Freedom of commercial speech: evaluating the ban on advertising of legal products such as tobacco

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Abstract

Although freedom of commercial expression is not specifically mentioned in section 16 of the Constitution of South Africa 108 of 1996, the right to freedom of expression includes *inter alia* the right to receive and impart ideas, which is wide enough to cover almost any form of expression. This article deals with freedom of speech in the form of commercial speech and particularly with the ban on the advertising of lawful consumer products such as tobacco. Although the focus falls mainly on tobacco advertising, the reasoning applies equally well to all similar advertising bans. Section 16 of the constitution and the Tobacco Products Control Act 83 of 1993 are in direct conflict with one another: the almost total ban on all forms of tobacco advertising and promotion severely restricts the right to receive and impart information on a legal consumer product. Various aspects in this debate are evaluated: whether advertising qualifies as a form of expression that is constitutionally protected and whether this right can be restricted; the advantages and disadvantages of a ban on the advertising of legal consumer products; the harm which the government seeks to reduce with its restrictive legislation; whether the ban on tobacco promotion results in a reduction of such harm; and whether this justifies the total ban on advertising. Various alternatives are evaluated and a comparative study of other jurisdictions is made.

INTRODUCTION

In South Africa freedom of expression is protected under section 16 of the Constitution. Although freedom of commercial expression is not specifically mentioned in this section, the right to freedom of expression in section 16 includes, *inter alia*, the right to receive and impart ideas, which is wide enough to cover almost any form of expression. This article deals with freedom of commercial speech, and particularly with the ban on the advertising of lawful consumer products such as tobacco.

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1Act 108 of 1996.
Section 16 of the Constitution and the Tobacco Products Control Act 83 of 1993 are in direct conflict with one another: the almost total ban on all forms of tobacco advertising and promotion severely restricts the right to receive and impart information on a legal consumer product. Apart from traditional advertising, the Act also prohibits tobacco company sponsorship of sporting and cultural events. The purpose of this advertising ban is to discourage consumption of tobacco and is therefore distinct from advertising regulations seeking to ensure such things as accuracy, good taste, or the targeting of the most appropriate audience. This is a controversial issue and the purpose is not to debate the merits or demerits of smoking. However, the issue which will be discussed is the principle of freedom of expression (particularly commercial expression) and whether it is permissible for the government to ban the advertising of lawful consumer products. The constitutionality of such a ban on tobacco advertising is also relevant for future regulation of commercial speech.

Although tobacco is the first product to be singled out for such radical treatment, it is possible that this could extend to calls for advertising bans on other legal products, such as alcohol, foods high in saturated fats, and the recently proposed ban on advertising of artificial baby-feeding formulas.

2In terms of the Tobacco Products Control Act of 1993 (as amended by the Tobacco Products Control Amendment Act 12 of 1999) a total ban is placed on all advertising of tobacco products and the use of tobacco trade marks, logos, brand names or company names to promote any organisation, service, activity or event (s 3(1)). Even tougher anti-smoking legislation is proposed in the Tobacco Products Control Amendment Bill of 2004 (Government Gazette 25601 No 1513 17 October 2003).

Section 3(3) of the Tobacco Products Control Act of 1993 exempts certain advertisements at the point of sale (to indicate the availability of tobacco products and their price). In terms of the regulations advertisements are exempted if they appear in any book, magazine or newspaper printed outside South Africa, or in any film or video transmission made outside South Africa provided that their main purpose is not to promote tobacco, or to be sold, distributed or exhibited primarily in South Africa or in the case of radio, television or any electronic transmission, targeted primarily at a South African audience (Government Gazette 21610 29 September 2000). For the problems regarding the practical implementation of these provisions, see the 'Comment of the Freedom of Commercial Speech Trust on the proposed regulations in terms of the Tobacco Products Control Act 83 of 1993' par 7 at http://users.iafrica.com/f/fc/fcstrust.

