

Art Thou for Us, or for Our Adversaries?^{*} Communicative Action and the Regulation of Product Placement: A Comparative Study and a Tool for Analysis[†]

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This study compares product placement regulation in the United States, Europe, Canada, Australia, and Israel as it relates to the normative status of free speech and commercial speech and to the inclusion of commercial content in noncommercial broadcasting in each of these countries (or regions). It concludes that societies with a strong public broadcasting tradition, where clear lines are drawn between commercial and noncommercial speech, tend to be less tolerant of the practice of product placement, a form of undisclosed advertising inserted into broadcast content, even when it applies to commercial broadcasting. Additionally, this Article concludes that the extent to which lines are drawn between commercial and noncommercial speech in broadcasting better predicts the extent of product placement regulation in a given country than the measures taken to protect commercial speech. Drawing on the theories of “communicative action” and “public sphere,” this study advocates drawing a clearer distinction between various forms of commercial and noncommercial broadcasting so as to protect the public interest.

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^{*} *Joshua* 5:13.

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I. INTRODUCTION

In 2001, the Dutch broadcasting regulator fined a Dutch public broadcasting company for displaying the cover of a Mars bar in a made-for-television film, citing the practice of prohibited product placement even though the broadcaster had not been paid to do so.¹ That same year, another broadcasting company in Holland was fined for displaying the logo of Coca-Cola and the Dutch potato chip Wokkels for the same reasons, even though its purpose was to mock both corporations and no payment had been made for the product exposure.² In the United States,

1. PRICEWATERHOUSECOOPERS, FINAL REPORT STUDY ON CONSUMER LAW AND THE INFORMATIONAL SOCIETY 26 (2000) (citation omitted).

2. *Id.*

however, in 2003, ABC and Sears struck a deal, for which Sears was initially estimated to have paid more than \$1 million to air a program in which trucks delivered Sears brands from a Sears store, while plumbers and other workers from the Sears home-improvement services department undertook repairs,³ all without any regulatory interference. The existence of regulatory regimes with diverse approaches to the introduction of branded products seamlessly within television programs in a growing global television marketplace ranging from a total prohibition to total indifference, the legal foundations upon which they are based, and a theoretical framework seeking explanations within the assumptions underlying these legal constructs while offering universal ethical considerations in the construction of a generalized model for regulating broadcasting are the topics of this study.

It is common practice in commercial broadcasting to insert advertising during breaks in programming (or vice versa, as some might argue), a practice that is at the base of the economics of commercial television. But today's audiences are equipped with enough choice, as well as new technological advances, that allow them to ignore advertisements by zapping to other channels or skipping them with the help of digital video recorders.⁴ It is this observable fact that changed the well-established equilibrium in which broadcasters, advertisers, and audiences operate and contribute to the ever blurring distinction between creative and commercial content, planting the seeds for what has become a growing industry of cooperation of product promoters and entertainment product creators in a practice that embeds branded goods—seamlessly and without disclosure to audiences—into popular entertainment products, overriding entertainment and artistic considerations, in order to encourage their consumption. The resultant hybrid message creatively combines the advantage of control over the message provided to advertisers and the credibility of source gained by its seamless insertion into artistic content.⁵

3. Stuart Elliott, *On ABC, Sears Pays To Be Star of New Series*, N.Y. TIMES, Dec. 3, 2003, at C1.

4. The general media and trade journals consistently refer to this. See, e.g., Matthew Gilbert, *Catching Unsuspecting Viewers in a Time Warp: Networks Manipulate Schedules of Shows To Control Channel Switching*, BOSTON GLOBE, Dec. 19, 2004, at N6; William Shanley, *Ad Trend: Sponsors Buy into Reality TV; Companies Are Spending Big Bucks for Product Placements To Counter Digital Recorders and Changing Viewing Patterns but Risk an Audience Backlash*, DENV. POST, Oct. 17, 2004, at K-01.

5. Siva K. Balasubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, 23 J. ADVERTISING 29, 29-30 (1994).

While both the advertising and broadcasting industries seek more innovative ways to guarantee their economic viability, some regulators deliberate whether and how to respond to the change in accepted practices triggered by this technological challenge. An examination of the belief system underlying product placement regulation is made possible by demonstrating the connection, or lack thereof, between relevant principles guiding media and commercial speech regulation in the United States, Europe, Canada, Australia, and Israel, and is the focus of this study.

This study argues that a more truthful relationship between broadcasters and audiences can exist only when commercial and noncommercial speech (which may deserve equal protection) occupy separate and distinct spheres. One way to determine whether a system operates by this principle is to look at how it regulates the financing of its public broadcasters. Another is to examine how it regulates commercial speech. This study argues that the ability to separate commercial from noncommercial speech contributes more to evenhanded regulation and the preservation of freedom for all types of speech than merely granting protection to commercial speech.

II. REVIEW OF THE LITERATURE

A. *Media Systems*

It is common to regard policy as a reaction to a real or perceived social need rooted in the belief patterns that underlie an adopted system of regulation.⁶ Perhaps the best-known⁷ study that attempted to identify these beliefs, *Four Theories of the Press* (*Four Theories*), organized types of media policy around four theories: Authoritarian, Libertarian, Social Responsibility, and Soviet-Totalitarian.⁸ The significance of this classic study is not in its ideologically biased classification of media systems, but rather in the insight that theories organizing media systems differ in how they answer questions concerning the underlying belief systems of

6. See generally EMMETTE S. REDFORD, *THE REGULATORY PROCESS* (1969).

7. According to John C. Nerone, *The Four Theories of the Press Four and a Half Decades Later: A Retrospective*, 3 *JOURNALISM STUD.* 133, 135 (2002), it is “the all-time nonfiction bestseller” published by University of Illinois Press “with sales in six figures.” According to Kaarle Nordenstreng, *Beyond the Four Theories of the Press*, in *MEDIA AND POLITICS IN TRANSITION: CULTURAL IDENTITY IN THE AGE OF GLOBALIZATION* 97-109 (Jan Servaes & Rico Lie eds., 1998), it was “reprinted in more copies . . . [and] translated into more languages . . . than . . . any other textbook in the field of . . . mass communication.”

8. FRED S. SIEBERT ET AL., *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY, AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO* 7 (1956).

different societies. However, a growing number of scholars recognize that the study downplayed commercialism and advertising and the underlying beliefs concerning their role in society.⁹ Their role should be highlighted, others maintain, because of the “colonization” of the press by advertising and the crossing of a threshold in the commercialization of media, with the elimination of traditional distinctions between creative work and advertising.¹⁰

Four Theories, which drew both praise and criticism over the years, established one basic principle: The organization of the press reflects the *system of control* in a given society. Unfortunately, the only system of control *Four Theories* identified was control by the state, its (then) contemporary example being the Soviet Communist system. Later typologies added “advancing”¹¹ or “developmental” to the four theories to allow for a generalized description of media systems in the third world and the “democratic participant” theory in which control was ideally distributed equally to all members of society.¹² Yet another set of typologies identified other loci of control, such as commercial interests. These typologies included such models as “private ownership,” “public service corporation,” “controlled commercialism,” “partnership in the public interest” (the Swedish model), and mixed systems.¹³ A more generalized typology identified four theories by focusing on the motivation of the possessor of the control: The “authoritarian” is interested only in maintaining its own power and practices “restrictive” methods to achieve this; the “paternal” wishes to “guide and protect” the majority in adapting the ways of the minority by emphasizing what ought to be communicated; the “commercial” believes in the right of free choice but limits itself to producing content that will sell; and the “democratic” maintains open communication channels to alternative viewpoints.¹⁴ Focusing on the motivation of the broadcaster can also be

9. WILLIAM E. BERRY ET AL., *LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS* 110 (John C. Nerone ed., 1995).

10. ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-FIRST CENTURY* 138, 148-49 (2004).

