COMMERCIAL SPEECH: A VARIANT OR A STEP-CHILD OF FREE SPEECH

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ABSTRACT

The manufactured notion of commercial speech has played a vital role in the establishment of a water-tight hierarchy amongst different forms of speech. It has been argued time and again that the diminished protection given to commercial speech is to prevent the dilution of protection afforded to non-commercial speech. The doctrine has successfully determined the criteria for qualifying a speech as commercial, the existential element of an economic interest. The absence of a more tangible definition must firstly berectified. The residual acknowledgment given to commercial speech is because in a market place, the free flow of information is significant. The proponents of commercial speech vehemently oppose the paternalistic treatment given to commercial speech and justifiably demand the demolition of any distinction between the two forms of speech. They argue that the attempted definition manufactured is solely for the purpose of distinguishing commercial from non-commercial speech rather than identifying and understanding commercial speech. The longstanding doctrine however is potently endangered with the call for heightened scrutiny by the Supreme Court in Sorrell.

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INTRODUCTION:

Freedom of speech and expression, in most democratic countries, is vigilantly guarded, customarily via written constitutions, or after expansive judicial determination. The notion of free speech has been categorically studied and researched; its importance stems from the belief that expression is a necessary human right, and is considered as a cornerstone of a democratic society. While it is emphatically protected and rarely restricted, ever so often forms of expression which do not fit perfectly within the constitutional set up, arise. One such form is commercial speech.

Put simply, an expression of commercial interest is considered commercial speech. The most ordinary and identifiable example is an advertisement, when a seller proposes his goods and wares to a customer; it is a form of speech motivated by commercial interest. Part I of this paper will attempt to define commercial speech; it will answer the most basic question, yet the most challenging one- what is commercial speech? Part II traces the development of the commercial speech doctrine, which in common parlance implies any speech that primarily entails a monetary transaction; The section examines both an American and Indian perspectives; it will highlight initial problems the court faced when grappling with the issue of commercial speech. Part III will analyse the importance of commercial speech or more specifically what fundamental values it serves to deserve protection. Part IV delves into the regulation of such speech; by identifying its exclusive nature in the domain of free speech jurisprudence, the means and methods of restricting it will be analysed.

This paper draws mostly from American and Indian constitutional set up, case-laws and commentary; dispersed in-between will also be the position of commercial speech in the EU. The primary objective of this paper will be to successfully draw forth a commercial speech doctrine for India. American and EU jurisprudence will be used to draw parallels and inferences and for a more complete picture of the same.

DEFINING COMMERCIAL SPEECH

Generally, commercial speech is defined as speech which proposes a commercial transaction;[1] or as expression solely related to the economic interest of the speaker and its audience.[2] This definition has however proved incongruous when it comes to classifying commercial speech;[3] courts often struggled to classify speech as non-commercial when it was motivated by profit[4] and conversely have found that communications can be commercial despite containing issues of public importance.[5] A predictable definition is essential for identifying whether the speech is commercial or not and as a consequence, what level of protection it receives.[6]

The distinction in the US has proved troublesome because commercial speech is essentially less protected than non-commercial speech[7]; in India however, the opposite is true. By placing commercial speech within the ambit of Article 19(1)(a), the Supreme Court of India has granted commercial speech a higher level of protection than would ordinarily be offered by Article 19(1)(g).[8] To differentiate commercial speech from other forms of speech, courts in the US have often referred to a "common sense distinction",[9] roughly categorizing any type of advertisement or its equivalent as commercial speech.

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[1] Tata Press Ltd v. Mahanagar Telephone Ltd., AIR 1995 SC 2438*;* Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 414 U.S. 376, 385 (1973); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Metromedia Inc. v. City of San Diego, 453 U.S. 490, 505 (1981); Posadas v. Tourism Co., 478 U.S. 328, 340 (1986); Edenfield v. Fane, 507 U.S. 761, 767 (1993); United States v. United Foods, 533 U.S. 405, 409 (2001).

[2]Central Hudson Gas & Elec. Corp. v. Public Service.Commission, 447 U.S. 557, 562 (1980).

[3]City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 79 (1999).

[4]Bigelow v. Virginia, 421 U.S. 809 (1975); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[5] Bolger v. Young Drug Prods. Corp., 463 U.S. 60 (1983).

[6] Ross D. Petty, *Advertising and the First Amendment: A Practical Test for Distinguishing Commercial Speech from Fully Protected Speech*, 12 J. PUB. POLICY & MARKETING 170, 171 (1993).

[7]*See generally*, Stephanie Marcantonio, *What is Commercial Speech? An Analysis in Light of Kasky v. Nike*, 24 PACE L. REV. 357 (2003); Troy L. Booher, *Scrutinizing Commercial Speech* 15 MASON U. C.R. L.J. 69 (2004); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979).

[8]Tata Press Ltd v. Mahanagar Telephone Ltd., AIR 1995 SC 2438.

[9]Ohralik v. Ohio State Bar Association, 436 U.S. 447, 455 (1978); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985).