3The aim is not to defend tobacco as a product, but rather the principle of freedom of commercial speech. The effects of smoking should be distinguished from the principle of freedom of commercial speech — this entails, on the one hand, that a product which may be legally produced may be promoted and, on the other, the public's right to receive information regarding such a product and to participate in discussion regarding such a product.

4In a public statement made on 10 October 2001 the Central Drug Authority has already proposed wide-ranging restrictions and prohibitions on alcohol advertising — Freedom of Commercial Speech Trust 'Comment on: first tobacco, now this is what's in store when the ban on liquor advertising kicks in' at http://m1.mny.co.za/mkfcc.../A88EE77FD54F2C9AC2256C01002A0AD6?OpenDocument (2002).

What will be next: cell phones, motor cars, sport, sugar? See also Mize 'The word "dog" never bit anyone — the tobacco advertising ban and freedom of expression' 1995 Otago Law Review 428.
bottles and teats. So, although this discussion deals mainly with tobacco as the product at the forefront of government advertising restrictions, the reasoning applies equally to all similar advertising bans.

The main argument proposed by those in favour of the ban on tobacco advertising is that it is justified because it will result in the reduction of the harm that flows from the advertising of tobacco products. When weighing, on the one hand, the harm of restricting freedom of expression, with, on the other hand, the harm that the proposed ban seeks to reduce, certain aspects need to be evaluated. First, does advertising qualify as a form of expression protected in terms of the Constitution and can this right be restricted? Secondly, the advantages and disadvantages of a ban on the advertising of legal consumer products are evaluated. Thirdly, the enquiry deals with the harm which the government seeks to reduce with its restrictive legislation, whether the ban on tobacco advertising results in a reduction of such harm and whether this justifies the total ban on advertising. Finally, a few alternatives are evaluated. During this discussion reference will be made to the position in other jurisdictions such as the United States, Canada, New Zealand, Australia and the United Kingdom to serve as possible guidelines for the South African situation.

DOES ADVERTISING QUALIFY AS A FORM OF EXPRESSION THAT IS PROTECTED IN TERMS OF THE CONSTITUTION AND CAN THIS RIGHT BE RESTRICTED?

Before evaluating this issue one needs briefly to state the functions of freedom of expression — in other words, why is it at all necessary that we protect freedom of expression? Freedom of speech enables a democracy to function properly, it facilitates individual self-actualisation and fulfilment, it advances the search for truth through the marketplace of ideas and it provides a forum for protest and opinion which enhances the advancement and stability of society. Basically, freedom of speech where an individual is allowed to hear all sides of an issue, enables him/her to evaluate the situation and make an informed, rational decision. It is therefore a wise and commendable notion, deserving of strict enforcement. However, the notion of freedom of speech has never been totally free and the protection of freedom of speech cannot be absolute. Restrictions to this right are acceptable, depending on the circumstances.

In both America and Canada the courts recognise that advertising, which is referred to as 'commercial speech', is entitled to protection in terms of their respective constitutions. However, it is not necessarily entitled to the same degree of protection that other forms of speech — such as political or artistic

7 See the Regulations relating to foodstuffs for infants and young children in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 (Government Gazette 25473 No 1328 26 September 2003).
expression enjoy.9

Freedom of commercial speech in America

In America the case which first acknowledged that commercial speech merited protection under the US Constitution, was Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.10 The United States Supreme Court stated that in order for the public to make intelligent and well informed decisions in a free market economy, the free flow of commercial information is indispensable. The court held that a state's paternalistic assumption that the public will use truthful, non-misleading commercial information unwisely, cannot justify a decision to suppress it.11 This was confirmed in Central Hudson Gas & Electric Corporation v Public Service Commission of New York12 in which the Supreme Court protected commercial speech constituting 'lawful activity' that was 'not misleading.' The court held that it will not approve a blanket ban on commercial speech unless the speech itself is flawed in some way, either because it is deceptive or because it is related to unlawful activities.13 It is generally accepted that commercial speech in the USA is less vigorously protected than other forms of speech and a test for the regulation of commercial speech has been developed. In the Central Hudson case, the court formulated the following three-point test. First, in order to justify a restriction on commercial speech, the state must show that the restriction serves a substantial interest. Secondly, it has to be determined whether the regulatory measure directly advances that interest. Thirdly, the restriction should be no broader than necessary to advance that interest.14 In Edenvale v Fane15 the court decided to make the third part of the test more lenient in that the state does no longer had to show that the means chosen was 'necessary', but rather that the means chosen was 'tailored in a reasonable manner'. The Supreme Court again examined the last leg of the test in Florida