11. J. HERBERT ALTSCHULL, *AGENTS OF POWER: THE ROLE OF THE NEWS MEDIA IN HUMAN AFFAIRS* 145 (1984).

12. DENIS MCQUAIL, *MASS COMMUNICATION THEORY: AN INTRODUCTION* 96-98 (1983).

13. SYDNEY W. HEAD, *WORLD BROADCASTING SYSTEMS: A COMPARATIVE ANALYSIS* 67-95 (1985).

14. RAYMOND WILLIAMS, *COMMUNICATIONS* 124-28 (2d ed. 1966). Needless to say, “democratic” or “democratic-participant” models of media organization are merely utopian theoretical constructs.

seen as an application of the “public sphere”¹⁵ theory to media. According to this theory, the public sphere is a domain open to all citizens in which individuals shed their personal, commercial, and political loyalties in order to conduct interest-free discourse that guarantees all participants an equal opportunity to express themselves.¹⁶ The outcomes of this discourse are decisions validated by the egalitarian and transparent process through which they were reached. Some literature identified the media and in particular noncommercial/public broadcasting, as the modern day equivalents of the public sphere.¹⁷

Public broadcasting takes one of three forms: a noncommercial corporation with a broad mandate to acculturate, exemplified by the Western European model; a government enterprise with a nationalistic duty, exemplified by models existing in various developing countries; or a default broadcaster aimed at filling the gaps in broadcasting fare not covered by commercial broadcasters, exemplified by the United States model.¹⁸ The sources of funding for each of these models can be the national budget, direct taxation (often called a license fee), advertising, or a combination of them.¹⁹ The specific mix of funding influences the content of public broadcasting, as it does the content of commercial broadcasting. The less reliant a broadcaster is on direct government subsidies or direct commercial income, the more it resembles a theoretical public sphere. Two models of independent public broadcasting emerged over the years in which the financing scheme was designed to ensure at least a façade of independence: the service largely funded by a license fee collected directly from the public²⁰ and the “Channel 4 model” of the unique British channel that existed for part of the 1980s and 1990s, which was funded by a share of the advertising revenues of commercial advertisers, without catering to or broadcasting

15. Jürgen Habermas, *The Public Sphere*, in JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 231, 231-36 (Steven Seidman ed., 1989) [hereinafter HABERMAS ON SOCIETY].

16. *Id.* at 231.

17. See PETER DAHLGREN, TELEVISION AND THE PUBLIC SPHERE: CITIZENSHIP, DEMOCRACY AND THE MEDIA 12-13 (1995).

18. See Amit Schejter, *Public Broadcasting, the Information Society, and the Internet: A Paradigm Shift?*, in PUBLIC BROADCASTING AND THE PUBLIC INTEREST 158, 160-62 (Michael P. McCauley et al. eds., 2003).

19. BROADCASTING FINANCE IN TRANSITION: A COMPARATIVE HANDBOOK 18, 285 (Jay G. Blumler & T.J. Nossiter eds., 1991).

20. See Martin Cave, *Public Service Broadcasting in the United Kingdom*, 9 J. MEDIA ECON. 17, 23 (1996).

advertising in itself.²¹ Indeed, even these “pure” models often require a renewed parliamentary or governmental decision regarding the amount of funds the broadcaster may collect, necessarily subjecting those broadcasters to indirect political pressures that may potentially affect content.²²

B. Product Placement

Long a practice accepted within the movie industry²³ and the radio industry,²⁴ the introduction of product placement to television in the United States dates to the 1950s.²⁵ It only started making significant inroads in television, however, in the late 1980s.²⁶ In some countries, most notably Brazil, it has been an element of broadcasting since the 1960s.²⁷ In the United States, media reports estimate that advertisers paid more than \$300 million to producers and the six networks during the 2003-04 television season²⁸ and that the total expenditure on television product placements grew to \$941.2 million in 2005.²⁹ Senior executives forecast that in three to four years, product placement will be evident in seventy-five percent of all prime-time scripted shows.³⁰ The total product placement industry (broadcasting and film) is estimated to be growing at a rate of about sixteen percent a year, and for the first time, it seems that

21. Georgina Born, *Strategy, Positioning and Projection in Digital Television: Channel Four and the Commercialization of Public Service Broadcasting in the UK*, 25 MEDIA, CULTURE & SOCIETY 773, 778 (2003).

22. See EVA ETZIONI-HALEVY, NATIONAL BROADCASTING UNDER SIEGE: A COMPARATIVE STUDY OF AUSTRALIA, BRITAIN, ISRAEL AND WEST GERMANY 69-70 (1987).

23. Jay Newell & Charles Salmon, Product Placement from Lumière to E.T.: The Development of Advertising in Motion Pictures 3-4 (Mar. 31, 2003) (unpublished manuscript, on file with Tulane Journal of International and Comparative Law).

24. Lawrence R. Samuel, *Advertising Disguised as Entertainment*, TELEVISION Q., Winter 2004, at 51.

25. The first major deal involving product placement was in the “I Love Lucy” show. See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 70 (2004).

26. See Julia Michaels, *Use of In-Program Ads Plays Big Role in Success of Brazilian TV Network*, WALL ST. J., Jan. 4, 1989, at 1.

27. Antonio C. La Pastina, *Product Placement in Brazilian Prime Time Television: The Case of the Reception of a Telenovela*, 45 J. BROADCASTING & ELECTRONIC MEDIA 541, 541 (2001).

28. Michael McCarthy, *Also Starring (Your Product Name Here)*, USA TODAY, Aug. 12, 2004, at 1B.

29. PQ MEDIA, GLOBAL PRODUCT PLACEMENT FORECAST 2006: EXECUTIVE SUMMARY 12 (2006), available at <http://www.pqmedia.com/execsummary/GlobalProductPlacementForecast2006-ExecutiveSummary.pdf>.

30. John Consoli, *Product Placement Put in the Game: Mostly Reality’s Domain, Client Integration Is Growing in Scripted Shows*, MEDIA WEEK, July 26, 2004, at 4.

broadcasting accounts for the bulk of this activity.³¹ The European Union also identified product placement on television as a growing trend.³² The proliferation of this practice generated considerable research,³³ although studies of product placement typically claim a paucity of research in the field.³⁴

Legal studies of product placement in the United States center on whether or not product placement renders broadcast or screened material *commercial* speech.³⁵ One commentator identified product placement as a form of “hybrid speech” whose existence helped contribute to the

31. PQ MEDIA, PRODUCT PLACEMENT SPENDING IN MEDIA 2005: EXECUTIVE SUMMARY 7 (2005), available at <http://www.pgmedia.com/ppsm2005-es.pdf>.

32. Commission (EC), *Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age*, at 17, COM (1999) 657 final (Dec. 14, 1999).

33. A growing number of studies center on product placement efficacy, in the tradition of advertising, public relations, and marketing research. These studies focus on how practitioners view the practice. See generally James A. Karrh et al., *Practitioners' Evolving Views on Product Placement Effectiveness*, 43 J. ADVERTISING RES. 138 (2003). Studies also focus on how audiences in various countries view the practice. Regarding product placement in the film industry, see, e.g., Stephen J. Gould et al., *Product Placement in Movies: A Cross Cultural Analysis of Austrian, French and American Consumers' Attitudes Toward This Emerging, International Promotional Medium*, J. ADVERTISING, Winter 2000, at 41; Sally A. McKechnie & Jia Zhou, *Product Placement in Movies: A Comparison of Chinese and American Consumers' Attitudes*, 22 INT'L J. ADVERTISING 349 (2003); Israel D. Nebenzahl & Eugene Secunda, *Consumers' Attitudes Toward Product Placement in Movies*, 12 INT'L J. ADVERTISING 1, 1 (1993). Regarding product placement on television, see, e.g., Alain d'Astous & Nathalie Séguin, *Consumer Reactions to Product Placement Strategies in Television Sponsorship*, 33 EUR. J. MARKETING 896, 897 (1999); Rosemary J. Avery & Rosellina Ferraro, *Verisimilitude or Advertising? Brand Appearances on Prime-Time Television*, 34 J. CONSUMER AFF. 217, 218 (2000); Cristel Antonia Russell, *Investigating the Effectiveness of Product Placements in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude*, 29 J. CONSUMER RES. 306, 306-07 (2002); Kim Bartel Sheehan & Aibing Guo, *“Leaving on a (Branded) Jet Plane”: An Exploration of Audience Attitudes Towards Product Assimilation in Television Content*, 27 J. CURRENT ISSUES & RES. ADVERTISING 79, 79 (2005). Within this literature, some researchers have expressed concern with the ethical aspects of product placement. See, e.g., Pola B. Gupta & Stephen J. Gould, *Consumers' Perceptions of the Ethics and Acceptability of Product Placements in Movies: Product Category and Individual Differences*, 19 J. CURRENT ISSUES & RES. ADVERTISING 37, 38 (1997); Lawrence A. Wenner, *On the Ethics of Product Placement in Media Entertainment*, 10 J. PROMOTION MANAGEMENT 101, 101 (2004).

34. See Laurie A. Babin & Sheri Thompson, *Viewer's Recognition of Brands Placed Within Film*, 15 INT'L J. ADVERTISING 140 (1996); Rungpaka Tiwsakul et al., *Explicit, Non-Integrated Product Placement in British Television Programmes*, 24 INT'L J. ADVERTISING 95, 96 (2005).

