

## The Regulations of Deceptive Labeling and Advertising in S. Korea: Controversial Issues and Alternatives

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### **Abstract**

*Deceptive advertising may inflict a loss on consumers in comparison with the other unfair ones. However, it has not been researched much in S. Korea how effectively it is regulated to protect consumers and maintain the order of fair market. It is discussed the controversial issues of the regulation of deceptive labeling or advertising in S. Korea and suggested the alternatives for improving the Fair Labeling or Advertising Act by comparing with the laws of US, Japan and S. Korea. It is concluded that the application of FLAA should be consistent by considering the nonexclusive definitions of four types of unfair labeling or advertising and the more specific analyses of the judgment cases by FTC are needed for the future research.*

**Keywords:** *Deceptive advertising, advertising regulation, unfair advertising, comparative study*

### **1. Introduction**

Deception is the act of deceiving someone or the state of being deceived by someone. This seems to be similar to 'fraud', 'deceit' or 'fake', so people use them synonymously. In this sense, deceptive advertising can be the advertising of deceiving, being likely to deceive or misleading consumers. It is called quite often as false advertising. Although its way to regulate is different, there is no any country not to ban the deceptive advertising in the world since it causes harmful influences for consumers. But, that is divided into two different sides in terms of defining 'deception', which one uses as a broad sense of the word that all untrue advertising equal deceptive advertising and the other uses as a specific meaning of the word, that is as a type of unfair advertising. S. Korea follows the latter.

Deceptive advertising can inflict a loss on consumers as it is difficult to distinguish the truth 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 or how to regulate it comparing with other countries in their related laws. This may be a good way to 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.

This Act regulates labeling and advertising at the same time and the definitions of terms used in this Act shall be as follows: 1) The term "label" means characters or figures written on or attached to containers or packages of products (including attachments and contents), bulletins in places of business or certificates specifying rights to products, *etc.*, such as gift certificates, membership cards and purchase rights, and containers or packages indicating characteristics of products, in order that business entities or business entities' organizations (hereinafter referred to as "business entities, *etc.*") may inform consumers of any of the following matters concerning products or services (hereinafter referred to as "products, *etc.*"): (a) Matters on the relevant business entities or other business entities, *etc.*; (b) Matters on details, terms of transactions and other matters concerning transactions of products, *etc.* of the relevant business entities or other business entities, *etc.* (subparagraph 1 of Article 2 of FLAA); 2) the term "advertising" means that business entities, *etc.* widely inform or publicize any of the following matters to consumers through newspapers and Internet newspapers defined in subparagraphs 1 and 2 of Article 2 of the Act on the Promotion of Newspapers, *Etc.*, periodicals defined in subparagraph 1 of Article 2 of the Act on Promotion of Periodicals, Including Magazines, broadcasting defined in subparagraph 1 of Article 2 of the Broadcasting Act, telecommunications defined in subparagraph 1 of Article 2 of the Framework Act on Telecommunications and in other methods prescribed by Presidential Decree (subparagraph 2 of Article 2 of FLAA).

Thus, label is more related to the information about the quality of products like ingredient, size, price, country or place of origin, *etc.*, that is more realistic, objective and fact-oriented. On the other hand, advertising is more related to the persuasive factors of making consumers be aware of products and preferring to choose them based on the information of label, that is more emotional and subjective. Generally, a product includes the emphatic contents about the quality in its label and its advertising includes the contents of the label, so the label and advertising of the product become unified to be regulated at the same time [9].

In this context, 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 fair trade market system.

**Table 1. Correction by Types of Violation of FLAA (Unit: Case)**

Year	Unfair Labeling and Advertising				Total
	False or Exaggerated Labeling or Advertising	Deceptive Labeling or Advertising	Unfairly Comparative Labeling or Advertising	Slandorous 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(%) <sup>1</sup>

(Note: Reconstructed from p. 69 of "Statistical Yearbook of 2014" by FTC focusing on FLAA [10])

<sup>1</sup>Due to rounding off the numbers to the nearest hundredths.

**Table 2. Correction by Types of Corrective Measure (Unit: Case)**

	Accusation to Prosecutor's Office (Surcharge)	Corrective Order (Surcharge)	Corrective Recommendation	Temporary Injunctions	Warning	Voluntary Correction <sup>2</sup>	Fine	Total
1999	1 (0)	244 (18)	0	1	97	0	0	343
2000	2 (0)	177 (4)	0	0	132	0	0	311
2001	0 (0)	96 (0)	0	0	224	0	8	328
2002	1 (0)	135 (9)	0	1	202	0	0	339
2003	2 (0)	234 (4)	0	0	307	0	15	558
2004	0 (0)	138 (2)	0	0	299	0	0	437
2005	0 (0)	185 (8)	0	0	321	0	7	513
2006	0 (0)	152 (1)	0	0	273	0	0	425
2007	2 (0)	76 (3)	0	0	216	0	10	304
2008	0 (0)	110 (15)	0	0	122	93	2	327
2009	6 (1)	69 (5)	14	0	70	127	14	300
2010	0 (0)	55 (5)	0	0	62	117	11	245
2011	2 (0)	40 (4)	0	0	111	123	52	328
2012	11 (3)	67 (3)	0	0	125	46	3	252
2013	3 (0)	61 (5)	0	0	74	28	84	250
2014	1 (1)	39 (4)	0	0	53	72	66	231
Total	31 (5)	1,878(90)	14	2	2,688	606	272	5,491
Ratio	0.6%	34.2%	0.3%	0.0%	49.0%	11.0%	5.0%	100%