11At 769–770. This does not mean that advertisers can proceed unrestricted. There are numerous federal, state and local legislation regulating the advertising industry. See Boddewyn Global perspectives on advertising self-regulation (1992) 135.
12447 US 557 (1980). At 574–575 the court stated that it is doubtful 'whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice'.
13447 US 557 (1980) 566–567. When dealing with products that are legal but which may be regarded as harmful or socially undesirable, such as smoking, the use of alcohol and gambling, the issue of a blanket ban on advertising becomes relevant.
14Ibid.
Bar v Went For It Inc\textsuperscript{16} and stated that what is needed is rather a 'fit' between the legislature's aims and the means chosen to accomplish those ends. This 'fit' need not necessarily be perfect, but reasonable. It should not necessarily be the single best disposition, but one whose scope is in proportion to the interest served. It should not necessarily make use of the least restrictive means, but a means narrowly tailored to achieve the desired objective.\textsuperscript{17}

The trend which followed the Supreme Court's deference to state legislatures, in Central Hudson Gas appears to have been halted and the court is again demonstrating strong support for freedom of commercial speech.\textsuperscript{18} Although the court used the Central Hudson test in Posadas de Puerto Rico Association v Tourism Company of Puerto Rico\textsuperscript{19} to find that a ban on advertising of casino gambling in Puerto Rico was constitutional, this decision was criticised by the Supreme Court in \textit{Liquormart, Inc v Rhode Island}\textsuperscript{20} where it was found that in the Posadas case the court had erred in its First Amendment analysis. This case dealt with a ban on the advertising of alcoholic beverages. After the court had rejected many of the arguments which had in previous cases been relied upon to support the blanket bans on advertising, it ruled that Rhode Island could not ban truthful, non-misleading advertising of the price of alcohol beverages.\textsuperscript{21} The court stated that while products remained freely available there could be no justification for a blanket prohibition on commercial speech regarding those products.\textsuperscript{22} This was confirmed in the decision of Greater New Orleans Broadcasting Association Inc v United States\textsuperscript{23} where a unanimous Supreme Court invalidated a federal ban on radio and TV advertisements for casino gambling. In states where casino gambling is legal, the court ruled, it is an infringement of free speech to prohibit anyone from advertising it. In other words, if you can buy it, you can advertise it. This of course has dramatic implications for the


\textsuperscript{17}Section IIB of the judgment; Woker n 9 above at 298. Some critics regard the difference that the court has made between commercial and non-commercial speech to be dangerous as it could be used by governments to suppress or control speech simply by putting it into the category of commercial speech — Kozinski and Banner 'Who's afraid of commercial speech?' 1990 \textit{Virxinia LR} 76 at 627.

\textsuperscript{18}Woker Advertising law in South Africa (1999) 209.

\textsuperscript{19}478 US 328 (1986) 92 L Ed 2d 266.

\textsuperscript{20}(1996) 134 L Ed 2d 711.

\textsuperscript{21}In terms of Rhode Island legislation of 1956 it was not allowed to display liquor prices outside a liquor store. Furthermore the ban also prohibited any advertising of liquor prices to be posted, published or broadcast anywhere in the state. The State of Rhode Island stated that the ban was aimed at promoting moderation and protecting the health and welfare of its citizens. The state claimed that the ban on reduced price competition reduced the consumption of liquor. See also Woker n 18 above at 219–220.