35. Paul Siegel, *Product Placement and the Law*, 10 J. PROMOTION MGMT. 89, 91 (2004); Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 302-03 (1992); William Benjamin Lackey, Comment, *Can Lois Lane Smoke Marlboros? An Examination of the Constitutionality of Regulating Product Placement in Movies*, 1993 U. CHI. LEGAL F. 275, 280 (1993); Matthew Savare, Comment, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 369 (2004).

United States Supreme Court's First Amendment protection of commercial speech.³⁶ At the same time, it was identified as a message chosen by advertisers "in a context designed to mislead" audiences about their control over the content that should fall under the sponsor identification rules³⁷—the longest running rules regulating broadcast advertising³⁸—and that it may have the undesirable effect of "advertiser-driven distortions of creative expression."³⁹ Some argued that "[a]n agreement to include a particular product in a film is not intrinsically false or misleading," and if its regulation is challenged in court, it may be upheld as a form of economic regulation, deeming the question of whether it amounts to commercial speech irrelevant.⁴⁰ In the European context, the proliferation of product placement has been discussed in studies of German broadcasting law, where regulatory oversight of illegal product placement has been a feature since the early 1990s,⁴¹ prompting questions of the viability of separating editorial and commercial content as dictated by European law.⁴²

III. RESEARCH QUESTIONS AND METHODOLOGY

This study systematically describes the status of commercial speech and the basic approach to the separation between commercial and noncommercial content in broadcasting in the United States, Canada, Australia, the European Union as a uniform unit, specific European countries,⁴³ and Israel. The separation of these forms of speech is operationalized, where possible, by the rules regarding the independence of public broadcasting and its financing scheme from commercial

36. John M. Olin, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2841 (2005).

37. C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2207 (1992).

38. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 331 (2004).

39. See Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HAR. J. L. & TECH. 1, 76 (2003).

40. Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 127 (1999).

41. Silke Ruck, *Development of Broadcasting Law in the Federal Republic of Germany*, 7 EUR. J. COMM. 219, 231 (1992).

42. Barbara Baerns, *Separating Advertising from Programme Content: The Principle and Its Relevance in Communications Practice*, 8 J. COMM. MGMT. 101 (2003).

43. The constitutionality of commercial speech freedom in Europe is dictated by an indisputable jurisprudence created by the European courts; therefore, it is seen as a principle element in all European countries. The terms for separating commercial and noncommercial broadcasting are not dictated by European law, thus requiring separate descriptions of the processes used in different European countries, including non-EU States.

content. This description is followed by a description of the approach adopted in each of these countries to the regulation of product placement or other forms of undisclosed advertising inserted into broadcast content.

The research question posed is whether a stronger connection exists between the regulation of product placement and the role of commercialism in broadcasting (expressed in the separation between commercial and noncommercial content) or between the regulation of product placement and the constitutional standing of commercial speech.

The theoretical significance of this question and its policy implications is that *if separation of forms of speech in broadcasting is possible, a model of a media system where "pure" commercial broadcasting and "pure" noncommercial broadcasting can live side by side is possible*. Mixing speech with a commercial motive with speech that evolves from another motive undermines both. The ideal system, on the other hand, would allow commercial communications to achieve their economic goals and benefit society, while preserving safe havens for truly uncontrolled forms of speech that serve other motivations, whether they be artistic, informational, creative, or political.

IV. BROADCASTING LAW, COMMERCIAL SPEECH, AND PRODUCT PLACEMENT REGULATION

A. *The United States*

1. Broadcasting Law

By the process of default, industries emerged in the United States through private enterprise. Broadcasting, however, is subject to licensing aimed at ensuring that it serves the "public interest."⁴⁴ While in the past, content obligations were a condition for licensing,⁴⁵ a "marketplace" philosophy adopted in the 1980s exempted broadcasters from this requirement, reflecting the belief that market forces best serve the public interest.⁴⁶ The regulation of advertising in broadcasting itself was traditionally limited to requiring sponsorship identification.⁴⁷ In 1967, Congress designated a commercial-free zone and named it "public

44. See Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 607-09 (1998) (detailing a history of the public interest requirement).

45. Heidi Young, Note, *The Deregulation of Commercial Television*, 13 FORDHAM URB. L.J. 373, 376-77 (1984).

46. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach To Broadcast Regulation*, 60 TEX. L. REV. 207, 235 (1982).

47. Kielbowicz & Lawson, *supra* note 38, at 331.

broadcasting,”⁴⁸ but business or institutional logograms can still be broadcast on these channels as long as they are shown between programs.⁴⁹ The implementation of this rule has been systematically loosened.⁵⁰ In addition, public broadcasters in the United States enjoy a government subsidy funneled through a private corporation created for that purpose.⁵¹ In 1990, Congress interfered for the first time in the total quantity of broadcast advertising allowed on television, as the amount of advertising permitted in children’s programming was limited⁵² in all media, demarcating, possibly for the first time in the law, a position that advertising may have undesirable effects, at least on children.

2. Commercial Speech

The constitutional safeguards for free speech do not apply in the United States to “purely commercial advertising.”⁵³ Truthful commercial speech, though, does enjoy constitutional protection, albeit limited.⁵⁴ Its regulation is justified when promoting a substantial government interest directly and not extensively.⁵⁵

3. Product Placement Regulation

Undisclosed commercial messages in broadcasting have been regulated since the Radio Act of 1927.⁵⁶ The Communications Act of 1934 stipulates that all matter broadcast by a broadcasting station, for which any type of monetary (or other) compensation is provided, needs

48. Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 369 (codified as amended at 47 U.S.C. §§ 390-399b (2000)).

49. 47 U.S.C. § 399a(b).

50. WILLIAM HOYNES, *PUBLIC TELEVISION FOR SALE: MEDIA, THE MARKET, AND THE PUBLIC SPHERE* 2, 114 (1994).

51. 47 U.S.C. § 396(b).

52. Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended 47 U.S.C. § 303a(b) (2000)).

53. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

54. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980).

55. What may further implicate regulations regarding product placement is that the scope of freedom of commercial speech was extended when the Supreme Court refused to hear an appeal of a decision of the California Supreme Court describing any corporate statement that “might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions” as a form of commercial speech. *Nike, Inc. v. Kasky*, 539 U.S. 654, 657 (2003). Because the denial of certiorari was for procedural reasons, the actual significance of this decision is unclear.

56. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934); Kielbowicz & Lawson, *supra* note 38, at 333.

to be identified as such.⁵⁷ When a broadcast station airs any matter in return for compensation, it must identify the sponsor at the time of the broadcast.⁵⁸ These regulations have led many companies to supply producers with products free of charge, under the assumption that in this way they are bypassing the rule⁵⁹—an interpretation supported by the language of the Federal Communications Commission (FCC) regulations.⁶⁰ Only twenty-nine percent of product placements were paid for in 2004, although this is higher than the eighteen percent paid for thirty years earlier.⁶¹ Neither the FCC nor the Federal Trade Commission (FTC) has acted on complaints against broadcasters claiming product placement calls for disclosure.⁶²

B. Europe (the Union)

1. Broadcasting Law

Pan-European policies are expressed by directives that serve as the European Union's body of statutory law and that eventually need to be transposed into national law.⁶³ The European Union enacted the Television Without Frontiers (TVWF) directive in the early 1990s, which set European broadcasting standards, including a limit on the amount of advertising permitted on commercial television and a requirement that advertising be differentiated from programming content.⁶⁴ In addition,

57. 47 U.S.C. § 317(a). The Communications Act of 1934 requires those providing and those receiving compensation to notify the station. *Id.* § 508.

58. 47 C.F.R. § 73.1212 (2005).

59. Avery & Ferraro, *supra* note 33, at 218.

60. Savare, *supra* note 35, at 361.

61. PQ MEDIA, *supra* note 31, at 8.

62. A Commercial Alert, a public interest advocate, filed a petition for declaratory ruling in September 2003, arguing that broadcasters and cable networks were violating § 317 of the Communications Act and provided documentation to prove their point. Letter from Gary Ruskin, Executive Dir., A Commercial Alert, to Marlene H. Dortch, Sec'y, Fed. Comm'n Comm'n (Sept. 30, 2003), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515285793. The FCC failed to rule on the petition, and the FTC dismissed it, arguing that the existing statutory and regulatory system provides sufficient tools for combating deceptive practices. Stuart Elliot, *F.T.C. Rejects Rule on Product Placement*, N.Y. TIMES, Feb. 11, 2005, at C5. The failure to take action against product placement should not be all that surprising, considering that the U.S. government itself uses product placement in order to deliver messages to consumers; for example, it introduced the newly designed \$20 bill in 2003 and conspicuously placed it in game shows on television, so that audiences would recognize the new design and not mistake it for counterfeit. Betsy Streisand, *Need Change for a \$20 Bill? Call Hollywood*, N.Y. TIMES, Sept. 28, 2003, § 3, at 4.

