may lead to misunderstanding, error, confusion or deception to consumer as regards the real nature, composition, origin, type, quality, quantity, duration, performance or manner of using the food.”

<sup>8</sup> Just like the advertising that refers, either explicitly or implicitly, to a competitor or its trademarks or the products or services offered by it.

- c) The comparison shall be made objectively, between one or more essential, relevant, representative and verifiable features of said goods (among which the price may be included).
- d) The purpose of the advertising must be to inform the public to which the advantages of the advertised goods are addressed.
- e) The advertising shall not discredit nor denigrate the intellectual and industrial property rights or circumstances of some competitor.
- f) The advertising shall not obtain improper advantage of the reputation of a trademark of some competitor.
- g) It shall not present as well a good as an imitation or replica of a good with a protected trademark or trade name.
- h) In the event of goods protected by a denomination of origin, geographical indication or specific denomination, the comparison may only be made with other goods of the same denomination.

### **c) Prohibition of discriminatory advertising**

The regulation of subsection c) of section 1101 of the Civil and Commercial Code of the Nation forbids – insofar as it is relevant here – discriminatory advertising, which is not defined by it.

The broadcasting of discriminatory advertising is forbidden in addition by subsection i) of section 81 of Act 26,522, of Audiovisual Communication Services, that provides – as regards this item – that: “i) Advertisements shall not imply discrimination due to race, ethnic background, gender, sexual orientation, ideological, socio-economic issues or nationality, among others; shall not lessen human dignity, shall not offend moral or religious beliefs...”<sup>9</sup>

The Act for the Integral Protection to Prevent, Punish and Eradicate Violence against Women within the Areas in which they develop their Interpersonal Relationships, N° 26,485, forbids also, as regards the feminine gender, discriminatory advertising.

---

<sup>9</sup> Citing section 81, subsection i) of Act 26,522, the Civil and Commercial Federal Justice issued in October 2018, a precautionary measure that ordered the suspension of the advertising campaign of Burger King called Redheads, highlighting in the judgment that: “On the other hand, section 81 of Act 26,522, that regulates the broadcasting of advertising, sets forth in its subsection i, that advertisements shall not imply discriminations of race, ethnic background, gender, sexual orientation, ideological, socio-economic issues or nationality among others; shall not lessen human dignity, shall not offend moral or religious beliefs, shall not lead to behaviors that damage environment or physical and moral health of children and teenagers. In the case, the content of said advertising is contrary to the provision contained in the regulation, since it bases the offered promotion in the physical features of persons and relates it to mocking situations that turn reasonable the statement mentioned in the pleading.” (CIVIL AND COMMERCIAL FEDERAL COURT N° 4, October 9, 2018, in the case captioned “Arregger, Matías Daniel v- Fast Food Sudamericana S.A., “Amparo” (Appeal for protection against infringement of constitutional rights or guarantees”).

The regulation, in its section 4<sup>th</sup>, second paragraph considers as indirect violence, for the purposes of the law, every discriminatory behavior, action, omission, provision, criterion or practice that places the woman in disadvantage with respect to the man.

In its section 5<sup>th</sup> it defines as a type of violence against the woman, the symbolic violence, defining it as the one that, through stereotypes, messages, values, icons or signs transmits and reproduces domination, inequality and discrimination in social relationships, naturalizing the subordination of the woman in society.<sup>10</sup>

The regulation of section 6<sup>th</sup> of Act 26,485 understands as modalities the manners in which the different types of violence against the woman in the different areas appear.

---

<sup>10</sup> As a result of a commercial ad of the beer “Brahma Lime”, briefly broadcasted in January 2020, strongly criticized in social networks and which Cervecería y Maltería Quilmes S.A.I.C.A. y G., after an unconvincing defense decided almost immediately to stop broadcasting it, apologizing to the public, the Ministry of Women, Gender and Diversity of the Nation (*Ministerio de las Mujeres, Géneros y Diversidad de la Nación*) talked precisely of “symbolic violence”, under the following terms: “Recently there was a debate as a result of an advertising. Some people got angry, others were concerned and others thought that a big deal was made out of it. We want to use this excuse to talk about symbolic violence, stereotypes and consumptions that lead us to naturalize behaviors”, wrote in its Twitter account the Department led by Elizabeth Gómez Alcorta.