\textsuperscript{22}At 734–6. Levendosky 'Can't ban truthful commercial speech, says court' \textit{Star-Tribune} 19 May 1996 is of the opinion that this judgment means that while cigarettes can be legally bought over the counter and the advertising is not misleading, the Supreme Court would not easily allow a blanket ban on cigarette advertising. See also Woker n 18 above at 20 n 135.

\textsuperscript{23}149 F 3d 334 (5\textsuperscript{th} Cir 1998).
regulation of other so-called 'vices' such as alcohol and tobacco. It seems that
the court suggests that the sole reason advertisements may be restricted is to
ensure that they are not misleading (not that the product may be bad for
you). 24

**Freedom of commercial speech in Canada**

The Canadian Supreme Court, like its US counterpart, has also recognised that
the protection granted to freedom of speech by the Canadian Charter also
applies to commercial speech, such as advertising. 25 In contrast to the
position in America, the Canadian Charter contains a limitation clause. 26 This
means that it may be possible for the state to show that the limitation of a
fundamental right is justifiable. In order to do this, two competing values have
to be weighed, namely the value of free speech on the one hand, and the value
of the limitation, on the other. 27

**Freedom of commercial speech in South Africa**

In South Africa the regulation and, in some cases even prevention, of
advertisements is effected not only by statute, 28 but also by the Advertising
Standards Authority of South Africa (ASA), under its voluntary Code. 29 Most
would agree that in general the majority of the restrictions, especially those
that seek to control misleading and false advertising, are desirable. Their aim
is generally to protect consumers, encourage legitimate business, and to
protect honest business people from the questionable practices of their
competitors. 30 However, any legislation and any new controls need to be
considered in the light of the Constitution and especially the limitation clause.

Section 16 of the Constitution 31 protects the right to freedom of expression.
Although freedom of commercial expression is not specifically mentioned in
this section, the right to freedom of expression in section 16 include _inter alia_
the right to receive and impart ideas, which is wide enough to cover almost
any form of expression. 32 To date only one South African Constitutional

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24Nielsen 'In court's eyes, commercial speech is rising in value' at http://www.kilstock.com/site/print/detail?Article_Id=550.
25In _Ford v Quebec (AG)_ (1988) 2 SCR 712 the court recognised that advertising is a
valuable source of information and concluded that it was protected in terms of the
Canadian Charter. See also Woker n 18 above at 210 _et seq._
26Section 1.
28For example s 6 of the Merchandise Marks Act of 1941, s 34 of the Trade Marks Act
of 1933 (as well as s 22 of Act 62 of 1963) which places a ban on the copying of a
trade mark or of a mark so closely resembling another person's trade mark that it
is likely to cause confusion. A number of statutes aim to control misleading and
false advertising, for example the Trade Practices Act of 1976.
29See the particulars of the ASA at http://www.asasa.org.za/index2.html.
30Woker n 9 above at 295.
31Act 108 of 1996.
32In terms of s 16(1) of the Constitution of 1996 everyone has the right to freedom
of expression, which includes '(a) freedom of the press and other media;(b) freedom
to receive and impart information and ideas; and (c) freedom of artistic creativity;
academic freedom and freedom of scientific research ...'.
Court case has dealt with freedom of commercial speech. In City of Cape Town v Ad Outpost (Pty) Ltd the court referred to American and Canadian judgments and held that advertising (commercial speech) falls within the nature of expression and is therefore protected in terms of section 16(1) of the Constitution. The court accepted that artificially created divisions between the value of different forms of speech requires critical scrutiny but did not make a finding on the issue. Unfortunately this statement creates the impression that commercial speech could be valued lower than other forms of expression in the limitation stage and therefore limitations could more easily fall within the requirements of section 36. It is submitted that the Canadian approach, namely that commercial speech should not be ‘undervalued’ or ‘lightly dismissed’, should be followed by our courts. Freedom of speech is no less a form of expression than any other kind of expression. To base a distinction between commercial expression and other forms of expression on economic grounds is futile, for most forms of expression worth the cost of taking to court will have some pecuniary value worth fighting for. Apart from the above-mentioned case, this is still an untested area of our law which means that there is no clear indication of the severity with which the South African courts would assess any restriction on freedom of expression of this kind in future.

