
J.Y. Interpretation No. 744 (January 6, 2017)*

Prior Restraint on Commercial Speech Case

Issue

Are Article 24, Paragraph 2 of the Statute for Control of Hygiene and Safety of Cosmetics and its punishment as provided in Article 30, Paragraph 1 of the same Statute unconstitutional?

Holding

Article 24, Paragraph 2 of the Statute for Control of Hygiene and Safety of Cosmetics reads, “Before publishing or broadcasting any advertisement, the cosmetic firm shall first submit [the content of the advertisement] to the health authority of the central government or that of a special municipality for approval” Article 30, Paragraph 1 of the same Statute reads, “Any person who violates ... Article 24, Paragraph 2 is punishable by a fine of up to TWD 50,000.” These two provisions constitute a prior censorship of cosmetic advertisements and go beyond what is necessary in restricting the cosmetic firms’ freedom of speech. As such, they are not in accordance with the proportionality principle as required by Article 23 of the Constitution and violate the people’s freedom of speech under Article 11 of the Constitution. These two provisions shall be null and void immediately from the date of announcement of this Interpretation.

Reasoning

[1] This case was petitioned for by DHC Taiwan, Inc., whose representative is Yoshiaki Yoshida. The petitioner advertised its sunscreen lotion products on an

* Translation and Note by Yen-Tu SU

online shopping website without first applying for and obtaining approval from the competent authority. Pursuant to Article 30, Paragraph 1 of the Statute for Control of Hygiene and Safety of Cosmetics (hereinafter “Statute”), the Department of Health of the Taipei City Government fined the petitioner TWD 30,000 for violating Article 24, Paragraph 2 of the Statute. To contest the fine, the petitioner filed an administrative suit after its administrative appeal was denied. The Taipei High Administrative Court ruled against the petitioner in its Judgment 99-Chien-850 (2010). In its Judgment 100-Tsai-2198 (2011), the Supreme Administrative Court dismissed the petitioner’s appeal on the grounds that the appeal was legally impermissible for lack of importance in terms of legal principles. Therefore, for the purpose of this petition, the judgment of The Taipei High Administrative Court is deemed the final judgment. In this petition, the petitioner challenges the constitutionality of the laws applied in the final judgment. The laws being challenged include three provisions of the Statute: Article 24, Paragraphs 1 and 2 and Article 30, Paragraph 1 regarding the punishment for violation of Article 24, Paragraph 2. The petitioner also challenges the constitutionality of Article 20 of the Enforcement Rules for the Statute. On two provisions of the Statute, Article 24, Paragraph 2 and Article 30, Paragraph 1 regarding the punishment for violation of Article 24, Paragraph 2, we granted review of the said petition, which was duly filed under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. This Court made this Interpretation on the basis of the following grounds:

[2] The purpose of freedom of speech is to ensure the free flow of information to provide people with opportunities to obtain ample information and to pursue self-realization. Cosmetic advertisements promote the use of cosmetic products through media communications for marketing purposes. They are a form of commercial speech. To the extent that commercial speech is producing information for lawful business, which is neither false nor misleading and can

help consumers make economically rational choices, it is protected by Article 11 of the Constitution as a form of free speech (*see* J.Y. Interpretations Nos. 577 and 623).

[3] Article 24, Paragraph 2 of the Statute stipulates, “Before publishing or broadcasting any advertisement, the cosmetic firm shall first submit all the texts, pictures, and/or oral statements of the advertisement to the health authority of the central government or that of a special municipality for approval; for the record, the cosmetic firm shall also present the approval letter or certificate to the press or media.” Article 30, Paragraph 1 of the Statute stipulates, “Any person who violates ... Article 24 Paragraph 2 is punishable by a fine of up to TWD 50,000; if the violation is a serious or a recurring one, the violator’s business license or factory permit may be annulled by the issuing authority.” Taken together, these two provisions (hereinafter “provisions at issue”) constitute a prior censorship of cosmetic advertisements that restricts cosmetic firms’ freedom of speech and the opportunities for the people to obtain ample information. Being a severe interference with the freedom of speech, such prior censorship of cosmetic advertisements shall be presumed unconstitutional. The provisions at issue can be otherwise regarded as permissible under the constitutional principle of proportionality and the constitutional guarantee to the freedom of speech if and only if their legislative records are sufficient enough to support the findings that the prior censorship of cosmetic advertisements is directly connected to and absolutely necessary for the achievement of compelling public interests in preventing direct, immediate, and irreparable harms to people’s lives, bodily integrity, and/or health, and the people are afforded with the opportunity to seek prompt judicial remedy.

[4] Cosmetics are defined as substances to be applied externally on the human body for the purpose of freshening hair or skin, stimulating the sense of smell, covering body odor, promoting attractiveness, or altering the appearance. The

national health authority is further authorized to make public the scope and categories of cosmetics (*see* Article 3 of the Statute). In other words, cosmetics are not for oral digestion. In addition, all of the cosmetics listed in the Table on the Scope and Categories of Cosmetics as announced by the national health authority are ordinary products for daily use. The most likely legislative purpose of the provisions at issue, therefore, is to prevent obscene, immoral, false, or exaggerated advertisements from being published or broadcasted (*see* Article 24, Paragraph 1 of the Statute) so as to maintain *boni mores* and to protect consumers' health as well as other lawful interests that are deemed relevant. These have to do with the protection of public interests, to be sure. But since cosmetic advertisements are aimed at attracting consumers to purchase the advertised products and do not pose direct or immediate threats to people's lives, bodily integrity, and/or health, it is difficult to argue that the purpose of censoring such advertisements in advance is to prevent direct, immediate, and irreparable harms to people's lives, bodily integrity, and/or health. And since the provisions at issue cannot be said to be aimed at protecting any compelling public interest, there exist no direct and absolutely necessary connections between the restrictions imposed by the prior censorship of the provisions at issue on cosmetic firms' freedom of speech and consumers' access to full information on the one hand and any compelling public interest on the other hand.

