

## THE VALUE OF COMMERCIAL SPEECH

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### I. INTRODUCTION

RECENT decisions in the courts have encouraged discussion of the extent to which the common law does or should place a high or higher value on political expression.<sup>1</sup> Some scholars argue for a more explicit recognition of the high value of political speech,<sup>2</sup> and would seek, for example, to “constitutionalise” defamation laws.<sup>3</sup> Others have adopted a more sceptical attitude to the desirability of importing American approaches to freedom of expression generally<sup>4</sup> or to the privileging of political speech as a category.<sup>5</sup>

The categorisation of different kinds of expression which is inherent in discussions of political speech is a tendency which is liable to have other applications. However, aside from some debate over political speech, the tendency has not been much explored in a British context. The relative absence of discussion may be explained, if rather circularly, by the observation that the area is under-theorised.<sup>6</sup> As against this, it might be suggested that, at least until recently, English law had no particular need to demonstrate a principled coherence, and apparent inconsistencies might even be interpreted as “a sign of the pragmatic genius of the common law in producing a workable solution to an important problem by paying scant regard to the theoretical and analytical issues that may arise”.<sup>7</sup>

Be that as it may, it would seem that categorisation of expression cannot be entirely ignored. This much is shown by a

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<sup>1</sup> See, for example, *Derbyshire C.C. v. Times Newspapers* [1993] A.C. 534; *Reynolds v. Times Newspapers Ltd.* [2001] 2 A.C. 127; *R. (on the application of ProLife Alliance) v. BBC* [2002] EWCA Civ 297, [2002] 2 All E.R. 756.

<sup>2</sup> The terms “speech” and “expression” may be distinguished for some purposes, but are here used interchangeably unless the context implies otherwise.

<sup>3</sup> See, for example, I.D. Loveland, *Political Libels: A Comparative Study* (Oxford 2000).

<sup>4</sup> S. Sedley, “The First Amendment: A Case for Import Controls”, in I.D. Loveland (ed.), *Importing the First Amendment* (Oxford 1998).

<sup>5</sup> I. Hare, “Is the Privileged Position of Political Expression Justified?”, in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information* (Oxford 2000).

<sup>6</sup> J. Gardner, “Freedom of Expression”, in C. McCrudden and G. Chambers (eds.), *Individual Rights and the Law in Britain* (Oxford 1994).

<sup>7</sup> C. Forsyth, “The Protection of Political Discourse: Pragmatism or Incoherence?”, in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information* (Oxford 2000), at p. 90.

discussion of the Strasbourg case law on Article 10 of the European Convention on Human Rights:

The indications are that commercial expression is not regarded as so worthy of protection as political or even artistic expression and that some considerations which make expression valuable in the political context may not apply in quite the same way in the commercial environment.<sup>8</sup>

In this article, it is proposed to consider commercial speech. That category has not been much discussed on this side of the Atlantic Ocean.<sup>9</sup> However, at least to the extent that it features in ECHR law, it is clearly not without potential significance in domestic law, made more immediate through the passing of the Human Rights Act 1998.

The recognition of a category of commercial speech may be traced back earlier than the European Convention, to First Amendment case law in the United States. Indeed, it may not go too far to say that the categorisation approach to issues of freedom of expression may itself be attributed broadly to American origins. It may therefore be instructive to glance at the treatment of commercial speech in the United States, before considering the treatment of commercial speech at Strasbourg. Then the larger parts of this article are devoted to considering the position of commercial speech in domestic law, and exploring the difficulties of defining commercial speech.

#### *United States Law*

In the United States, the First Amendment to the Constitution provides (in part) that “Congress shall make no law ... abridging the freedom of speech, or of the press”. With the adoption of the Fourteenth Amendment in 1868, the guarantee became applicable to the States.

Although the words may be framed as an apparently absolute guarantee, their interpretation has been critical, as always. In *Chaplinsky v. New Hampshire*,<sup>10</sup> a unanimous Supreme Court upheld the constitutionality of state legislation prohibiting offensive name calling in a public place. They did so by a categorisation: obscenity, profanity, libel, and “fighting words” were cited as

<sup>8</sup> D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London 1995), p. 402.

<sup>9</sup> An honourable exception is the paper by G. Quinn “Extending the Coverage of Freedom of Expression to Commercial Speech: A Comparative Perspective”, in L. Heffernan (ed.), *Human Rights: A European Perspective* (Dublin 1994). See also A. Lester and D. Pannick, “Advertising and Freedom of Expression in Europe” [1985] P.L. 349; G. Marshall, “Taking Rights for an Override: Free Speech and Commercial Expression” [1989] P.L. 4.

<sup>10</sup> 315 U.S. 568 (1942).

examples of classes of speech which did not merit First Amendment protection.

The vogue for categorisation soon spread. Shortly after, in *Valentine v. Chrestensen*,<sup>11</sup> the Supreme Court had before it a First Amendment challenge to the validity of a New York City ordinance prohibiting distribution of advertising matter on the streets, which had been used to prosecute the owner of a submarine using handbills to promote its exhibition. The Court unanimously rejected the challenge, putting commercial speech entirely outside the realm of First Amendment concern. A decade later, the doctrine was reinforced by the upholding of another municipal ordinance prohibiting door-to-door solicitations, even though the merchandise involved was magazine subscriptions.<sup>12</sup>

The dissent of Douglas J. in a 1973 case<sup>13</sup> recorded his conversion from the doctrine, and in 1975 the Court came closer to abandoning it. In the aftermath of the abortion decision in *Roe v. Wade*,<sup>14</sup> there was still a patchwork of restrictions on information regarding the availability of services. *Bigelow v. Virginia*<sup>15</sup> involved the conviction, under a Virginia statute, of the editor of a newspaper for running an advertisement for an abortion clinic in New York. With two judges dissenting, the Supreme Court found the application of the state law to be in violation of the First Amendment. A year later, there was a case touching more squarely on typical commercial speech, with a challenge to a state statute that made the advertising of prescription drug prices “unprofessional conduct”. Here, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*,<sup>16</sup> a Supreme Court majority found that, because commercial speech often provided useful information to consumers, it was covered by the First Amendment guarantee.

However, the landmark decision extended only qualified protection to commercial speech. In *Central Hudson Gas and Electricity Corporation v. Public Service Commission*,<sup>17</sup> the courts were considering a ban on promotional advertising by a state’s electricity companies, which a public agency had deemed requisite in order to conserve energy. In striking it down as too extensive, the majority of the Supreme Court acknowledged that restrictions on commercial speech were justifiable in some circumstances:

<sup>11</sup> 316 U.S. 52 (1942).

<sup>12</sup> *Breard v. Alexandria* 341 U.S. 622 (1951).

<sup>13</sup> *Pittsburgh v. Pittsburgh Commission on Human Relations* 413 U.S. 376 (1973).

<sup>14</sup> 410 U.S. 113 (1973).

<sup>15</sup> 421 U.S. 809 (1975).

<sup>16</sup> 425 U.S. 748 (1976).

<sup>17</sup> 447 U.S. 557 (1980).