(Source: FTC, "Statistical Yearbook of 2014", FTC, Seoul, (2015), p.68 [11])

## 2.2. Controversial Issues

The requirements for establishing unfair labeling or advertising are: 1) It may any of the following labeling or advertising: a) False or exaggerated labeling or advertising; b) deceptive labeling or advertising; c) unfairly comparative labeling or advertising; and d) slanderous labeling or advertising; 2) it may undermine order in fair trade; and 3) it may deceive or mislead consumers (Article 3 (1) of FLAA). But, all labeling or advertising that deceive or are likely to deceive, and cause misunderstanding or misleading consumers may be called generally as deceptive labeling or advertising, which means all unfair labeling or advertising may be defined as deceptive labeling or advertising, not just a type of unfair labeling or advertising. The deceptive labeling or advertising by Article 3 (2) of the Presidential Decree of the Act is labeling or advertising by means of suppressing, minimizing a fact and so on.

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,

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Corrected by 'Warning'.

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

**Table 3. The Violations of FLAA in Recent 5 years Received in FTC (Unit: Case)**

Violations of FLAA		
2010	Report	339
	Ex-officio investigation	99
	Total	438
2011	Report	387
	Ex-officio investigation	174
	Total	561
2012	Report	335
	Ex-officio investigation	74
	Total	409
2013	Report	362
	Ex-officio investigation	97
	Total	459
2014	Report	219
	Ex-officio investigation	74
	Total	293

(Note: Reconstructed from p. 4 of "Statistical Yearbook of 2014" by FTC focusing on FLAA [12])

**Table 4. Complaints Received by Consumer Protection Related Acts in 2014**

Act	Ratio of the Complaints
FLAA (Fair Labeling and Advertising Act)	24.2
RACA (Regulation of Adhesion Contracts Act)	16.9
DSA (Door-to-Door Sales, <i>Etc.</i> Act)	5.0
ITA (Installment Transactions Act)	11.5
ACPEC (Act on Consumer Protection in Electronic Commerce, <i>Etc.</i> )	42.3
Total	100(%)

(Note: Reconstructed from p. 19 of "Statistical Yearbook of 2014" by FTC focusing on FLAA [13])

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 [14-15]. 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 [16-18]. 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 [19-21], 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. The Regulation of Deceptive Advertising in the US and Japan**

#### **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 [22-23]. 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 [24].

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 [25]. 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. Consequently, under this Act, the Commission is empowered, among other things, to (a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress [26]. This means that 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. Apart from the FTC Act, the Commission is in charge of the Fair Packaging and Labeling Act, the Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Fur Products Labelling Act, and it regulates disclosing the origin, content, ingredient, production and pack date and the name and address of the distribution dealer in the label of all kinds of consumer products.

To sum up, the regulations of deceptive labeling or advertising in terms of its legal definition and enforcement in US are different from S. Korea, which they are much more broadly based than S. Korea. In other words, the deceptive advertising by US laws may be applied to the cases not only that are overt or obvious fraud, but that are suggestive, thought-provoking or allusive deception even though they are executed without intention. And as long as labeling or advertising of products violates the regulations regardless of package, advertising by media or other commercial activities, it is judged as a deceptive advertising.

### **3.2. Definition of Deceptive Advertising in Japan**

The general law of labeling or advertising in Japan is the Premium and Representation Act (PRA) [27]. 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.

The regulations of unfair representations by PRA are classified as two major groups; one is about unfair representations, and the other is about the unfairly comparative advertising [28]. The former is subdivided into four subcategories such as the misleading representations of superiority to competitors, the misleading representations of advantageousness over competitors, unfair representations and dual price representations. Firstly, the misleading representations of superiority to competitors mean that business entities, *etc.* represent to consumers their products and services untruthfully, antithetically superior to other business entities, *etc.* Secondly, the misleading representations of advantageousness over competitors mean that business entities, *etc.* represent to consumers their products and services having antithetical advantages in conditions of transaction except their prices than other business entities, *etc.* These representations are banned because they are likely to hinder consumers from making reasonable decisions to buy independently irrespective of their intentions, even in the case of making a mistake.