Although freedom of expression, and therefore freedom of commercial expression, is guaranteed in terms of the Constitution, it is not an absolute right. Every society places its own restrictions on a right which depends on

33City of Cape Town v Ad Outpost (Pty) Ltd 2000 2 SA 733 (C). In this case the respondent, Ad Outpost (Pty) Ltd, erected two billboard signs in contravention of a municipal by-law. In terms of s 6(1) of the by-law any advertising on a sign or billboard about goods and/or services that is not related to that particular property is prohibited, while so-called ‘own advertising’ is allowed. The respondents argued that the requirements of the by-law were unconstitutional and invalid in so far as they contravened inter alia s 16 of the Constitution dealing with freedom of speech.

342000 2 SA 733 (C) 748-749.

35At 749 the court states: 'To the extent that its value may count for less than other forms of expression, account of this exercise in valuation can only be taken at the limitation enquiry as envisaged in s 36 of the Constitution.'

36Delport and Bekink (eds) City of Cape Town v Ad Outpost (Pty) Ltd 2000 2 SA 731 (C) 2000 De Jure 388. On 394 they refer to the decision of the court in RJR MacDonald Inc v Canada (Attorney General) 1995 3 SCR 199 where the Supreme Court made the following statement on the ‘value’ of commercial speech: 'Second, just as care must be taken not to overvalue the legislative objective beyond its actual parameters, so care must be taken not to undervalue the expression at issue. Commercial speech, while arguably less important than some forms of speech, nevertheless should not be lightly dismissed.' And further: 'Third, in finding that the commercial speech here at issue is entitled to a very low degree of protection under s. 1' (para. 75) and that 'an attenuated level of s. 1 justification is appropriate in these cases' (par. 77), La Forest J. places a great deal of reliance on the fact that the appellants are motivated by profit. I note that the same may be said for many business persons or corporations that challenge a law as contrary to freedom of expression. While this Court has stated that restrictions on commercial speech may be easier to justify than other infringements, no link between the claimant’s motivation and the degree of protection has been recognized.'

37Silver n 9 above at 566.
factors such as culture, history and tradition. Public opinion changes from time to time depending on developments in society, as well as changes in attitude in other jurisdictions. In South Africa, the Constitution stipulates that fundamental freedoms may be limited, provided these limitations are reasonable and justifiable in an open and democratic society. Section 36 contains the general limitations clause, and the ambit of each right in the Bill of Rights must be assessed within the framework embodied in this section.

When evaluating specific legislation to determine its constitutionality, the following two-stage analysis is followed: the first question to be asked is whether the law violates any of the guarantees embodied in the Constitution, and if the answer is in the affirmative, the next step is to examine whether the law is acceptable in terms of the limitation clause.

In the case of restricting legislation, the state will have to show that any restriction of free speech is justified in a free and democratic society. During the analysis the court may, in terms of section 39 of the Constitution, refer to the approach followed by foreign courts restricting advertising.

When the constitutionality of any restriction on commercial speech is evaluated, the court will have to assess each case on its merits. In S v Makwanyane the Constitutional Court made the following comments on the limitation of fundamental rights. It stated that in order to determine whether a limitation is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. The court stated that there is no absolute standard which can be laid down for determining reasonableness and necessity, and that although principles can be established, the application of those principles to particular circumstances can only be done on a case-by-case basis. The court explained that there must be a balancing of different interests and that

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38 Woker n 9 above at 293 et seq.
39 Section 36 provides the following:
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
   (a) the nature of the right;
   (b) the importance of the purpose of the limitation;
   (c) the nature and extent of the limitation;
   (d) the relation between the limitation and its purpose; and
   (e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'
40 S v Zuma 1995 4 BCLR 401 (SA). The limitation clause in the South African Constitution is based on a similar clause contained in the Canadian Charter of Rights and Freedoms. A similar two stage inquiry is also followed there.
42 Section 39 of the Constitution of 1996 provides that when interpreting the Bill of Rights, a court must promote the values that underlie a democratic society and may consider foreign law.
43 1995 (6) BCLR 665 (C) at 708. Woker n 9 above at 308.
it will consider factors such as the nature of the right being limited; its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited; the importance of that purpose to such society; and the extent of the limitation and its efficacy.

