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Regulating commercial advertising aimed at children

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**REGULATING
COMMERCIAL ADVERTISING
AIMED AT CHILDREN**

**LLM RESEARCH PAPER
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FREEDOM OF EXPRESSION**

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TABLE OF CONTENTS

I	INTRODUCTION.....	1
II	THE HARM OF ADVERTISING AIMED AT CHILDREN.....	3
A	DEFINITIONS	3
1	<i>Advertising</i>	3
2	<i>Children</i>	5
3	<i>Aimed at children</i>	8
4	<i>Summary</i>	10
B	FORMS OF ADVERTISING AIMED AT CHILDREN	10
1	<i>Television advertising</i>	11
2	<i>New media</i>	12
3	<i>Product placement</i>	13
C	EFFECTS ON CHILDREN.....	14
D	CONSEQUENCES.....	17
E	SUMMARY	19
III	CONFLICT WITH THE FREEDOM OF EXPRESSION.....	20
A	FREEDOM OF EXPRESSION	20
B	ADVERTISEMENT AS COMMERCIAL EXPRESSION	24
C	PROTECTION OF COMMERCIAL SPEECH UNDER THE FREEDOM OF EXPRESSION	25
D	JUSTIFIED LIMITATIONS.....	33
IV	PRACTICAL SOLUTIONS	38
A	THE APPROACH OF NEW ZEALAND	38
1	<i>Industrial self-regulation</i>	39
2	<i>The Advertising Standards Authority</i>	39
3	<i>The Code for Advertising to Children</i>	40
4	<i>The Complaints Procedure</i>	41
B	THE APPROACH OF THE EUROPEAN UNION	42
1	<i>The "Television Without Frontiers" Directive</i>	43
(a)	Background.....	43
(b)	Content related to advertising aimed at children.....	44
2	<i>The Madelin Report</i>	46
(a)	Background.....	46
(b)	Findings and recommendations.....	47
3	<i>The EU Audiovisual Media Services Directive</i>	48
(a)	Background.....	48
(b)	Content related to advertising aimed at children.....	50

C	THE APPROACHES OF THE MEMBER STATES	51
1	<i>Ban of advertising aimed at children</i>	51
2	<i>Restriction of advertising aimed at children</i>	52
(a)	Self-regulation within a strong legislative framework	52
(b)	Self-regulation restricted by law	53
(c)	Emerging self-regulatory systems	53
C	EFFECTIVENESS OF THE DIFFERENT APPROACHES	54
1	<i>Effectiveness of a ban</i>	54
2	<i>Effectiveness of self-regulation</i>	57
(a)	In general	57
(b)	In New Zealand	58
V	CONCLUSION	60
	APPENDIX 1 – ADVERTISING STANDARDS AUTHORITY (ASA) CODE FOR ADVERTISING TO CHILDREN	63

ABSTRACT

This research paper deals with the subject of regulating commercial advertising aimed at children. It gives special attention to the self-regulatory approach applied in New Zealand.

The paper will examine the possible harm that advertising can pose to children. It presents results of psychological research that shows that children under the age of 7 to 8 clearly lack an understanding of the persuasive intent of television advertising, which can lead to problems like parent-child conflicts or changes in behaviour or habits. After that the paper focuses on the conflict between a regulation of commercial advertising aimed at children and the freedom of expression. Based on judgments and legislation from different jurisdiction, the paper shows that nowadays commercial expression enjoys at least limited protection under the freedom of expression, but is nevertheless subject to limitations.

The last paragraph introduces the self-regulatory approach applied in New Zealand and explains the situation in the European Union for comparison, where self-regulation becomes more and more popular among the Member States. After that, the different approaches are analysed regarding their effectiveness on the protection of children from the possible harms of advertising. The paper will argue that a total ban is less favourable, because it goes too far. Self-regulation on the other hand can be an effective tool, but the current systems need revision in most jurisdictions, including New Zealand. The Code for Advertising to Children is not effective enough in relation to the protection of children from the possible harms of advertising.

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I INTRODUCTION

Commercial advertising is one of the main instruments for companies to make people aware of their products or services. The purpose behind advertising is "to influence us to purchase various goods and products".¹ Advertising aimed at children seems to be omnipresent. In average, a young person nowadays views more than 3000 ads per day on television, on the Internet, on billboards, and in magazines.² Studies suggest that children need "some kind of protection from advertising to prevent exploitation of their "inexperience or their natural credulity and sense of loyalty".³ It seems to be a fact that young children "cannot distinguish readily between advertising and editorial messages, and are unduly susceptible to persuasion as a result".⁴

Research shows that "approximately 80% of all advertising targeted to children falls within four product categories: toys, cereals, candies, and fast-food restaurants".⁵ That is one reason why health organisations and other children's advocates call for strong regulations or even a total ban of advertising aimed at children "to protect a vulnerable audience from a marketing machine which risks their well-being in its pursuit of profit."⁶ On the other side are the advertisers, who "stoutly defend their right to commercial free speech".⁷

¹ Bjurström, Erling *Children and television advertising* (2 ed, Swedish Consumer Agency, Kalmar, 2000) 20.

² American Academy of Pediatrics "Children, Adolescents and Advertising" (2006) 116 *Pediatrics* No 6, 2563.

³ O'Sullivan, Terry "Advertising and Children: What do the kids think?" *QMRIJ* 8, 4 371, 376.

⁴ Duff, Rosemary "What advertising means to children" *Advertising & Marketing to Children* 01-03/2004, 41.

⁵ American Psychological Association *Report of the APA Task Force on Advertising and Children - Section: Psychological Issues in the Increasing Commercialization of Childhood* 4 www.apa.org (accessed 17 May 2009).

⁶ "Advertising and Children: What do the kids think?", above n 3, 371.

⁷ *Ibid.*

This research paper deals with the regulation of commercial advertising aimed at children. It will give special significance to the situation in New Zealand. As the changed rationale for censorship has moved the debate from moral imperatives to a discussion of harm,⁸ the research paper will first introduce the possible harm that commercial advertising can pose for children. It will therefore give definitions of the key terms – advertising, children and aimed at children – and give examples of the most common forms of advertising aimed at children. After that, it will – on the basis of psychological research – analyse the effect of advertising on children, showing how children perceive advertising and what the consequences of this perception are. It will argue that while the exact influences of advertising on children remain unclear, all studies indicate that children under the age of 7 to 8 years are unable to really understand advertising and therefore need protection.

In the next chapter, the paper will explain the conflict between the regulation of commercial advertising aimed at children and the freedom of expression. It will show that according to judgments and legislation advertising is accepted to enjoy at least some protection under the freedom of speech in most jurisdictions, but is subject to limitations, especially for the purpose of the protection of children.

After that, the paper will explain the different approaches towards the regulation of advertising aimed at children in New Zealand and the European Union and its Member States. It will explain the underlying legal background and show the significance relating to advertising aimed at children. After that it will analyse the effectiveness of the two most commonly used models, a total ban of advertising aimed at children and a self-regulation of the subject in general and in New Zealand. It will argue that while a total ban is able to protect children from the possible harm of advertising, it will also keep children from all other kind of advertising.

⁸ Human Rights in New Zealand Today – Chapter 8: The right to freedom of opinion and expression www.hrc.co.nz (accessed 9 November 2009).

Self-regulation, on the other hand, can be a very effective way to regulate advertising aimed at children, but in most jurisdictions the model of self-regulation used lacks important features. In New Zealand, the Code for Advertising to Children⁹ is too vague to provide efficient protection for children from the possible harm of advertising and therefore needs to be revised.

II THE HARM OF ADVERTISING AIMED AT CHILDREN

When talking about the regulation of commercial advertising aimed at children, the question has to be asked whether there is the need of regulating it at all. To answer that question, one has to look at the impact that advertising aimed at children can have on children and if they need to be protected from that.

A Definitions

1 Advertising

The term advertise derives from the Latin term *advertere*, which means turn to.¹⁰ The Oxford Dictionary of English defines advertise as "describe or draw attention to (a product, service, or event) in a public medium in order to promote sales or attendance",¹¹ and advertising as "the activity or profession of producing advertisements for commercial products or services".¹² In regulations relating to advertising aimed at children advertising is usually defined in a very broad sense to cover not only "pure advertising", but "all other forms of commercial or marketing

⁹ Code for Advertising to Children 2006 (NZ).

¹⁰ *The Oxford Dictionary of English* (2 ed revised, Oxford University Press, Oxford, 2005) advertise www.oxfordreference.com (accessed 9 November 2009).

¹¹ *Ibid*, advertise.

¹² *Ibid*, advertising.

communication".¹³ Examples of the two most common approaches – an abstract one and a very detailed one – can help to illustrate this point:

In New Zealand, the Code for Advertising to Children defines advertising as including "all advertisements in all forms of media directed at children whether contained in children's media or otherwise".¹⁴ This broad and abstract definition of advertising is applicable to all forms of commercial or marketing communication and easily adaptable to new situations.

In Bulgaria, the lawmaker chose a different approach, namely a very detailed definition of advertising. Additional provision section 1(12) of the Radio and Television Law states:¹⁵

"Advertising" shall mean any public announcement included in the program of a radio or television operator related to trade, work, skill, or profession aimed at encouraging the purchase, sale, or rental of a product or service, including real estate property, at contributing to the popularization of a cause, or idea, or at bringing about some other effect desired by the advertiser.

This very detailed definition can lead to problems, as it is not very flexible and will have to be changed once new ways of advertising emerge.

According to the findings of the Madelin Report¹⁶, a report of a commission dealing with the question of self-regulation in the advertising sector in the European Union, the ideal generic definition comprises of a "global coverage for all type of marketing or commercial communication", encompassing all advertising techniques using any medium or distribution

¹³ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties" (2006) 6 <http://ec.europa.eu> (accessed 31 July 2009).

¹⁴ Code for Advertising to Children 2006 (NZ).

¹⁵ Radio and Television Law 1998 (BG), Additional Provision, §1(12).

¹⁶ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13.

channel based on new technology".¹⁷ The abstract definition in the Code for Advertising to Children¹⁸ is very close to the ideal definition that the Madelin Report¹⁹ proposes, while the definition in the Bulgarian Radio and Television Law²⁰ seems to be too detailed to be able to cope with all possible forms of advertising. According to the Madelin Report²¹, regular frameworks should be able to "easily expand both their scope (sectoral coverage and participation) and content (rules) in response to new challenges", because "new media are dynamic and constantly evolving".²² In contrast to the approach taken in New Zealand, the Bulgarian approach cannot provide this flexibility.

2 Children

The Oxford Dictionary of English defines the term child as "a young human being below the age of full physical development".²³ An indication of what the age of full physical development might be is missing. The definitions in the regulations relating to advertising aimed at children are .

In New Zealand, the Code for Advertising to Children²⁴ defines children as "all persons below the age of 14". Similarly, in Germany section 1 of the Protection of Young Persons Act 2002 defines child as a person who has not yet reached the age of 14.²⁵ In Belgium, the Child Labour Law 1992²⁶ defines a child as "a minor under the age of 15".²⁷ In the United

¹⁷ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13, 6.

¹⁸ Code for Advertising to Children 2006 (NZ).

¹⁹ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13.

²⁰ Radio and Television Law 1998 (BG), Additional Provision, §1(12).

²¹ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13.

²² Ibid, 28.

²³ *The Oxford Dictionary of English*, above n 10, child.

²⁴ Code for Advertising to Children 2006 (NZ).

²⁵ Gesetz zum Schutze der Jugend in der Öffentlichkeit (Protection of Young Persons Act) 2002 (GER), s1 §1 No 1.

²⁶ Loi concernant le travail des enfants (Child Labour Law) 1992 (BEL).

Kingdom, section 7 of the Television Advertising Standards Code regards "people of 15 or under as children".²⁸ In the Netherlands, the Code for Advertising Directed at Children and Young People defines child as a "person of 12 and under".²⁹ Similarly, section 4 of the Swedish Radio and Television Act defines child as being under the age of 12.³⁰ In the Canadian province of Quebec advertising is banned when it is aimed at children under the age of 13.³¹

Some countries do not distinguish between children and minors and only provide definitions of the term minor, or use the terms interchangeably. In Denmark, the Children, Young People and Marketing Practices do not set absolute age limits for "children and young people", but state that "the upper age limit should be 18 years of age".³² In Latvia, the term child is defined in section 3 § 1 of the Protection of the Rights of the Child Law 1998 as "a person who has not attained 18 years of age".³³ Section 57 § 1 indicates that "child" is hereinafter also called "minor".³⁴ Some other countries also have various definitions, depending on the context of the regulation. In Malta, under the Civil Code a minor is defined as "a person of either sex who has not yet attained the age of eighteen years".³⁵ Nevertheless, there are several other laws which "grant rights and impose duties on **children even if they are less than the age of majority**".³⁶

²⁷ Stylianou, Konstantinos "Regulation on Advertising Aimed at Children in Europe: The Legal Framework Provided for by Overarching European Rules and the Laws of 26 European Countries" (2008) 3 www.obs.coe.int (accessed 31 July 2009).

²⁸ Television Advertising Standards Code 2002 (UK), s 7.

²⁹ Kinder- en Jeugdreclamecode (Code for Advertising Directed at Children and Young People) 2009 (NL).

³⁰ Radio- och TV-lag (Radio and Television Act) 1996 (SWE), sec 4.

³¹ Consumer Protection Act RS Q 2009 c P-40.1, s 248.

³² Børn, unge og markedsføring (Children, Young People and Marketing Practices) 2008 (DK), annex 3.0.

³³ Bērnu tiesību aizsardzības likums (Protection of the Rights of the Child Law) 1998 (LV), s 3 § 1.

³⁴ Bērnu tiesību aizsardzības likums (Protection of the Rights of the Child Law) 1998 (LV), s 57 § 1.

³⁵ Civil Code, Chapter 16 of the Laws of Malta 2009 (MLT), s 157.

³⁶ "Regulation on Advertising Aimed at Children in Europe: The Legal Framework Provided for by Overarching European Rules and the Laws of 26 European Countries", above n 27, 103.