The script of the questioned commercial ad was the following: “Beer. All of us like it. But you think that it is bitter. You feel that you are out of place, by drinking little colored drinks. Don’t despair. This summer brings you Brahma Lime: a Brahma with a touch of Lime, less bitter”, says a voice-over while a young woman in bathing suit is seen drinking a “colored little drink”, surrounded by boys and girls – also young – that drink Brahma beer at a beach. Next, one of said young girls takes the “little drink” away from the principal actress of the commercial ad and immediately several young boys take her from the arms to “drag her” towards the sea against her will, where a notoriously older man is waiting her with the rest of the group of young girls and boys “Come on my queen, it’s time to have your beer baptism!”, says now the voice-over, at the time the older man who is in the sea, grabs the young woman who was drinking the “colored little drink” by the waist and submerges her – not without some violence – under the water, while he forces her to drink, while submerging her, a sip of beer. Once she gets out of the sea, the “baptized” young woman lets out a moan expressing her pleasure, presumably for having tasted Brahma Lime and said moan is received by her friends at the beach with clear gestures of rejoicing and approval. The commercial ad ends with takes of the young boys and girls dancing, while the principal actress of the spot holds in her hands a can of the new beverage.

The commercial ad may be interpreted as the blog of “Women that were not in the magazine covers” (<http://www.mujeresquenofuerontapa.com/la-cerveza-nos-gusta-a-todos/>) did, as using “... the old resource of making us feel as silly girls to sell us things ... And adds, it is not enough for them to tell you that you are a fool that does not know how to have fun because you are drinking colored juices and not beer. It is not enough to show you how a girl who did not become a woman “yet”, who does not know what she likes, but in order to “convince you” that “you should like what everyone likes” you are forced, pushed and obligated to go through the initiation rite to “taste” the thing that “when you taste it you like it” ...”

It is especially comprised in the regulation – among other modalities specified in said section 6<sup>th</sup> - the “Media violence against women”, and defines it as the publication or broadcasting of stereotyped messages and images through which any mass media, that directly or indirectly promotes the exploitation of women or their images, insults, defames, discriminates, dishonors, humiliates or infringes on the women’s dignity, as well as the use of women, teenagers and girls in pornographic messages and images, legitimating the inequality of treatment or constructing sociocultural patterns that reproduce inequality or generate violence against women.

**d) Prohibition of advertising that leads consumer to behave in a damaging or dangerous manner for his/her health or safety**

The regulation of subsection c) of section 1101 of the Civil and Commercial Code of the Nation forbids – insofar as it is relevant here – the advertising that leads consumer to behave in a damaging or dangerous manner for his/her health or safety.

Subsection i) of section 81 of Act 26,522, of Audiovisual Communication Services, sets forth in the same line, that advertising must not lead to behaviors that damage environment or the physical and moral health of children and teenagers.

**e) Prohibition of abusive advertising**

The regulation of subsection c) of section 1101 of the Civil and Commercial Code of the Nation forbids – insofar as it is relevant here – abusive advertising, but does not define it.

Abusive advertising has been characterized as the advertising that is based on and insists with emotions, motivations and direct suggestions, appeals to vertigo and discrimination, fears, beliefs, generates or exacerbates anxieties, directly or through subliminal mechanisms’.<sup>11</sup>

In comparative law, the Consumer Right Code of Brazil, in its section 37, paragraph 2<sup>nd</sup>, provides that among other advertising, discriminatory advertising of any nature whatsoever, that encourages violence, exploits fear or superstition, takes advantage of the deficient criterion and experience of a child, does not respect environmental values, or can lead consumer to behave in a way that damages or endangers his/her health or safety, is abusive.

---

<sup>11</sup> Pursuant to Pérez Bustamante, Laura, “*Derecho Social del Consumo*” (Social Right of Consumption), La Ley, Buenos Aires, 2005, page 403.