**THE ADVANTAGES OF ADVERTISING OF LEGAL PRODUCTS SUCH AS TOBACCO AND NEGATIVE CONSEQUENCES OF THE ADVERTISING BAN**

As stated earlier, commercial speech in the USA is not necessarily entitled to the same degree of protection as other forms of speech.\(^44\) It is, however, considered that the motive for disclosing information in the case of commercial speech is usually pure economic gain.\(^45\) Where the advertiser is restrained from disclosing this information, the loss suffered by the advertiser is merely a loss of profit. It does not really prevent someone from taking part in the political process or the 'marketplace of ideas'. For this reason the courts in the USA have stated that restrictions on expressions of this kind (in other words, advertising) are easier to justify than other restrictions. However, the courts still recognise that advertising does provide a real public service in that it can enhance the ability of consumers to make informed choices. Legislation that denies or restricts access to information which consumers need in order to make informed decisions, will accordingly not readily be accepted by the courts.\(^46\)

The perception that advertising may be speech, but not a valuable form of speech, is disputed by Gray.\(^47\) He points out that it is accepted throughout the world's liberal democracies that political, religious and artistic speech merit significant protection from government restriction because they contribute to human freedom and embody the realities of human choice. In other words, these forms of speech are valuable. Commercial speech, on the other hand, is often regarded as having less intrinsic value and being the so-called 'poor relation'. It is thus singled out for particularly restrictive control, or censorship, which would not be tolerated in the other forms of speech. Gray argues that this conviction represents a fundamental mistake in philosophy, logic and ultimately, in ethics. All forms of speech, including commercial speech, are branches from the single tree of free expression. They all complement each other and are not necessarily competitive. It is thus a mistake, he states, to think that one type of speech less worthy or valuable

\(^{44}\)Silver n 9 above at 566; Woker n 9 above at 295.

\(^{45}\)This is however not the opinion of Dr John Gray, a widely respected political philosopher and fellow of Jesus College Oxford, who is a great proponent of freedom of commercial expression. To him advertising is an 'enabling device for individual choice'. He is of the opinion that in a market economy, advertising is the most essential component in facilitating the choice and flow of information for the consumer's benefit. However, he warns against justifying the protection of economic expression for purely commercial reasons, even though the commercial reasons are quite compelling. He proposes that the distinction between commercial speech and other forms of expressions is arbitrary. Silver n 9 above at 567.

\(^{46}\)Woker n 9 above at 296 and the authorities cited there.

\(^{47}\)See Corner 'Free flow of commercial speech essential to world market' (October 1999) at http://www.iaaglobal.org.
than any other. They all persuade people to do certain things.

Regarding the criticism that commercial speech 'manipulates' the minds of consumers, implanting purchasing desires that did not previously exist, Gray points out that this line of reasoning attempts to downgrade advertising's key function, namely to inform, and seeks to convince us that such speech is merely meant to manipulate and appeal to emotions. He argues that if this is true, would it not also be true of political life? Political discourse is seldom purely informative, but it is usually persuasive, setting out practical objectives and appeals to emotion. This line of reasoning can certainly apply to counter the belief that consumers need government protection from commercial speech. If consumers are the very same citizens who can receive messages in the form of political, religious or artistic speech, and be trusted to make their own decisions on their choice of leaders or their spiritual faith, why are they suddenly incapable of making the infinitely less fundamental decisions on what products and services to purchase and use?