This illustration of the different definitions used in different jurisdictions shows that there is no unanimous definition of the term children. The reason why jurisdictions choose certain age limits are different, but in the context of the regulation of advertising aimed at children they should be set for a certain reason, namely the ability of children to "understand, interpret and filter the commercial messages that are directed towards them"³⁷. Based on the work of Jean Piaget, the crucial stages in the development of children for advertising are the pre-operational stage (from the age of 2 to 7) and the concrete operational stage (from the age of 7 to 10). When in the pre-operational phase, children "are unaware of perspectives on the world other than their own", and "accept things at face value, seeing an advertisement as a kind of public information broadcast".³⁸ Only during the concrete operational stage children are able to "become aware of the persuasive intent of advertising", as their thinking "becomes more structured" and they realise that "the world is not always as it appears".³⁹ Other research has come to similar conclusions, including a study conducted for the Swedish government which found that "only by the age of 12 could children be guaranteed to have developed an understanding of the persuasive purposes of advertising".⁴⁰ Therefore the age limit for the definition of the term children in the context of advertising regulation should be based on these findings of cognitive psychology. An age limit of 18 goes way beyond the psychological barrier of understanding, interpreting and filtering commercial messages. The most commonly applied age limits between 12 and 15 years can make sure that persons over the age of the limit are able to understand the intention behind an advertisement.

³⁷ "What advertising means to children", above n 4, 41.

³⁸ "Advertising and Children: What do the kids think?", above n 3, 375.

³⁹ Ibid.

⁴⁰ Ibid.

3 *Aimed at children*

The term aim is defined by the Oxford Dictionary of English as "point or direct ... at a target".⁴¹ Therefore the term aimed at children can be interpreted as pointed or directed at the target children. Most regulations do not contain a more specific definition of the term aimed at children.

The Code for Advertising to Children in New Zealand does not contain a definition of the term advertising aimed at children. The definition contained in the Dutch Code for Advertising Directed at Children and Young People⁴² is very broad and of only marginal use for the determination whether an advertising is aimed at children. The Code defines the term directed at children as "advertising which is specifically directed at children, wholly or partly".⁴³

In Belgium, a report conducted for the Flemish Government gives four directional criteria that can help determine whether an advertisement is directed to children: The broadcasting time, the content of the spot, the nature of the programme and the product involving.⁴⁴ Similarly, in Norway article 3(6) of the Regulations on Broadcasting sets out certain criteria, like the time of the advertising, content of particular interest to children, presentation of particular appeal to children or the featuring of children under the age of 13.⁴⁵ In Quebec, section 249 of the Quebec Consumer Protection Act 2009 states the following criteria for the determination whether or not an advertisement is aimed at children: The "context of its

⁴¹ *The Oxford Dictionary of English*, above n 10, aim.

⁴² Kinder- en Jeugd reclamecode (Code for Advertising Directed at Children and Young People) 2009 (NL).

⁴³ Kinder- en Jeugd reclamecode (Code for Advertising Directed at Children and Young People) 2009 (NL).

⁴⁴ "Regulation on Advertising Aimed at Children in Europe: The Legal Framework Provided for by Overarching European Rules and the Laws of 26 European Countries", above n 27, 5.

⁴⁵ *Ibid*, 117

presentation", and in particular "the nature and intended purpose of the goods advertised, the manner of presenting such advertisement and the time and place it is shown".⁴⁶

In Germany, a legal definition of the term aimed at children cannot be found, but the courts have dealt with the issue, deciding it on a case-to-case basis. In the case *Milchtaler*⁴⁷, the Higher Regional Court in Frankfurt held that an advertisement for candies containing printings on the wrapping that were to be collected and traded for prizes typical for children was aimed at children and exploited their inexperience.⁴⁸ Similarly, an advertisement that invited children to fill in forms regarding their hobbies and preferences and promised some of the children a visit to a rollercoaster park was found to be aimed at children by the same court in the case *Skoda-Autokids-Club*⁴⁹.

However, some regulations contain detailed definitions. In Serbia, advertising aimed at children is defined in article 72 of the Law on Advertising as "a message that recommends a product or a service, which by its type, nature, form, quality and other features is used exclusively or mostly by minors independently or with parents' help".⁵⁰ And in the French community in Belgium, the Ethical Code on Audiovisual Publicity directed to Children 2007 defines advertisement aimed at children as all messages concerning a product or a service that is principally used by children and that is presented in a form which especially addresses children under the age of twelve years.⁵¹

⁴⁶ Consumer Protection Act RS Q 2009 c P-40.1, s 249.

⁴⁷ *Milchtaler* (12 May 2005) OLG Frankfurt 6 U 24/05.

⁴⁸ *Ibid.*

⁴⁹ *Skoda-Autokids-Club* (30 June 2005) OLG Frankfurt 6 U 168/04.

⁵⁰ "Regulation on Advertising Aimed at Children in Europe: The Legal Framework Provided for by Overarching European Rules and the Laws of 26 European Countries", above n 27, 141.

⁵¹ *Ibid.*, 6.

4 Summary

The examples of definitions given above show that in the field of advertising aimed at children there is no uniformity when it comes to defining the relevant terms. This raises some concerns, as without proper definitions it is difficult to determine what exactly advertising aimed at children is. Some jurisdictions have already established clear definitions, while others have not. On the definition of the term advertising there's a broad consensus, while on the definition of the term children the opinions differ. This can be explained through the fact that research on this issue is not unambiguously, and therefore the states have to draw lines according to what they think is the most reasonable age limit. The term aimed at children is the most important one, and still it is the one where most jurisdictions lack definitions. While an exact definition can be hard to formulate, the formulation of criteria of advertising aimed at children proves to be very helpful.

B *Forms of Advertising aimed at Children*

Advertising is not a modern human invention. The first forms of advertising can be traced back to the time of the Romans.⁵² However, commercial advertising aimed at children only really emerged at "the advent and widespread adoption of television", expanding rapidly "with the advent of cable television, which allowed programmers to develop entire channels of child-oriented programming and advertising".⁵³ With the rapid expansion of the Internet "thousands of child-oriented Web sites with advertising content have appeared in the past few years".⁵⁴ Another important

⁵² American Psychological Association *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions* 3 www.apa.org (accessed 17 May 2009).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

development is the privatization of the media use of children.⁵⁵ The results of a study showed that a most children in the United States of America "have televisions in their bedrooms, and many children also have unsupervised access to computers", which leads to a situation where much of the media (and advertising) content that children are exposed to is "in contexts absent parental monitoring and supervision".⁵⁶

The particular fascination of the audiovisual media for children is that they can convey "through images meanings which the print media are not able to impart".⁵⁷ This immediate and powerful effect is nowadays "commonly acknowledged",⁵⁸ and also accepted by the jurisprudence: In the case *Murphy v Ireland*⁵⁹ the European Court of Human Rights acknowledged the potential impact of the medium of expression concerned as an important factor in the consideration of the proportionality of an interference and explicitly stated that "the audio-visual media have a more immediate and powerful effect than the print media".⁶⁰ This might be the reason why in Europe for example "the vast majority of food promotion was through television, with food promotion through radio, magazines and cinemas taking a low and possibly declining proportion of advertising spending."⁶¹ Therefore this research paper does not deal with advertising through the less influential media like radio and magazines, but focuses on television and the new media.

1 Television advertising

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ *Jersild v Denmark* [1994] Application No 15890/89 (Grand Chamber, ECHR), Series A298, para 31.

⁵⁸ Ibid.

⁵⁹ *Murphy v Ireland* [2003] Application No 44179/98 (Section III, ECHR).

⁶⁰ Ibid, para 69.

⁶¹ Matthews, Anne E "Children and obesity: a pan-European project examining the role of food marketing" (2007) 18 European Journal of European Health 1, 7, 10.

In earlier times, when the number of channels and therefore the capacity for broadcasts was limited, television programmes for children were "limited in amount" and "relegated to time slots unpopular with adults".⁶² Nowadays this has changed due to technical advancement. There are numberless programmes for children and even channels especially devoted to children. While it might seem to be a good thing to parents that their children can now watch television programmes especially designed for them at any time, they may not realise that due to this different situation children are much more exposed to "child-oriented advertising than any previous generation of youth" before them.⁶³ Nowadays TV commercials, alongside children's programmes, are considered to be "the most effective the most effective form of advertising when it comes to reaching large groups of children", which is why television advertising aimed at children is connected to powerful financial interests.⁶⁴ According to the research that has been conducted so far, television advertising seems to be the form of advertising with "the greatest influence on children and young people".⁶⁵ Throughout many countries, strategies that advertisers commonly use for advertisements aimed at children include "linking into children's culture by referencing movies and their characters, and by using child-related appeals to play, fun, action, adventure, humour, magic or fantasy", and a lot of commercials use "cartoon or celebrity characters".⁶⁶

2 *New media*

With the emergence of cell phones, computers and especially the internet, companies started to use these new media for the advertisement of their products and services. A lot of companies host web pages designed

⁶² *Report of the APA Task Force on Advertising and Children – Section: Psychological Issues in the Increasing Commercialization of Childhood*, above n 5, 2.

⁶³ *Ibid*, 2-3.

⁶⁴ *Children and television advertising*, above n 1, 3.

⁶⁵ *Ibid*, 18.

⁶⁶ "Children and obesity: a pan-European project examining the role of food marketing", above n 61, 7, 8.

especially for children, involving clubs and games, promotions relating to the product or service or screensavers and other downloads related to the product or service.⁶⁷ This particularly attracts children and leads to them "receiving sophisticated messages promoting brands and linking these to positive experiences and outcomes", but they do not receive any or little information "about the frequency with which these foods should be consumed, or the need to eat a wider range of foods to ensure a healthy diet".⁶⁸ Equally cell phones and other technological advances are used to "bypass parents and directly target children".⁶⁹

3 *Product placement*

Unlike traditional advertising, product placement is a much more subtle method to make someone aware of a product or service. The Oxford Dictionary of English defines product placement as "a practice in which manufacturers of goods or providers of a service gain exposure for their products by paying for them to be featured in films and television programmes".⁷⁰ This definition needs to be extended to product placement in the new media, like web sites or video and online games.⁷¹ Research shows that product placement is growing steadily.⁷² The advantage for the company initiating the product placement is that a product or brand placed in the context of a movie or television programme, it is much harder to avoid than traditional advertising, as it cannot just be skipped over or fast-forwarded, thus avoiding parental control and responsibility.⁷³ Product

⁶⁷ Hoek, Janet and Maubach, Ninya "Self-Regulation, Marketing Communications and Childhood Obesity: A critical Review from New Zealand" (2006) 39 Loy LA L Rev 139, 158.

⁶⁸ Ibid, 158.

⁶⁹ Simon, Michele "Food Marketing to Children and the Law" (2006) 39 Loy LA L Rev 1, 4.

⁷⁰ *The Oxford Dictionary of English*, above n 10, product placement.

⁷¹ Linn, Susan "Beyond Commercials: How Food Marketers Target Children" (2006) 39 Loy LA L Rev 13, 20.

⁷² "Self-Regulation, Marketing Communications and Childhood Obesity: A critical Review from New Zealand", above n 67, 159.

⁷³ Center for Science in the Public Interest *Pestering Parents: How Food Companies Market Obesity to Children* 22 <http://cspinet.org> (accessed 10 November 2009).

placement is a means to "incorporate brands into young people's experiences" and making them seem like a regular part of those experiences.⁷⁴ This form of "stealth advertising" portrays integral parts of a movie or programme, which makes it more unlikely for children to recognise it as advertising, and therefore children might be "less sceptical of, and perhaps more susceptible to, it than to more obvious forms of advertising".⁷⁵ Because of its subtle and somehow hybrid character – as it is both an advertisement and a regular movie or programme – product placement as a form of advertising aimed at children is very hard to grasp and therefore very hard to regulate. Many jurisdictions, like New Zealand, do not have provisions specifically designed for the regulation of product placement. Therefore the rules for general advertising have to be applied, which can lead to problems as they are not made for this specific purpose.

C *Effects on Children*

Psychological research has shown that in order to achieve a mature understanding of advertising, a person needs to be able to conduct two important information processing tasks.⁷⁶ The first one is the ability to "distinguish between commercial and non-commercial content", the second one is the ability to "recognize the persuasive intent of advertising and to apply that knowledge in the ... understanding of the advertising message".⁷⁷ The term commonly used in this context is advertising literacy, which refers to "one's ability to "read" advertising" in the sense of understanding the underlying intentions.⁷⁸ To maturely understand the persuasive intent of advertising involves not only the comprehension of the different perspective

⁷⁴ "Self-Regulation, Marketing Communications and Childhood Obesity: A critical Review from New Zealand", above n 67, 160.

⁷⁵ *Pestering Parents: How Food Companies Market Obesity to Children*, above n 73 21.

⁷⁶ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 4.

⁷⁷ *Ibid.*

⁷⁸ Lawlor, Margaret-Anne and Prothero, Andrea "Exploring children's understanding of television advertising – beyond the advertisers perspective" (2007) 42 *European journal of Marketing* 11/12, 1203, 1205.

that the advertiser has – they try to persuade the viewer to want to buy the advertised products – but also the recognition that "such persuasive communication is biased, and that biased messages must be interpreted differently than unbiased messages".⁷⁹

The research on this subject relating to children is not unambiguously. It has created "much debate in academic circles" and elsewhere.⁸⁰ While some argue that children "are cognitively and psychologically defenceless against advertising",⁸¹ other see children as "being relatively knowledgeable about advertising".⁸² But the one thing that all researchers agree on is that children are not able to conduct these two information processing tasks the same way grownups are; their ability to understand the purpose of advertising "grows as part of their cognitive development".⁸³

The results of several studies show that children "begin to understand and respond to advertising somewhere between ages 3 and 5", and they start to express brand and product preferences at no later than the age of 5.⁸⁴ Therefore in 1978 the Federal Trade Commission of the United States of America, after reviewing the existing research, came to the conclusion "that it was unfair and deceptive to advertise to children younger than 6 years".⁸⁵ Other researchers came to the conclusion that children under 8 years were "cognitively and psychologically defenceless against advertising", because they cannot comprehend "the notion of intent to sell"

⁷⁹ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 4.

⁸⁰ "Exploring children's understanding of television advertising – beyond the advertisers perspective", above n 78, 1204.