At the outset, we must determine whether the expression is protected by the First Amendment. 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 [in curbing it] is substantial. If both enquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more than is necessary to serve that interest.<sup>18</sup>

In a later case, the fourth prong was further refined as requiring “a fit that is not necessarily perfect, but reasonable ... that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective”.<sup>19</sup>

Thus, instead of the strict scrutiny which is applied, for example, to restrictions on political speech, intermediate scrutiny is applied to commercial speech regulation, consistently with what the Supreme Court has called its “subordinate position in the scale of First Amendment values”.<sup>20</sup> The test does not only allow restrictions on the advertising of illegal activities and untruthful or misleading advertising. It also allows restrictions on the promotion of activities, which, while lawful, may be judged more or less harmful, such as gambling or alcohol or tobacco use, if the restrictions are justifiable and proportionate. In one case, therefore, a comprehensive ban on casino advertising targeted at Puerto Rico residents was upheld by the Supreme Court, albeit narrowly.<sup>21</sup> In others, the Court has invalidated a Rhode Island law which prohibited the advertisement of the prices of alcoholic drinks, and Massachusetts regulations which banned outdoor advertising of tobacco products in the neighbourhood of schools, as being too broad, when discouragement could have been accomplished by other methods less damaging to freedom of speech.<sup>22</sup> The latter case echoed a decision on the Canadian Charter of Rights and Freedoms, where a 5–4 majority in the Supreme Court sustained a challenge to legislation imposing a comprehensive ban on tobacco advertising as being an unwarranted infringement of rights to commercial expression.<sup>23</sup>

The position of commercial speech in the United States can scarcely be regarded as satisfactorily settled, however. At time of writing, the Supreme Court has in January 2003 agreed to hear an

<sup>18</sup> *Ibid.*, at pp. 565–566.

<sup>19</sup> *Board of Trustees of State University of New York (SUNY) v. Fox* 492 U.S. 469, 479 (1989).

<sup>20</sup> *Ohralik v. Ohio State Bar Association* 436 U.S. 447, 456 (1978).

<sup>21</sup> *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico* 478 U.S. 328 (1986).

<sup>22</sup> *44 Liquormart Inc. v. Rhode Island* 517 U.S. 484 (1996); *Lorillard Tobacco Co. v. Reilly, A.G. of Massachusetts* 533 U.S. 525 (2001).

<sup>23</sup> *R.J.R. Macdonald v. Attorney-General of Canada* [1995] 3 S.C.R. 199.

appeal from the decision in *Kasky v. Nike Inc.*<sup>24</sup> There a narrow majority of the California Supreme Court decided that the corporation's statements in defence of its business practices did not enjoy First Amendment protection. When the appeal is heard, it is potentially important for clarification of the commercial speech doctrine.

#### *ECHR Law*

With its rather gnomic affirmation that "Everyone has the right to freedom of expression", Article 10 of the ECHR does not precisely specify what types and forms of expression it protects but, as the European Court of Human Rights noted in one case, "neither, on the other hand, does it distinguish between the various forms of expression".<sup>25</sup> The implication to be drawn is that all expression, whatever its content, is encompassed by the guarantee of Article 10(1), so that the key questions depend on scrutiny of the justification for interference under Article 10(2).<sup>26</sup> In this way the European Convention draftsmen sidestepped the issue of what is protected "speech", which has been troublesome in the experience of the First Amendment in the United States.

A restriction on advertising provided the European Commission of Human Rights with the first opportunity to fashion a stance on commercial speech, in its decision on admissibility in *X and Church of Scientology v. Sweden*.<sup>27</sup> There, the Swedish Consumer Ombudsman had secured an injunction relating to some passages in an advertisement issued by the Church of Scientology, which made various claims for a device called the "E-meter". Rejecting the complaint against the member state, the Commission indicated that it did not believe commercial speech lay outside the protection of Article 10(1), but did consider that the level of protection should be less than that accorded to the expression of political ideas, in the broadest sense.

The Commission's somewhat diffident double negative proved to be an accurate indicator of future attitudes. The case of *Barthold v. Germany*<sup>28</sup> involved German courts' injunctions against a veterinary surgeon who, in an interview with a newspaper, had incidentally promoted his own facilities amidst broader criticisms of the lack of

<sup>24</sup> 27 Cal. 4th 939 (2002).

<sup>25</sup> *Müller v. Switzerland* (1988) 13 E.H.R.R. 212, para. 27.

<sup>26</sup> See generally D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London 1995), ch. 11; F.G. Jacobs and R.C.A. White, *The European Convention on Human Rights*, 2nd edn. (Oxford 1996), ch. 12; P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edn. (The Hague 1998), ch. 7.10; A. Nicol, G. Millar and A. Sharland, *Media Law and Human Rights* (London 2001), ch. 12.

<sup>27</sup> App. No. 7805/77, 16 D.R. 68 (1979).

<sup>28</sup> (1985) 7 E.H.R.R. 383.

all-night veterinary services. The German government argued that Article 10 was not engaged, because it did not extend to commercial speech. However, observing that the publication at issue was an article composed by a journalist, the European Court of Human Rights found it impossible to disassociate opinions, information and “publicity-like” elements in it, and by a majority of five to two found that there had been a violation of Article 10. The Court, therefore, did not have to confirm that commercial speech as such came within the protection of Article 10, although Judge Pettiti, in a separate concurring opinion, stated clearly that commercial speech was protected, “even if it were to be conceded that the State’s power to regulate is capable of being more extensive in relation to commercial advertising”, and incidentally remarked on its beneficial role in providing financial backing for media and communications.

Several other cases have concerned advertising by members of professions such as the legal or the medical, where traditionally there were prohibitions or severe restrictions on forms of advertisement.<sup>29</sup> In many European countries, these restrictions have been or are in the process of being relaxed, but in the meantime there is a wide divergence of practice. Accordingly, the Court has tended to take refuge in the margin of appreciation doctrine in cases of that type. A British application in the same area was resolved by a friendly settlement, which acknowledged that the rules were undergoing change.<sup>30</sup>

Absent such divergences of practice, the need for a margin of appreciation is perhaps more questionable, but the doctrine had been employed in the leading case of *Markt Intern. and Beermann v. Germany*.<sup>31</sup> The applicants were publishers of a trade bulletin, an issue of which had included an item about a customer’s dissatisfaction with a mail-order firm’s products, which also requested further feedback on the firm from readers. A court order under the German Unfair Competition Act 1909 was issued to restrain the applicants from repeating the statements, and became the subject of a petition to Strasbourg. The European Court was agreed that information “of a commercial nature” was included within the scope of Article 10, but was evenly divided (9–9) as to whether there was a violation. The President used his casting vote

<sup>29</sup> *Casado Coca v. Spain* (1994) 18 E.H.R.R. 1; *Lindner v. Germany* (App. No. 32813/96, 9 March 1999). For an attempt to explain the Court’s disposition to subsidiary in Article 10 cases, see P. Mahoney, “Universality versus Subsidiary in Free Speech Cases” [1997] E.H.R.L.R. 364.

<sup>30</sup> *Colman v. United Kingdom* (1993) 18 E.H.R.R. 119. More recently, in *Stambuk v. Germany* (App. No. 37928/97), the Court found a violation of Article 10 in a professional disciplinary tribunal’s punishment of an ophthalmologist who had been interviewed by a newspaper about his laser treatment practice.