The courts have alluded to the fact that, *"the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees."*[10]Keeping that in mind:

a.) *Are Advertisements Commercial Speech?*

Since the ruling in the *Indian Express*[11]case which borrowed the rationale from *Hamdard,*[12] advertisements have been accorded protection in India.[13] The court in *Tata Press*[14] approved of defining an advertisement as *"merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase."*[15] This falls in line with the definition of commercial speech, adopted in the U.S., as speech which relates to the economic interest of the speaker and its audience and speech which proposes a commercial transaction.[16] The essential idea communicated here is "I will sell you X product for Y price."[17]

b.) *Are Information Pamphlets Commercial Speech?*

In *H.T. Annaji v. The District Magistrate and the Deputy Commissioner*,[18] a state government notification prohibiting a private company from publishing the time table of their tourist buses, either in any local or largely circulated newspapers in Karnataka was in question. In this case the communication being published was not entirely an advertisement or a speech proposing only a commercial transaction but also contained a schedule of the buses plying within Karnataka. The Karnataka High Court found that *"The publication of time table of arrival and departure of the buses by private bus owners or public service vehicle owners is*

[10]Bigelow v. Virginia, 421 U.S. 809, 826 (1975).
[11]Indian Express Newspapers (Bombay) Ltd v. Union of India, 1985 SCR (2) 287.
[12]HamdardDawakhana v. Union of India, 1960 SCR (2) 671.
[13]*Id.* at 361.
[14]Supra.
[15]*Id.* at 2443.
[16]Cent.Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, (1980).
[17]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).
[18]1998 (4) Kar L.J. 75.

nothing but publication and advertisement of the Transport Service Vehicles amounting to commercial advertisement or commercial speech covered by protection guaranteed under Article 19(1)(a) of the Constitution."[19]

The position in the U.S. stands on similar footing. In *Bolger,*[20] a prophylactic manufacturer who published information pamphlets which discussed the availability of various contraceptives challenged a federal law prohibiting the mailing of unsolicited advertisements for contraceptives. The court found that a combination of three factors would provide strong support for classifying speech as commercial:[21] (1) Advertising format, (2) Product references and (3) commercial motivation.

c. *Is Film Distribution Commercial Speech?*

The position in India with respect to distribution and exhibitions of films was that it is outside the scope of Article 19(1)(a),[22] despite the same being provided for producers of films. The reason behind this it was that an exhibitor shows films merely to earn a profit.[23] However, this position was changed in the *TataPress* case[24], since the court did not consider whether exhibition of films could be considered as protected speech despite its commercial motive.

Subsequently, when a state government notification suspending the exhibition of the film was challenged in the Andhra Pradesh High Court on grounds of Article 19(1)(a),[25] the court, without explicitly identifying what constitutes commercial speech, made references to American decisions which dealt with regulations on commercial speech on grounds of indecency and morality.[26] A Film neither contains an advertising format nor does it make product references for commercial motivation. However the court did find that *"the right to*

[19] *Id.* at¶ 8.
[20] *Supra* note 5.
[21] *Id.* at 67 (noting however that each of these factors might not be necessary for classifying speech as commercial).
[22] Sitar Video v. State of Uttar Pradesh, AIR 1994 All 25.
[23] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1050 (6th ed. 2011).
[24] *Supra* note 8.
[25] Lakshmi Ganesh Films v. Government of Andhra Pradesh, 2006 (4) ALD 374.
[26] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, 427 U.S. 50 (1976).

communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, drama, theatre, dance, music, film, through a newspaper, magazine or book is an essential component of the protected right and may be exercised untrammelled by unreasonable Governmental restraint."[27] Along with a communicative idea, the presence of a commercially motivated entity seemed to compel the court to consider film exhibition as commercial speech. The position taken in the *Sitar Videos*[28] case is no longer correct and a commercial motive alone cannot make a certain form of speech ineligible for constitutional protection.

d. *Are Unsolicited Commercial Communications ("*UCCs*") Commercial Speech?*

UCCs are essentially a form of telemarketing that can take the form of automated messages, calls or emails.[29] On considering this question, the Delhi High Court[30] found that UCCs are essentially commercial advertisement but they are meant for furtherance of trade and commerce and hence, would not *prima facie* amount to freedom of speech under Article 19(1)(a).[31] While such a position appears to conflict with the Supreme Court's rulings in the *Tata Press* and *Indian Express* cases, the Delhi High court places heavy reliance on the *Hamdard Dawakhana* case[32] in distinguishing commercial speech with merely entailing a trade aspect, and the one with a social aspect in addition to the commercial angle.[33] However, the court was quick to observe that even if UCCs were classified as commercial speech under

[27] Lakshmi Ganesh Films v. Government of Andhra Pradesh, 2006 (4) ALD 374 at ¶ 50.
[28] Sitar Video v. State of Uttar Pradesh, AIR 1994 All 25.
[29] Steven R. Probst, *Telemarketing, Commercial Speech and Central Hudson: Potential Problems for Indiana Code Section 24-4.7 and Other Do-Not-Call Legislation,* 37 VAL. U. L. REV. 347, 348 (2002).
[30] Telecom Watchdog v. Union of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012 (involved a challenge to regulations issued by the telecom regulatory authority of India limiting the number of short message service to only 200 per day).
[31] *Id.* at 13.
[32] *Supra* note 12.
[33] *Id.* at 22.

Article 19(1)(a), they would be subject to the limitations imposed upon them by Article 19(2) and regulating the number of UCCs was permissible.[34]

The authors feel that the courts observation that, an UCC would form a part of protected commercial speech under Article 19(1)(a), is substantially better than completely excluding it from the purview of the same. The court correctly concluded that it was permissible to impose a reasonable restriction on the volume of UCC's, thereby allowing for both constitutional protection and regulation.

e. *Difficulties in Defining Commercial Speech*

Attempting to define commercial speech or to draw a distinction between commercial and non-commercial speech is, by the courts' own admissions, not an easy one to make.[35] Some have criticized the very distinction itself.[36] Even where support is drawn for the distinction, the method adopted by the court is almost always criticized for being uncertain and vague.[37] It seems evident that defining commercial speech is decided on a rough set of factors, mainly the motivation of the speaker, the interest of the listener and the content of the proposed message which is generally commercial in nature. However it is apparent that none of these factors are decisive in concluding whether speech is commercial or not;

[34] *Id.* at 13.