⁸¹ "Children, Adolescents and Advertising", above n 2, 2563.

⁸² "Exploring children's understanding of television advertising – beyond the advertisers perspective", above n 78, 1219.

⁸³ "Advertising and Children: What do the kids think?", above n 3, 376.

⁸⁴ Fletcher, Winston "The challenge of advertising to children" (2004) 1 *Advertising & Marketing to Children* 11, 12.

⁸⁵ "Children, Adolescents and Advertising", above n 2, 2563.

and therefore tend to "accept advertising claims at face value".⁸⁶ Other research confirms these observations, stating that until the age of 7 children "are unaware of perspectives on the world other than their own", and "accept things at face value, seeing an advertisement as a kind of public information broadcast".⁸⁷ Researchers got the impression that children under the age of 8 "literally believe what advertisements say about products".⁸⁸ All those studies came to the conclusion that young children "are not critical or do not question the messages conveyed by advertising".⁸⁹

However, all researchers agree that the ability to distinguish between an advertisement and regular programme content is fully developed before children reach the age of 10.⁹⁰ Nevertheless, this does not mean that at this age they can also already understand the underlying purposes of advertising, as these two different abilities do not coincide.⁹¹ In one of the studies, children between the ages of 7 and 11 believed that "the prime role of advertising is to inform – to introduce potential customers to new products, and to give details about existing products".⁹² They also had the impression that "new products are more likely to be advertised than established ones, that big brands advertise more than minor brands, because the manufacturer cares more, and that struggling brands will be advertised to improve their chances."⁹³ These conceptions clearly show the naivety, immaturity and inexperience of the children taking part in the study in relation to advertising. More research is needed in that area to find out the upper age limit for when children are advertising literate in the sense that they are able to "recognize the persuasive intent of advertising and to apply that knowledge in the ... understanding of the advertising message".⁹⁴ Studies

⁸⁶ Ibid.

⁸⁷ "Advertising and Children: What do the kids think?", above n 3, 375.

⁸⁸ *Children and television advertising*, above n 1, 22.

⁸⁹ Ibid, 22.

⁹⁰ Ibid, 26.

⁹¹ Ibid, 26.

⁹² "What advertising means to children", above n 4, 41, 42.

⁹³ Ibid.

⁹⁴ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 4.

differ on that subject, as they usually base their findings on different interpretations of the phrase understanding advertising, and there are indications that "the definitions and the methods used in the studies have influence the results".⁹⁵ Thus the only definite conclusion that can be drawn from all of the research undertaken so far is that "young children below 7–8 years of age clearly lack an understanding of the persuasive intent of television advertising".⁹⁶

D Consequences

Advertising has been found to have several effects on children, including direct effects and more indirect ones. The most immediate effects are the commercial recall effect and the product preference effect. Studies showed that children tended to remember commercials for products such as "toys, cereals, and ice cream even when each ad is shown just once during a program", and when asked about where they learned about a certain product they wanted to have, children "most often identify television commercials as the source".⁹⁷ As a consequence, advertisements have an immediate and short-term effect on children's desire to acquire certain goods and products.⁹⁸ As several studies for the example of unhealthy foods document, young children "request more junk food (defined as foods with high-caloric density but very low nutrient density) after viewing commercials".⁹⁹ While this is not negative in itself, in the long term it can lead to "outcomes such as misperceptions about proper nutritional habits or parent–child conflict should a child's purchase-influence attempt be rejected by the parent".¹⁰⁰

⁹⁵ *Children and television advertising*, above n 1, 27.

⁹⁶ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 5.

⁹⁷ *Report of the APA Task Force on Advertising and Children – Section: Psychological Issues in the Increasing Commercialization of Childhood*, above n 5, 10.

⁹⁸ *Children and television advertising*, above n 1, 33.

⁹⁹ "Children, Adolescents and Advertising", above n 2, 2565.

¹⁰⁰ *Report of the APA Task Force on Advertising and Children – Section: Psychological Issues in the Increasing Commercialization of Childhood*, above n 5, 9.

One of the more indirect effects of advertising is an increase in the children's pressure "to make parents buy one thing rather than another".¹⁰¹ This is usually referred to as an unintentional effect or side-effect of the intentional effect of advertising to make children want to buy a certain product.¹⁰² Research shows that children are clearly influenced by advertising and are even "absorbing detail to use in persuading their parents to buy".¹⁰³ And, according to studies, these purchase-influence attempts have "a relatively high degree of success".¹⁰⁴ But as parents obviously are not able and/or willing to grant all purchase requests of their children, this can lead to serious parent-child conflicts. If due to an advertisement children want things that are inappropriate or unnecessary in the view of their parents, a rejection of the purchase request can generate "feelings of inadequacy and frustration", and promote "aggression or antagonism towards parents or carers".¹⁰⁵

Another indirect effect of advertising on children is a possible change of attitude towards certain products or behavioural patterns. The most obvious assumption is that the large amount of advertising for unhealthy food leads to overconsumption of such products, which is linked to "obesity and poorer health".¹⁰⁶ This assumption is based on studies that show that disproportionate exposure to advertising for "food items with low nutritional values, but with high fat, sugar, salt and cholesterol values" can contribute to unhealthy eating habits of children.¹⁰⁷ However, the results of these studies are controversially debated, as it is difficult to filter the effect of one of many interweaved causes that can have an influence on children's eating habits.¹⁰⁸ Other assumptions are that exposure to alcohol or tobacco

¹⁰¹ "The challenge of advertising to children", above n 84, 14.

¹⁰² *Children and television advertising*, above n 1, 31.

¹⁰³ "What advertising means to children", above n 4, 49.

¹⁰⁴ *Report of the APA Task Force on Advertising and Children – Section: Psychological Issues in the Increasing Commercialization of Childhood*, above n 5, 11.

¹⁰⁵ "Advertising and Children: What do the kids think?", above n 3, 376.

¹⁰⁶ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 6.

¹⁰⁷ *Children and television advertising*, above n 1, 36-37.

¹⁰⁸ *Ibid.*

advertising can influence young people's attitudes toward these products, and that advertising can influence children in reinforcing stereotypical conceptions of gender roles and in changing their attitude towards violence. The most general conclusion that can be drawn from all those studies is that advertising is a factor that can contribute to a change of children's attitudes towards certain products or behavioural patterns, but so far the research cannot substantiate a more direct connection between advertising and children's attitudes or behaviour in these areas.¹⁰⁹

E Summary

The findings of the research conducted on children relating to advertising aimed at them clearly shows, that children below the age of 7 or 8 years "clearly lack an understanding of the persuasive intent of television advertising".¹¹⁰ That is the reason why many jurisdictions, to the delight of health initiatives and children's advocates, have adopted regulations on advertising aimed at children to reduce the exposure and thus protect the children from the possible harm and negative effects of advertising. Due to the psychological research, there is the association that if it is "unfair and deceptive" for advertising to try to "bypass the cognitive defences against persuasion that adults are presumed to have when they are aware that advertising is addressed to them" it also must be "considered unfair and deceptive to advertise to children in whom these defences do not yet exist".¹¹¹ Thus advertising is seen to be possibly harmful to children, which makes it subject to regulation.

¹⁰⁹ Ibid, 36-40.

¹¹⁰ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 5.

¹¹¹ *Report of the APA Task Force on Advertising and Children – Section: Psychological Issues in the Increasing Commercialization of Childhood*, above n 5, 21.

III CONFLICT WITH THE FREEDOM OF EXPRESSION

The argument that advertisers give against a regulation of advertising is that such a regulation infringes their right of freedom of expression. The possible conflict of a regulation of advertising with the freedom of expression will be dealt with in this chapter. The courts of most jurisdictions have dealt with this question in detail, and nowadays it is a common assumption throughout that advertising enjoys protection under the freedom of expression. But, like all freedoms, freedom of expression is not an absolute right; it is like all rights subject to limitations.¹¹² This chapter will show the several reasons that courts have identified as being able to justify a violation of the freedom of expression. Thus two questions will be answered in this chapter: First, is advertising an expression that is protected under the guarantee of the freedom of expression. And second, how can a regulation be a justified restriction of the freedom of expression. To get a better understanding of the underlying principles, the first paragraph will introduce the concept of freedom of expression. As there is no universal definition and guarantee of freedom of expression, this chapter will introduce how different jurisdictions treat the subject of advertising in relation to the freedom of expression guaranteed in that jurisdiction, and show the similarities that the judgments, decisions and statutes of all the different jurisdictions have in common.

A Freedom of Expression

The term freedom of expression was used for the first time by John Stuart Mill in his famous essay *On Liberty*¹¹³. He stated that the "freedom of the expression of opinion" is essential for the "mental well-being (on which all their other well-being depends)" of mankind.¹¹⁴ The fundamental right to

¹¹² *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 1011.

¹¹³ Mill, John Stuart *On Liberty* (4ed, Longman, Roberts & Green, London, 1869).

¹¹⁴ *Ibid*, 30.

freely express one's opinion is sometimes also referred to by courts as freedom of speech, but these terms basically mean the same thing, so that what a court says about freedom of speech is also valid for the freedom of expression and vice versa.¹¹⁵

There are three main arguments for the protection of the freedom of expression:

The first argument is that the protection of the freedom of expression is "essential to intelligent and democratic self-government".¹¹⁶ As the European Court of Human Rights stated in its judgment in the case *Handyside v United Kingdom*¹¹⁷, freedom of expression "constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man".¹¹⁸ The permission of free speech can benefit several democratic purposes: it can promote self-government by an informed citizenry, preserve social stability, assure accountability of officials, and increase confidence in the political system.¹¹⁹ For that matter it is not important if freedom of expression "is politically useful"; the "crucial point" is that "it is indispensable to the operation of a democratic form of government".¹²⁰

The second argument is that freedom of expression supports "the search for truth" by protecting open exchange of information and creating a "competitive market-place of ideas".¹²¹ According to this, free speech – even in error – is "necessary to the eventual ascertainment of the truth

¹¹⁵ Zoller, Elisabeth "The United States Supreme Court and the Freedom of Expression" (2009) 84 Ind LJ 885, 886.

¹¹⁶ Sharpe, Robert J "Commercial Expression and the Charter" (1987) 37 U Toronto LJ 229, 232.

¹¹⁷ *Handyside v United Kingdom* [1976] Application No 5493/72 (Plenary/ECHR) Series A24.

¹¹⁸ *Ibid*, para 49.

¹¹⁹ Dubick, Keith "The Theoretical Foundation for Protecting Freedom of Expression" (2001) 13 Nat'l J Const L 1, 15.

¹²⁰ Emerson, Thomas I "Toward a General Theory of the First Amendment" (1963) 72 Yale LJ 877, 883.

¹²¹ "Commercial Expression and the Charter", above n 116, 232.

through conflict of ideas in the marketplace".¹²² As the Supreme Court of Canada stated in *Irwin Toy Ltd v Quebec (Attorney General)*¹²³, "seeking and attaining the truth is an inherently good activity".¹²⁴ The originator of this theory was John Stuart Mill, who stated that the "peculiar evil" of the oppression of opinion is that it is "robbing the human race":¹²⁵

If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Therefore in Mill's opinion it "is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied".¹²⁶

The third argument is that freedom of expression is "essential to personal growth and self-realization".¹²⁷ When speech is "freely chosen by the speaker to persuade others it defines and expresses the "self," promotes his liberty".¹²⁸ Thus the freedom of expression "enables the individual to develop his powers and abilities and to make and influence decisions regarding his destiny".¹²⁹ This is seen as an "indispensable part of the human experience"¹³⁰, and therefore the freedom of expression needs to be protected. Following this approach, the Supreme Court of Canada stated:

The diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those for whom it is conveyed.¹³¹

¹²² CRS Annotated Constitution, 1026 www.lawcornell.edu (accessed 9 November 2009).

¹²³ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112.

¹²⁴ *Ibid.*, para 54.

¹²⁵ *On Liberty*, above n 113.

¹²⁶ *Ibid.*

¹²⁷ "Commercial Expression and the Charter", above n 116, 232.

¹²⁸ CRS Annotated Constitution, above n 122, 1026.

¹²⁹ *Ibid.*

¹³⁰ "The Theoretical Foundation for Protecting Freedom of Expression", above n 119, 40.

¹³¹ *Toy Ltd v Quebec (Attorney General)*, above n 112.

Therefore the freedom of expression needs to be protected to promote the ultimate human effort, which is the "realization of [one's] character and potentialities as a human being".¹³²

Under the freedom of expression people are allowed "to speak their mind"¹³³, including the right to dissent and the right to disagree. According to the European Court of Human Rights, the "pluralism, tolerance and broadmindedness without which there is no democratic society" demands that freedom of expression not only applies to "information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference";¹³⁴ protected under the freedom of expression are also "those that offend, shock or disturb the State or any sector of the population",¹³⁵ as those ideas especially need that protection. Additionally, as stated by the Supreme Court of the United States in the case *First National Bank of Boston v Bellotti*¹³⁶, the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual".¹³⁷ Therefore the protection guaranteed by the freedom of expression can apply to several forms of expressions; it is not only limited to political speech. The right to freedom of expression evolved from being a residual freedom under common law to being a fundamental freedom, which means that it can only be restricted in exceptional cases; restriction cannot be the rule.¹³⁸

¹³² "Toward a General Theory of the First Amendment", above n 120, 879.

¹³³ *Morse v. Frederick* (2007) 127 S Ct 2618, 2633 (Thomas J concurring).

¹³⁴ *Handyside v United Kingdom*, above n 117, para 49.

¹³⁵ *Ibid.*

¹³⁶ *First National Bank of Boston v Bellotti* (1978) 435 US 765.

¹³⁷ *Ibid.*, 777.

¹³⁸ "The United States Supreme Court and the Freedom of Expression", above n 115, 901.

