

J. Y. Interpretation No.414 (November 8, 1996) *

- ISSUE:** (1) Does freedom of speech guaranteed by Article 11 of the Constitution include commercial speeches made with the intent to obtain profits through sales of goods, services and concepts?
- (2) Is censorship by the provincial (municipal) health authority prior to the broadcasting of a drug commercial constitutional?

RELEVANT LAWS:

Articles 11, 15 and 23 of the Constitution (憲法第十一條、第十五條及第二十三條) ; Articles 66 and 105 of the Pharmaceutical Affairs Act (藥事法第六十六條、第一百零五條) ; Article 47, Subparagraph 2, of Enforcement Rules of the Pharmaceutical Affairs Act (藥事法施行細則第四十七條第二款) .

KEYWORDS:

drug commercial (藥物廣告) , pharmaceutical manufacturers (藥商) , property right (財產權) , commercial speech (商業言論) , freedom of speech (言論自由) , prior censorship (事前審查) .**

HOLDING: Drug commercials are economic activities engaged in by pharmaceutical manufacturers for the pur-

解釋文：藥物廣告係為獲得財產而從事之經濟活動，涉及財產權之保障，並具商業上意見表達之性質，惟因

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pose of obtaining profits. These kinds of activities involve protection of property rights and possess the characteristics of a commercial speech. Because drug commercials are closely related to the health of nationals, they thus should be strictly regulated by law to protect the public interest. In order to ascertain the truthfulness of the drug commercial and to maintain the health of nationals, Article 66, Paragraph 1, of the Pharmaceutical Affairs Act provides that before broadcasting the drug commercial, the pharmaceutical manufacturer should submit all writings, graphics, or words and phrases to the provincial (municipal) health authority for approval. This prior censorship requirement is necessary to protect the public interest and is consistent with Articles 11 and 15 of the Constitution. In addition, Article 47, Subparagraph 2, of Enforcement Rules of the Pharmaceutical Affairs Act provides that by allowing the exchange of prizes with the drug containers or by granting awards, the content of drug commercials is likely to encourage consumers to use drugs abusively, the provincial (municipal) health authority thus should delete or disapprove of such content

與國民健康有重大關係，基於公共利益之維護，應受較嚴格之規範。藥事法第六十六條第一項規定：藥商刊播藥物廣告時，應於刊播前將所有文字、圖畫或言詞，申請省（市）衛生主管機關核准，旨在確保藥物廣告之真實，維護國民健康，為增進公共利益所必要，與憲法第十一條及第十五條尚屬相符。又藥事法施行細則第四十七條第二款規定：藥物廣告之內容，利用容器包裝換獎或使用獎勵方法，有助長濫用藥物之虞者，主管機關應予刪除或不予核准，係依藥事法第一百零五條之授權，就同法第六十六條相關事宜為具體之規定，符合立法意旨，並未逾越母法之授權範圍，與憲法亦無牴觸。

according to the authorization granted under Article 105 of the Pharmaceutical Affairs Act. Furthermore, Article 47, Subparagraph 2, of the Enforcement Rules of the Pharmaceutical Affairs Act is promulgated to supplement the explicit requirements for the relevant matters governed by Article 66 of the Pharmaceutical Affairs Act, and complies with the legislative intent without exceeding the scope of authorization granted under Article 66 of the Pharmaceutical Affairs Act and is consistent with the Constitution.

REASONING: Through the mass media, drug commercials promote the beneficial effects of medical treatment for the purpose of soliciting sales. These drug commercials are economic activities engaged in by pharmaceutical manufacturers to obtain profits. By possessing the characteristics of a commercial speech, these drug advertisements should be protected under Articles 15 and 11 of the Constitution where freedom of speech is guaranteed. Freedom of speech is to protect the free flow of opinions so that people can acquire information and express

解釋理由書：藥物廣告係利用傳播方法，宣傳醫療效能，以達招徠銷售為目的，乃為獲得財產而從事之經濟活動，並具商業上意見表達之性質，應受憲法第十五條及第十一條之保障。言論自由，在於保障意見之自由流通，使人民有取得充分資訊及自我實現之機會，包括政治、學術、宗教及商業言論等，並依其性質而有不同之保護範疇及限制之準則。其中非關公意形成、真理發現或信仰表達之商業言論，尚不能與其他言論自由之保障等量齊觀。藥物廣告之商業言論，因與國民健康有重大關係，基於公共利益之維護，自應受較嚴

themselves. The categories of speech protected under Articles 15 and 11 of the Constitution include political speech, academic speech, and commercial speech. The scope of protection and the level of restriction are different for the abovementioned three categories of speeches according to their characteristics. Being irrelevant to the formation of public opinion, fact-finding, or the expression of beliefs, commercial speech does not enjoy the high degree of protection afforded to the other categories of speeches. Because the commercial speech of drug advertisements is closely related to the health of nationals, it thus should be strictly regulated by law to protect the public interest.