[35] *In re* Primus, 436 U.S. 412, 438 (1978); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 536 (1981) (stating that the distinction between commercial and non-commercial speech in individual cases is anything but clear); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) (noting the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (finding that the "precise bounds" of the category of commercial speech may be "subject to doubt").

[36] 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484, 520 (1996); *See* Scott Joachim, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations*, 19 HASTINGS COMM. &ENT. L.J. 517, 541-50 (1997); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) [hereinafter "Kozinsk i& Banner"].

[37] David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 397 (1990); Howell A. Burkhalter, Comment, *Advertorial Advertising and the Commercial Speech Doctrine*, 25 WAKE FOREST L. REV.861, 867 (1990).

For example, in India, defining commercial speech as speech which proposes a commercial transaction is too narrow. The *H.T Annaji*[38] case itself demonstrates that commercial speech is capable of more than simply implicating a commercial transaction. Courts in the America also tend to treat this definition as the "core notion"[39] of commercial speech or a mere indication rather than a definitive or necessary condition.[40] Moreover, the *Lakshmi Ganesh Film*[41]caserules out a necessary proposal of commercial transaction but suggests that speech which can be attributed to *effecting* a commercial transaction should be enough. American case laws point to the same, where American courts have treated various forms of speech which only indirectly propose commercial transactions as commercial speech, for instance alcohol content in a beer bottles,[42] professional business cards,[43] and even trade names.[44] Even the fact that the court's primary inference in *Telecom Watchdog*[45]that UCCs are not commercial speech is strange, considering that it evidently encompasses most factors of such speech and given that courts in the United States have even treated unsolicited advertisements as commercial speech.[46]

While clarity in terms of discerning the type of speech is always relevant, it should be noted that some[47] argue that rather than fixating on one particular definition of 'commercial speech', it is more important to treat the case as having fallen within a commercial framework and within this framework of commercial expression; the court must be free to

[38]H.T. Annaji v.The District Magistrate and the Deputy Commissioner, 1998 (4) Kar.L.J. 75.
[39]*Supra* note 5.
[40]*See also*, United Reporting Publ'g Corp. v. Cal. Highway Patrol, 146 F.3d 1133, 1137 (9th Cir. 1998); L.A.P.D. v. United Reporting Publ'g Corp., 528 U.S. 32 (1999).
[41] Lakshmi Ganesh Films v. Government of Andhra Pradesh, 2006 (4) ALD 374.
[42]Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
[43] Ibanez v. Florida Dept. of Bus. & Prof'l Regulation, 512 U.S. 136 (1994).
[44]Friedman v. Rogers, 440 U.S. 1 (1979).
[45] Telecom Watchdog v. Union of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012.
[46] *In re* Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1024 (1980); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73-74 (1983).
[47]*See generally,* Nat Stern, *supra* note 3.

address factual problems on a case by case basis.[48] The question of defining commercial speech becomes more relevant as we try to address the reasons for its protection.

DEVELOPMENT OF THE DOCTRINE - A HISTORICAL PERSPECTIVE

The Supreme Court of India in the *Tata Press*[49] *case* concluded that *"commercial speech is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the constitution."*[50] This ruling brought about a significant change in the ambit of the words 'freedom' and 'expression' and brought about a change in law with respect to a previous judgement,[51] which had found that misleading commercial advertising would receive no protection under Article 19(1)(a). While the development of the doctrine has been studied significantly in America,[52] this part briefly outlines the same along with case-laws from India.

The categorization of speech as commercial was first seen in *Valentine v. Chrestensen,*[53] in a ruling that was later criticized for being "casual and offhand",[54] the court held that *"purely commercial advertising was ineligible for First Amendment consideration.*"[55] This ruling was later referred to in the matter of *Hamdard Dawakhana v. Union of India,*[56] where a statute restricting "objectionable" and "unethical" advertisements with respect to drugs was challenged; the court found that an advertisement in the interest of trade and commerce cannot be protected under Article 19(1)(a), stating that:

[48] *Id.* at 111.
[49] *Supra* note 8.
[50] *Id.* at 2448.
[51] *Supra* note 12.
[52] *See generally,* M.H. Redish, *First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429 (1970) [hereinafter "Redish"]; T.H. Jackson & J.C. Jeffries, *Economic Due Process and the First Amendment,* 65 VA L. REV. 1 (1979) [hereinafter "Jackson & Jeffries"]; C.E. Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 IOWA L. REV. 1 (1986) [hereinafter "Baker"]; D. A. Faber, *Commercial Speech and First Amendment Theory,* 74 NW. U. L. REV. 372 (1980).
[53] 316 U.S. 52 (1942), (discussing Chrestensen's violation of a municipal ban on distribution of advertising material in the streets by disseminating handbills that publicized his exhibit of a retired United States Navy submarine).
[54] Cammarano v. United States, 358 U.S. 498, 514 (1959); Kozinski & Banner, *supra* note 34.
[55] *Supra* note 5.
[56] *Supra* note 12.