<sup>31</sup> (1990) 12 E.H.R.R. 161.

to hold that the state was not in breach, supporting the view that states were permitted a wide margin of appreciation in the area of commercial matters, and in particular on unfair competition, since otherwise the Court would be put in the position of having to undertake re-examinations of all the facts and circumstances. The opposing view, lost on the casting vote, would have been less deferential to states.

However, the line of substantial deference to the state's laws on unfair competition was followed in another, somewhat similar, case, *Jacobowski v. Germany*.<sup>32</sup> There the national court had issued an injunction to restrain a dismissed news agency editor from sending to journalists a mailing with newspaper articles critical of his former employer along with a letter in which he offered to meet them. A majority (6–3) of the Court held that there was no violation of Article 10, on the view that the injunction was not disproportionate. In a forceful dissent, the minority warned: “To accept in this case a preponderance of the competitive element amounts to reducing the principle of freedom of expression to the level of an exception and to elevating the Unfair Competition Act to the status of a rule”.

A more rigorous test of the necessity of the interference was applied by the Court in *Hertel v. Switzerland*,<sup>33</sup> where the publication in question was a journal article concerning the alleged effects of microwave cookery on the health of users. The applicant had been restrained from expressing his views by an injunction, granted by a Swiss court at the behest of a manufacturers' association. The Court characterised the issue as involving a debate which was of general interest, and not purely commercial statements. That being so, the margin of appreciation was less, and it was concluded that the injunction violated the applicant's right to freedom of expression because it was disproportionate.

Again, in *Vgt Verein Gegen Tierfabriken v. Switzerland*,<sup>34</sup> the Court found a violation. Swiss television companies, purportedly following a prohibition of political advertising, refused to broadcast an advertisement from an animal welfare group which would have advised viewers to “eat less meat, for the sake of your health, the animals and the environment”. The Court held that the extent of the margin of appreciation was reduced, given that the filmed advertisement “fell outside the regular commercial context” and rather “reflected controversial opinions pertaining to modern society in general”.

<sup>32</sup> (1994) 19 E.H.R.R. 64.

<sup>33</sup> (1998) 28 E.H.R.R. 534.

<sup>34</sup> (2002) 34 E.H.R.R. 4.

Several of the cases, therefore, indicate a willingness to classify instances of expression as being of general interest, even when they are colourably commercial or involve payment for advertising space. In one instance, the classification issue was simply avoided by being ignored. In *Open Door Counselling and Dublin Well Woman Centre v. Ireland*,<sup>35</sup> the Court ruled against Ireland, where injunctions had been issued to prevent the publication of advertisements or information relating to the availability of abortions in the United Kingdom. The Dublin clinics which were amongst the applicants charged for their provision of advice and the British abortion services operated commercially. However, in finding that there had been a violation of Article 10 because the restrictions were not “necessary”, the Court did not categorise the speech involved at all, but seemed to proceed on an unarticulated assumption that it was political, if anything.

Along with the tendency to cross-classify, we may also notice that the Court has occasionally seemed to doubt whether distinctions between different types of expression are appropriate.<sup>36</sup> However, much more often it has employed a categorisation and, as the writers of a leading textbook conclude, “the categories of expression to which it has from time to time referred must relate to the different characteristics of each of them and, therefore, ... the necessity for interfering with any particular exercise of the freedom”.<sup>37</sup> In the Strasbourg case law, it appears that the necessity of a legitimate interference is more readily accepted when the instance of expression is categorised as commercial speech. While restrictions on freedom of expression must normally be justified by demonstrating that they correspond to “a pressing social need”,<sup>38</sup> it would seem that restrictions on commercial speech may be compatible with the Convention so long as a state reasonably views them as necessary. So, for example, a state’s restrictions on tobacco advertising, with the aim of the protection of health, are likely to be compatible with Article 10, provided they are not disproportionate.<sup>39</sup>

<sup>35</sup> (1992) 15 E.H.R.R. 244.

<sup>36</sup> *Müller v. Switzerland* (1988) 13 E.H.R.R. 212, para. 27; *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843, para. 64.

<sup>37</sup> D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London 1995), p. 396.

<sup>38</sup> *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737; *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245.

<sup>39</sup> As implied by *Germany v. European Parliament and European Union Council* [2000] 3 C.M.L.R. 1175. The European Court of Justice annulled the EC’s Tobacco Advertising Directive 98/43 because the Community did not have powers to make it under the purported bases. Advocate-General Fennelly considered the alternative challenge of inconsistency with the ECHR and regarded the ban as compatible with Article 10, except for provisions which prohibited cross-branding. See E. Barendt, “Tobacco Advertising: The Last Puff?” [2002] P.L. 22.



## II. COMMERCIAL SPEECH IN ENGLISH LAW

Other systems, rather than English law, have employed categorisations of speech. So when we consider the position of commercial speech, or what protection is given to it, in English law, the inquiry is novel, because it has not previously been called for. Moreover, the term “commercial speech” is relatively unfamiliar and (as discussed in the following section) ill-defined. Notwithstanding these difficulties, it may perhaps be of interest to make the attempt.

### *Neutrality*

Unless there is an evident privileging of some category of speech on the one hand, or proscription or disfavouring of it on the other hand, it seems appropriate to describe the attitude of the law to it as one of neutrality. On that basis, it is submitted that the attitude to commercial speech in English law is a stance of neutrality.

As evidence of the neutrality to broad categories, consider the operation of criminal offences such as blasphemy or incitement to racial hatred<sup>40</sup> or a contempt of court under the strict liability rule,<sup>41</sup> all being examples of offences which may be committed by offending expression. In each instance, the essence of the offence lies in the publication of the matter defined as harmful or offensive. In the case of blasphemous libel, when a prosecution was brought in respect of a published poem, it was neither necessary nor relevant to consider whether the publication concerned might be classifiable as literary or artistic.<sup>42</sup> In the case of prosecutions for the offences of incitement to racial hatred, it has been neither necessary nor relevant to inquire whether provocative speakers or pamphleteers were indulging in “political speech”, as many of them arguably were.<sup>43</sup> If a television broadcast is held to involve a substantial risk that it would seriously prejudice legal proceedings, it is immaterial whether the publisher is a public corporation (like the BBC)<sup>44</sup> or a “commercial” television company.<sup>45</sup> In all of these cases, if the material involved were classifiable as “commercial”, it would not serve either to mitigate or to aggravate the commission of the offence.

<sup>40</sup> Public Order Act 1986, ss. 17–23.

<sup>41</sup> Contempt of Court Act 1981, ss. 1–7.

<sup>42</sup> *Whitehouse v. Lemon* [1979] A.C. 617.

<sup>43</sup> See A. Dickey, “Prosecutions under the Race Relation Act 1965, s. 6” [1968] Crim.L.R. 480; W.J. Wolfe, “Values in Conflict: Incitement to Racial Hatred and the Public Order Act 1986” [1987] P.L. 85.

<sup>44</sup> As, for example, in *A-G v. BBC* (1996) *The Times*, 26 July or *Muir v. BBC* 1996 S.C.C.R. 584.

<sup>45</sup> As, for example, in *Atkins v. London Weekend Television Ltd.* 1978 S.L.T. 76 or *A-G v. TVS Television Ltd.* (1989) *The Times*, 7 July.