63. Tanja A. Börzel & Thomas Risse, *When Europe Hits Home: Europeanization and Domestic Change*, EUROPEAN INTEGRATION ONLINE PAPERS, Nov. 29, 2000, available at <http://eiop.or.at/eiop/texte/2000-015a.htm>.

64. Council Directive 89/552, 1989 O.J. (L 298) 28 (EC) [hereinafter TVWF Directive].

the European Union reaffirmed its commitment to the public funding of public service broadcasting, so long as public broadcasters adhered to their “public service remit” and did not interfere in the commercial market.⁶⁵

2. Commercial Speech

The gradual establishment of the European core principles led to the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC),⁶⁶ whose principles are binding for the member states, as is its interpretation by the European Court of Justice (ECJ),⁶⁷ although whether the EHRC’s status is equivalent to that of a national constitution is in dispute.⁶⁸ Article 10 of the convention protects freedom of expression.⁶⁹ Decisions made by European courts hold without qualification that article 10 applies to commercial speech as well.⁷⁰

3. Product Placement Regulation

Two directives are relevant to product placement policies: The TVWF directive, mentioned above, and the Unfair Business Practices directive (UBP), adopted in May 2005.⁷¹ Article 10 of the TVWF stipulates that “[t]elevision advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.”⁷² Article 18 of the directive sets the maximum ratio of advertising spots on a given hour of

65. A protocol added to the 1997 Amsterdam Treaty states:

The provisions of the Treaty . . . shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 109.

66. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter EHRC].

67. J. Steven Rich, Note, *Commercial Speech in the Law of the European Union: Lessons for the United States?*, 51 FED. COMM. L.J. 263, 265 (1998).

68. See Jo Shaw, *Process and Constitutional Discourse in the European Union*, 27 J.L. & Soc’y 4, 9 (2000).

69. EHRC, *supra* note 66, art. 10.

70. See Rich, *supra* note 67, at 268.

71. Council Directive 2005/29, 2005 O.J. (L 149) 22 (EC) [hereinafter UBP Directive].

72. TVWF Directive, *supra* note 64, at 28.

television at twenty percent.⁷³ According to the TVWF directive, “surreptitious advertising,” which means “the representation . . . of goods . . . when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature” is prohibited.⁷⁴ In 2004, the European Commission published an interpretation of the TVWF directive, which deals broadly with the issue of surreptitious advertising.⁷⁵ This communication states that “the [d]irective does not contain an absolute ban on all references in words or pictures” of goods or a provider of services, and thus “intentionality” should serve as the “criterion for prohibiting surreptitious advertising.”⁷⁶ The way to test if a placement is intentional is to determine whether “undue prominence” is provided to a product in a program.⁷⁷ In this context, the commission recommends taking note of the recurring appearance of a particular brand or product as well as the specific nature of the program.⁷⁸ An example cited of this type of placement is a product display that “is not warranted on the editorial grounds of the programmes.”⁷⁹

While the TVWF and the interpretative communication have failed to identify product placement by name, the UBP “[d]irective does not affect accepted advertising and marketing practices, such as legitimate product placement.”⁸⁰ The UBP differentiates between “advertorials” defined as “[u]sing editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content,”⁸¹ and product placement, which is undefined. While advertorials are prohibited, product placement falls under “normal business practices which are in conformity with custom and usage, such as advertising based on brand recognition or product placement, [that] will not be caught by the [d]irective even if they are capable of influencing consumers’ economic behaviour.”⁸² In addition, product placement “may legitimately affect consumers’ perceptions of products

73. *Id.* at 29.

74. *Id.* at 26, 28.

75. *Commission Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising in the ‘Television Without Frontiers’ Directive*, 2004 O.J. (C 102) 2, 5-6.

76. *Id.* at 6.

77. *Id.*

78. *Id.*

79. *Id.*

80. UBP Directive, *supra* note 71, at 23.

81. *Id.* at 36.

82. *Commission Proposal for a Directive of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)*, at 12 COM (2003) 356 final (June 18, 2003).

and influence their behaviour without impairing the consumer's ability to make an informed decision."⁸³

The European Economic and Social Committee on Consumer Education stipulates that "it is becoming increasingly difficult to properly identify commercial communication, as it is integrated more and more in other types of supposedly informative or recreational content, such as . . . product placement."⁸⁴ As such, it proposes enhancing consumer education to promote proper understanding of commercial communication.⁸⁵

In December 2005, the European Commission published a proposal for a directive amending major elements of the TVWF.⁸⁶ One of the major issues the proposal addresses is product placement as part of an overhaul of the rules regarding advertising, described by the commission as adding flexibility to the rules pertaining to advertising, clarity to the rules regarding product placement, and the elimination of quantitative restrictions on the amount of advertising.⁸⁷ Flexibility is achieved by applying the "separation principle" of editorial and commercial content only to advertising and teleshopping, while defining product placement as neither unless it is surreptitious.⁸⁸ In order for product placement to be deemed acceptable, its scheduling must not affect the "editorial independence of the media service provider," or encourage the purchase of the product.⁸⁹ In addition "[p]rogrammes containing product placement must be appropriately identified at the start of the programme in order to avoid any confusion on the part of the viewer."⁹⁰ Article 1 of the proposal defines product placement as "any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within audiovisual media services, normally in return for payment or for similar consideration."⁹¹ News, current affairs, and children's programming must not contain product placements.⁹²

In an informal document, the European Commission explains that leniency is required in order to help the European audio-visual industry

83. *Id.* at 19.

84. *Opinion of the European Economic and Social Committee on 'Consumer Education,'* 2003 O.J. (C 133) 1, 3.

85. *Id.* at 2-3.

86. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC,* at 3, COM (2005) 646 final (Dec. 13, 2005).

87. *Id.* at 11.

88. *Id.* at 18.

89. *Id.* at 25.

90. *Id.*

91. *Id.* at 21.

92. *Id.* at 26.

become more competitive, in particular with regard to the United States.⁹³ The revolutionary character of the proposed directive has raised much concern in Europe and its easing of product placement regulation has, in particular, alarmed public broadcasters and consumer groups,⁹⁴ while not fully meeting the expectations of the association of television advertisers.⁹⁵ Independent film and television producers found the new proposal to be balanced.⁹⁶ The controversy raised by the proposal has slowed down the legislative process and it has not yet been enacted.

C. Europe (Individual Countries)

1. Broadcasting Law

In contrast to the United States, most European governments “shared the belief that broadcasting was too important to be left to [the hands of] the market.”⁹⁷ The outcome, almost uniformly across the continent, was the establishment of a noncommercial monopoly broadcaster specially mandated and publicly funded, owned, and accountable.⁹⁸ A theory of justifications for regulating broadcasting in Europe emerged, which addressed such concerns as the free flow of communication, provision of access, performance of broadcasters, the economic impact of the industry,⁹⁹ pluralism, diversity, and the protection of vulnerable values.¹⁰⁰ Since the 1980s, European countries witnessed a gradual transition from the public service-based model to a dual system

93. Commission Proposal for a Modernisation of the Television Without Frontiers Directive: Frequently Asked Questions (Dec. 13, 2005), <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/475&format=HTML&aged=0&language=EN&guiLanguage=fr>.

94. Doreen Carvajal, *New EU Rules for Television: Content Without Frontiers?*, INT'L HERALD TRIB., Nov. 27, 2005, at F13.

95. EurActiv.com, *Commission Recommends Authorising TV Product Placement*, <http://www.euractiv.com/en/infosociety/commission-recommends-authorising-tv-product-placement/article-150885> (last visited Aug. 14, 2006).

96. *See id.*

97. DAVID A.L. LEVY, EUROPE'S DIGITAL REVOLUTION: BROADCASTING REGULATION, THE EU AND THE NATION STATE 20 (1999).

98. Kees Brants & Els De Bens, *The Status of TV Broadcasting in Europe*, in TELEVISION ACROSS EUROPE 7, 9 (Jan Wieten et al. eds., 2000).