> *"An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed…. when it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas-social, political or economic or furtherance of literature or human thought; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business… and…* [has] *no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution."*[57]

This notion did not however survive for long; courts in the U.S. started to recognize that merely because speech is commercial, it cannot be denied protection. In rulings subsequent to *Valentine*, the court significantly eroded its own decision by providing First Amendment protection to periodicals,[58] also clarifying that paid advertisements relating to public affairs receive constitutional protection,[59] and reaffirming that a profit motive did not disentitle speech from first amendment protection.[60] This erosion began brewing in India with the Supreme Court holding in *Indian Express Newspapers (Bombay) Ltd v. Union of India*[61] that "*we are of the view that all commercial advertisements cannot be denied the protection of Art 19(1)(a) of the Constitution merely because they are issued by businessmen."*[62]

[57] *Id.* at 688.
[58] Breard v. Alexandaria, 341 U.S. 622 (1951).
[59] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[60] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).
[61] 1985 SCR (2) 287.
[62] *Id.* at 361.

Beginning with treating a for-profit advertisement as genuine speech, entitled to first amendment consideration on its own merits,[63] courts in the US finally overruled *Valentine* in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[64] where a Virginia state ban on advertising the prices of prescription drugs was struck down, finding that "*speech which does no more than propose a commercial transaction*" was fully entitled to first amendment protection,[65] a sentiment which was echoed in the *Tata* case.

While the court in the *Hamdard* case found that misleading advertisements were ineligible for constitutional protection,[66] the bench in the *Tata* case clarified that all advertisements would be protected under Article 19(1)(a) and would be subject to regulation under Article 19(2).[67] Therefore, the fact that an advertisement was misleading would only make it prone to restrictions as opposed to being ineligible for protection. Before delving further into the concept of commercial speech, there are two important observations to be made regarding the *Hamdard Dawakahana* case which found that despite advertising being a *form* of speech it was ineligible for protection under 19(1)(a) because it bore no relationship with the essential concept of speech. The first is that the *Tata* judgement was delivered by a Division Bench while the *Hamdard* judgement was delivered by a Constitutional bench, meaning that the *Tata* judgement clarified the position of law on commercial speech as opposed to over-ruling it.[68] The second significant observation is that the Court here considered the fact that there may be hierarchies of expression with different importance at each level.[69] Both these concepts will be discussed further in Parts III and IV.

[63] *Supra* note 10.
[64] 425 U.S. 748 (1976)
[65] *Id.* at 762 (quoting Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 414 U.S. 376, 385 (1973)).
[66] Hamdard Dawakhana v. Union of India, 1960 SCR (2) 671, 688.
[67] *Supra* note 8.
[68] *Hierarchies of Expression: Commercial Speech, Hamdard Dawakhana and Tata Press*, INDIAN CONST. L. & PHIL.(Aug. 7, 2013, 4:44 PM),http://indconlawphil.wordpress.com/2013/08/07/hierarchies-of-speech-commercial-advertisements-hamdard-dawakhana-and-tata-press/.
[69] *Id.*

WHY PROTECT COMMERCIAL SPEECH?

While defending the extension of first amendment protection to commercial speech,[70] the Supreme Court of the United States observed that, advertisement was indeed dissemination of information essential to serve a predominantly free enterprise and that it is a matter of public interest that decisions of consumers should be intelligent and well informed and found that the free flow of information serves the foal of public decision making.[71] This view exemplified the belief that commercial speech could not be differentiated from other categories of protected speech in its ability to lead to an informed public;[72] it focused primarily on the perspective of the effect it had on the audience of the speech.[73]

Considering Article 19(1)(a) of the Indian constitution, the right to freedom of speech and expression does not simply extend to communication[74] but also includes the right to acquire and disseminate information.[75] The Supreme Court of India recognized this in *Tata*[76] as well, finding that the public has the right to receive commercial speech, the bench quoted with approval that advertising is also a way of disseminating information.[77] Moreover, the court also linked the importance of commercial speech to free media, finding that advertisements were crucial in keeping prices down. The Supreme Court has also held that laws which place excessive burdens on advertisements resulting in decreased circulation of newspapers as a result of increased prices would be unconstitutional.[78]

[70]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[71]*Id.* at 765.
[72]*See*, Redish, *supra* note 50.
[73] J.S. Werts, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177, 188-89 (1971).
[74]M.P. JAIN, *supra* note 23.
[75]Secretary Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal, AIR 1995 SC 1236; *See also*, PUCL v. Union of India, (2003) 4SCC 399.
[76]*Supra* note 8.
[77]*Supra* note 8 (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)).
[78]Bennett Coleman & Co. v. Union of India, 1973 2 SCR 757.

Critics of the distinction between commercial and non-commercial speech in America point to the fact that commercial speech does not protect first amendment values such as an individual's meaningfully expressive behaviour,[79] self-government or realization of the individual personality.[80] Moreover, commercial speech is essentially profit motivated.[81]

Courts in India, prior and subsequent to the *Tata* case, have come to acknowledge that an advertisement is a form of speech;[82] however, certain advertisements have no relationship with the essential concept of freedom of speech and as such will receive no protection under Article 19(1)(a).