Similarly, to take the most obvious example from the civil law, it makes no difference in the law of defamation whether a publication might be classified as being in some way commercial or not. Occasionally, defamation actions arise from the content of advertisements. A well known instance was *Tolley v. J.S. Fry and Sons Ltd.*,<sup>46</sup> where an advertisement for chocolate featured the caricature of the plaintiff, who was a famous amateur golfer, and was held to carry the innuendo that he had unworthily permitted his likeness to be used commercially for reward. More commonly, actions are based on imputations in the text of a book or newspaper or the words of a broadcast programme. Again, it is immaterial to consider whether it was or was not “commercial speech” in the setting.

### *Advertising Controls*

The ordinary law of the land may treat commercial speech with neutrality. However, in respect of one type of commercial speech, it is evident that there are controls and restrictions over content. The practice of advertising is subject to a battery of legal requirements, supplemented by schemes of self-regulation.

Thus there is legislation to prohibit the misdescription of the qualities of goods or aspects of the provision of services, accommodation or facilities in the course of trade or business,<sup>47</sup> and further legislation makes it a criminal offence to give misleading price indications.<sup>48</sup> In implementation of EC Directives, there are regulations on misleading advertising and on comparative advertising.<sup>49</sup> There are besides more than a hundred statutes which prohibit, restrict, or affect advertising in specific ways, ranging from the Accommodation Agencies Act 1953 to the Wireless Telegraphy Act 1949, by way of the Firearms Act 1968 (which prohibits unregistered persons from offering a restricted firearm for sale)<sup>50</sup> and the Sex Discrimination Act 1975 (which makes unlawful the publication of an advertisement which indicates, or could reasonably be understood as indicating, an intention by anyone to do an act of unlawful discrimination),<sup>51</sup> for example.<sup>52</sup> In addition, under the broadcasting legislation broadcast advertising is subject to some statutory rules and codes provided

<sup>46</sup> [1931] A.C. 333.

<sup>47</sup> Trade Descriptions Act 1968. See R. Bragg, *Trade Descriptions* (Oxford 1991).

<sup>48</sup> Consumer Protection Act 1987, Part III.

<sup>49</sup> Control of Misleading Advertisements Regulations 1988, S.I. 1988/915; Control of Misleading Advertisements (Amendment) Regulations 2000, S.I. 2000/914.

<sup>50</sup> Firearms Act 1968, s. 3.

<sup>51</sup> Sex Discrimination Act 1975, s. 38.

<sup>52</sup> See generally G. Crown, *Advertising Law and Regulation* (London 1998). A recent example is found in the Tobacco Advertising and Promotion Act 2002.

for by these rules.<sup>53</sup> Non-broadcast advertising is subject to self-regulation, most importantly through the Committee of Advertising Practice and the Advertising Standards Authority.<sup>54</sup>

All of this may be conceded, but should also be put in context. The laws on trade descriptions and price indications and on misleading advertising may be viewed along with other areas of consumer law and competition law, as intended to provide protection for consumers along with fair trading for businesses.<sup>55</sup> The European Community approach faces both ways. On the one hand, there are aspirations to develop Community measures on advertising in furtherance of market integration, while on the other, given the objective of free trade (and respect for human rights), it is generally supportive of advertising as an ancillary informational right.<sup>56</sup> Some national restrictions on advertisements may be accepted by the European Court of Justice as not constituting measures having equivalent effect to quantitative restrictions, so as to be unlawful under Article 28, EC (previously Article 30).<sup>57</sup> However, if the restrictions are discriminatory in law or fact, or involve a ban which is liable to affect imports more than domestic goods or services, national restrictions would be unlawful unless they were justified by a permitted exception and were proportionate.<sup>58</sup>

As for the miscellany of specific restrictions on advertising found in domestic legislation, most are incidental or collateral to a particular mischief which is the subject matter: if restricted firearms are only to be sold lawfully by registered dealers, it is logical to seek to discourage preparations for unlawful activity. The relevant provisions are not meant to downgrade or disfavour commercial speech; they are merely incidents of legislation against perceived harms.

There is an extensive body of broadcasting law, much of it concerned with organisational structures, financing and regulation. Most of the requirements and rules regarding the content of broadcast output apply without distinction to the service as a whole because, for the purpose of the legislation, “‘programme’

<sup>53</sup> Broadcasting Acts 1990 and 1996. See N. Reville, *Broadcasting Law and Practice* (London 1997); E. Barendt and L. Hitchens, *Media Law: Cases and Materials* (Harlow 2000), ch. 6.

<sup>54</sup> See S. Spilsbury, *Guide to Advertising and Sales Promotion Law* (London 1998); C.R. Munro, “Self-Regulation in the Media” [1997] P.L. 6.

<sup>55</sup> See generally C. Scott and J. Black, *Cranston’s Consumers and the Law*, 3rd edn. (London 2000).

<sup>56</sup> S. Weatherill, *EC Consumer Law and Policy* (London 1997), ch. 6; A.M. Collins, “Commercial Speech and the Free Movement of Goods and Services at Community Law”, in J. O’Reilly (ed.), *Human Rights and Constitutional Law* (Dublin 1992).

<sup>57</sup> (C-267/91) *Criminal Proceedings against Keck and Mithouard* [1993] E.C.R. I-6097, [1995] 1 C.M.L.R.101.

<sup>58</sup> (C-405/98) *Konsumentombudsmannen v. Gourmet International Products* [2001] 2 C.M.L.R. 31.

includes an advertisement and ... any item included in that service".<sup>59</sup> There are some additional provisions specific to advertisements, and there is provision for a code on this, as on some other matters. Generally, it may be thought that the regime of broadcasting law (contrasted with, say, the press) is explained by apprehensions of the greater influence and impact attributable to the broadcast media and residual perceptions that control lies in relatively few hands.<sup>60</sup>

A self-regulation system is applied to non-broadcast advertising, in order to protect consumers and to encourage responsibility in advertisers.<sup>61</sup> In many respects the system is comparable to the self-regulation of newspapers and magazines through the Press Complaints Commission or the vetting of films by the British Board of Film Classification. In all these cases, the industries concerned are aiming to enhance standards and to demonstrate a sense of responsibility to consumers and to society.

#### *Positive Protection*

If advertising controls are suggestive of a negative attitude to some forms of commercial speech, there are broad areas of English law which give positive protection to commercial speech and, therefore, may be thought to redress the balance somewhat.

It was noticed earlier that instances of actionable defamation may arise from commercial speech, such as advertisements. However, it must equally be remembered that business associations are able to bring actions for defamation. Trading companies can sue in respect of statements that affect their business or trading reputation. In some cases, malicious falsehood may be the appropriate cause of action.<sup>62</sup>

From such cases, we see that the law operates to protect businesses, as well as operating as a restraint. The commercial interests of businesses are protected through company and partnership law and in a variety of ways. The commercial speech engendered by businesses is most obviously protected by the laws

<sup>59</sup> Broadcasting Act 1990, s. 202.

<sup>60</sup> T. Gibbons, *Regulating the Media*, 2nd edn. (London 1998).

<sup>61</sup> The Advertising Standards Authority has been held subject to judicial review, and more recently has been held to be a public authority under the Human Rights Act 1998: *R. v. Advertising Standards Authority, ex p. The Insurance Service plc* [1990] C.O.D. 42; *R. v. Advertising Standards Authority, ex p. Matthias Rath* [2001] E.M.L.R. 581. In the latter case, Turner J. accepted that the Codes' rules on which the Authority adjudicated had an "underpinning of subordinate legislation". However, it has been submitted that doubts remain on the issues of whether the Codes are "prescribed by law" and whether all of their provisions are related to legitimate aims: see R.G. Lawson, "Challenging the Advertising Standards Authority" (2001) 151 N.L.J. 526.