B Advertisement as Commercial Expression

In the case *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*¹³⁹ the Supreme Court of the United States gave a definition of the core notion of commercial speech: speech that does "no more than propose a commercial transaction".¹⁴⁰ A broader definition of commercial speech was given by the United States Court of Appeals in the judgment in the case *US Healthcare Inc v Blue Cross of Greater Philadelphia*¹⁴¹. The Court defined commercial speech as "expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services".¹⁴²

In its decision in the case *William F Bolger v Youngs Drug Products Corporation*¹⁴³ the Supreme Court developed a three step test to find out if an expression constituted commercial speech, later known as the *Bolger* test: First, one has to find out if the speech is "conceded to be advertisement", second, if the speech does give "reference to a specific product" and third, if the speaker has an "economic motivation" in delivering the speech.¹⁴⁴ The affirmation of one of these criteria alone does not "compel the conclusion" that the expression constitutes commercial speech. However, the combination of all three characteristics can provide "strong support for the ... conclusion that the speech is commercial".¹⁴⁵ This

¹³⁹ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* (1976) 425 US 748.

¹⁴⁰ *Ibid*, 761.

¹⁴¹ *US Healthcare Inc v Blue Cross of Greater Philadelphia* (1990) 898 F2d 914.

¹⁴² *Ibid*, 933.

¹⁴³ *William F Bolger v Youngs Drug Products Corporation* (1983) 463 US 60.

¹⁴⁴ *Ibid*, 66-67.

¹⁴⁵ *Ibid*, 67.

test was applied in subsequent cases like *US Healthcare Inc v Blue Cross of Greater Philadelphia*¹⁴⁶ and most recently *Facenda v NFL Films*¹⁴⁷.

C Protection of Commercial Speech under the Freedom of Expression

Commercial expression is seen to be different to other forms of expression. The Supreme Court of the United States found "commonsense differences" to other varieties of speech,¹⁴⁸ because advertisers "can determine more readily than others whether [their] speech is truthful and protected", as the disseminated information is about a product that the advertisers themselves provide.¹⁴⁹ Moreover, since "advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation".¹⁵⁰ Therefore it is disputed if and to what extent commercial speech is under the protection of the freedom of expression.

Critics say that commercial speech "has nothing to do" with other forms of speech that is protected under the freedom of expression,¹⁵¹ and its protection would therefore be nothing more than "a conceptual and normative fraud".¹⁵² Their main arguments are that commercial speech is no more than "expression of economic power" which is dictated by market forces,¹⁵³ that it is not exercised by "morally significant flesh-and-blood individuals", but commercial entities, and that because of its "integral relation to market transactions" it is not an exercise of "constitutionally

¹⁴⁶ *US Healthcare Inc v Blue Cross of Greater Philadelphia*, above n 141.

¹⁴⁷ *Facenda v NFL Films Inc* (2008) 542 F3d 1007.

¹⁴⁸ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, above n 139, 772.

¹⁴⁹ *John R Bates and Van O'Steen v State Bar of Arizona* (1977) 433 US 350, 381.

¹⁵⁰ *Ibid.*

¹⁵¹ Baker, C Edwin "The First Amendment and Commercial Speech" (2009) 84 *Ind LJ* 981.

¹⁵² Shiner, Roger *Freedom of Commercial Expression* (Oxford University Press, Oxford, 2003) 3.

¹⁵³ Mandel, Michael *The Charter of Rights and the Legalization of Politics in Canada* (2 ed, Thompson Educational Publishing, Inc, Toronto, 1994) 331.

protected freedom".¹⁵⁴ Commercial expression furthermore does not directly promote intelligent and democratic self-government.

Nevertheless there are several reasons to include commercial expression into the scope of protection of the freedom of expression. Information contained in an advertisement can facilitate the "self-development and individual growth of the listener",¹⁵⁵ which is one of the arguments mentioned above for the general protection of the freedom of expression. Commercial speech can provide this the same way as other forms of expression. In the same way it also contributes to the marketplace of ideas and the search for truth, which are the other arguments for the general protection of the freedom of expression.

The courts of several jurisdictions have already dealt with this issue in detail:

In its judgment in the famous case of *Valentine v Chrestensen*¹⁵⁶ the Supreme Court of the United States held that the exercise of freedom of speech may be appropriately regulated in the public interest, but may not be "unduly" burdened or proscribed.¹⁵⁷ However, according to the Supreme Court the Constitution of the United States, especially the First Amendment¹⁵⁸ does not impose "such restraint on government with respect to commercial advertising"¹⁵⁹. Therefore the court found that a regulation prohibiting commercial advertising in streets did not constitute an unconstitutional abridgment of the constitutional right of freedom of speech guaranteed by the First Amendment¹⁶⁰. This statement, now known as the commercial speech doctrine or commercial speech exception, means that commercial advertisements are do not fall under the protection of the

¹⁵⁴ "The First Amendment and Commercial Speech", above n 151, 997.

¹⁵⁵ "Commercial Expression and the Charter", above n 116, 237.

¹⁵⁶ *Valentine v Chrestensen* (1942) 316 US 52.

¹⁵⁷ *Ibid.*

¹⁵⁸ The Constitution of the United States, First Amendment.

¹⁵⁹ *Ibid.*

¹⁶⁰ The Constitution of the United States, First Amendment.

freedom of expression and do not enjoy the safeguard of the First Amendment.¹⁶¹ This was the fifth category of expression that justified limitations on the freedom of expression that the Supreme Court identified.¹⁶² The decision put commercial speech on the same level as the other four categories identified by the Supreme Court in the case *Chaplinsky v State of New Hampshire*¹⁶³ – the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – in regards to the protection guaranteed by the First Amendment¹⁶⁴.

However, since the 1970s the Supreme Court changed its judicature and nowadays accepts commercial speech as being protected under the freedom of expression. In the case *Pittsburgh Press Company v The Pittsburgh Commission on Human Relations*¹⁶⁵ from 1973 the Supreme Court for the first time addressed the issue of First Amendment¹⁶⁶ protection for commercial speech. The Court stated that if "the exchange of information is as important in the commercial realm as in any other" this would mean that the distinction between commercial and other speech has to be abrogated.¹⁶⁷ Nevertheless, the Court did not give an answer to that question, as it was not relevant for the decision in the case. In the case *Jeffrey Cole Bigelow v Commonwealth of Virginia*¹⁶⁸ the Supreme Court repudiated the decision in *Valentine v Chrestensen*¹⁶⁹ stating that "speech is not stripped of First Amendment¹⁷⁰ protection merely because it appears in the form of a paid commercial advertisement"¹⁷¹. And furthermore, the

¹⁶¹ Wooster, Ann K "Protection of Commercial Speech Under First Amendment – Supreme Court Cases" (2000) 164 ALR Fed 1.

¹⁶² "The United States Supreme Court and the Freedom of Expression", above n 115, 896.

¹⁶³ *Chaplinsky v State of New Hampshire* (1942) 315 US 568, 572.

¹⁶⁴ The Constitution of the United States, First Amendment.

¹⁶⁵ *Pittsburgh Press Company v The Pittsburgh Commission on Human Relations* (1973) 413 US 376.

¹⁶⁶ The Constitution of the United States, First Amendment.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Jeffrey Cole Bigelow v Commonwealth of Virginia* (1975) 421 US 809.

¹⁶⁹ *Valentine v Chrestensen*, above n 156.

¹⁷⁰ The Constitution of the United States, First Amendment.

¹⁷¹ *Jeffrey Cole Bigelow v Commonwealth of Virginia*, above n 164.

Court stated that "the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas"¹⁷².

In 1976, commercial speech was finally removed from the "place of infamy" it had occupied since *Valentine v Chrestensen*¹⁷³.¹⁷⁴ In its judgment in the case *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*¹⁷⁵ Blackmun J delivered the Court's opinion on the question of the protection of pure commercial speech under the freedom of expression. He started with explaining several propositions that the Court had decided on before. He explained that speech does not lose its protection under the freedom of speech "because money is spent to project it, as in a paid advertisement of one form or another", or because "it is carried in a form that is "sold" for profit", and even if it involves "a solicitation to purchase or otherwise pay or contribute money".¹⁷⁶ He then came to the conclusion that even speech that does no more than "propose a commercial transaction, is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government" does not lack all protection under the First Amendment.¹⁷⁷ The reasons given for that are first that "society also may have a strong interest in the free flow of commercial information", which could make even an individual advertisement a matter of public interest, and second that "the free flow of commercial information is indispensable" for intelligent and well informed private economic decisions, which are essential for the preservation of a "predominantly free enterprise economy".¹⁷⁸

¹⁷² *Ibid*, 825.

¹⁷³ *Valentine v Chrestensen*, above n 156.

¹⁷⁴ "The United States Supreme Court and the Freedom of Expression", above n 115, 897.

¹⁷⁵ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, above n 139.

¹⁷⁶ *Ibid*, 761.

¹⁷⁷ *Ibid*, 762.

¹⁷⁸ *Ibid*, 765.

This positive approach towards First Amendment¹⁷⁹ protection of commercial speech has since been followed. In 1980, the Court clarified in its decision in the case *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*¹⁸⁰ that commercial expression, even though being of lesser value than other constitutionally guaranteed expression, nevertheless was protected under the First Amendment¹⁸¹, as long as it does not concern "unlawful activity" and is not misleading.¹⁸² The judgment also laid out the criteria that justified limitations on commercial speech need to fulfil regarding to the First Amendment,¹⁸³ thus circumscribing the power of the government and strengthening the position of commercial speech regarding to the freedom of expression. Since this decision the category of unprotected commercial speech that the Supreme Court identified in *Valentine v Chrestensen*¹⁸⁴ in 1942 only contains advertising for illegal products. In recent cases the Court has "swung back and forth" between stronger and weaker protection, although the trend seems to be toward granting more protection.¹⁸⁵ Some judges even are of the opinion that the distinction between commercial expression and other forms of speech should be totally abolished. In *Liquormart Inc v Rhode Island*¹⁸⁶ Thomas J stated that in his opinion there is no "philosophical or historical basis for asserting that "commercial speech" is of lower value than "non-commercial" speech".¹⁸⁷ He concluded that the premise of treating commercial speech as being in a "subordinate position in the scale of First Amendment values" leads to the government "keeping citizens ignorant as a means of manipulating their choices in the commercial or political marketplace", which contradicts the rationale of the judgment in *Virginia*

¹⁷⁹ The Constitution of the United States, First Amendment.

¹⁸⁰ *Central Hudson Gas & Electric Corporation v Public Service Commission of New York* (1980) 447 US 557.

¹⁸¹ The Constitution of the United States, First Amendment.

¹⁸² *Ibid*, 563-564.

¹⁸³ *Ibid*, 564.

¹⁸⁴ *Valentine v Chrestensen*, above n 156.

¹⁸⁵ "The First Amendment and Commercial Speech", above n 151, 983.

¹⁸⁶ *Liquormart Inc v Rhode Island* (1996) 517 US 484.

¹⁸⁷ *Ibid*, 522 (emphasis in the original).

*State Board of Pharmacy v Virginia Citizens Consumer Council Inc*¹⁸⁸ for protecting commercial speech in the first instance.¹⁸⁹

According to the landmark decision of the Supreme Court of Canada on the topic of commercial expression in the case *Ford v Quebec (Attorney General)*¹⁹⁰, advertising is protected under the guarantee of the freedom of expression. Before that decision, the term commercial expression did not have "any particular meaning or significance in Canadian constitutional law".¹⁹¹ The judgment stated that advertising is a commercial expression that serves "individual and societal values in a free and democratic society"¹⁹². It is an important factor that enables people to make "informed economic choices, an important aspect of individual self-fulfilment and personal autonomy", and is therefore protected under the freedom of expression.¹⁹³ The Court considered the decision of the United States Supreme Court in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*¹⁹⁴ and followed its underlying rationale, stating that commercial speech cannot be deprived of protection under the freedom of expression, because "it is not only the speaker but the listener who has an interest in freedom of expression".¹⁹⁵ Thus any laws that restrict commercial expression infringe the freedom of expression guaranteed by section 3 of the Quebec Charter of Human Rights and Freedoms¹⁹⁶ and section 2(b) of the Canadian Charter of Rights and Freedoms¹⁹⁷, as freedom of expression is "not to be confined to political expression", but also includes commercial expression within its protection.¹⁹⁸

¹⁸⁸ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, above n 139.

¹⁸⁹ *Liquormart Inc v Rhode Island*, above n 179, 522-524.

¹⁹⁰ *Ford v Quebec (Attorney General)* [1988] 2 SCR 712.

¹⁹¹ *Ibid*, para 46.

¹⁹² *Ibid*, para 54.

¹⁹³ *Ibid*, para 59.

¹⁹⁴ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, above n 139.

¹⁹⁵ *Ford v Quebec (Attorney General)*, above n 183, para 50.

¹⁹⁶ Charter of Human Rights and Freedoms RSQ 2008 c C-12, s 3.

¹⁹⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, s 2(b).

¹⁹⁸ *Ford v Quebec (Attorney General)*, above n 183, para 55, 59.

Initially the European Court of Human Rights only awarded marginal protection to commercial expressions under the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights¹⁹⁹, as the decisions in the cases *Markt Intern Verlag GmbH and Klaus Beermann v Germany*²⁰⁰, *Casado Coca v Spain*²⁰¹ and *Jacobowski v Germany*²⁰² show.²⁰³ This attitude has changed in more recent cases, and the European Court of Human Rights now fully accepts commercial speech as a form of expression that can be protected under the freedom of expression. In the judgment in the case *Stambuk v Germany*²⁰⁴ the Court stated that "for the citizen, advertising is a means of discovering the characteristics of services and goods offered to him" and found that a ban on advertising in this case portrayed a violation of the freedom of expression.²⁰⁵ Nevertheless, the level of protection awarded to commercial speech is still very limited and "heavily qualified".²⁰⁶

In the United Kingdom, the first case that dealt with the protection offered to commercial speech under Article 10 of the European Convention on Human Rights²⁰⁷ was *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health*²⁰⁸. In its judgment the Court referred to the decisions of the European Court of Human Rights on the matter and, in absence of other "sympathetic" case law, based its

¹⁹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003, art 10.

²⁰⁰ *Markt Intern Verlag GmbH and Klaus Beermann v Germany* [1989] Application No 10572/83 (Plenary, ECHR) Series A165.

²⁰¹ *Casado Coca v Spain* [1994] Application No 15450/89 (Chamber, ECHR) Series A285-A.