The question now is when can statements that qualify as commercial speech bear a relationship to the essential concept of freedom of speech? EU jurisprudence on commercial speech is similar and just as under-developed[83] as it is India,[84] ECHR case laws points to the fact that all forms of expression are protected under Article 10,[85] including commercial speech.[86] However, the level of protection accorded would be less than political ideas;[87] and to differentiate commercial and non-commercial elements of speech, the court determines whether there exists a public debate on a particular issue and if the contested speech can contribute significantly to it.[88] Another criterion used in the EU to determine the

[79]*See*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–25 (1989).
[80]Jackson & Jeffries, *supra* note 50; Baker, *supra* note 50.
[81]Redish, supra note 50.
[82]*See generally*, Hamdard Dawakhana v. Union of India AIR 1960 SC 554; Indian Express Newspapers (Bombay) Ltd v. Union of India, AIR 1986 SC 515; Mr. Mahesh Bhatt & Kasturi and Sons v. Union of India, 147 (2008) DLT 561; Telecom Watchdog v. Union Of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012.
[83] G. Quinn, *Extending the Coverage of Freedom of Expression to Commercial Speech: A Comparative Perspective*, *in*HUMAN RIGHTS: A EUROPEAN PERSPECTIVE (L. Heffernan ed. 1994).
[84]Nishant Kumar Singh, *Should Lawyers be Allowed to Advertise*, 11 STUDENT ADVOC. 67 (1999).
[85]European Convention for the Protection of Human Rights and Fundamental Freedoms art.10, Nov. 4, 1950, E.T.S. 5 (*entered into force* Sept. 3, 1953); Muller v. Switzerland, (1988) 13 E.H.R.R 212, 27.
[86]X and Church of Scientology v. Sweden, App. No. 7805/77, 16 D.R. 68 (1979.)
[87]Colin R. Munro, *Value of Commercial Speech*, 62 CAMBRIDGE L.J. 134 (2003); Markt Intern Verlag GmbH and Klaus Beermann v. Germany, [1989] 12 E.H.R.R. 161.
[88]*See*, Hertel v. Switzerland, [1998] 28 E.H.R.R. 534; J. Krezeminska, *Freedom of Commercial Speech in Europe*, 58 VERLAG DR KOVAC, STUDIEN ZUM VÖLKER- UND EUROPARECHT 292 (2008).

commerciality of speech involves understanding the character of the speech which is determined through the enterprise's objective.[89]

On an examination of various cases that deal with commercial speech in India, it is apparent that the decision in *Hamdard*[90] is still good in law and that there are, in fact, some forms of speech excluded from Article 19(1)(a). Two decisions of the Delhi High Court[91] point to the fact that a purely commercial advertisement which does not bear a relationship with the essential idea of freedom of speech[92] would be ineligible for protection. The Delhi High Court in *Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India and Anr.,*[93] found that commercial speech whose only purpose is to earn profits and further trade cannot receive the protection of article 19(1)(a) unless it claimed and established to be in public interest.[94]

The question of when 'commercial speech' bears a relationship with the essential idea of freedom of speech and expression seems to have been answered by the *Mahesh Bhatt*[95] case as being established in public interest. The difficulty in concluding whether commercial speech contains an aspect of public interest has been highlighted several times in American jurisprudence. In *New York Times co v. Sullivan,*[96] the court granted full protection to paid advertisement because it "*communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.*"[97] Despite the

[89]Demuth v. Switzerland, (2004) 38 E.H.R.R. 20.
[90]*Supra* note 12..
[91] Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561; Telecom Watchdog v. Union of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012.
[92]Hamdard Dawakhana v. Union of India, AIR 1960 SC 554 (noting that the essential concept is propagation of ideas-social, political or economic or the furtherance of human literature and thought).
[93] 147 (2008) DLT 561 (discussing the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, impugned for allegedly violating Art 19(1)(a) by placing restrictions on the advertising, surrogate or otherwise, of tobacco products and cigarettes).
[94]*Id.* at ¶ 31.
[95]Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561.
[96]376 U.S. 254 (1964).
[97]*Id.* at 266.

existence of a profit motive, in *Central Hudson*[98] the court refused to grant first amendment protection for advertising simply because it links a product to a current public debate.[99] The court defended its decision by drawing out a distinction between "direct comments on public issues" which would receive full protection and speech about public issues "made only in the context of commercial transactions"[100] which would receive an intermediate level of protection. Later, in *Board of Trustees of the State University of New York v. Fox,*[101] the court observed that because a company's commercial statements were not so "inextricabl[y] intertwined with otherwise fully protected speech"[102] it would be regulated under standards for commercial speech.[103]

Moreover, courts in the US as well as well as in India have accepted a subordinate status given to commercial speech without explaining why.[104] In fact, there is some disagreement about whether commercial speech should even be treated differently from other forms of protected speech as long as it is truthful.[105] This public interest test devised by the court lacks theoretical justifications as to why a certain classification of speech is burdened as compared to other forms of protected speech. In *IMS v. Sorrell,*[106] the court found that a regulation by which the sale for marketing purposes of physicians' prescription records without their permission disfavoured marketing speech[107] or speech with a particular content[108] and was thus unconstitutional. Creating a hierarchy of speech within the framework of Article 19(1)(a) with commercial speech or any other form of speech placed on a lower rung or

[98]Cent.Hudson Gas & Elec. Corp. v. Pub.Serv. Comm'n, 447 U.S. 557 (1980).
[99]*Id.* at 563.
[100] *Id.* at 563
[101]492 U.S. 469 (1989).
[102] *Id.* (quoting Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988)).
[103]*Id.* at 475.
[104]Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561; Robert C. Post, *Constitutional Status of Commercial Speech,* 48 UCLA L. REV. 1 (2000) [hereinafter "Robert Post"].
[105] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001)
[106]Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011).
[107]*Id.* at 2656.
[108] *Id.*

accorded lesser protection seems absurd, especially when Article 19(2) specifically deals with restrictions or regulations on such speech. The most appropriate considerations would have to involve treating all speech as falling within Article 19(1)(a) and devising appropriate regulations within the set-up of Article 19(2).