<sup>62</sup> See, for example, *Compaq Computer Corporation v. Dell Computer Corporation Ltd.* [1992] F.S.R. 93, where an interlocutory injunction was granted in an instance of comparative advertising.

of intellectual property. These are not, of course, designed solely to afford protection to commercial speech, but it is submitted that they do extend substantial protection to this amongst other things. To the extent that they do, it may be inferred that the policy of the law is to value commercial speech as socially useful.

Often, intellectual property laws are liable to be something of a hindrance as well as a help, in practical terms, to someone who is formulating commercial speech. Take, for example, an advertising agency charged with the task of creating a television advertisement for a client's product. On the one hand, the law of copyright limits the material which can legitimately be used, by precluding unauthorised acts in relation to other creators' original works. So, for instance, when an advertisement created for a bus company involved a parody of the Rodgers and Hammerstein song, "There is Nothin' like a Dame", an injunction was granted to restrain its use as an arguable infringement of copyright in the music.<sup>63</sup> On the other hand, original works created by an advertising agency themselves enjoy copyright protection.<sup>64</sup> Many advertisements involve more than one copyright, as they are multiple works. Thus a filmed advertisement is a copyright work in its own right, but is also made up of separate copyright works such as, possibly, the script (a literary work), the sound track (a sound recording) and music or a jingle (as a musical work). Moreover, if it is broadcast on television, the broadcast has a separate copyright.

Similarly, other heads of intellectual property law may give protection to commercial speech within their purposes. Under the Trade Marks Act 1994, the law of trademarks protects those signs which have been registered in order to distinguish an undertaking's goods or services from others'. Trade marks may be non-verbal or may consist of words, including personal or brand names or signatures.<sup>65</sup> The common law action for passing off, in protecting a trader's goodwill, also includes verbal and non-verbal distinctive marks within its scope. Goodwill might, for example, consist in a title: in one case, an injunction was obtained to restrain the unauthorised use by another business of the name "Internet World", when it was used by the plaintiffs as the title for their magazine and in the promotion of their trade fairs.<sup>66</sup> The law of breach of confidence was largely developed in a commercial and industrial context, to protect trade secrets and the like. Its modern extension to areas such as government secrecy and personal

<sup>63</sup> *Williamson Music v. Pearson Partnership* [1987] F.S.R. 97.

<sup>64</sup> *Hutchison Personal Communications Ltd. v. Hook Advertising Ltd.* [1996] F.S.R. 549.

<sup>65</sup> *Waganama Ltd. v. City Centre Restaurants plc* [1995] F.S.R. 713.

<sup>66</sup> *Mecklermedia Corporation v. DC Congress GmbH* [1997] F.S.R. 627.

relations should not blind us to the fact that it may still be deployed in regard to commercial communications, such as a public relations consultancy's report for a client,<sup>67</sup> a company's internal documents,<sup>68</sup> or the development of a concept for a television series.<sup>69</sup>

### *Categorisations of Expression*

Notwithstanding the general neutrality as between different types of expression, it is of interest to observe that there are at least a few areas identifiable in English law where some overt categorisation has been employed.

Thus in copyright law which, as has been observed, protects commercial speech in important ways, there are some distinctions depending on the category of "work" or on the medium in which expression is made.<sup>70</sup> However, the key definitions are sufficiently inclusive as to leave no doubt that advertisements and other instances of commercial speech fall within the ambit of protected categories. The Copyright, Design and Patents Act 1988 characterises literary works as "any work, other than a dramatic or musical work, which is written, spoken or sung",<sup>71</sup> a definition which has been judicially explained as extending to every "work which is expressed in print or writing, irrespective of the question whether the quality or style is high".<sup>72</sup> An "artistic work" is defined to include *inter alia* "a graphic work, photograph, sculpture or collage, irrespective of artistic quality".<sup>73</sup>

Beyond this, we find several other examples of categorisation. However, it is submitted that in each case commercial speech is not excluded from qualifying for the preferred categories, but actually cuts across them so as to be included in the named categories in at least some instances.

Take, for example, the Data Protection Act 1998. It incorporates exemptions when personal data is processed under certain conditions and with a view to publication for any of the "special purposes," these being "(a) the purposes of journalism; (b) artistic purposes; and (c) literary purposes".<sup>74</sup> These terms are left undefined, but the analogy of copyright law is persuasive, especially as in the parliamentary passage of the 1998 Act it was confirmed

<sup>67</sup> *Fraser v. Evans* [1969] 1 Q.B. 349.

<sup>68</sup> *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096.

<sup>69</sup> *Fraser v. Thames Television Ltd.* [1984] Q.B.44.

<sup>70</sup> Copyright, Designs and Patents Act 1988, ss. 1-8.

<sup>71</sup> Copyright, Design and Patents Act 1988, ss. 1 (1)(a), 3.

<sup>72</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601, 608 *per* Peterson J.

<sup>73</sup> Copyright, Designs and Patents Act 1988, s. 4 (1).

<sup>74</sup> Data Protection Act 1998, s. 3. See R. Jay and A. Hamilton, *Data Protection Law and Practice* (London 1999), ch. 15.

that the categories were not intended to import qualitative criteria.<sup>75</sup>

The same categories recur in section 12(4) of the Human Rights Act 1998: courts are required to pay particular regard to the importance of the Convention right to freedom of expression, and additionally to some other considerations, such as the public interest, when “the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material) ...”. Again, the terms are left undefined, so analogies may be persuasive. Besides, on the face of it the provision treats a respondent’s claim that material falls within one of the categories as conclusive, in the alternative to a court’s so regarding it. On that basis, for example, a claim that an advertisement constituted “literary” or “artistic” material would apparently suffice to bring it into the category.

Finally, an older example of categorisation is found in the defence in the law of obscenity, where “it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern”.<sup>76</sup> Again, commercial speech seems to cut across these categories. Occasionally advertisements have been adjudged to be obscene.<sup>77</sup> However, notice that it is not the item itself which must be shown to be for the public good under the provision, but its publication. In the leading case, the House of Lords favoured a broad view of the innominate “other objects of general concern”<sup>78</sup> and, as a commentator observes, it has been “accepted that almost any kind of redeeming social value in a publication ... could be relied upon to support a public good defence”.<sup>79</sup> Granting this, it seems entirely likely that many instances of advertising, and commercial speech more widely, could be justified on the basis that the publication was in the interests of a permitted object.

### III. DEFINING COMMERCIAL SPEECH

It has been persuasively argued that there are considerable difficulties in defining political speech and distinguishing it from other kinds of expression, which are such that we should hesitate

<sup>75</sup> HC Standing Committee D col. 212 (21 May 1998).

<sup>76</sup> Obscene Publications Act 1959, s. 4(1).

<sup>77</sup> As in *Shaw v. DPP* [1962] A.C. 220, although the case is better remembered for the conviction on the alternative charge of conspiracy to corrupt public morals.

<sup>78</sup> *DPP v. Jordan* [1977] A.C. 699.