[5] According to the existing law, cosmetics are divided into two major categories: ordinary cosmetics and cosmetics containing drug ingredients (*see* Article 7, Paragraphs 1 and 2 as well as Article 16, Paragraphs 1 and 2 of the Statute). Cosmetics containing drug ingredients are for such uses as sun screening, hair dyeing, hair perming, minimizing sweating and odor, skin whitening, acne prevention, skin moisturizing, preventing bacterial infections, teeth whitening, *etc.* (*see* the Criteria for Cosmetics Containing Medical, Poisonous, or Potent Drugs). Although they could produce greater impacts than ordinary cosmetics on people's

lives, bodily integrity, and/or health, it is inconceivable that their advertisements would pose direct threats to people's lives, bodily integrity, and/or health. Besides, regardless of whether it is imported or produced domestically, a cosmetic containing drug ingredients could be imported or produced only if it has first applied for and then obtained approval from the authorities, after examination and testing (*see* Article 7, Paragraph 1 and Article 16, Paragraph 1 of the Statute). Any cosmetic containing drug ingredients must list the ingredients, usage, dose, and other information as required by the national health authority on its label leaflet and/or package, in the same manner as what is required for any ordinary cosmetic. Also, it is required to disclose the name and content of the drug ingredients contained, the precautions for use, and the serial number of its license (*see* Article 6 of the Statute). As far as the prevention of health hazards is concerned, Chapter IV (beginning with Article 23) of the Statute authorizes the health authorities to conduct such inspection measures as spot checks and sampling and to enforce the law by revoking the licenses and/or prohibiting the importation, manufacture, and/or sale [of any given harmful cosmetic]. Chapter V, in turn, provides for the penalties for violations. Furthermore, Article 24, Paragraph 1 of the Statute bans false advertisements and the like, and the authorities may also invoke Article 30, Paragraph 1 of the Statute to punish those false cosmetic advertisements that are likely to be harmful to human health. Given the above regulations and subsequent punishments, the provisions at issue, even when applied to the advertisements for cosmetics containing drug ingredients, can neither be justified as pursuing any compelling public interest nor be directly connected to and considered absolutely necessary for protecting any such interest.

[6] In sum, the provisions at issue violate the proportionality principle under Article 23 of the Constitution and freedom of speech as guaranteed by Article 11 of the Constitution. Both provisions shall be null and void immediately from the date of announcement of this Interpretation.

[7] The petitioner also contends that Article 24, Paragraph 1 of the Statute and Article 20 of the Enforcement Rules for the Statute were unconstitutional as well by virtue of violating Articles 11, 15, and 23 of the Constitution. Judging from the petitioner's arguments in this regard, however, it is difficult to sustain that the petitioner has made sufficiently-grounded challenges to the constitutionality of these aforementioned provisions. According to Article 5, Paragraph 3 of the Constitutional Court Procedure Act, this part of the petition shall be dismissed for failing to meet the requirements set forth in Article 5, Paragraph 1, Subparagraph 2 of the same Act. It is noted here.

Background Note by the Translator

In 2010, the petitioner DHC Taiwan, Inc. posted an advertisement for its "DHC White Sunscreen" on an online shopping website. The advertisement stated among its claims that "[the product] ... can form a membrane on the surface of the skin to prevent skin from being harmed by the sun's glare. [It] ... can lighten skin color, moisturize skin, and prevent skin dryness. It is non-greasy and works well as a base under makeup. It doesn't leave white residue on the skin and is suitable for body use as well." Pursuant to Article 30, Paragraph 1 of the Statute for Control of Hygiene and Safety of Cosmetics, the Department of Health of the Taipei City Government fined the petitioner TWD 30,000 for posting the advertisement without first applying for and obtaining approval from the competent authority and thereby violating Article 24, Paragraph 2 of the same Statute. To contest the fine, the petitioner filed an administrative lawsuit after its administrative appeal was denied. Both The Taipei High Administrative Court and the Supreme Administrative Court ruled against the petitioner. In September 2011, the petitioner brought its case before the Constitutional Court, challenging the constitutionality of the prior censorship of cosmetic advertisements.

J.Y. Interpretation No. 744 is widely considered a significant departure

from the Constitutional Court's prior jurisprudence. In *J.Y. Interpretation No. 414*, issued on November 8, 1996, the Constitutional Court upheld the constitutionality of the prior censorship of drug advertisements as provided for in Article 66, Paragraph 1 of the Pharmaceutical Affairs Act. While acknowledging that drug advertisements are a form of commercial speech protected by Articles 15 and 11 of the Constitution, the Constitutional Court in *J.Y. Interpretation No. 414* held that drug advertisements should be subject to stricter regulation for the sake of protecting public interests. Applying the standard of intermediate scrutiny, the Constitutional Court held that the prior censorship of drug advertisements at issue was justified as necessary for advancing the public interests in ensuring the truthfulness of drug advertisements and protecting public health. In *J.Y. Interpretation No. 744*, the Constitutional Court apparently adopted the most stringent standard of "strict scrutiny" and held unconstitutional the prior censorship of cosmetic advertisements. However, the Constitutional Court did not make it clear that all and other forms of commercial speech would also be subject to strict scrutiny after *J.Y. Interpretation No. 744*. It remains to be closely watched whether the Constitutional Court will apply the same stringent standard of strict scrutiny to other forms of commercial speech in the future.