In Spain, the Advertising General Act (*Ley General de Publicidad*) 34/1988, in its section 3, subsection a), characterizes it as “the advertising that infringes the person’s dignity or undermines the values and rights acknowledged in the Constitution, especially those referred to in its sections 18 and 20, paragraph 4. The ads that humiliate or insult women, by particularly and directly using her body or parts of it as a mere object not related to the product that is intended to promote, of her image associated to stereotyped behaviors that infringe the grounds of our legislation contributing to generate violence as referred to in the “Organic Law with measures for the integral protection against gender violence.”

The doctrine in Argentina has considered that abusive advertising mainly infringes the right to a dignified and fair treatment of consumer, guaranteed by section 42 of the National Constitution, el section 8 bis of the Consumer Defense Act, sections 1097 and 1098 of the Civil and Commercial Code of the Nation<sup>12</sup> and the group of rights, principles and values acknowledged by the National Constitution and the international treaties of human rights having a constitutional hierarchy pursuant to section 75, subsection 22 of the National Constitution.<sup>13</sup>

#### **f) Legal remedies against forbidden advertising**

Our legislation provides for different legal remedies to seek the suspension of the forbidden advertising broadcasting, to punish those who perform it and compensate de damages caused by its broadcasting to competitors or consumers.

Some of them are the following:

(a) The legal action set forth in section 1102 of the Civil and Commercial Code of the Nation that I mentioned at the beginning of this work, which allow applying for the suspension of the illegal advertising and the publication of rectifying notices.

(b) The legal action set forth in section 61 of decree 274/2019, which allows applying for the suspension or prohibition of the advertising, the compensation of the damages caused by the unfair competition act (that may include the publication of the judgment) and the issuance of precautionary measures.

---

<sup>12</sup> Section 1097.- Dignified treatment. Suppliers must guarantee service conditions and dignified treatment to consumers and users. The person’s dignity must be respected pursuant to the general criteria arising from the human rights treaties. Suppliers must refrain from having behaviors that place consumers in embarrassing, humiliating o intimidating situations.

Section 1098.- Equitable and non-discriminatory treatment. Suppliers must provide a non-discriminatory and fair treatment to consumers. They cannot set differences based on guidelines contrary to the constitutional guarantee of equality, especially, regarding the nationality of consumers.

<sup>13</sup> Pursuant to. Barocelli, Sebastián, “*La regulación de la publicidad en el Código Civil y Comercial*” (The regulation of advertising in the Civil and Commercial Code), Magazine of Consumer Right – Número 1 – November 2016, IJ Printing House, 11/30/2016.

(c) The appeal for protection against infringement of constitutional rights or guarantees (*Acción de Amparo*), that requires the compliance with the requirements set forth in section 43 of the National Constitution.

(d) The preventive legal action of section 1711 of the Civil and Commercial Code of the Nation – even though, since it is advertising, I feel like it is too similar to the prior restraint, forbidden by our National Constitution.

(e) The presentation of reports to the enforcement authorities of the Fair Commercial Practices regime (decree 274/2019), that provides for the possibility that the suspension of the presumably infringing behavior be ordered by the administrative authorities through a precautionary measure and that, after the administrative investigation is carried out, the infringer be punished.

(f) The presentation of reports to the enforcement authorities of the Consumer Defense Act that provides in addition the possibility that the suspension of the presumably infringing behavior be ordered by the administrative authorities through a precautionary measure and that, after the administrative investigation is carried out, the infringer be punished.

(g) The presentation of reports to the enforcement authorities of the Audiovisual Communication Services, when the advertising is broadcasted in one or more audiovisual media.

(h) The presentation of reports to the enforcement authorities of the National Administration of Drugs, Foods and Medical Devices (ANMAT) | National Institute of Food (INAL), in the case of advertising of medicines, dietary supplements, household cleaning products or other “medical” products or of food or beverages.

(i) The presentation of reports to the enforcement authorities of the National Institute against Discrimination, Xenophobia and Racism (INADI), in the event of discriminatory advertising.

The preceding list is not exhaustive and the election of the proper action or report shall depend – just like us, the lawyers, like to say – “on the circumstances of the case.”

**Buenos Aires, April 16, 2020.**