99. WOLFGANG HOFFMANN-RIEM, REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES 268-80 (1996).

100. Jay G. Blumler, *Vulnerable Values at Stake*, in TELEVISION AND THE PUBLIC INTEREST: VULNERABLE VALUES IN WEST EUROPEAN BROADCASTING 22, 30-39 (Jay G. Blumler ed., 1992).

in which public and private broadcasters operate.¹⁰¹ Within this dual system, some countries allow public broadcasters to sell advertising.¹⁰²

Austria was one of the last bastions of the public broadcasting monopoly in Europe, with its commercial broadcasting law taking effect only in 2001.¹⁰³ Denmark was also slow to introduce alternatives to public service broadcasting, and only two national terrestrial broadcasters exist there, one on which advertising is prohibited, the other on which it is limited.¹⁰⁴ In Sweden,¹⁰⁵ no advertising is allowed on public broadcasting,¹⁰⁶ as is the case in Norway, and where advertising on commercial channels is restricted,¹⁰⁷ as it is in Finland.¹⁰⁸ Among those countries that permit advertising on public broadcasting are Spain, where no license fee exists;¹⁰⁹ France, where the government consistently permits the level of advertising revenue to grow;¹¹⁰ and Portugal.¹¹¹ The difference between the latter three is that while in France and in Spain the decline in the direct public subsidy—the license fee—was offset by commercial income,¹¹² in Portugal, the government was authorized to directly subsidize programming that the public broadcaster was required to carry as part of its public service obligations.¹¹³

2. Commercial Speech

As mentioned, the superiority of commercial speech applies to the European Union as much as it applies to the Member States, although the process of integrating European law into national systems is gradual.

101. Denis McQuail et al., *A Framework for Analysis of Media Change in Europe in the 1990s*, in *DYNAMICS OF MEDIA POLITICS: BROADCAST AND ELECTRONIC MEDIA IN WESTERN EUROPE* 9, 16 (Karen Siune & Wolfgang Truetzschler eds., 1992).

102. See, e.g., Rosario DeMateo, *Spain*, in *THE MEDIA IN EUROPE* 224, 229 (Mary Kelly et al. eds., 2004).

103. See Joseph Trappel, *Austria*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 4, 8-9.

104. See Frands Mortensen, *Denmark*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 43, 45-46.

105. Sweden is also the only country with a specific clause protecting commercial speech in its constitution. *Ytrandefrihetsgrundlagen* [YGL] [Constitution] 1:12 (Swed.).

106. See Olof Holten, *Sweden*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 236, 241.

107. See Helge Ostbye, *Norway*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 157, 164.

108. See Marina Osterlund-Karinkata, *Finland*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 54, 61.

109. See DeMateo, *supra* note 102, at 229.

110. See Jean Marie Charon, *France*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 65, 72.

111. See Manuel Pinto & Helena Sousa, *Portugal*, in *THE MEDIA IN EUROPE*, *supra* note 102, at 180, 184.

112. See DeMateo, *supra* note 102, at 229; Charon, *supra* note 110, at 72.

113. See Sociedade Independente de Comunicação, S.A. v. Commission of the European Communities, 2004 E.C.R. II-743; Nelson Traquina, *Portuguese Television: The Politics of Savage Deregulation*, 17 *MEDIA CULTURE & SOC'Y* 223, 229 (1995).

Hence, traditional approaches to commercial speech, which find it “inferior” to other forms of speech, may still prevail in some Member States. Sweden, on the other hand, does not allow any advertising on its public channels, as mentioned, and awarded commercial speech constitutional guarantees even before the European Union did.¹¹⁴

3. Product Placement Regulation

Most European countries made the transition from state-related noncommercial monopolies to dual public-private systems of broadcasting, each proceeding at its own pace and embodying its own peculiar characteristics.¹¹⁵ The UBP, only recently adopted, is not yet transposed into European Union Member State law. But implementation of the TVWF is subject to an extremely varied interpretation across the continent,¹¹⁶ as the following typology shows.

a. Countries Prohibiting Product Placement

In Austria, public broadcasting law prohibits product placement on public channels unless such practice is external to the broadcaster and outside its control.¹¹⁷ Other European countries that prohibit product placement infer the prohibition from the general rule derived from the TVWF, which stipulates that advertising should be distinguished from the content of a program (on commercial channels as well).¹¹⁸ Such is the case in Denmark¹¹⁹—where the Radio and Television Advertising Board concluded that product placement is a form of hidden advertising, prohibited under the Marketing Practices Act,¹²⁰ in Italy¹²¹—where the

114. See Holten, *supra* note 106, at 241, 244.

115. See Denis McQuail, *Introduction to THE MEDIA IN EUROPE*, *supra* note 102, at 2.

116. This variance of interpretation is not limited to product placement and is evident in other regulations as well.

117. M. ANDREAS ULRICH, KOAN LAW FIRM, COMPARATIVE STUDY CONCERNING THE IMPACT OF CONTROL MEASURES ON THE TELEVISUAL ADVERTISING MARKETS IN THE EU MEMBER STATES AND CERTAIN OTHER COUNTRIES: AUSTRIA: LEGAL REPORT 8 (2003), *available at* <http://ec.europa.eu/comm/avpolicy/docs/library/studies/2003/44-03-rj-austria.pdf>.

118. See TVWF Directive, *supra* note 64, at 28.

119. AGNÈS MAQUA & ILSE HENDRIX, BIRD & BIRD, FINAL REPORT: STUDY ON THE DEVELOPMENT OF NEW ADVERTISING TECHNIQUES: SUMMARIES OF NATIONAL REPORTS 19 (2003), *available at* http://ec.europa.eu/comm/avpolicy/docs/library/studies/finalized/bird_bird/pub_resume_en.pdf.

120. Hagen Jorgensen, Danish Consumer Ombudsman, Remarks at the European Comm'n Annual Assembly of Consumer Ass'ns (Nov. 12-13, 1998) (transcript *available at* http://ec.europa.eu/consumers/cons_org/assembly/event06/speech08_en.pdf).

121. MAQUA & HENDRIX, *supra* note 119, at 72.

interpretation of the rules is subject to litigation confirming the ban,¹²² and in Germany.¹²³ Other Scandinavian countries inferred that product placement is prohibited in broadcasting, based on the adoption of the ban on surreptitious advertising. Such is the case in Iceland,¹²⁴ Sweden,¹²⁵ Norway,¹²⁶ and Finland.¹²⁷ In Ireland, the public broadcaster's sponsorship rules and the Broadcasting Commission of Ireland, which licenses independent broadcasters, prohibit product placement.¹²⁸

b. Countries Practicing an "Undue Prominence" Test

In Denmark, Germany, Greece, and Liechtenstein,¹²⁹ if placing a product can be justified for editorial reasons, it is not prohibited. This test is known in some countries as the test for undue prominence, suggesting that due prominence may be accepted. In Holland, however, this "inevitable" form of product placement is permitted only if the scene lasts no more than a few seconds.¹³⁰ Sweden uses the test of undue prominence as well.¹³¹

The apparent contradiction between a ban on product placement and the rule of undue prominence, which might be interpreted to permit placing a product as long as it is not unduly prominent, is clearly resolved in the United Kingdom, both by the still existing Independent Television Commission (ITC) rules and the recently proposed rules of the Office of Communications (OFCOM), the regulator that replaced the ITC in 2003. According to the ITC Sponsorship Code, product placement, defined as placing a product in return for payment, is

122. NICOLO BASTIANINI & CECILA CAGNONI, KOAN LAW FIRM, COMPARATIVE STUDY CONCERNING THE IMPACT OF CONTROL MEASURES ON THE TELEVISUAL ADVERTISING MARKETS IN THE EU MEMBER STATES AND CERTAIN OTHER COUNTRIES: ITALY: LEGAL REPORT 20-21 (2003), available at <http://ec.europa.eu/comm/avpolicy/docs/library/studies/2003/44-03-rj-italy.pdf>.

123. Baerns, *supra* note 42, at 102.

124. MAQUA & HENDRIX, *supra* note 119, at 72 (explaining that underwriting announcements may not contain any form of encouragement to purchase products or services).

125. *Id.* at 102.

126. *Id.* at 91 (stating that products or services may not be displayed in a promotional manner).

127. *Id.* at 29 (disallowing product placement).

128. *Id.* at 66.

129. *Id.* at 19, 43, 51; BIRD & BIRD, THE EVOLUTION OF NEW ADVERTISING TECHNIQUES: LIECHTENSTEIN 7 (2003), available at http://ec.europa.eu/comm/avpolicy/docs/library/studies/finalized/bird_bird/pub_liechtenstein.pdf.