COMMERCIAL SPEECH: A QUALIFIED RIGHT NONETHELESS

Freedom of speech and expression, like every other right in India, is not exercisable unrestricted. Under the United States constitution, there are no explicitly mentioned restrictions, however, the court has, over the years, come to its own conclusions as to what forms of speech deserve protection from restrictions.[109] As has been noted above, the *Hamdard Dawakhana* case[110] outlines that there are certain forms of speech which deserve the protection of Article 19(1)(a) and restrictions on such speech is based on the degree of value that speech attains. This position has been occasionally endorsed in the United States with the government requiring a lower burden of justification for regulating a certain type of speech, for example, the court has decided that speech that contains adult content,[111] speech which may be harmful to children,[112] speech broadcast on radio and television,[113] even certain forms of employee speech[114] all receive less than full protection. [115]

The courts in the U.S., embracing the 'subordinate position' attributed to commercial speech, have held that this form of speech is "subject to 'modes of regulation that might be impermissible in the realm of non-commercial expression."[116] Speech that enjoys extensive first amendment protection may be subject to content-neutral regulations which are narrowly

[109]*See generally*, Henry Cohen, *Freedom of Speech and Press: Exceptions to the First Amendment*,CONGRESSIONAL RESEARCH SERVICE (July 21, 2014), http://fas.org/sgp/crs/misc/95-815.pdf [hereinafter "Henry Cohen"]; Nishant Kumar Singh, *supra* note 82 (noting that American decisions must be used with caution).
[110]*Supra* note 12.
[111]U.S. v. Playboy, 529 U.S. 803 (2000).
[112]Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).
[113]Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S 367, 388 (1969).
[114] Arnett v. Kenned 416 U.S. 134, 140 (1974).
[115] Henry Cohen, *supra* note 107.
[116]Board of Trustees v. Fox, 492 U.S. 469, 477 (1989).

tailored to serve a significant government interest and leave viable alternative mediums of communication subject to intermediate scrutiny.[117] Moreover, content based restrictions may also be constitutional if they fulfil the test of strict scrutiny, where the government must show that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further that interest."[118]

In India, however, once speech has been deemed to be protected under Article 19(1)(a), the only forms of permissible restrictions are contained under Article 19(2). In light of this compulsion, we look at such restrictions and parallels to a form of intermediate scrutiny developed by the United States Supreme Court.

a.) *Restrictions under Article 19(2)*

Freedom of speech and expression is not an unrestricted right.[119] In *Tata Press,*[120] it was settled that article 19(1)(a) does not exclude commercial speech. The recognition of commercial speech as a fundamental right under article 19(1) makes it a qualified right and the corresponding restrictions that could impede the speech could not be outside the realm of the exceptions laid down in article 19(2).

It has been held that nothing short of a danger to the foundations of the state or a treat to its overthrow could justify a curtailment of the right to freedom of speech and expression.[121] The underlying principle of determining a regulation that is potentially restricting speech is the extent of reasonableness in the law. The limitations under article 19(2) lay down that the freedoms envisaged in Article 19 can be restricted provided that they are[122] based under the authority of law and reasonable.

[117] Henry Cohen, *supra* note 107.
[118] Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); Chaplinsky v.New Hampshire, 315 U.S. 568, 572 (1942).
[119] M.P. JAIN, *supra* note 23.
[120] *Supra* note 8.
[121] Romesh Thapar v. State of Madras, AIR 1950 SC 124.
[122] *Id.*

The Supreme Court, while summarizing the principles of Article 19(1)(a), carved out a string of tests for application of article 19(2):

a. A direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought is to be established.
b. It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on the fundamental rights.
c. Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest.[123]

The Supreme Court, while determining the parameters of adjudging reasonableness of restrictions, emphasised that the purpose of the restriction must be related to the ones mentioned in article 19(2).[124]

The court has found that reasonability cannot have an exact definition and must be construed with respect to each individual case.[125] "Reasonability" enables the court to determine whether the impugned restrictive law is in fact in the interest of the public order, morality, or health. The reasonableness of the restraint would also have to be judged by the magnitude of the evil which it is the purpose of the restraint to curb or to eliminate.[126] There is an absence of a straight-laced definition of reasonableness which makes room for subjectivity, however, the exhaustive set of limitations given in article 19(2) draws a definite framework which is easier to scrutinize.

b.) *Parallels to the Central Hudson Intermediate Scrutiny Test*

[123]Papnasam Labour Union v. Madura Coats Ltd., 1995 SCC (1) 501.
[124]Ramlila Maidan Incident v. Home Secretary, Union of India, 2012 (2) SCALE 682.
[125]State of Madras v. V.G. Row, 1952 S.C.R. 597.
[126]Collector of Customs v. Sampathu Chettty, AIR 1963 SC 316 at ¶ 35.