²⁰² *Jacobowski v Germany* [1994] Application No 15088/89 (Chamber, ECHR) Series A291-A.

²⁰³ Flauss, Jean-François "The European Court of Human Rights and the Freedom of Expression" (2009) 84 Ind LJ 809, 812.

²⁰⁴ *Stambuk v Germany* [2002] Application No 37928/97 (Section III, ECHR).

²⁰⁵ *Ibid*, para 39.

²⁰⁶ Caddell, Richard "Freedom of Commercial Speech and the UK Courts" (2005) 64 CLJ 274.

²⁰⁷ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003, art 10.

²⁰⁸ *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health* [2004] EWHC 2493 (Admin).

decision on the appropriate authorities from the United States of America.²⁰⁹ McCombe J stated that it was hard to apply decisions of the United States Supreme Court, because they were not dealing with the European Convention on Human Rights²¹⁰, but the Constitution of the United States of America, which guarantees different freedom of speech rights. Therefore the Court did not apply the United States Supreme Court case law, but decided in accordance with the decisions of the European Court of Human Rights that commercial speech in itself enjoys protection under the freedom of expression, but is nevertheless subject to limitations that serve an objective that overrides public importance, in this case the objective of public health.²¹¹ Thus this decision followed and supported the rather restrictive approach taken by the European Court of Human Rights towards the regulation of commercial speech.²¹²

In Germany the development of the protection of commercial speech under the freedom of expression proceeded similar to the United States of America. While the German Constitutional Court in its decision in the case *Werbefahrten*²¹³ from 1975 excluded commercial advertising from the extent of protection of the freedom of expression guaranteed under article 5 § 1 (1) of the German Basic Law²¹⁴, the approach has changed in more recent decisions to a more protective approach. In 1985 the Constitutional Court established in its judgment in the case *Frischzellentherapie*²¹⁵ that advertising as commercial speech can insofar be protected under the basic right of freedom of expression as it comprises judgmental, opinion-forming contents or statements that serve the formation of opinion.²¹⁶ This approach

²⁰⁹ "Freedom of Commercial Speech and the UK Courts", above n 199, 275.

²¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003.

²¹¹ *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health*, above n 201.

²¹² "Freedom of Commercial Speech and the UK Courts", above n 199, 276.

²¹³ *Werbefahrten* [1975] 1 BvR 118/71 BVerfGE 40, 37.

²¹⁴ Grundgesetz (Basic Law for the Federal Republic of Germany) 2008 (GER), art 5§1(1).

²¹⁵ *Frischzellentherapie* [1985] 1 BvR 934/82 BVerfGE 71, 162.

²¹⁶ *Ibid*, para 55.

was affirmed in the case *Warnhinweise für Tabakerzeugnisse*²¹⁷ and even extended in the case *Schockwerbung I*²¹⁸, where the Court stated that the protection guaranteed by article 5 § 1 (1) of the German Basic Law²¹⁹ applies to all commercial expression and even pure commercial advertising, as long as it comprises judgmental, opinion-forming contents.²²⁰

The common similarity of all these different judgments is that nowadays advertising does enjoy protection under the freedom of expression, even though the scope of the protection awarded to commercial speech is usually limited in contrast to other forms of expression. The reasons for the inclusion of commercial speech into the scope of protection of the freedom of expression are very similar in each jurisdiction. Furthermore, in all mentioned jurisdictions commercial speech is subject to limitations.

D Justified Limitations

If any regulation of commercial expression is an infringement of the freedom of expression, the question remains whether that infringement can be justified. Freedom of expression is not an absolute right; it is like all rights subject to limitations.²²¹ The courts in the different jurisdictions have determined several criteria that the legislative bodies have to comply with when regulating commercial expression.

In the United States of America, the Supreme Court stated in its judgment in the case *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*²²² that "the State must assert a substantial

²¹⁷ *Warnhinweise für Tabakerzeugnisse* [1997] 2 BvR 1915/91 BVerfGE 95, 173.

²¹⁸ *Schockwerbung I* [2000] 1 BvR 1762/95 BVerfGE 102, 347.

²¹⁹ Grundgesetz (Basic Law for the Federal Republic of Germany) 2008 (GER), art 5§1(1).

²²⁰ *Schockwerbung I*, above n 211, para 40.

²²¹ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112, 1011.

²²² *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*, above n 174.

interest to be achieved by restrictions on commercial speech".²²³ In addition to that, the "regulatory technique must be in proportion to that interest".²²⁴ To achieve the aim that the State pursues, the limitation on expression "must be designed carefully".²²⁵ The Court defined two criteria to measure the compliance with this requirement:²²⁶

First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

To determine the lawfulness of a restriction of commercial expression, the Court developed a four-part analysis: First one has to determine whether the expression is protected under the freedom of expression, which for commercial expression means that it "at least must concern lawful activity and not be misleading".²²⁷ According to the Court, the next question is whether there is a substantial governmental interest involved.²²⁸ After that, it has to be determined whether the regulation in question "directly advances the governmental interest asserted", and finally whether it is "not more extensive than is necessary to serve that interest."²²⁹ If all questions can be answered in the affirmative, the regulation that infringes the commercial expression guaranteed under the freedom of expression is justified. Additionally, the regulation has to be content-neutral, which means that it cannot take sides and be discriminating either in favour of or against a certain point of view.²³⁰ Instead the purpose of the regulation has to take into account the effects of the expression that it tries to

²²³ Ibid, 564.

²²⁴ Ibid, 564.

²²⁵ Ibid, 564.

²²⁶ Ibid, 564.

²²⁷ *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*, above n 174, 566.

²²⁸ Ibid, 566.

²²⁹ Ibid, 566.

²³⁰ See *Regan v Time Inc* (1984) 468 US 641.

regulate.²³¹ The regulation has to strike a balance between "the value of the expression and the harm that will result if the expression is permitted to go forward".²³²

(A restriction of the freedom of expression guaranteed under article 10 of the European Convention on Human Rights²³³ is justified if it complies with the premises set out in article 10 § 2²³⁴, which states:²³⁵

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In the case *Markt Intern Verlag GmbH and Klaus Beermann v Germany*²³⁶ the European Court of Human Rights acknowledged the protection of the rights of others, namely the creditworthiness of a company that was jeopardised due to untruthful statements, as legitimate justification for a violation of the freedom of expression.²³⁷ The judgment in the case *Casado Coca v Spain*²³⁸ allowed a limitation of the freedom of expression for the purpose of the regulation of advertising standards for the legal profession, as this was supposed to protect the legitimate rights of the public

²³¹ Applied for the first time by Holmes J in *Schenck v United States*, 249 US 47.

²³² Huhn, Wilson Ray "Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus" (2004) 13 William & Mary Bill of Rights Journal 125-203.

²³³ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003, art 10.

²³⁴ Ibid, art 10 § 2.

²³⁵ Ibid, art 10 § 2.

²³⁶ *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, above n 193.

²³⁷ Ibid, para 31.

²³⁸ *Casado Coca v Spain*, above n 194.

and other members of the Bar²³⁹. In *Jacobowski v Germany*²⁴⁰, the Court found that a restriction of the freedom of expression was justified to protect fair competition. The broad number of exceptions in the general wording of article 10 § 2²⁴¹ and the decisions in the mentioned cases in particular show that commercial speech can be subject to a broad margin of limitations, and its protection under the freedom of expression is therefore highly restricted.

In the United Kingdom another justification for a limitation of commercial speech in relation to the freedom of expression guaranteed under article 10 of the European Convention on Human Rights²⁴² was given by the High Court in the case *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health*²⁴³. In this case, a restriction of the advertising of tobacco products in the United Kingdom was justified for reasons of public health. The High court stated that the national authorities enjoyed "a wide degree of discretion in protecting public health" and that therefore the freedom of commercial speech "must necessarily be subject to restrictions and restraints".²⁴⁴

In Canada, the limitations to the freedom of expression are set out in section 1 of the Canadian Charter of Rights and Freedoms²⁴⁵. According to section 1, freedom of expression is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".²⁴⁶ The reason for regulating certain types of expression in Canada is not "because it offends against morals but because it is perceived by public opinion to be harmful to society".²⁴⁷ This harms approach was explicitly accepted by the Supreme Court of Canada in the case of *R v*

²³⁹ Ibid, para 44.

²⁴⁰ *Jacobowski v Germany*, above n 195.

²⁴¹ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003, art 10 § 2.

²⁴² Ibid, art 10.

²⁴³ *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health*, above n 201.

²⁴⁴ Ibi).

²⁴⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, s 1.

²⁴⁶ Ibid.

²⁴⁷ *R v Butler* [1992] 1 SCR 452.

*Butler*²⁴⁸. The Court defined harm as something that "predisposes persons to act in an anti-social manner, in other words, a manner which society formally recognizes as incompatible with its proper functioning".²⁴⁹ One of the landmark cases dealing with the regulation of commercial speech, more precisely with a regulation that prohibited advertising directed at persons under the age of thirteen years, was the case *Irwin Toy Ltd v Quebec (Attorney General)*²⁵⁰. In appliance of the infamous Oakes test, established by Dickson CJ in *R v Oakes*²⁵¹, the Supreme Court of Canada tested in that case if the objective sought to be achieved by the regulation related to concerns which were "pressing and substantial in a free and democratic society".²⁵² After that the Court determined whether the means of the regulation were proportional to its objective.²⁵³ The majority of the judges stated in that case that even a total ban of advertising aimed at children can be a justified infringement of the freedom of expression, as the intention behind the ban was the "protection of a group that is most vulnerable to commercial manipulation".²⁵⁴

In summary, it seems that all jurisdictions accept similar reasons as justifications for a violation of the freedom of commercial expression. Formulations like "pressing and substantial in a free and democratic society",²⁵⁵ the protection of "public health",²⁵⁶ "for the protection of the reputation or the rights of others"²⁵⁷ or "a substantial governmental interest"²⁵⁸ show that for important reason, commercial expression can be limited. Especially important for the topic of this research paper is the

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112, 927.

²⁵¹ *R v Oakes* [1986] 1 SCR 103.

²⁵² Ibid, 138-139.

²⁵³ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112, 993.

²⁵⁴ Ibid, 936.

²⁵⁵ *R v Oakes*, above n 244, 138-139.

²⁵⁶ *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health*, above n 201.

²⁵⁷ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003, art 10 § 2.

²⁵⁸ *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*, above n 174, 566.

decision in *Irwin Toy Ltd v Quebec (Attorney General)*²⁵⁹, which allowed a total ban – the strongest form of restriction – for the purpose of protecting children.

IV PRACTICAL SOLUTIONS

In practice, jurisdictions have different opportunities to regulate advertising aimed at children, ranging from a total regulatory ban to allowing the industry to self-regulate the issue. This chapter will explain the approach taken in New Zealand and then introduce the different approaches of the European Union and its Member States. The example of the European Union is used, because nearly the whole spectrum of possibilities is used by the various Member States. After that follows an analysis of the effectiveness of the different approaches with regard to the protection of children from the possible harms of advertising.

A The Approach of New Zealand

In New Zealand, as in most other countries, advertising is a big business. The New Zealand advertising industry turnover grew over the last decade from NZ\$ 1420,000.00 in 1999 to NZ\$ 2317,000.00 in 2008.²⁶⁰ Advertising aimed at children is seen as problematic and therefore regulated, but the way of regulation is under some debate.²⁶¹ This paragraph will introduce the self-regulatory approach applied in New Zealand and explain the involved procedures.

²⁵⁹ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112, 927.

²⁶⁰ New Zealand Advertising Industry Turnover Statistics for 2008 www.asa.co.nz (accessed 9 November 2009).

²⁶¹ Shaw, Caroline "(Non)regulation of marketing of unhealthy food to children in New Zealand" (2009) 122 *Journal of the New Zealand Medical Association* 1288.

1 *Industrial self-regulation*

Already in 1991, a Cabinet paper from the New Zealand Government's Committee on Enterprise, Growth and Employment recommended the passing of jurisdiction on advertising from the Government to self-regulatory bodies, which the advertising industry should establish.²⁶² This recommendation was strongly supported by the New Zealand Government. Therefore the necessary legislative steps were undertaken to implement a system of industrial self-regulation in New Zealand for the purpose of the regulation of commercial advertising.

2 *The Advertising Standards Authority*

The Advertising Standards Authority was formed in 1973 under the name of Committee of Advertising Practises and was incorporated in 1990.²⁶³ It is a non-government organisation, funded by the advertising and media industries in New Zealand, with the prime function to "self-regulate advertising in New Zealand"²⁶⁴. Its members include advertisers, advertising agencies, television, radio, newspapers, magazines, community newspapers and cinema advertisers.²⁶⁵ According to a statement of its current chairman, the Advertising Standards Authority is "dedicated to ensure that not only does advertising comply with the law but it is also truthful and not misleading or deceptive, and that it is socially responsible"²⁶⁶.

²⁶² Advertising Standards Authority *Bugger... it's ok! The Case for Advertising Self-Regulation*, 6 www.asa.co.nz (accessed 17 May 2009).

²⁶³ Advertising Standards Authority *Who we are* www.asa.co.nz (accessed 17 May 2009).

²⁶⁴ *Bugger... it's ok! The Case for Advertising Self-Regulation*, above n 255, 6.

²⁶⁵ Advertising Standards Authority *Chairman's Statement* www.asa.co.nz (accessed 17 May 2009).

²⁶⁶ *Ibid*

3 *The Code for Advertising to Children*

The Code for Advertising to Children is one of twelve specific codes that the Advertising Standards Authority has formulated in addition to their Advertising Code of Ethics. All members of the Advertising Standards Authority voluntarily agreed to abide these codes in accordance with self-regulatory principles.²⁶⁷

The Code for Advertising to Children, which is under constant review, consists mainly of four principles:²⁶⁸

- Advertisements should comply with the laws of New Zealand and appropriate media and industry Codes.
- Advertisements should observe a high standard of social responsibility.
- Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive children, abuse the trust of or exploit the lack of knowledge of children, exploit the superstitious or without justifiable reason play on fear.
- Advertisements should not encourage inappropriate purchase or use including excessive consumption.

To give a better understanding of those four principles, the code comprises guidelines to all principles but the first.²⁶⁹

²⁶⁷ Ibid).