130. BIRD & BIRD, THE EVOLUTION OF NEW ADVERTISING TECHNIQUES: THE NETHERLANDS 49 (2003), available at http://ec.europa.eu/common/avpolicy/docs/library/studies/finalised/bird_bird/pub_Netherlands.pdf.

131. MAQUA & HENDRIX, *supra* note 119, at 102.

prohibited.¹³² Within this code, undue prominence given to products that were purchased by the producer or received for free is prohibited as well. Since undue prominence only applies to products whose exposure is not paid for, their incidental exposure is allowed.¹³³ On the other hand, it is totally prohibited to provide products with exposure in return for payment.¹³⁴ Although the United Kingdom was one of the first countries in Europe to introduce commercial television, it still prohibits any form of advertising or sponsorship on the British Broadcasting Corporation (BBC).¹³⁵ It is therefore one of the only countries where a clear separation of funding for public and private broadcasting exists. The government in the United Kingdom does not subsidize public broadcasting provided by the BBC, and its public activities are therefore funded directly by the public.

c. Countries Where Product Placement Is Not Prohibited

In Portugal, product placement in itself is not defined in the law, but has been subordinated to the rules regarding sponsorship, a practice which is not prohibited but requires public disclosure.¹³⁶ As mentioned, Portugal is one extreme example in which public funding of public broadcasting has been eliminated, with financing coming from a mix of direct government subsidies and advertising, each supporting different types of programs. Perhaps the most confusing situation exists in Belgium, where there is no reference to product placement with regard to French and German broadcasting, but where, in Flemish broadcasting, there is a rule prohibiting promotion of products outside of traditional advertising that may be applied to product placement.¹³⁷

132. INDEP. TELEVISION COMM'N, THE ITC CODE OF PROGRAMME SPONSORSHIP para. 15.1 (2000).

133. *See id.* para. 15.4. Indeed, in 2001, London Weekend Television was fined 100,000 pounds sterling for violating this rule. BBC News, *LWT Fined £100,000* (July 27, 2001), http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/1460888.stm. In 2003, the entertainment channel "You TV" was fined 40,000 pounds sterling for a series of breaches of the code of conduct—including product placement. Office of Commc'ns, Programme Complaints & Interventions Report (May 29, 2003), http://www.ofcom.org.uk/static/archive/itc/itc_publications/complaints_reports/programme_complaints/show_complaint.asp-prog_complaint_id=629.html.

134. INDEP. TELEVISION COMM'N, *supra* note 132, para. 15.1.

135. BIRD & BIRD, THE EVOLUTION OF NEW ADVERTISING TECHNIQUES: UNITED KINGDOM 14 (2003), *available at* http://ec.europa.eu/comm/avpolicy/docs/library/studies/finalized/bird_bird/pub_UnitedKingdom.pdf.

136. MAQUA & HENDRIX, *supra* note 119, at 97.

137. *Id.* at 12-13.

D. Australia

1. Broadcasting Law

The structure of broadcasting in Australia is more similar to that of the United States than to that of Europe,¹³⁸ with private and public broadcasting existing side by side since the 1930s.¹³⁹ Australia also went through a phase of broadcast deregulation in the 1990s, which saw the introduction of self- and co-regulation in certain practices.¹⁴⁰

2. Commercial Speech

Freedom of speech is not guaranteed as an explicit constitutional right in Australia, but rather through court interpretations.¹⁴¹ The courts ruled that speech aimed at selling goods and services for profit falls outside the boundaries of that protection.¹⁴²

3. Product Placement Regulation

The Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000¹⁴³ and the Commercial Television Industry Code of Practice of 2004¹⁴⁴ require the disclosure of commercial agreements by presenters of current affairs programs (on radio) and current affairs, documentaries, and infotainment on television.¹⁴⁵ The disclosure should be made “in a way . . . readily understandable to a reasonable person.”¹⁴⁶ A similar rule regarding entertainment was not

138. Richard Collins, *National Broadcasting and the International Market: Developments in Australian Broadcasting Policy*, 16 MEDIA, CULTURE & SOC'Y 9, 10 (1994).

139. Gareth Grainger, Deputy Chairman, Australian Broad. Auth., Spry Memorial Lecture: Broadcasting, Co-Regulation and the Public Good (Oct. 28, 1999), available at <http://www.com.umontreal.ca/spry/spry-gg-lec.html>.

140. See, e.g., Debra Harker, *Improving the Effectiveness of Advertising Self-Regulatory Schemes: Empowering the Public*, 20 J. MARKETING MGMT. 625, 628-30 (2004); Sandra C. Jones & Robert J. Donovan, *Self-Regulation of Alcohol Advertising: Is It Working for Australia?*, 2 J. PUB. AFF. 153, 154 (2002).

141. David S. Bogen, *Telling the Truth and Paying for It: A Comparison of Two Cases—Restrictions on Political Speech in Australia and Commercial Speech in the United States*, 7 IND. INT'L & COMP. L. REV. 111, 111 (1996).

142. David S. Bogen, *The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws*, 46 DRAKE L. REV. 53 (1997).

143. Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (Austl.) [hereinafter Broadcasting Services].

144. Commercial Television Industry Code of Practice, 2004 (Austl.), available at <http://www.aba.gov.au/contentreg/codes/television/documents/CodeofPractice-July2004.pdf> [hereinafter Code of Practice].

145. *Id.* cl. 1.19; Broadcasting Services, *supra* note 143, paras. 5(a)-(b).

146. Code of Practice, *supra* note 144, cl. 1.22.

enacted. Recent investigations undertaken by the Australian Communications and Media Authority demonstrate the implementation of this new standard.¹⁴⁷

E. Canada

1. Broadcasting Law

Advertising has always funded Canadian public broadcasters,¹⁴⁸ emerging at times as their second largest source of financing.¹⁴⁹

2. Commercial Speech

The Canadian Charter of Rights and Freedoms, enacted in 1982, guarantees freedom of speech.¹⁵⁰ Commercial speech enjoys constitutional safeguards as well because of the role it is perceived to play in this free-market democracy, although reasonable and justifiable restrictions on commercial speech may receive court approval.¹⁵¹

3. Product Placement Regulation

Product placement is allowed in both commercial and public broadcasting in Canada. Revenues generated from nontraditional forms of advertising, such as product placement, sponsorships, and digital superimposition, must be disclosed during license renewals. Licensees must also indicate where these revenues have been accounted for in their projections for the new license term.¹⁵² In public broadcasting, internal

147. On July 1, 2005, the Australian Broadcasting Authority and the Australian Communications Authority merged, forming the Australian Communications and Media Authority (ACMA). Australian Communications and Media Authority Act, 2005; Australian Communications and Media Authority (Consequential and Transitional Provisions) Act, 2005. ACMA investigation reports are posted on the agency's Web site, <http://www.acma.gov.au> (last visited Nov. 19, 2006).

148. Russell Johnston, *The Emergence of Broadcast Advertising in Canada, 1919-1932*, 17 HIST. J. FILM, RADIO & TELEVISION 29, 29 (1997).

149. Anthony E. Boardman & Aidan R. Vining, *Public Service Broadcasting in Canada*, 9 J. MEDIA ECON. 46, 53 (1996).

150. Part I, § 2(b) of the Constitution Act, 1982, being Sched. B to the Canada Act, 1982, ch. 11 (U.K.); Karla K. Gower, *Looking Northward: Canada's Approach to Commercial Expression*, 10 COMM. L. & POL'Y 29, 33 (2005).

151. Gower, *supra* note 150, at 57-58.

152. In the only filing on record to date, the Global Group states:

While Global has experimented with product placement, it finds that the financial returns are minimal, and the practice is awkward for program producers. It is difficult to guarantee how long a given product will be visible during a program, and the value of such exposure is therefore difficult to establish.

journalistic standards and practices limit product placement in children's and informational programs and in programs in which the Canadian Broadcasting Corporation does not schedule advertising.¹⁵³ The placements cannot affect the content of the shows or their integrity. "A program containing product placement must carry an advisory to that effect . . . identifying the advertiser" and be "distinct from special credits which may be granted in return for special assistance from a program sponsor or a supplier."¹⁵⁴

F. Israel

1. Broadcasting Law

State broadcasting preceded a public broadcasting monopoly and, as in Europe, the industry developed into a dual public-private model that prohibits advertising on public television but allows sponsorship and public service announcements.¹⁵⁵

2. Commercial Speech

Israel lacks a bill of rights and the courts have deduced the existence of freedom of speech from a variety of sources including the Declaration of the Establishment of the State of Israel¹⁵⁶ in 1948, and later on, the Basic Law: Human Dignity and Liberty, enacted in 1992, which promulgated a limited bill of rights with limited constitutional safeguards.¹⁵⁷ Israeli courts afford commercial speech the same level of protection as other forms of speech, although at times, they express reservations about its scope.¹⁵⁸

3. Product Placement Regulation

Regulations prohibit any form of advertisement that is not in the format of a "spot,"¹⁵⁹ although the authorizing law allows the authority to

Canadian Radio-Television & Telecomm. Comm'n, Decision CRTC 2001-438, Increase in Power for CIME-FM (July 27, 2001), <http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DB2001-458.htm>.