<sup>79</sup> J. Gardner, “Freedom of Expression”, in C. McCrudden and G. Chambers (eds.), *Individual Rights and the Law in Britain* (Oxford 1994), at p. 215.

before adopting it as an organising concept.<sup>80</sup> Equally, from case law<sup>81</sup> and legal literature,<sup>82</sup> it is apparent that there are problems and uncertainties in the definition of “artistic” works or expression. In a broadly similar way, it is submitted that there are also significant difficulties in defining and distinguishing commercial speech.

### *Category Crossover*

Some of the difficulties are exemplified by category crossover. Thus we might be put on guard immediately by noticing that some of the cases provoking discussion in the literature on “political” expression also represent, in some sense, instances of “commercial” activity. The English case of *R. v. Radio Authority, ex parte Bull*<sup>83</sup> concerned the regulatory authority’s decision to refuse to allow the broadcast of an advertisement on commercial radio services. A section of Amnesty International had hoped to advertise, referring to genocide in Rwanda and Burundi. The pressure group was rejected on the ground that its objects were “wholly or mainly of a political nature”, which meant that the advertisement fell to be prohibited under primary legislation.<sup>84</sup> Another example is seen in the landmark decision of *New York Times v. Sullivan*,<sup>85</sup> where the United States Supreme Court held that a public official could not succeed in a defamation action unless he could prove that the untrue allegation against him was made with actual malice. The alleged libel was contained in an advertisement signed by Alabama clergymen, protesting against the Montgomery authorities’ mishandling of civil rights demonstrations, paid for and published in the *New York Times*. Noting that it was an advertisement which “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of those whose existence and objectives are matters of the highest public interest and concern”,<sup>86</sup> the Supreme Court did not treat it

<sup>80</sup> I. Hare, “Is the Privileged Position of Political Expression Justified?”, in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information* (Oxford 2000). Christopher Forsyth’s paper in the same book also has a sceptical tone.

<sup>81</sup> The leading decision on the meaning of “artistic craftsmanship” in the legislation on copyright is *Hensher v. Restawile* [1976] A.C. 64, in which the speeches notably lack uniformity of approach: see W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 4th edn. (London 1999), pp. 390–392.

<sup>82</sup> P.H. Karlen, “What is Art? A Sketch for a Legal Definition” (1978) 94 L.Q.R. 383; P. Kearns, *The Legal Concept of Art* (Oxford 1998), ch. 3.

<sup>83</sup> [1998] Q.B. 294. See J. Stevens and D. Feldman, “Broadcasting Advertisements by Bodies with Political Objects” [1997] P.L.615.

<sup>84</sup> Broadcasting Act 1990, s. 92. The decision of the European Court of Human Rights in *Vgt Verein Gegen Tierfabriken v. Switzerland* (2002) 34 E.H.R.R. 4 will have to be taken account of in this area.

<sup>85</sup> 376 U.S. 254 (1964).

<sup>86</sup> *Ibid.*, at p. 266 *per* Brennan J.



as commercial speech. As already noticed, in *Open Door Counselling and Dublin Well Woman Centre v. Ireland*,<sup>87</sup> the European Court of Human Rights simply evaded the question, when the relevant information was in some senses commercial, but the implications were political.

Of course, there are certain instances of expression which appear to come clearly within the category of commercial speech. The newspaper advertisements in the *Pall Mall Gazette* and elsewhere which justified the claim against the manufacturers of the Carbolite Smoke Ball provide an obvious illustration,<sup>88</sup> as do television advertisements for Nestlé's Gold Blend coffee.

However, even if we may say with some confidence that these types of advertisements are commercial and not political, we may not find it possible to deny that they are commercial and artistic. Some species of advertisement, such as the classified advertising typically found in local newspapers, cannot easily be viewed as artistic, but many others can and should be. Toulouse-Lautrec and Alphonse Mucha originated much of their art for commercial purposes. Guy Bourdin and Helmut Newton produced many of their most memorable images for fashion photography. Writers, including William Trevor and Fay Weldon, have worked as advertising copywriters, and film directors from Orson Welles to Ridley Scott have worked on television commercials. These examples remind us that creative endeavours lie behind the images and the words in many advertisements, even when the results are less distinguished or less celebrated. All in all, it is reasonable to conclude that, with many types of advertisements, the overlap between commercial expression and artistic expression is substantial.

#### *The Wider Dimension*

Besides, it should be emphasised that, while some types of advertisement may provide standard examples of the category of commercial speech, the categories of advertising and of commercial speech are not co-extensive. From a case such as *New York Times v. Sullivan*,<sup>89</sup> it may appear that the category of commercial speech is narrower than the category of advertisements, since not every advertisement was to be classified as commercial. Conversely, there are cases where facts and opinions have been treated as commercial speech, although not occurring in advertisements. In *Markt Intern. and Beermann v. Germany*,<sup>90</sup> the reporting of a consumer complaint

<sup>87</sup> (1992) 15 E.H.R.R. 244.

<sup>88</sup> *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

<sup>89</sup> 376 U.S. 254 (1964).

<sup>90</sup> (1990) 12 E.H.R.R. 161.

about a firm's products in a trade bulletin for pharmacies and beauty shops was treated by the European Court of Human Rights as being "of a commercial nature" and a court's interdict in connection with the publication considered accordingly.

Therefore, items such as are found in a newspaper's display advertising or "spot" advertisements on commercial television may be paradigms, but it is important to appreciate that the types and examples of communication which might properly or reasonably be designated as commercial speech are considerably wider. Business associations may advertise to the public at large or, in more restricted fashion, to the trade. But they and their employees also communicate in multifarious other ways. The employees often communicate to each other. They also communicate to shareholders and potential investors, to fund managers and financial journalists, to auditors, lawyers and advisers, to central government and local government, to allies and to rivals, to employers' organisations and to trade unions, to purchasers and to suppliers, amongst others. Some of these communications are made to meet, or to prepare for meeting, legally imposed requirements, such as are found in the Companies Act 1985 or the Income and Corporation Taxes Act 1988, for example.

Thus there is identifiable a universe of communications which are related to business activity, yet are quite different from the advertisement paradigms. According to one author, difficulties along these lines explain why the United States Supreme Court "for all it has said about commercial speech, has conspicuously avoided saying just what it is".<sup>91</sup>

#### *Domestic Definitions*

It might be wondered whether any assistance is to be gathered from definitions identified in domestic law, whether statutory or judicially worked. Courts in the United Kingdom have not as yet found it necessary to define what is to be counted as "commercial speech", although the concept has come close to surfacing, for example in cases which have involved challenges to Advertising Standards Authority decisions by reference to human rights arguments.<sup>92</sup>

The adjective "commercial" appears sometimes in legislation in tandem with other nouns, but these uses do not seem to afford any guidance. Often the use of the adjective is coloured by its adjacent noun. When the words form a composite phrase, such as

<sup>91</sup> S. Shiffrin, "The First Amendment and Economic Regulation : Away from a General Theory of the First Amendment" (1983) 78 *Northwestern University Law Review* 1212, 1213.

<sup>92</sup> *R. v. Advertising Standards Authority, ex p. Matthias Rath* [2001] E.M.L.R. 581; *R. (on the application of SmithKline Beecham) v. Advertising Standards Authority* [2001] EWHC Admin 6, [2001] E.M.L.R. 598.