²⁶⁸ Code for Advertising to Children 2006 (NZ).

²⁶⁹ See appendix 1.

4 The Complaints Procedure

Any person who thinks that any advertisement in any media contains a violation of the Code for Advertising to Children (or any of the other codes) can complain about that to the Advertising Standards Complaints Board.²⁷⁰ The Advertising Standards Complaints Board was established in 1988 to adjudicate on complaints, report to the Advertising Standards Authority about any concerns, and to advise the ASA on interpretation and possible improvements of the codes.²⁷¹ Complaints should be in writing and involve a copy of the advertisement or the date, time and station of the broadcast of the advertisement.²⁷² After the decision of the chairman of the Advertising Standards Complaints Board that the complaint is suitable for decision and within the Board's jurisdiction, the complaint will be sent to all involved parties to seek their opinions and comments.²⁷³ If the complaint proceeds, the Board will decide whether one of the codes has been breached and inform all parties and the media of their decision.²⁷⁴ If an advertisement has been found to breach one of the codes, the advertiser is requested to "voluntarily immediately withdraw the advertisement" in accordance with self-regulatory principles.²⁷⁵ In addition to that the Advertising Standards Authority also asks the media not to publish or broadcast the advertisement any more.²⁷⁶ If any of the concerned parties do not agree with the decision of the Board, they have the possibility to appeal that decision.²⁷⁷

²⁷⁰ Advertising Standards Authority *How to make a complaint* www.asa.co.nz (accessed 17 May 2009).

²⁷¹ Advertising Standards Authority *Advertising Standards Complaints Board* www.asa.co.nz (accessed 17 May 2009).

²⁷² *How to make a complaint*, above n 262.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

In 2007, 668 advertisements have been subject to complaints, and the average time to process one of them was only 25 working days.²⁷⁸ In 2008, only 3 complaints have been made relating to a violation of the Code for Advertising to Children, in the last five years it have never been more than 11.²⁷⁹ The code for advertising to children is currently under review, and any person had the chance to comment until 13 May 2009²⁸⁰.

B The Approach of the European Union

The push for a European-Union wide ban on advertising aimed at children was launched by Sweden – a country that has a ban in place for eighteen years now – in 2001, when it held the European Presidency for half a year.²⁸¹ An adviser in the Swedish Culture Ministry justified this approach by saying that “children cannot understand fully what advertising is about so it is impossible for there to be a state fair play”.²⁸² But so far the Swedish approach has not been accepted by a majority of the Member States of the European Union, and – given the provisions of the latest Directive²⁸³ dealing with advertising aimed at children – a pan-European ban is not very likely. Nevertheless, there are several European provisions dealing with advertising aimed at children, and the issue is very prominent in today’s debate.

²⁷⁸ *Bugger... it's ok! The Case for Advertising Self-Regulation*, above n 255, 6.

²⁷⁹ Advertising Standards Authority *Annual Report 2008* 25 www.asa.co.nz (accessed 9 November 2009).

²⁸⁰ Advertising Standards Authority *Consultation on the review of the Code for Advertising to Children and the Code for Advertising of Food* www.asa.co.nz (accessed 17 May 2009).

²⁸¹ Push for EU Ban on TV Adverts That Target Children www.telegraph.co.uk (accessed 9 November 2009).

²⁸² *Ibid.*

²⁸³ European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27.

1 The "Television Without Frontiers" Directive

(a) Background

The Member States of the European Union very early decided on a common position on how to regulate the audiovisual market throughout the European Union. This was done to create "the conditions necessary for unrestricted broadcasting across the territory of [the] Member States".²⁸⁴ In 1989 the European Council adopted a Directive "on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities"²⁸⁵, better known as the "Television Without Frontiers" Directive. With the advent of digital television in the mid-nineties the audiovisual landscape of the European Union considerably changed, and the rapid development caused by technological progress since then required a substantial revision of the terms of the Directive to provide for an "up-to-date regulatory framework adapted to digital broadcasting".²⁸⁶ Therefore on 30 June 1997 the European Parliament and the European Council adopted a revised version²⁸⁷ of the "Television Without Frontiers" Directive, clarifying certain legal concepts, introducing new rules and especially increasing protection for children.²⁸⁸

One of the most important amendments was the introduction of the "Principle of Establishment" to clarify which Member State has jurisdiction over a certain broadcaster, a provision that was missing in the original

²⁸⁴ Aubry, Patrice *The "Television Without Frontiers" Directive, Cornerstone of the European Broadcasting Policy* (2000) 3 www.obs.coe.int (accessed 31 July 2009).

²⁸⁵ Council Directive (EEC) 89/552 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23.

²⁸⁶ *The "Television Without Frontiers" Directive, Cornerstone of the European Broadcasting Policy*, above n 276, 3,4.

²⁸⁷ European Parliament and Council Directive (EC) 97/36 [1997] amending the Council Directive 89/552/EEC [1997] OJ C202/60.

²⁸⁸ *The "Television Without Frontiers" Directive, Cornerstone of the European Broadcasting Policy*, above n 276, 4.

directive, but was later established by the European Court of Justice, particularly in the cases *Commission v United Kingdom*²⁸⁹, *Commission v Belgium*²⁹⁰ and *VT4 v Flemish Community of Belgium*²⁹¹. The “Principle of Establishment” means that a broadcaster falls under the jurisdiction of the Member State in which it is established. In its decision in *VT4 v Flemish Community*²⁹² the court further extended the principle, stating that “broadcasters established in more than one State fall within the jurisdiction of the Member State where they have their centre of activity, namely where scheduling decisions are taken”.²⁹³ This Principle of Establishment is now codified in Article 2.3 of the revised Directive²⁹⁴.

(b) Content related to advertising aimed at children

Article 2 of the revised Directive²⁹⁵ states that “Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive”.²⁹⁶ The protection of minors is considered to be already fully regulated by Community law, which means that a receiving state is not allowed to take any measures to control television programmes broadcast from a foreign Member State, because only that other Member State then has jurisdiction over the broadcaster.²⁹⁷ Article 2a gives the possibility to make an exception of this

²⁸⁹ Case C-222/94 *Commission v United Kingdom* [1996] ECR I-4025.

²⁹⁰ Case C-11/95 *Commission v Belgium* [1996] ECR I-4115.

²⁹¹ Case C-56/96 *VT4 v Flemish Community of Belgium* [1997] ECR I-3143.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ European Parliament and Council Directive (EC) 97/36 [1997] amending the Council Directive 89/552/EEC [1997] OJ C202/60.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*, art 2.

²⁹⁷ *The “Television Without Frontiers” Directive, Cornerstone of the European Broadcasting Policy*, above n 276, 6.

rule in the case that a "television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22".²⁹⁸

Article 22 of the revised Directive²⁹⁹, which deals with the protection of minors, states that:³⁰⁰

Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

The first sentence of Article 22 defines programmes that are subject to an absolute ban: Those that "might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence".³⁰¹ The second sentence regulates what to do with programmes that are "likely to impair" – not "seriously" impair as in the first sentence – "the physical, mental or moral development of minors".³⁰²

Article 22 does not explicitly deal with advertising directed at children, even though some commercial could theoretically fall into one of the categories that are regulated in Article 22. The provision that explicitly deals with advertising directed at children is Article 16. It reads as follows:³⁰³

²⁹⁸ European Parliament and Council Directive (EC) 97/36 [1997] amending the Council Directive 89/552/EEC [1997] OJ C202/60, art 2a.

²⁹⁹ Ibid.

³⁰⁰ Ibid, art 22.

³⁰¹ Ibid, art 22.

³⁰² Ibid, art 22.

³⁰³ Ibid, art 16.

Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

- (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
- (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust minors place in parents, teachers or other persons;
- (d) it shall not unreasonably show minors in dangerous situations.

In addition to that, Article 15a states that Television advertising for alcoholic beverages “may not be aimed specifically at minors or, in particular, depict minors consuming these beverages”.³⁰⁴

2 *The Madelin Report*

(a) Background

In October 2005 the European Union set up an ad hoc Round Table on Advertising Self Regulation “in response to a request by advertisers for guidance and support at the current stage of their endeavours” with participants from the European Commission, some NGOs and representatives of the European Advertising Standards Alliance.³⁰⁵ The aim of the Round Table was to find a clearer definition of a best practice model for self-regulation, clarifying the responsibilities between Self-Regulation Organisations, government and other authorities.³⁰⁶ In 2006, a report was released under the name “Madelin Report”³⁰⁷ – named after the chairman

³⁰⁴ *Ibid*, art 15a.

³⁰⁵ “Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties”, above n 13, 5, 8.

³⁰⁶ *Ibid*, 5.

³⁰⁷ “Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties”, above n 13.

Robert Madelin - containing the findings and recommendations of the Round Table.

(b) Findings and recommendations

The Madelin Report explained the concept of advertising self-regulation, analysed the current models of self-regulation across the European Union and identified the weaknesses and strengths of advertising self-regulation. In conclusion, the report recommended a best practice model, based on four key determinants:

Firstly, the best practice model demands a high level of effectiveness from self-regulation organisations. To achieve this, the report amongst other things proposes the implementation of performance objectives, clear and effective sanctions for non-compliance with codes or offences and the introduction of a duty to publish decisions.³⁰⁸

Secondly, to get public acceptance of the self-regulation on advertising, openness, independence and transparency are seen as indispensable. Therefore actions of the organisation should be monitored and adjudication bodies should – at least partially – consist of impartial persons.³⁰⁹

Thirdly, self-regulation organisations should be given a “global coverage for all type of marketing or commercial communication”.³¹⁰ The Member States need to provide basic legal requirements for this.

Fourthly, effective self-regulation organisations need “strong political support for industry voluntary funding”.³¹¹

³⁰⁸ Ibid, 5-6.

³⁰⁹ Ibid, 6.

³¹⁰ Ibid.

The report regards self-regulation as the preferred choice “among the menu of regulatory options”.³¹² Self-regulation provides “the least costly, most effective, most proportionate and sufficiently legitimate response to public policy interventions at EU level”, while regulatory interventions can sometimes be ineffective due to the “increasing complexity in society and the pace of social change”.³¹³ Therefore the report came to the conclusion that self-regulation “would drive up quality across the EU”.³¹⁴ Even though best practice model proposed by the report seems to be “rather challenging for self-regulation practitioners”, as Robert Madelin himself stated, it nevertheless reflects an “almost unprecedented almost unprecedented in-depth exchange between practitioners and stakeholders on the desired components of best-practice self-regulation in one sector”³¹⁵ that for the first time gives a practical solution. As the proposed best practice model comprises all forms of advertising, it also applies to the regulation of advertising directed at children.

3 *The EU Audiovisual Media Services Directive*

(a) Background

Since 1989, when the “Television Without Frontiers” Directive “defined the first set of rules for television broadcasting in the European Union”, audiovisual Europe “has seen tremendous change”.³¹⁶ New opportunities to deliver audiovisual content meant a new challenge for regulatory bodies. Therefore the legal framework needed to be adapted “to

³¹¹ Ibid, 7.

³¹² Ibid, 4.

³¹³ Ibid, 10.

³¹⁴ Ibid, 12.

³¹⁵ Ibid, 3.

³¹⁶ European Commission *TV, online, on-demand: Modern Rules for Audiovisual Europe 1* <http://ec.europa.eu> (accessed 31 July 2009).

the new audiovisual environment".³¹⁷ In 2007 the European Parliament and the European Council passed the so called "EU Audiovisual Media Services Directive"³¹⁸ to replace the old "Television Without Frontiers" Directive while preserving the core principles of the existing television rules. The reasons for the amendment were technological developments and the attempt to create a "level playing field in Europe for emerging audiovisual media".³¹⁹

The aim of the Directive is to make "EU rules on TV advertising less detailed and more flexible and focused on future trends to make it easier for service providers to finance their programmes and for users to recognise commercial messages".³²⁰ The new Directive tries to "support the development of new business opportunities without jeopardizing important public interests such as the protection of minors and human dignity".³²¹ To achieve this, the Directive – following in parts the recommendations of the Madelin Report³²² – promotes "Member State use of self- and/or co-regulatory measures while eschewing new licensing schemes".³²³

The Member States of the European Union have to implement the EU Audiovisual Media Services Directive³²⁴ into national law at the latest two years after the entry into force of the Directive, which is on 19 December 2009. As of 18 December 2008, only Romania had "completed

³¹⁷ Ibid.

³¹⁸ European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27.

³¹⁹ European Commission *Audiovisual Media Services Directive (AVMSD)* <http://ec.europa.eu> (accessed 31 July 2009).

³²⁰ European Commission *Audiovisual Media Services without Frontiers: Frequently Asked Questions* (2008) 1 <http://ec.europa.eu> (accessed 31 July 2009).

³²¹ *TV, online, on-demand: Modern Rules for Audiovisual Europe*, above n 308, 1.

³²² "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13.

³²³ *TV, online, on-demand: Modern Rules for Audiovisual Europe*, above n 308, 1.

³²⁴ European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27.

the necessary steps to fully implement the new Directive”, while the other twenty-six Member States, the European Economic Area countries and the candidate countries had not been able to do so.³²⁵ While in some Member States – like Germany or the UK – stakeholders had not even been consulted, other countries had already implemented at least some of the rules or at least had prepared drafts for parliamentary procedures.³²⁶

(b) Content related to advertising aimed at children

The first important amendment is that the measures of protection that the old “Television Without Frontiers” Directive guaranteed for children is extended to on-demand services. The new Article 3h of the Directive states that:³²⁷

Member States shall take appropriate measures that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand audiovisual media services.

This can be achieved by password protection, encryption or other technical means.³²⁸

The provisions of Article 16 of the old Directive have been literally adopted in the new Article 3e (1g).

³²⁵ *Audiovisual Media Services without Frontiers: Frequently Asked Questions*, above n 312, 3.

³²⁶ *Ibid*

³²⁷ European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27 art 3h.

³²⁸ *Audiovisual Media Services without Frontiers: Frequently Asked Questions*, above n 312, 6.