In *Central Hudson*[127] the United States Supreme Court developed a standard for determining the validity of a regulation on commercial speech using a four part analysis. While it has been interpreted in many ways,[128] it still remains the most dominant test.[129] The test states:

"For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[130]

In terms of false and misleading statements made in a commercial context, the law in India is clear[131] and advertisements which are deceptive, unfair, misleading and untruthful can be regulated under Article 19(2).[132] In the case of *Mahesh Bhatt,*[133] the Supreme Court found that commercial speech could be restricted more easily compared to political or social speech if the government could show substantial justification for doing so. The court held that preventing advertisement of tobacco products was justified because the state had an interest in safekeeping public health after a harmonious reading of Article 19(1)(a) and Article 21.[134] In *Lakshmi Ganesh Films*,[135] the High Court acknowledged that commercial speech ordinarily receives less than the full spectrum of constitutional protection, however any state

[127]Cent.Hudson Gas & Elec. Corp. v. Pub.Serv. Comm'n, 447 U.S. 557 (1980).
[128] Matthew Miller, The *First Amendment* and *Legislative Bans of Liquor* and Cigarette Advertisements, 85 COLUM. L. REV. 632, 633-35 (1985); Brian J.Waters, Comment, *ADoctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech,* 27 SETON HALL L. REV. 1626, 1628 (1997).
[129]*See*, Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the Central Hudson and O'Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 727 (2001) (quoting Madsen v. Women's Health Ctr., 512 U.S. 753, 792 (1994)).
[130]Cent.Hudson Gas & Elec. Corp. v. Pub.Serv. Comm'n, 447 U.S. 557, 566 (1980).
[131] Especially in the form of statutory enactments, see generally The Consumer Protection Act, 1986; Food Safety & Standards Act (FSSA), 2006; The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.
[132]*Supra* note 8.
[133]Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561.
[134]*Id.* at ¶ 32.
[135] Lakshmi Ganesh Films v. Government of Andhra Pradesh., 2006 (4) ALD 374.

action impacting such a right must be scrutinized to test: *"(a) whether it falls within the permissible area of restriction; (b) whether the restriction is reasonable; and (c) whether there are available less restrictive alternatives that the State ought to have pursued before resorting to the impugned action".*[136]

c.) *Adapting Strict Scrutiny Standards for Regulation of Commercial Speech*

The variation in the level of protection afforded to commercial speech comes with a corresponding variation in terms of the regulating the restrictions imposed on it. The profit making agenda connected to commercial speech is cited as a primary reason for the step-motherly treatment. However, much expression is engaged in for profit and nevertheless receives full first amendment protection.[137]

The judicial scrutiny which the regulations on speech must satisfy is determined on the basis of the form of speech. In the United States, a comfortable bifurcation in the forms of speech has enabled jurists to afford categorical protection to speech, depending on its form. For commercial speech, an intermediate threshold is applied, which is implemented through the *Central Hudson's* four pronged test while strict constitutional scrutiny is invoked for "fully protected speech".[138] The categorization of the forms of speech has been a subject of immense discord[139] as many jurists vehemently discard the existence of notable differences[140] between the two. While delivering the judgment in *Liquormart*,[141] Justice Thomas was inclined on abolishing the *Central Hudson test* and substantially merging commercial speech with fully protected speech under the First Amendment, subjecting both to a form of strict

[136] *Id.* at¶ 55.
[137] Alex Kozinski& Stuart Banner, *supra* note 34.
[138] Reno v. A.C.L.U., 521 U.S. 844, 868–70 (1997); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[139] Alex Kozinski& Stuart Banner, *supra* note 34.
[140] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[141] Liquormart v. Rhode Island Inc., 517 U.S. 484 (1996).

scrutiny.[142] A strict scrutiny standard that accommodates the context of commercial speech would offer a more coherent approach than Central Hudson's often-criticized[143] multi-pronged test, while retaining the most useful aspects of that standard. Up until *Sorrell,*[144] although the Courts struck down several regulations on commercial speech,[145] they merely sought to determine the scope of the "limited measure of protection."[146]

The demand for a 'heightened scrutiny' in *Sorrell* has triggered the near convergence of commercial speech and core speech.[147] The application of a heightened scrutiny is expectedly going to elevate the position of commercial speech by diluting one of the most fundamental differences that existed between commercial speech and core speech.

The Indian judiciary has only recently attempted developing a normative context to justify its resort to strict judicial scrutiny of laws and is yet to employ it as a standard to regulate restrictions on commercial speech.

THE RELUCTANT CLIMB AGAINST STEP-MOTHERLY TREATMENT:

The Supreme Court of the U.S. in *Virginia State Board of Pharmacy*[148] refused to draw a distinction between publicly '*interesting*' or '*important*' commercial advertising and the '*opposite kind'*,[149] stating that *"advertising, however tasteless and excessive, it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price*."[150] This protection however, was not absolute. The court, while carving a recognition plank for commercial speech, squeezed in a footnote declaring that '*common sense differences'* between commercial speech and non-

[142]STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE 2-5 (2d ed. 2014).
[143]Alex Kozinski& Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993).
[144]Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011).
[145]Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
[146] Robert Post, *supra* note 102.
[147]Nat Stern and Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171(2012).
[148]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[149]*Id.* at 765.
[150]*Id.*

commercial speech suggest that "a different degree of protection is necessary".[151] In the years following Virginia State Board, the U.S. courts identified two differences between commercial and non-commercial speech. First, commercial speech is supposedly more objective than non-commercial speech because its truth is more easily verifiable. Second, because commercial speech is engaged in for profit, it is claimed to be more durable than non-commercial speech. As a result, it is less susceptible to being chilled by proper regulation.[152] The two differences, till date remain unquestioned and the Courts have not once suggested that they do not justify the lower level of protection granted to commercial speech.