“commercial traveller”,<sup>93</sup> “commercial unit”,<sup>94</sup> “commercial vehicle”,<sup>95</sup> or “commercial rent”,<sup>96</sup> the meaning attributed either in a statutory definition or by the courts’ construction is so particular to the context as to be unilluminating outside that context.

There are other, more open, phrases such as “commercial basis”<sup>97</sup> and “commercial undertaking”<sup>98</sup> to be found in legislation where, however, the phrases are left undefined. There is a definition of “commercial transaction” for the purposes of the State Immunity Act 1978,<sup>99</sup> but it is neither free of prolixity nor of circularity, while it also offers courts an escape route: in litigation turning on the distinction between sovereign state activity and activity “for commercial purposes”, the English courts have been content to devise tests for characterising the activity as sovereign or non-sovereign, and so have largely managed to avoid discussion of “commercial”.<sup>100</sup>

Recently, in the Freedom of Information Act 2000, it has been provided that prejudice to “commercial interests” operates as one of the exemptions from the duty to disclose information, subject to the public interest test.<sup>101</sup> It may be thought significant that, again in this legislation, the decision was taken to provide no guidance as to the definition.

### *Approaches in the Literature*

If little assistance is to be found in domestic legislation and case law, can any be found in the approaches to definition canvassed in the literature?

One approach could be to focus on subject-matter so that, let us say, facts or opinions concerning the qualities of goods or services offered for sale or purchase would be regarded as “commercial speech”. However, this cannot be a satisfactory approach. The magazine *Which* and the online services of the Consumers’

<sup>93</sup> Used in the Finance Act 1915, s. 39. It was defined according to ordinary usage in *Findlay & Co. v. Inland Revenue* 1928 S.C. 218.

<sup>94</sup> Used in the Sale of Goods Act 1979, s. 39 (7), as substituted by the Sale and Supply of Goods Act 1994, s. 2.

<sup>95</sup> Used in the Public Passenger Vehicles Act 1981, s. 48.

<sup>96</sup> Used in the Finance Act 1994, s. 120 (3).

<sup>97</sup> Income and Corporation Taxes Act 1970, s. 170.

<sup>98</sup> Small Lotteries and Gaming Act 1956, s. 1(1).

<sup>99</sup> Section 3(3) defines it as: “(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority ...”. By section 4, the phrase “commercial purposes” is defined by reference to section 3(3).

<sup>100</sup> *I Congreso del Partido* [1983] 1 A.C. 244; *Littrell v. United States of America (No. 2)* [1994] 4 All E.R. 203; *Arab Republic of Egypt v. Gamal-Eldin* [1996] 2 All E.R. 237.

<sup>101</sup> Freedom of Information Act 2000, s. 43.

Association are designed to inform readers and subscribers of the merits and demerits of competing products. The BBC television series *Watchdog* alerts viewers to dishonest and dubious business practices. These are surely examples of information published in the public interest which, if there were to be lesser protection for commercial speech, ought not to be included in the category.

A distinction may, of course, be drawn between a television programme and television advertisements or between a magazine's news and features and its display advertising. So it might be asked whether the medium or form of expression provides a way of distinguishing commercial speech. Some media, such as the BBC's "non-commercial" channels and services, on the one hand, or outdoor advertising in public places, on the other, may appear clearly to be one thing or the other.

However, other media are more heterogeneous in this respect. Obviously, advertisements are carried along with other material in newspapers and magazines, commercial radio and television broadcasting, cinema presentations, viewdata services and non-broadcast electronic media, for example. Therefore, any distinction along these lines would have to be more carefully refined, depending not only on the medium of expression, but also turning on secondary criteria such as the positioning of the item or whether third parties have made payment for its insertion. These refinements might cover standard cases of advertising adequately, but are indiscriminating at the margins. An announcement of a birth or a death typically appears amidst the "classified advertisements" in a newspaper and has to be paid for, but is surely not to be categorised as "commercial speech"? Some media, such as broadcasting regulated by the Independent Television Commission, operate under rules designed to effect a clear separation between advertising content and programme content, but other media are less insistent on separation and there are phenomena such as government advertising and announcements, party political broadcasts, sponsored programmes (in broadcasting) and advertising features (in newspapers and magazines) which straddle or blur the categories, often deliberately. Besides, as already noticed, advertising is not identical to, or co-extensive with the boundaries of, commercial speech. A definition of commercial speech which turns on the medium or form of expression seems to be unworkable, or at least irrational.<sup>102</sup>

<sup>102</sup> A United States decision which typified anomalies was *Koch v. FTC* 206 F. 2d 311 (1953). While upholding the Federal Trade Commission's finding that advertisements for pharmaceutical drugs contained falsities, the Sixth Circuit court conceded that the statutory provisions relied on could not have been applied to a book written by the drugs company's president (which made similar claims) without violation of the First Amendment.

Finally, another approach to definition would use as a criterion the intention or motives of the speaker, as suggested by Professor Thomas Scanlon:

presumably “commercial speech” is to be defined with reference to participant intent: expression by a participant in the market for the purpose of attracting buyers or sellers. It is not identical with advertising, which can serve a variety of expressive purposes, and it cannot be defined by its subject matter.<sup>103</sup>

However, one immediately encounters the difficulty that intentions are often difficult to ascertain or verify. Another problem is that communications may involve a mixture of motivations. At first sight, an article in a newspaper might be categorised as commercial speech under this approach on the ground that the newspaper proprietor’s motive is to profit from their business. However it would be too cynical to assume that newspaper proprietors, individual or corporate, are concerned solely with maximising profit without regard to the product involved. Those who founded *The Independent* might perhaps be credited with higher motives while, for example, the first Lord Beaverbrook owned newspapers not merely as a business but as a vehicle for the promotion of his political views.

Besides, when there are different participants responsible for a publication, the mixture of motivations becomes even richer. A freelance journalist may be motivated chiefly by reward. A staff writer or a salaried radio producer is doing his or her job, for remuneration certainly, with other aims and objectives probably. An unpaid contributor of an article or a letter cannot reasonably be classed as having a “commercial” motive.

On examination, a test of participant intent is not only difficult to apply, but is unsatisfactory. Politicians and political parties are not disinterested in their expression, even if (which would be debatable in some instances) the motivation is not economic. Authors and artists may often be motivated by the prospect of pecuniary reward. The point is well made by Frederick Schauer:

The mistake made by those who talk of motives ... is that they fail to consider fully the nature of the interests being protected ... many great works have been produced for quite pedestrian reasons. *The Prince* was written not to provide the world with an important and controversial work, but to curry favour in the crassest sense. Much beneficial technology was developed for the original purpose of killing human beings

<sup>103</sup> T.M. Scanlon, “Freedom of Expression and Categories of Expression” (1979) 40 *University of Pittsburgh Law Review* 519, 540.

during time of war. And for every worthless occupant of the pages of an academic journal that is written solely to gain promotion or tenure, there is an important contribution to knowledge published for precisely the same reason. In dealing with free speech problems it is especially important that we look to the value of the product more than we look to the motives of the producer.<sup>104</sup>

#### IV. CONCLUSION

Professor Schauer's conclusion that we should look to "the value of the product" invites some inquiry into the benefits or otherwise of commercial speech as such.