The prohibition of advertising for alcoholic beverages aimed at children can now be found in Article 3e (1e) of the new Directive, which states that "audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages".³²⁹

The new Article 3e of the Directive also addresses for the first time the issue of unhealthy foods in advertisements linked to children's programmes.³³⁰ Article 3e(2) states that:³³¹

Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

C The Approaches of the Member States

1 Ban of advertising aimed at children

The strictest approach to advertising aimed at children is to totally ban it. This is an approach pursued by Sweden. According to Section 7b of the Swedish Radio and Television Act³³² advertising "may not occur immediately before or after a programme or part of a programme that is

³²⁹ European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27 art 3e(1e).

³³⁰ *TV, online, on-demand: Modern Rules for Audiovisual Europe*, above n 308, 2.

³³¹ European Parliament and Council Directive (EC) 2007/65 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27 art 3e(2).

³³² Radio- och TV-lag (Radio and Television Act) 1996 (SWE).

primarily addressed to children under 12 years of age".³³³ Section 4 of the Act states that "commercial advertising in a television broadcast may not be designed to attract the attention of children less than 12 years of age".³³⁴ It also ascertains that "individuals or characters who play a prominent role in programmes which are primarily aimed at children under 12 years of age may not appear in commercial advertising in a television broadcast".³³⁵

This very strict approach is only followed by one other European Member States, which is Norway, but a similar approach is used in the Canadian province of Quebec.

2 *Restriction of advertising aimed at children*

Most Member States of the European Union do not totally ban advertising aimed at children, but provide restrictive regulatory frameworks. Those can be put into three different categories depending on the relationship between self-regulation and the law.³³⁶

(a) Self-regulation within a strong legislative framework

In a lot of the Member States like Ireland, the Netherlands, Spain and the UK, legislation "allows extensive scope for self regulation".³³⁷ In these countries self-regulation organisations have a lot of power and a broad jurisdiction. In some of these countries there have been initiatives to reduce those powers and strengthen regulatory measures to "reinforce the levels of

³³³ Ibid, sec 7b.

³³⁴ Ibid, sec 4.

³³⁵ Ibid, sec 4.

³³⁶ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13, 17.

³³⁷ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13, 15.

protection” on some issues like alcohol and food advertising to children.³³⁸ In other countries like France advertising is subject to “extensive legislative regulation”, but nevertheless self-regulation organisations play an important role “by fulfilling a complimentary role to legislation”.³³⁹

(b) Self-regulation restricted by law

The situation in countries like Germany or Austria is different. Due to the presence and detail of legislation there is only limited scope available for self-regulation to operate.³⁴⁰ Germany for example has an “extensive legal framework relating to advertising” and detailed provisions for its regulation and supervision.³⁴¹ The special situation in Germany is also that “statutory authorities are responsible for applying self-regulatory rules”, not self-regulation organisations.³⁴² These statutory authorities are “constituted by law and legally bound to supervise broadcasting and media services”.³⁴³

(c) Emerging self-regulatory systems

Some Member States, which might be called the “new” Member States of Central and Eastern Europe, do not have an established tradition of advertising self-regulation, but are in the process of defining the relationships of their self-regulation organisations with statutory regulation and consumers.³⁴⁴

In the Czech Republic for example, in 1994 a self-regulatory body called “Rada Por Reklamu” was established as the Czech Advertising

³³⁸ Ibid.

³³⁹ Ibid, 16.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid, 17.

Standards Council, and its general assembly adopted a Code of Advertising Practice.³⁴⁵ The Czech Act Nr. 231/2001 imposes obligations on broadcasters by stating that “the broadcaster shall not include in the broadcasting any programme units that may seriously affect the physical, mental or moral development of minors”.³⁴⁶ Art. 48(2) of the Act grants the same level of protection as Article 3e(1g) of the new “EU Audiovisual Media Services” Directive. There are other provisions in Czech law regulating advertising directed at children, but there is no total ban like in other countries. The Czech approach therefore is not too strict about advertising aimed at children and uses self-regulation for the enforcement of their provisions. The legal frameworks in other “new” Member States like Poland and Hungary are very similar to the one in the Czech Republic.³⁴⁷

C Effectiveness of the Different Approaches

The important question relating to the different approaches is how effective they are in respect of the protection of children from the possible harm of advertising aimed at them. This chapter will analyse the effectiveness of a ban of advertising aimed at children and of self-regulation in general and in New Zealand.

1 Effectiveness of a ban

The question of the effectiveness of a ban on advertising aimed at children is hard to answer. On the one hand, a total ban does protect children from the possible harms of advertising directed at them

³⁴⁵ “Regulation on Advertising Aimed at Children in Europe: The Legal Framework Provided for by Overarching European Rules and the Laws of 26 European Countries”, above n 27, 33.

³⁴⁶ Zákon č 231/2001 ze dne 17 května 2001 o provozování rozhlasového a televizního vysílání a o změně dalších zákonů (Act Nr 231/2001 Coll on Radio and Television Broadcasting Operation and on Amendments to Other Acts) 2001 (CZ), art 32(1e).

³⁴⁷ “Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties”, above n 13, 17.

For Sweden, where advertising aimed at children under the age of 12 years is banned since 1991, there exist no significant studies yet. One reason for that might be that Swedish children are able to watch television channels that are broadcasted from other countries, which the Swedish ban does not apply to. European law forbids Sweden to regulate retransmission on their territory of television broadcasts from other Member States. Therefore Swedish children are still exposed to advertising aimed at children, as long as the advertising is allowed in the country of origin of the broadcast. This makes it very hard to conduct significant research on the effectiveness of the ban of advertising aimed at children under the age of 12 years.

For Quebec, a province of Canada where advertising aimed at children under the age of 13 is forbidden since 1980 according to the Consumer Protection Act³⁴⁸, the results of a study on the effects of that ban have been released in 2007. Two researchers of the University of Columbia in Vancouver, Kathy Baylis and Tirtha Dhar, examined the effect of the advertising ban on the consumer food choice in Quebec.³⁴⁹ The unique feature of this research was that it used a "different-in-different approach, comparing Francophones and Anglophones in Quebec to their neighbours in Ontario" and also took into account so-called Allophones (families "whose mother tongue is neither French nor English").³⁵⁰ This approach was seen to be necessary due to the fact that English-speaking children in Quebec seem to have more access to media from outside Quebec than French-speaking children.³⁵¹ The different-in-different approach was also used in comparing families with and without children in Quebec and Ontario, where there is no ban on advertising aimed at children.³⁵² The fact that the ban only applies to advertising broadcasted in Quebec, and not to advertisings originating from

³⁴⁸ Consumer Protection Act RS Q 2009 c P-40.1, s 248.

³⁴⁹ Baylis, Kathy and Dhar, Tirtha *Effect of the Quebec Advertising Ban on Junk Food Expenditure* <http://works.bepress.com> (accessed 12 November 2009).

³⁵⁰ *Ibid.*, 2.

³⁵¹ *Ibid.*, 1.

³⁵² *Ibid.*, 2.

elsewhere, was also incorporated into the findings of the research.³⁵³ The very interesting conclusion of the research paper was that due to the ban "families with kids living in Quebec spend significantly less on fast food than their Ontario counterparts".³⁵⁴ Furthermore, because of the ban, French-speaking families living within Quebec, who are more affected by the ban due to their mother tongue, "spend less on fast food" than English-speaking families living within Quebec, while the difference between the same groups in Ontario is "much smaller".³⁵⁵ Interestingly, the research showed that once the families are in a fast food restaurant, the difference in expenditure is only marginally between the different groups; the ban only has an effect on the probability of purchasing fast food at all.³⁵⁶ The researchers concluded that there was "a myriad of evidence that indicates that the ban had an effect on the number of fast food meals purchased".³⁵⁷

This research indicates that a ban of advertising aimed at children can be an effective measure to reduce the effect that harmful advertising can have on children. A total ban does protect children from the possible harm that such advertising can have on them due to their lack of understanding of the underlying purposes of advertising. On the other hand, a total ban of advertising aimed at children is the strongest possible restriction of the freedom of speech of the affected advertisers (but is nevertheless justified, as the judgment of the Supreme Court of Canada in *Irwin Toy Ltd v Quebec*³⁵⁸ confirmed). A total ban forbids all kinds of advertising aimed at children, including advertising that does not try to exploit the vulnerability and inexperience of children relating to advertising. In other words, a total ban of advertising aimed at children does not only protect children from harmful advertising, but from all forms of advertising. This will also include advertisements for food that is considered healthy or advertising that tries to

³⁵³ Ibid, 6.

³⁵⁴ Ibid, 31-32.

³⁵⁵ Ibid, 32.

³⁵⁶ Ibid.

³⁵⁷ Ibid, before 1.

³⁵⁸ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112.

educate children and promotes socially acceptable behaviour. Therefore a total ban seems to be less favourable as a means to protect children from the possible harm of advertising.

2 *Effectiveness of self-regulation*

There is a tendency towards self-regulation of advertising aimed at children not only within the Member States of the European Union. Several other countries, including New Zealand, have delegated the subject of the regulation of advertising aimed at children to self-regulatory bodies. Self-regulation is a system "by which the advertising industry actively polices itself", working together to agree on "standards and to set up a system to ensure that advertisements which fail to meet those standards are quickly corrected or removed."³⁵⁹ It is praised to be "useful and effective" when it comes to the regulation of advertising.³⁶⁰

(a) In general

Self-regulation has the advantage of being more flexible than direct regulatory interventions by the state, as the latter may require more complex procedures. The "increasing complexity in society" and "the pace of social change", especially in the area of media advertising, asks for solutions that are flexible, but on the other hand also effective and preferably cost-efficient.³⁶¹ All these criteria can be fulfilled by self-regulatory systems that reflect the best-practice model developed by in the Madelin report.³⁶² However, the "real world practice" of self-regulation today falls short on nearly all of the requirements that define the best-practice model.³⁶³ The

³⁵⁹ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13, 8.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Ibid.*

critique is that even though self-regulation may help advertisers "internalize accepted social values while promoting moral adhesion to these values",³⁶⁴ in reality the self-interest of the participants undermines this intent of self-regulation.³⁶⁵

In relation to the protection of children from the possible harms of advertising, researchers are not sure about the effectiveness of self-regulatory systems in this area. If the standards set by the self-regulatory body are sufficient enough – including for example a prohibition of advertising aimed at children that contains violence or a prohibition of excessive promotion of unhealthy food – self-regulation seems to be a very effective measure to protect children from harmful advertising. The concern that remains with every self-regulatory approach is that "industry monitoring of its own activities" might lead to "standards so liberal that they afford minimal protection to consumers".³⁶⁶

(b) In New Zealand

The example of the self-regulatory system of New Zealand emphasises these concerns. While the Advertising Standards Authority itself praises the effectiveness of its self-regulatory system and the commitment of the New Zealand advertising industry,³⁶⁷ research shows different results. A look at the statistical data of the Advertising Standards Authority from 2000 to 2004 showed that the number of complaints not accepted rose continuously while, in contrast, the number of complaints upheld

³⁶⁴ Boddewyn, Jean "Advertising Self-Regulation: True Purpose and Limits" (1989) 18 J Advertising 19, 20.

³⁶⁵ Jones, Sandra and Donovan, Robert "Self-Regulation of Alcohol Advertising: Is It Working for Australia?" (2002) 2 J Pub Aff 153, 163.

³⁶⁶ "Self-Regulation, Marketing Communications and Childhood Obesity: A critical Review from New Zealand", above n 67, 142.

³⁶⁷ *Bugger... it's ok! The Case for Advertising Self-Regulation*, above n 255, 6, 14.

declined.³⁶⁸ However, as no independent studies exist, the question of the effectiveness of the self-regulatory system in New Zealand remains unclear.

In relation to the protection of children from the possible harm of advertising, the Code for Advertising to Children could be more effective from a legal point of view. The rules contained in the Code are very broad, although dealing with all issues that research has shown to be possibly harmful for children in the relevant guidelines. However, the Code lacks a definition of the term aimed at children, and, in contrast to the regulations in other jurisdictions, it does not give any criteria that could help identify advertising aimed at children. This, together with the very broad principles, makes the Code very vague and leads to the conclusion that it is more of a framework for case-by-case decisions of the Complaints Board, and not a regulation that sets clear boundaries for the advertising industry in respect of their rights and duties relating to advertising aimed at children. Another observation supports this impression: There are no severe consequences for a violation of the code. The worst thing that can happen to advertisers in case of a complaint is that they are requested to "voluntarily immediately withdraw the advertisement" in accordance with self-regulatory principles.³⁶⁹ In addition to that the Advertising Standards Authority can also ask the media not to publish or broadcast the advertisement any more.³⁷⁰ Other than that, there is no further consequence. There's no pecuniary fine or anything similar. This leads to the conclusion that the Code is a rather toothless instrument when it comes to infringements. A clearer definition of its scope and a set of more severe consequences for the case of a violation of the code would help to protect children from the possible harm of advertising more effectively.

³⁶⁸ "Self-Regulation, Marketing Communications and Childhood Obesity: A critical Review from New Zealand", above n 67, 148.

³⁶⁹ *How to make a complaint*, above n 262.

³⁷⁰ *Ibid.*

V CONCLUSION

The market for children's products, along with those for pet foods and gifts, is a market where the purchasers usually are not the users. The unique thing about children's products is "that pets do not respond to advertising, nor vocalise their desires; and gift recipients do so only rarely".³⁷¹ Therefore the most widespread persuasive strategy for advertising aimed at children is to associate the product with fun and happiness, rather than to provide any factual product-related information".³⁷² Studies suggest that children need "some kind of protection from advertising to prevent exploitation of their "inexperience or their natural credulity and sense of loyalty".³⁷³ The common conclusion from all the studies is that young children under the age of 7 or 8 "cannot distinguish readily between advertising and editorial messages, and are unduly susceptible to persuasion as a result".³⁷⁴ This means that advertising aimed at children can be harmful for children, even though it does not always have to be.

As this research paper has shown, advertising can lead to an immediate and short-term effect on children's desire to acquire certain goods and products.³⁷⁵ When parents are not able and/or willing to grant all purchase requests of their children, this can lead to serious parent-child conflicts. While some argue that the parents "have the primary responsibility for the upbringing and development of their children",³⁷⁶ this does not reflect the actual situation nowadays when it comes to the exposure to advertising. There is a growing tendency towards the privatization of media use of children.³⁷⁷ The results of a study showed that a most children in the

³⁷¹ "The challenge of advertising to children", above n 84, 12.