Other “unfair representations” to mislead consumers are designated and managed by the Prime Minister. The examples are such as the misrepresentations of non-juicy beverages, country of origin of products, financing costs for consumer credit, bait advertising of real estate, general bait advertising, and paid nursing homes. “Dual price representation” means that business entities, *etc.* represent dually their own sale prices of their products and services and the higher ones, in order for making the lower prices appeal to consumers.

Lastly, according to the regulation of unfairly comparative advertising, it is banned that business entities, *etc.* advertise their products and services by comparing unfairly, whether implicitly or explicitly, with their competitors’ that may mislead consumers due to misconception of contents or transaction conditions of the products and services.

In sum, the term, “deceptive advertising” is not used in PRA that is the general law of the regulations of representations or advertising in Japan, whereas it is used as a type of unfair labeling or advertising in FLAA, and as a broader meaning containing all kinds of unfair commercial promotions including labeling and advertising in the FTC Act. Even though the term is not directly used in PRA, all representations which deceive explicitly or mislead implicitly consumers are regulated as the unfair representations by PRA that means certainly that the term may be used broader than in FLAA.

By comparing the definitions or usages of deceptive advertising in the laws of US, Japan and S. Korea, it may be found that although they have differences in the bounds of their applications, they have it in common to regulate deceptive labeling, representing or advertising by any kinds of commercial activities in order to protect consumers and establish fair market mechanism. This may imply a few suggestions to improve the regulations of deceptive advertising by FLAA.

## 4. Conclusions

### 4.1. Implications

As discussed earlier, deceptive labeling or advertising in FLAA of S. Korea is defined as one of the four types of unfair labeling or advertising which are false or exaggerated labeling or advertising, deceptive labeling or advertising, unfairly comparative labeling or advertising and slanderous labeling or advertising. False or exaggerated labeling or advertising is defined as, untruthfully labeling or advertising or excessively exaggerating the fact respectively. 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 that, without objective grounds. And slanderous



labeling or advertising means the relevant business entities, *etc.* slander on other business entities, *etc.*, their products, *etc.* or their disadvantage without objective grounds in their labeling or advertising. However, with the lack of theoretical backgrounds in this classification, there have been raised the controversial issues that the meaning of deceptive advertising is not clear. Therefore, it was researched that the judgment of FTC was not consistent.

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.

Consequently, if the relevant business entities *etc.* compare their products or services with others' by concealing, suppressing or minimizing facts in their labeling or advertising, that may be applied to not only unfairly comparative labeling or advertising but also deceptive labeling or advertising. Similarly, if the relevant business entities *etc.* slander the products or services of others by falsifying or exaggerating the facts, that may be applied to not only slanderous labeling or advertising but also false or exaggerated labeling or advertising. And this should be applied consistently in the judgment by FTC. Therefore, if one labeling or advertising constitutes more than two types of unfair labeling or advertising, the articles of FLAA, as many as that should be applied consistently, and this should be clearly reported in the statistical yearbook of FTC.

#### **4.2. Suggestions for the Future Research**

Considering the ambiguity of the definition of the four types of the unfair labeling or advertising by FLAA which are not exclusively differentiated, it is possibly construed that the labeling or advertising contains explicit untruthfulness or exaggeration is False or exaggerated labeling or advertising, and all misleading labeling or advertising doesn't contain them are deceptive labeling or advertising. Specially, it is implied that deceptive labeling or advertising is placed by not only concealing or minimizing facts, but also any other ways except for that.

In fact, according to the Review Guidelines of Deceptive Labeling or Advertising established by FTC in Dec. 31st of 2010, "concealment" means that business entities, *etc.* label or advertise their products or services to consumers by concealing for them too tiny writing to read or too short time to realize not to perceive the facts, therefore they can't comprehend the truths; "omission" means business entities, *etc.* label or advertise to consumers by that the facts are not included or done, either deliberately or accidentally in the first place; and "minimization" means business entities, *etc.* label or advertise to consumers by providing too abbreviated explanation about their products or services for the ordinary intelligent consumers not to comprehend the facts although they label or explain without concealing or omitting the important matters of purchasing decisions. Besides these three means, it is possible to think of more ways to deceive consumers.

For the future research to improve FLAA or the enforcement of deceptive labeling or advertising, it is suggested that other types of deceptive labeling or advertising besides concealment, omission and minimization should be researched and established the clearer criteria to define the meaning of deception in labeling or advertising. Furthermore, according to the literature review, the researches related to the ambiguity of the classification of unfair labeling or advertising were not enough to provide information for

improve the regulations, so more researches to analyze the judgment cases of FTC are needed. Finally, because the ambiguity may be avoided by the Announcement of Critical Information and Integrated Notification, Article 4, and the Verification, *etc.* of Details of Labels and Advertisements, Article 5 of FLAA, the review guidelines of these articles should be newly updated to establish properly with the regulation of deceptive labeling or advertising [29].

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