153. Canadian Broad. Corp., *Journalistic Standards and Practices* (Sept. 24, 2002), <http://cbc.radio-canada.ca/accountability/journalistic/comimpact.shtml#placement>.

154. *Id.*

155. DAN CASPI & YEHIEL LIMOR: *THE IN/OUTSIDERS: THE MEDIA IN ISRAEL* 33 (1999).

156. H CJ 73/53 *Kol Ha'am Co. v. Minister of the Interior*, [1953] IsrSC 7(2) 871.

157. BASIC LAW: HUMAN DIGNITY AND LIBERTY 1992, amended 1994, S.H. 90.

158. H CJ 606/93 *Kidum Entrepreneurship & Publ'g Ltd. v. Isr. Broad. Auth.*, [1994] Isr SC 48(2) 1.

159. Second Authority Regulations (Ethics in Television Advertising), 1994, KT 5580, 640.

establish specific regulations for remuneration when other forms of advertisement are used.¹⁶⁰ The authority limits that authorization to “incidental mentioning” of products for which no compensation is received in return.¹⁶¹ In addition, the regulations prohibit making any mention of programs or their contents in advertisements in a way that might “heighten public awareness of the product through the program or of the program through the product.”¹⁶²

The commercial television regulator announced in December 2004 a total ban on “marketing content.”¹⁶³ The cable television authority, on the other hand, after fining cable channels several times for violating the terms of their licenses for practicing product placement, published in May 2005 a draft of new regulations that would allow properly identified product placement to be carried on cable channels.¹⁶⁴

V. DISCUSSION AND CONCLUSION: WHAT YOU SEE IS WHAT IT IS

A. *What Does This Study Demonstrate?*

The regulation of product placement in commercial broadcasting varies from country to country, ranging from a complete ban to regulatory indifference. What emerges from this study is that the extent of separation between public and commercial media in each country or region directly influences the scope of regulation: The more a country resists commercialism in broadcasting in general, the less inclined it is to legalize product placement in commercial broadcasting. At the same time, countries in which commercial and noncommercial speech mix in the same broadcasts tend to be more permissive when it comes to product placement regulation in commercial broadcasting. Societies with a strong tradition of public broadcasting are typically more suspicious of advertising, whether it be open or concealed, and for this

160. Second Authority for Radio and Television Law, 1990, S.H. 59.

161. The free placement of musical instruments in entertainment programs in return for exposure of brand names has been subject to at least two state comptroller reports and two supreme court decisions, although no uniform policy has been formulated as a result. On the one hand, the court has deemed the practice “surreptitious,” H CJ 7833/96 Melnik v. Second Authority [1996] Isr SC 52(3) 586, while on the other, it did not invalidate product placement agreements made with the public broadcaster, which is prohibited from selling advertising, CA 4976/00 House of Piano v. Dalia Mor [2000] Isr SC 56(1) 577.

162. The Second Authority Regulations (Ethics in Television Advertising), 2002, KT 6161, 603.

163. Anat Balint, *Second Authority Decided To Ban Surreptitious Advertising*, HAARETZ (Isr.), Dec. 6, 2004 (on file with the *Tulane Journal of International and Comparative Law*).

164. Draft Advertising Content Code (2005), available at http://www.moc.gov.il/new/documents/mismachim/rfi_19.5.05.pdf.

reason, it appears, are more inclined to crack down on this practice that involves mixing artistic and commercial considerations seamlessly.

In Canada, it has long been accepted that the public broadcaster benefit from commercial sources of revenue. Canada also exemplifies the most liberal approach to product placement. In the United Kingdom, Austria, Scandinavia, and Israel, where broadcasting was generally free of advertising when public broadcasting enjoyed a monopoly and where limitations exist on the amount and type of advertising on commercial television, product placement is limited and often banned. Regulators in these countries have not been concerned by the fact that sponsors are not identified in product placements (something that has been a concern in countries where commercial content in broadcasting is tolerated) but rather by the “surreptitious” or “undue prominence” nature of the practice. Philosophically, this reflects a different approach to that taken by Canada, as well as the United States and Australia, which require sponsor identification. The latter may be regarded as a middle-ground approach, one that comes to terms with the practice of product placement, so long as it is made public, although that disclosure need not be at the same time that the product is exposed.

In the United States and Australia, which require sponsor identification, freedom of commercial speech is subject to less protection, while in Europe and Israel, where commercial speech enjoys a higher level of protection, product placement may at least in some instances be banned. The conclusion is that the extent to which lines are drawn between commercial and noncommercial speech in broadcasting better predicts the extent of product placement regulation in a given country than the measures taken to protect commercial speech. The examples provided by individual European nations with stronger traditions of public media free of commercial content, which have banned product placement even in commercial broadcasting (such as the United Kingdom, Austria, and the Scandinavian countries), provide further support for this proposition, although different approaches to freedom of commercial speech do exist in these countries. A case in point is Sweden, where product placement is prohibited, while commercial speech is protected by the constitution.

B. Why Is This Finding Significant?

The commercialized North American (U.S. and Canadian) system accepts advertising as an integral part of broadcasting. This explains the reluctance of policy makers to regulate advertising, even when it appears undisclosed in entertainment products, and why the debate in these

countries focuses on whether programs consequently become commercial speech, a form of speech that may be regulated whether or not it is delivered on television. It also explains why, beyond theoretical discussions, regulators in these countries have not responded to the proliferation of product placement.

Government regulation of artistic expression, arising from the need to differentiate it from the commercial content embedded in it, may indeed endanger the freedom of artistic expression. However, the fact that commercial interests influence artistic expression also means that it is regulated speech, only by a different “regulator.”¹⁶⁵ The choice here is, therefore, not between regulating and not regulating speech, but rather between types of regulation, or between the identity and motivation of the regulators, whether they are governments or market pressures. The blurring of distinctions between advertising and content encompasses the actual creation of programs and promotion of brands.¹⁶⁶ Commercial interests gradually take over artistic and entertainment interests, not only in the type of broadcasting organizations (which at least in the American and Australian models have always been commercial) but are now also evident in even more intricate decisions regarding program sets and scenes.

In light of all this, should broadcasting still enjoy the unique status it enjoys in society for the ostensibly distinctive social and political roles it plays in serving the public interest? Because the regulations discussed in this study spring from different paradigms of the role of broadcasting in society, identifying those paradigmatic differences can help to create a proper solution that suits each society’s regulatory peculiarities and at the same time promotes universal criteria of truthfulness in communication. The introduction of advertising into broadcasting in countries that ban product placement caused lines to be drawn between advertising and entertainment and between commercial-free and commercial broadcasting, because these differentiations were natural and accepted in the system. Product placement blurred these lines and was, therefore, prohibited.¹⁶⁷ As has been demonstrated, basing regulatory responses to

165. In no way do I claim that speech has become “commercial” because the artist is getting paid. Speech is deemed “commercial” because its main purpose is the commercial transaction it promotes.

166. A primary example is the deal struck in December 2003 between ABC and the Sears, Roebuck & Co. over “Extreme Makeover,” which may have the “look and feel” of a program but is, in fact, an hour-long advertisement for Sears products. Elliott, *supra* note 3.