In *Liquormart, Inc. v. Rhode Island,*[153] a divided court, struck down two Rhode Island statutes prohibiting the advertisement liquor prices. The 'special care' review applied by the Supreme Court in *Liquormart*[154] along with the imposition on the government to establish a nexus between the object and the effectiveness of the regulation on commercial speech, demolished the doctrine that had gradually developed over the past fifty years.[155] The vacuum of a judicial compass was felt for a long time to come.[156]

In 2011, the Supreme Court of the U.S. passed a judgment which went largely unnoticed; the impact of which is yet to be realized. In *Sorrell v IMS Health, Inc.,*[157] the Supreme Court by a 6-3 majority, propounded the concept of a *disfavored speaker* in reference to a marketer, while striking down a Vermont statute that was founded upon *viewpoint discrimination.*[158] The statute aimed at limiting the ability of pharmaceutical manufacturers to purchase and use

[151]Kozinski& Banner, *supra* note 34.
[152]*Id.* at 634.
[153]517 U.S. 484 (1996).
[154]*Id.* at 517.
[155] John V. Tait, *Trademark Regulations and the Commercial Speech Doctrine: Focusing on the Regulatory Objective to Classify Speech for First Amendment Analysis*, 67 FORDHAM L. REV. 897, 923 (1998).
[156] Michael W. Field, *On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine*, 2 ROGER WILLIAMS U. L. REV. 57 (1996).
[157]Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011).
[158] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011); Tamara R Piety, *A Necessary Cost Of Freedom? The Incoherence of Sorrell v. IMS*,64 ALA. L. REV. 1 (2012).

for marketing purposes government-collected data[159] regarding the prescribing practices of individual doctors. "*The law on its face*," Justice Kennedy declared, "*burdens disfavored speech by disfavored speakers*"[160] and asserted that the statute *"disfavored marketing, i.e., speech with a particular content,"*[161] and therefore attracted a *"heightened judicial scrutiny".*[162] The judgment delivered in Sorrell, extensively altered the existing law on commercial speech in two ways. First the Court expanded the ambit of protected commercial speech, by striking a law that only objected to the use of data collected under a government mandate. Second, the court held that such regulations are subject to a more heightened scrutiny because it was a content-based and speaker-based regulation of commercial speech,[163] sharply deviating from the standpoint of an intermediate level of scrutiny laid down in *Central Hudson*.

Sorrell presents a deadlock insofar as reaffirmation of the commercial speech doctrine is concerned; and only an application of the "heightened scrutiny" in impending matters will clear the position as to whether the doctrine is withering away in its entirety, or if it's merely a grant of substantial protection[164] under the same doctrine. Regardless, commercial speech stands in a better position today. Owing firstly, to the introduction of heightened scrutiny and secondly, to the strong distaste displayed towards viewpoint discrimination.

Insofar as the evolution of commercial speech within the Indian realm is concerned, the process has been obstinately measured. Projects such as Central Monitoring System (CMS), National Intelligence Grid (Natgrid), Aadhar, Crime and Criminal Tracking Network and Systems (CCTNS), are not governed by any legal framework and procedural safeguards.

[159] *Protecting Commercial Speech and Personal Privacy in the Internet Age: Is the Court Lochnerizing the First Amendment? The Constitution at a Crossroads,* CONSTITUTIONAL ACCOUNTABILITY CENTER, (July 21, 2014), http://www.acslaw.org/CAC%20-%20Protecting%20Commercial%20Speech.pdf.
[160] Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) at 2663.
[161] *Id.* at 2656.
[162] *Id*. at 2657.
[163] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011).
[164] Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?* CATO SUP. CT. REV. 129 (2010).

While they do not entail information exchange for a monetary consideration unlike *Sorrell*, the subject matter of the transaction remains personal data. With the introduction of systems such as assimilation of biometric data and CMS, Indian jurists are compelled to widen the definition of commercial speech. As has been discussed earlier, the decision in *Hamdard Dawakhana* case[165] has not been obliterated in the case of *Tata Press Limited*[166] and the position is yet to be put in order. It is necessary to note that although the concept of viewpoint discrimination and the likes have not found a place in the Indian jurisprudence, there appears to be an inclination to accommodate commercial speech under the same roof as free speech albeit in the garb of public interest and right to receive information.

CONCLUSION

The doctrine of commercial speech evolved from a mere intuition of economic policies to a component of speech that potentially carries ideas of substantial interest. The doctrine has been treated with utmost caution which can be inferred from the dearth of a reasonably clear definition, to a pattern of mighty hesitation in exploring various facets of this form of speech, to granting it a legal status worthy of protection. The fundamental points that were judicially marked as the reasons for lesser protection have continued to subsist only because of the precedence set. The criteria of a transaction being an active or passive carrier of an element which is of public interest or a public debate has gone a long way in categorizing commercial speech, in India. From advertisements to film distribution to compelled disclosure, the question of what constitutes commercial speech is expanding and the reasons to not qualify it as a variant of core speech is diminishing by the day.

The notion of durability and objective verifiability has been discarded as inadequate set of reasons to treat commercial speech differently from core speech. *Sorrell* has opened up a new

[165] *Supra* note 12.
[166] Mahesh Bhatt and Kasturi and Sons v. Union of India,147 (2008) DLT 561.

territory of disclosure of personal information keeping economic interests in mind. Post *Sorrell,* an altered doctrine is inevitable and awaited.