To be sure, some types of commercial speech have their critics. Critics of capitalism or at least of its excesses are apt to see "dystopian visions of a passive citizenry in a society dominated by commercial interests where politics and the public sphere are infected by the values of a promotional culture".<sup>105</sup> Critiques often alight on advertising, with its high profile in consumer capitalism. The journalist Vance Packard gained a large readership for his thesis that the advertising industry was ready, willing and able to use manipulative techniques to persuade defenceless consumers to spend.<sup>106</sup> In more scholarly literature, the economist J.K. Galbraith would suggest that when the majority of a state's citizens could be considered affluent, markets would focus on creating demand for non-essentials, and the trend would transfer excessive power to the advertisers and the corporations that financed them.<sup>107</sup> From the perspective of literature, writers such as Richard Hoggart and Raymond Williams, anticipating later cultural theorists, dissected the relationships between ideology and culture, and warned of the dangers of the drift to a mass culture in a commercialised society.<sup>108</sup>

However, some of the accusations levelled at advertising have not been borne out by empirical analysis. Of the contention that advertising is anti-competitive, by creating barriers to entry and inhibiting competitive processes, Veljanovski noted that "despite four decades of intensive research by economists, it has not been possible to find robust evidence to support this claim".<sup>109</sup> As for the simplistic argument that advertising must increase prices

<sup>104</sup> F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge 1982), p. 160.

<sup>105</sup> I. Ramsay, *Advertising, Culture and the Law* (London 1996), p. 2.

<sup>106</sup> V. Packard, *The Hidden Persuaders* (London 1957).

<sup>107</sup> J.K. Galbraith, *The Affluent Society* (London 1958).

<sup>108</sup> R. Hoggart, *The Uses of Literacy* (London 1957); R. Williams, *Television: Technology and Cultural Form* (London 1974); *Communications* (London 1965).

<sup>109</sup> C. Veljanovski (ed.), *Freedom in Broadcasting* (London 1989), p. 107.

because it costs money, the same author, citing research on branded products and on opticians' services, concluded that "the evidence points in the opposite direction—advertising reduces prices".<sup>110</sup> It is, of course, true that successful advertising increases demands, and to an extent artificially; however, in the society that we have, goods and services which Galbraith would have dismissed as frivolous are now deemed by many to be essentials. It is, no doubt, true that eternal vigilance is required to detect and to monitor the influence of commercial interests on mass communications. However, the development of a critical literacy which encourages such vigilance has arguably increased rather than declined in the population. It should also be remembered that commercial activity sustains, and adds to the diversity of, the mass communications media.

Granting acceptance of a market economy, there is a general acceptance that advertising necessarily has a place in it. More positively, it is reasonable to contend that advertising performs useful social and educational functions. Speaking for the majority of the United States Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, Blackmun J. said:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . .

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.<sup>111</sup>

In the same opinion, Blackmun J. argued that there was a "listener's right to receive advertising".<sup>112</sup> The need for a political justification or rationale for constitutional protection is more pressing in the United States context.<sup>113</sup> A few writers, locating their justification for free speech narrowly in its instrumental role in democracy, would exclude commercial speech from protection.<sup>114</sup> However, when justification is found by other consequentialist

<sup>110</sup> *Ibid.*

<sup>111</sup> 425 U.S. 748, 763 (1976).

<sup>112</sup> 425 U.S. 748, 756–757 (1976).

<sup>113</sup> R.M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, USA 1996), ch. 8. For some discussion of theoretical justifications generally, see E.M. Barendt, *Freedom of Speech* (Oxford 1985); D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn. (Oxford 2002), ch. 13.

<sup>114</sup> A. Meiklejohn, *Political Freedom* (New York 1965); R. Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47 *Indiana Law Journal* 1. Interestingly, both were later to retract their narrower views: Meiklejohn, "The First Amendment is an Absolute" 1961 *Supreme Court Review* 245, 263; Bork said that he had abandoned his view in the Senate hearings which considered his nomination to the Supreme Court.

arguments or through subscription to the value of personal autonomy, the case for inclusion is strong.<sup>115</sup> When the Supreme Court of Canada confirmed that commercial speech was included in the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms, in *Ford v. A.G. Quebec*, they considered the rationales as based not only on the welfare enhancing argument that individuals were enabled to make improved economic choices, but also on the proposition that the making of market choices was “an important aspect of individual self fulfilment and personal autonomy”.<sup>116</sup> These justifications view matters from the point of the recipient rather than the speaker, which is arguably the better way to proceed in general.<sup>117</sup> When advertising represents the artistic creations of individuals, there is also justification by the same arguments for self-expression as apply to other artistic works. There could even be constructed an argument that businesses have rights to self-expression, given that expression has economic as well as personal and political applications.<sup>118</sup>

If advertising may be justified on the basis of its social utility, there should be no difficulty in defending other types of commercial speech such as corporate communications. The activities of business and commerce are, in general, in the public interest, so commercial speech scarcely deserves to be treated as “low value” speech as if it involved criminality.

It may be wondered whether the issue of how commercial speech is to be treated need arise at all. It may arise, perhaps through litigation involving challenges to some of the restrictions or conditions which apply to some types of commercial speech. Suppose, for example, that a member of one of the professions, being restricted in their freedom to comment or in their freedom to advertise their services, suggests that the restriction violates Convention rights. Or suppose that a business, vexed by the censure of their advertisement by the Advertising Standards Authority, argues that the Code rule relied on by the Authority does not correspond to any of the legitimate aims which can justify interference with freedom under Article 10(2) of the ECHR. In

<sup>115</sup> M. Redish, “The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression” (1971) 39 *George Washington Law Review* 429; “The Value of Free Speech” (1982) 130 *University of Pennsylvania Law Review* 591; R.H. Coase, “Advertising and Free Speech” (1977) 6 *Journal of Legal Studies* 1; F.S. Haiman, *Speech and Law in a Free Society* (Chicago 1981).

<sup>116</sup> [1988] 2 S.C.R. 712, 767 (1989) 54 D.L.R. (4th) 577, 618.

<sup>117</sup> F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge 1982), p. 159.

<sup>118</sup> G. Quinn, “Extending the Coverage of Freedom of Expression to Commercial Speech: A Comparative Perspective”, in L. Heffernan (ed.), *Human Rights: A European Perspective* (Dublin 1994), at p. 231.



these situations, the court would be faced with the possibility of categorising the subject matter as commercial speech and allowing the categorisation to influence its approach.

However, it is perhaps a moot point whether English courts, which have been able to avoid employing the category in the past, need alter their practice in this regard now. Admittedly, the Strasbourg authorities' jurisprudence, which incorporates the "commercial" categorisation, must be taken account of when cases arise in connection with Convention rights.<sup>119</sup> However, importantly courts and tribunals in Britain are not bound by the case law from Strasbourg and, as Keith Ewing has observed, "the nature and extent of judicial power under the Act is greater than may be realised", so far as the interpretation and application of Convention rights is concerned.<sup>120</sup> Therefore, it is open to English courts to treat issues of freedom of expression on their merits *without* engaging in a classification of the subject matter as involving "commercial speech" or not and without, therefore, allowing anything to turn upon such a distinction. In view of the difficulties of defining "commercial speech" satisfactorily, and in the light of the social utility of commercial speech, it would be preferable for them to do so.

<sup>119</sup> Human Rights Act 1998, s. 2.

<sup>120</sup> K.D. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79, 86.