167. The chronological sequence of directive adoption in Europe, in which the restrictive TVWF is followed by the permissive UBP, may imply that the European regulatory atmosphere is shifting from a prohibition of “surreptitious” advertising practices to a limited definition of the

product placement on the extent of freedom granted to commercial speech guarantees neither protection to product placement nor a uniform policy. Differentiating between commercial and noncommercial speech, however, does, and therein lies the importance of this study's finding: The ability to differentiate between types of speech, by identifying with whom the speaker's loyalties lie, a concept that may be termed *speech transparency*, is the key to attaining freedom for *all* forms of speech. Television viewers, who are also citizens of their communities, have the right to know which side the broadcaster represents. The identification of "sides" is critical, because for viewers to comprehend a message, they must be made aware of the motivation behind it. The reason product placement has been growing is because it carries the credibility associated with the entertainment product while obscuring the commercial nature of the message, which viewers consider less credible.¹⁶⁸ A system that distinguishes between forms of speech based on their motivation promotes an equitable, ethical view of the relationship between the media and their audiences. The power of media and money is blind to the social need for noneconomic processes of mutual understanding.¹⁶⁹ However, the expectations of audiences, when exposed to entertainment, must be addressed, as these audiences are more than mere consumers at the mercy of economic interests. If a commercial consideration distorts the message or even disguises the identity of the messenger, mere warning signs, which reveal the existence of commercial involvement to the audience, are insufficient. "In communicative action, participants are not primarily oriented to their own individual successes," explains philosopher Jürgen Habermas, "they pursue their individual goals under the condition that they can harmonize their plans of action on the basis of common situation definitions. In this respect, the negotiation of definitions of the situation is an essential element of the interpretive accomplishments required for communicative action."¹⁷⁰ The regulatory response to this situation must, therefore, treat the viewer with at least as much respect as the broadcaster. Indeed, such considerations were addressed in the groundbreaking holding in *FCC v. Pacifica Foundation*, where the Supreme Court ruled that otherwise

prohibited practice. But that has yet to be determined, considering that the authorities are constantly renewing their commitment to the well-being of public broadcasting, as long as it maintains its "public remit," meaning that it stays separate.

168. See Balasubramanian, *supra* note 5, at 30.

169. A concept borrowed from 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 342 (Thomas McCarthy trans., 1981).

170. HABERMAS ON SOCIETY, *supra* note 15, at 157.

constitutionally protected speech may be barred from being broadcast.¹⁷¹ Justice Powell's concurring opinion stated that broadcasting, unlike most other forms of communication, comes directly into the home, which he termed "the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds 'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.'"¹⁷² In its ruling in this case, the Court noted that the FCC's sensitive judgment in protecting unwilling adults from exposure to such content deserved to be respected.¹⁷³ Does this mean that a ban on product placement is the only option? The answer, in this author's opinion, is absolutely not, and that a middle ground can be reached, as it has in the case of indecency, where the solution took the form of creating safe havens from indecent speech and a clear demarcation of broadcasts containing indecent content.¹⁷⁴ Separation does not mean a total ban. On the other hand, adopting the halfhearted solutions prevalent in broadcasting today is not acceptable. In the case of indecency, community values may interfere with sound judgment regarding content and its definition. But this is not the case with product placement identification, for which the test may be based on examining the procedural transaction affecting the appearance of the branded good in the program. This approach is also in line with the philosophy of communicative action, which "holds that philosophy cannot determine the primacy of particular theories of the good," but instead adhering to procedure and process can lead to an agreed upon definition of right.¹⁷⁵ Identifying intervention in the decision-making process of the televised program can help classify it and assign it to the proper category.

C. *What Is To Be Done?*

It is the loci of control and the motivation of the controlling powers that differentiate broadcasting systems and dictate the way they are

171. 438 U.S. 726 (1978) (citation omitted).

172. *Id.* at 759 (Powell, J., concurring).

173. *Id.*

174. FCC rules prohibit the broadcast of indecent material from 6 a.m. to 10 p.m. and require that all televisions thirteen inches or larger include technology allowing blocking of unwanted programming. Industry Guidelines on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8001 (2001).

175. See Karin Wahl-Jorgensen & Hernan Galperin, *Discourse Ethics and the Regulation of Media: The Case of the U.S. Newspaper*, 24 J. COMM. INQUIRY 19, 21 (2000).

organized.¹⁷⁶ Undisclosed sponsorship and advertising is problematic because the true motivation behind the broadcast is not clear to the viewer, and therefore, the communication dynamic between broadcasters and viewers does not conform to the rules of full disclosure that an ethical communication process should follow. On the other hand, once the intrusion of commercial interests into the broadcasting sphere has been accepted as the norm, it is of relatively little importance whether they take the form of isolated “spots” or whether they are inserted seamlessly into the content. What is important is that all who participate in the communicative action—creators, broadcasters, and audiences—are aware that they are taking part in a commercial process. As demonstrated, both the United States’ and European approaches share a certain apprehension of product placement, even though their reservations are based on different philosophies, which have spawned different regulatory responses. This is because the growth of product placement in advertising supported broadcasting today can and has been attributed to the fact that audiences are turning away from advertising.¹⁷⁷ Nevertheless, broadcasters and advertisers try to force viewers to watch advertising by coating it with “artistic” content. Regulators in societies where market rules prevail seem indifferent to this unholy union, even though, as mentioned, they do project through their halfhearted solutions their discomfort with this conduct. Their overall apathy, however, appears to contradict their mission of serving the public interest, as product placement is a way of forcing on the public something it desires to avoid: commercial content in broadcasting. It does so by presenting the undesired content in a way that the public cannot avoid seeing. The solution lies in carefully redefining the lines between different types of broadcasting, which is feasible in both systems that have traditionally shied away from commercial content in broadcasting and in those unperturbed by the coexistence of commercial and artistic content. However, as uneasy as product placement makes some critics feel, an all-or-nothing approach, in other words throwing out the baby with the bath water, is also unadvisable. Regulators must take the industry’s welfare into account when weighing “moral” objections to product placement and other new forms of advertisement. Better solutions than a total ban exist. Creating safe harbors of commercial-free broadcasting, truly commercial-free broadcasting, is a solution that would provide for both the coexistence of and a clear distinction between two important types of

176. WILLIAMS, *supra* note 14, at 124.

177. See Gilbert, *supra* note 4; Shanley, *supra* note 4.

broadcasting. Commercial broadcasting, in spite of all its shortcomings, is a significant contributor to the free flow of ideas and information. Public broadcasting, however, is at least as important, as long as it is truly free of commercial interests. These are not the only types of broadcasting that exist, however. There are many shades to the commercial/noncommercial dichotomy. For example, noncommercial media in the United States are allowed, as mentioned, to include limited commercial material in their broadcasts,¹⁷⁸ while cable and satellite operators offer “commercial free” time on pay services, in which product placements are prevalent.¹⁷⁹ Shades of gray are apparent also in television programming itself. In “reality” shows, where nonactors compete against each other for prizes, and which have become a major target for product placements,¹⁸⁰ products are placed mostly as props and do not affect the “real” contest that is taking place and entertaining the viewers.¹⁸¹ The same applies to sporting events where the fact that there are billboards present in the stadium or that the players’ uniforms boast corporate logos has no effect on the content of the broadcast whose importance lies in the competition itself. In scripted shows, however, the content of the show is often altered in order to accommodate the products promoted and advertisers play an active role in developing the scripts.¹⁸² Indeed, it is possible to argue that the “contract” upon which the relationship between viewers and broadcasters is based differs in these two cases and that in the case of scripted shows, viewers have higher expectations of artistic freedom from commercial involvement than in “reality” shows, where the fairness of the “competition” is deemed more important. All these gray areas point to one conclusion: A new system of disclosure is necessary, one that distinguishes between different types of broadcasters and content providers, different genres of programs, and audiences with different perceptions of broadcasting content. Understanding the roots of different regulatory systems will facilitate the goal of reaching an ethical solution.

178. 47 U.S.C. § 399a(b) (2000).

179. According to media reports, product placement on pay channels such as Showtime and HBO is not paid, but rather bartered. However, even barter constitutes a form of paid advertising as producers admit it lowers their production expenses. See Michael McCarthy, *HBO Shows Use Real Brands*, USA TODAY, Dec. 3, 2002, at 3B; Susanne Ault, *L Gets the Word Out*, VIDEO BUS., Sept. 27, 2004, at 46.

180. June Deery, *Reality TV as Advertainment*, 2 POPULAR COMM. 1, 11 (2004).

181. This is not to claim that these so-called “reality shows” project reality in any way.

182. Lorne Manly, *When the Ad Turns into the Story Line*, N.Y. TIMES, Oct. 2, 2005, § 3, at 1.

As he raised his eyes after crossing the Jordan River, Joshua noticed a man holding a sword.¹⁸³ Joshua walked up to him and inquired: “Art thou for us, or for our adversaries?”¹⁸⁴ As far back as 3000 years ago, honest statements of loyalty at the beginning of a communicative action determined the definition of the situation and set the rules for further discourse. That basic ethical principle should be upheld and continue to determine the relationship between people.

183. *Joshua* 5:13.

184. *Id.*