Article 66 of the Pharmaceutical Affairs Act provides that before broadcasting a drug commercial, the pharmaceutical manufacturer should submit all writings, graphics, or words and phrases to the provincial (municipal) health authority for approval and should send the permit to the media. The media is prohibited from broadcasting a drug commercial without approval from the provincial (municipal)

格之規範。

藥事法第六十六條規定：「藥商刊播藥物廣告時，應於刊播前將所有文字、圖畫或言詞，申請省（市）衛生主管機關核准，並向傳播業者送驗核准文件。傳播業者不得刊播未經省（市）衛生主管機關核准之藥物廣告。」旨在確保藥物廣告之真實，維護國民健康，其規定藥商刊播藥物廣告前應申請衛生主管機關核准，係為專一事權，使其就藥物之功能、廣告之內容、及對市場之影

health authority. The purpose of this prior censorship is to ascertain the truthfulness of the drug commercial and to protect the health of nationals. The provincial (municipal) health authority has the exclusive right to impose such requirements so that it can, in accordance with routine procedure, objectively review the effects of the drug, the content of the drug commercial, and the impact on the market. This prior censorship is necessary to protect the health of nationals and is consistent with the freedom of speech guaranteed by Article 11 of the Constitution and existence rights, right of work and property rights guaranteed by Article 15 of the Constitution. In addition, Article 47, Subparagraph 2, of the Enforcement Rules of the Pharmaceutical Affairs Act provides that by allowing the exchange of prizes with the drug containers or granting other awards, the content of drug commercials is likely to encourage consumers to use drugs abusively. The provincial (municipal) health authority thus should delete or disapprove of such content pursuant to the authorization granted under Article 105 of the Pharmaceutical Affairs Act. Furthermore,

響等情事，依一定程序為專業客觀之審查，為增進公共利益所必要，與憲法第十一條保障人民言論自由及第十五條保障人民生存權、工作權及財產權之意旨尚屬相符。又藥事法施行細則第四十七條第二款規定：藥物廣告之內容，利用容器包裝換獎或使用獎勵方法，有助長濫用藥物之虞者，主管機關應予刪除或不予核准，係依藥事法第一百零五條之授權，為執行同法第六十六條有關事項而為具體之規定，符合立法意旨，並未逾越母法之授權範圍，亦未對人民之自由權利增加法律所無之限制，與憲法亦無牴觸。惟廣告係在提供資訊，而社會對商業訊息之自由流通亦有重大利益，故關於藥物廣告須先經核准之事項、內容及範圍等，應由主管機關衡酌規範之必要性，依比例原則隨時檢討修正，併此指明。

Article 47, Subparagraph 2, of Enforcement Rules of the Pharmaceutical Affairs Act is promulgated to supplement the explicit requirements for the relevant matters governed by Article 66 of the Pharmaceutical Affairs Act, and complies with the legislative intent without exceeding the scope of authorization granted under Article 66 of the Pharmaceutical Affairs Act. The regulation neither burdens any freedoms or rights of the people with additional restrictions not imposed by law nor is contrary to the Constitution. Because the purpose of advertising is to provide information and the society may have a strong interest in the free flow of commercial information, therefore, as to the items, content and scope of drug commercials submitted for approval, the provincial (municipal) health authority should consider the need for prior censorship and modify the requirements accordingly.

Justice Geng Wu filed dissenting opinion in part, in which Justice Jyun-Hsiung Su and Justice Chung-Mo Cheng joined. Justice Sen-Yen Sun filed dissenting opinion in part.

本號解釋吳大法官庚、蘇大法官俊雄與城大法官仲模共同提出部分不同意見書；孫大法官森焱提出部分不同意見書。