³⁷² *Report of the APA Task Force on Advertising and Children – Section: Psychological Issues in the Increasing Commercialization of Childhood*, above n 5, 4-5.

³⁷³ "Advertising and Children: What do the kids think?", above n 3, 376.

³⁷⁴ "What advertising means to children", above n 4, 41.

³⁷⁵ *Children and television advertising*, above n 1, 33.

³⁷⁶ Advertising on Television – Getting it Right for Children www.nztbc.co.nz (accessed 10 November 2009).

³⁷⁷ *Report of the APA Task Force on Advertising and Children – Summary of Findings and Conclusions*, above n 52, 3.

United States of America "have televisions in their bedrooms, and many children also have unsupervised access to computers", which leads to a situation where much of the media (and advertising) content that children are exposed to is "in contexts absent parental monitoring and supervision".³⁷⁸ This tendency and the emergence of the new media are used by advertisers to "bypass parents and directly target children".³⁷⁹ Therefore advertising aimed at children needs to be subject to regulation.

The problem with a regulation of advertising aimed at children is that this is in conflict with the freedom of expression. As this paper showed, the courts in many jurisdictions nowadays grant advertising as commercial speech protection under the freedom of expression, even though the scope of that protection is limited. For the limitation of commercial expression, the courts accepted several reasons as justifications for a limitation of the freedom of expression, including "pressing and substantial in a free and democratic society",³⁸⁰ the protection of "public health",³⁸¹ "for the protection of the reputation or the rights of others"³⁸² or "a substantial governmental interest".³⁸³ In *Irwin Toy Ltd v Quebec (Attorney General)*³⁸⁴, the Supreme Court of Canada allowed a total ban on advertising aimed at children – the strongest form of restriction – for the purpose of protecting children.

The effectiveness of a total ban of advertising aimed at children is not without controversy, but recent research on the ban in place in Quebec shows that it can have a positive effect on children's eating habits.³⁸⁵ Nevertheless, a total ban seems to go too far, as it also takes advertising

³⁷⁸ Ibid.

³⁷⁹ "Food Marketing to Children and the Law", above n 69, 4.

³⁸⁰ *R v Oakes*, above n 244, 138-139.

³⁸¹ *R (on the application of British American Tobacco UK Ltd and five others) v Secretary of State for Health*, above n 201.

³⁸² Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13 September 2003, art 10 § 2.

³⁸³ *Central Hudson Gas & Electric Corporation v Public Service Commission of New York*, above n 174, 566.

³⁸⁴ *Irwin Toy Ltd v Quebec (Attorney General)*, above n 112, 927.

³⁸⁵ *Effect of the Quebec Advertising Ban on Junk Food Expenditure*, above n 314, before 1.

away from children that is not harmful, and is therefore a less favourable measure of regulation of advertising aimed at children. Self-regulation on the other hand can be a very effective tool to protect children from the possible harm of advertising. To fulfil this task though, the self-regulatory system needs to meet certain standards that have been explained in the Madelin report.³⁸⁶

Most jurisdictions do not give sufficient definitions of the key terms in their regulations, and this is also the case within New Zealand. The Code for Advertising to Children³⁸⁷ is very vague and seems to be more of a framework for case-by-case decisions of the Complaints Board, and not a regulation that sets clear boundaries for the advertising industry in respect of their rights and duties relating to advertising aimed at children. It does not contain any serious consequences for the case of a violation, which leads to the conclusion that the Code is a rather toothless instrument when it comes to infringements. A clearer definition of its scope and a set of more severe consequences for the case of a violation of the code would help to protect children from the possible harm of advertising more effectively.

In conclusion, it seems that regulation, whatever approach is followed, cannot solve the problem alone. Other instruments need to be established to protect children from possibly harmful effects of advertising. A good solution in addition to effective regulation is "to educate children and teenagers about the effects of advertising – media literacy".³⁸⁸ If children get taught how to become critical viewers of media in all of its forms, including advertising, this can help to protect them from "harmful effects of media, including the effects of cigarette, alcohol, and food advertising."³⁸⁹

³⁸⁶ "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", above n 13.

³⁸⁷ Code for Advertising to Children 2006 (NZ).

³⁸⁸ "Children, Adolescents and Advertising", above n 2, 2566.

³⁸⁹ Ibid.

VII APPENDICES

Appendix 1 – Advertising Standards Authority (ASA) Code for Advertising to Children

DEFINITIONS

For the purposes of this Code:

The term “**children**” means all persons below the age of 14.

“**Advertisement**” includes all advertisements in all forms of media directed at children whether contained in children’s media or otherwise. Reference should be made to the Interpretation section of the Codes of Practice.

“**Appropriate media and industry Codes**” includes the Television Broadcasters’ Council Children’s Broadcasting Code, and any other industry Codes endorsed by the ASA.

Principle 1 – Advertisements should comply with the laws of New Zealand and appropriate media and industry Codes.

Principle 2 – Advertisements should observe a high standard of social responsibility.

Guidelines

- 2(a) Advertisements should not portray violence, undue aggression, or menacing or horrific elements likely to disturb children.
- 2(b) Advertisements should not encourage anti-social behaviour or depict children behaving in an anti-social manner, eg. vindictiveness and bullying, unless the purpose of the advertisement is to discourage such behaviour.
- 2(c) Children in advertisements should not behave in a socially unacceptable manner, bearing in mind their age, unless the purpose of the advertisement is to discourage such behaviour.
- 2(d) Children should not be urged in advertisements to ask their parents, guardians or caregivers to buy particular products for them.

- 2(e) Advertisements should not suggest to children any feeling of inferiority or lack of social acceptance for not having the advertised product.
- 2(f) Advertisements, except safety messages, should not contain any statement or visual presentation that could have the effect of portraying children in unsafe acts, showing them in unsafe situations, encouraging them to consort with strangers, or behaving in an unsafe way.
- 2(g) Advertisements, except safety messages, should not show products being used in an unsafe or dangerous manner, or which would be unsafe if used by children without proper supervision.
- 2(h) Advertisements should not depict toy weapons which are realistic (in size, shape and colour) and can be confused with real weapons.
- 2(i) Advertisements should not portray sexually suggestive images, or images that are degrading to any individual or group.
- 2(j) Children should not be encouraged in advertisements to participate in gambling or gaming. (Refer to the Code for Advertising Gaming and Gambling)
- 2(k) Advertisements should not undermine the role of parents in educating children to be healthy and socially responsible individuals.
- 2(l) Persons, characters or groups who have achieved particular celebrity status with children shall not be used in advertisements to promote food or drink in such a way so as to undermine a healthy diet taking into account the Ministry of Health's 'Food and Nutrition Guidelines' for children.

Principle 3 – Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive children, abuse the trust of or exploit the lack of knowledge of children, exploit the superstitious or without justifiable reason play on fear.

Guidelines

- 3(a) Advertisements must be clearly recognisable as such by children and separated from editorial, programmes or other non-advertising material. If there is any likelihood of advertisements being confused with editorial or programme content, they should be clearly labelled “advertisement” or identified in a clear manner.
- 3(b) Advertisements should take into account the level of knowledge, sophistication and maturity of the intended audience. In particular advertisements should not be directed at younger children who may have a lack of ability to comprehend the purpose of advertising and differentiate between it and non-advertising messages.
- 3(c) Care should be taken to ensure that advertisements are able to be understood by children to whom the advertisements are directed, are not ambiguous, do not mislead as to the true size, value, nature, durability and performance of the advertised product and contain warning information if the product is unsafe when used by younger children.
- 3(d) If extra items are needed to use the product (eg. batteries) to produce the result shown or described (eg. paint, dolls clothes) this should be made clear. A product that is part of a series should be clearly indicated as such as well as the method of acquiring the series.
- 3(e) In the case of a product that must be assembled, this should be made clear, and where appropriate, the source of power and performance should be indicated.
- 3(f) If price is mentioned, the complete price of the product should be made clear, and advertisements should clearly indicate the cost of those items that constitute the original purchase and additional items that must be purchased separately.
- 3(g) Where reference is made to a competition the rules should be made clear and the value of prizes and the chances of winning should not be exaggerated.

- 3(h) Any reference to a premium (eg. an additional product or service offered free, at a reduced price or as a prize) should be clearly displayed and conditions relating to it should be clearly represented.
- 3(i) Care should be taken to ensure advertisements do not mislead as to the nutritive value of any food. Foods high in sugar, fat and/or salt, especially those marketed to and/or favoured by children, should not be portrayed in any way that suggests they are beneficial to health.

Principle 4 – Advertisements should not encourage inappropriate purchase or use including excessive consumption.

Guidelines

- 4(a) Children are not a homogeneous group but have varying levels of maturity and understanding. Care needs to be taken that the product advertised and style of advertisement are appropriate for the audience to whom it is primarily directed.
- 4(b) Advertisements soliciting responses incurring a fee to telephone or text should state, “Children ask your parents first” or similar words.
- 4(c) Extreme care should be taken in requesting or recording the names, addresses and other personal details of children to ensure that children’s privacy rights are fully protected and the information is not used in an inappropriate manner.
Note: Notice should also be taken of Principle 3 of the Privacy Act 1993.
- 4(d) Care should be taken with advertisements promoting a premium or loyalty/continuity programme to ensure that inappropriate purchase or excessive consumption was not a likely outcome.
- 4(e) For advertisements for food or beverages attention is drawn to the Code for Advertising Food and in particular Principle 3.

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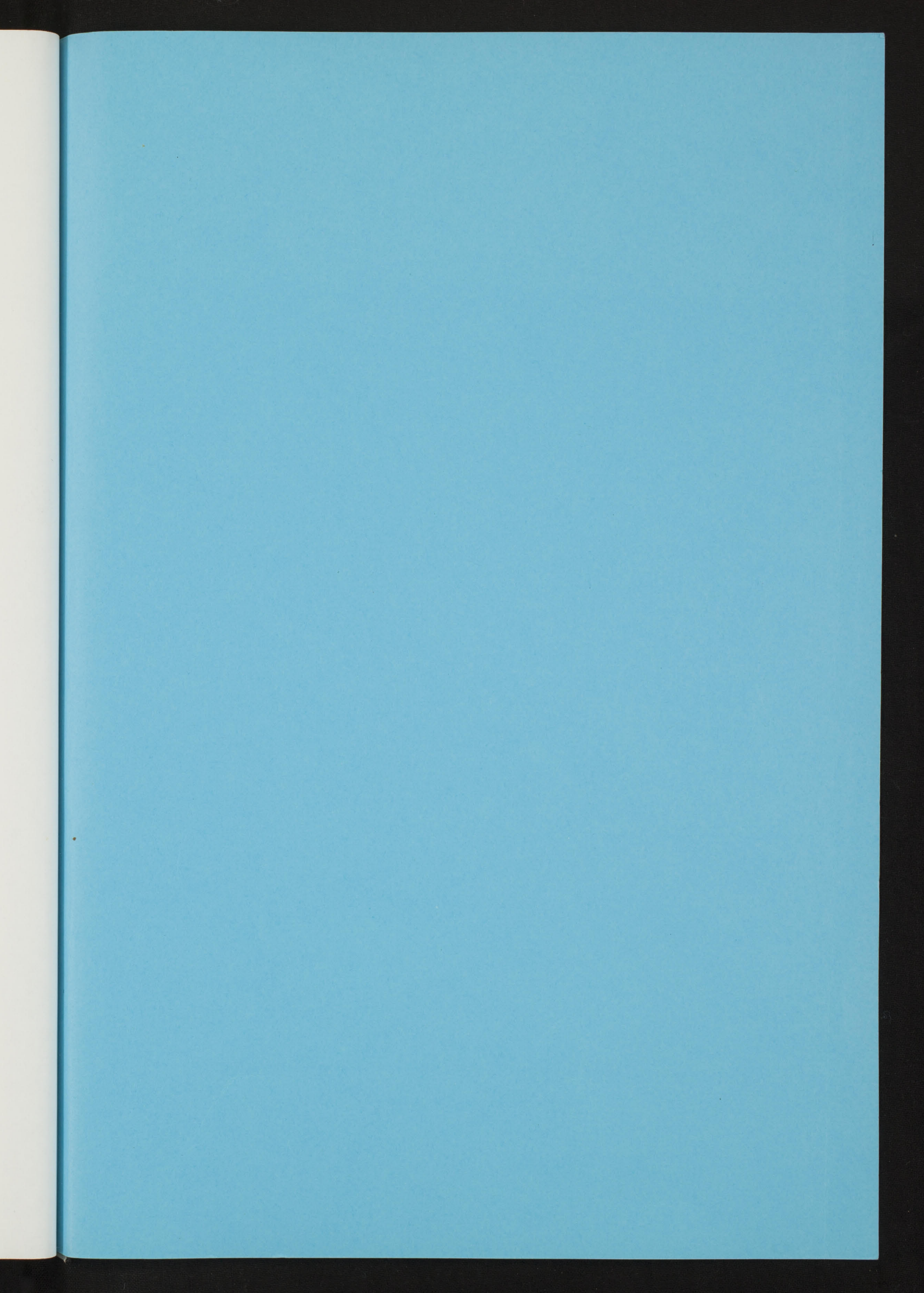
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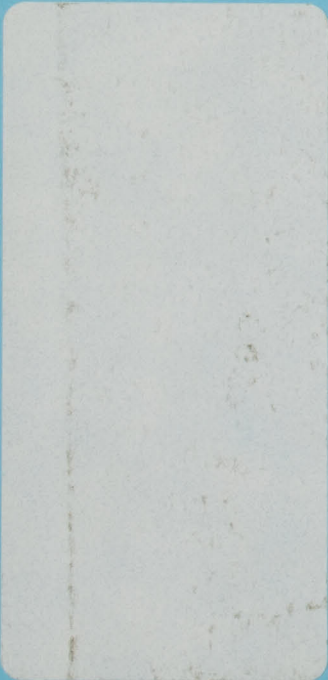
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