There does seem to be merit in Gray's point of view that the same checks and balances that are applied to other types of expression, also be applied to commercial speech. Silver correctly proposes that if a system of law would protect one's right to hear all types of political views (except those that would incite violence) then so should society be given the same opportunity to exercise its identity as consumer.

The provisions of section 16 of the 1996 Constitution is relevant to advertising since advertising is about conveying information to consumers. Unless consumers are sufficiently informed to make intelligent choices, they will select, and producers will produce, blindly and uneconomically. Advertising, in its broadest sense, is the vital conduit for information between producer and consumer. No one other than the producer has the will or the means to do it. Without advertising, consumers would not know what was available or where to get it. A ban on the advertising of tobacco products would have the effect that consumers would be prevented from learning where they would be able to buy their brand of cigarettes at the lowest price. This again results in a financial loss for uninformed smokers. A study conducted in America and Germany has indicated that advertising is the most important source of product and purchasing information available to consumers in industrial societies with market economies. It has been suggested that cigarette advertising may even have certain health benefits — the information as to

48 See n 9 above at 567.
49 Corner n 47 above.
51 Studies examining the potential detriment of advertising bans on spectacles and pharmaceuticals in the USA have shown that bans result in considerable consumer loss, and price differentials as high as twenty per cent in favour of the consumer in states where advertising was not banned. Silver n 9 above at 567.
52 Rijkens & Miracle European regulation of advertising (1986) 25; Woker n 9 above at 293.
which brand of cigarette contains the lowest amount of tar and nicotine enables smokers to make an informed decision.\textsuperscript{53}

Apart from the financial and health impact on smokers, the Act also prohibits individual expression and debate on the merits of smoking, since a pro-smoking visual or audible message would be considered to be an 'advertisement' even if there is no profit motive present.\textsuperscript{54} Authors and fictional characters in stories and plays who say 'I need a smoke' and then light up, as well as anyone stating that 'those adults who wish to smoke should continue to do so', would run the risk of being considered to be promoting smoking and therefore contravening the Act.\textsuperscript{55} The general prohibition in section 3 of the Tobacco Products Control Act is over broad, and even an individual wearing clothing with a tobacco trade mark\textsuperscript{56} on it could be committing an offence.\textsuperscript{57} Furthermore, section 3 of the Act not only prohibits the transmission of satellite feeds carrying direct or indirect tobacco advertisements, but also the marketing of imported magazines with tobacco advertising — this is problematic since the Act does in principle not have extraterritorial application.\textsuperscript{58} The mere fact that the Minister of Health is given the authority to make regulations to exclude 'unintended consequences',\textsuperscript{59} is a clear indication that the provisions in the Act are over broad and questionable regarding their constitutionality.\textsuperscript{60}

\textsuperscript{53}Some people are unwilling or unable to quit smoking and decreased risk of nicotine/tar levels and new safety measures regarding filters, etcetera, is important to them. Mize n 6 above at 428. Corner n 47 above summarises the benefits of commercial speech as follows: 'it creates and encourages competition; encourages product innovation; plays a part, through the process of mass production demand, in creating jobs; helps provide, through its subsidy role, diverse independent, and affordable media; subsidizes a large part of the entertainment industry, particularly sports and music; and most importantly, empowers consumer choice. ' A total ban on advertising has a negative effect on all these aspects.

\textsuperscript{54}In terms of the Tobacco Products Control Act 83 of 1993 an 'advertisement' is defined in section 1 as '... any drawn, still or moving picture, sign, symbol, other visual image or message or audible message aimed at the public and designed to promote or publicise a tobacco product or to promote smoking behaviour ...'. See also Mize n 6 above at 428 for similar criticism regarding the position in New Zealand.

\textsuperscript{55}Mize n 6 above at 428.

\textsuperscript{56}According to the definitions section of the Act, such a trade mark can be registered or registrable for trade purposes or any recognised version thereof that is likely to be taken as, or confused with, that trade mark.


\textsuperscript{58}According to the Freedom of Commercial Speech Trust n 57 above, this will have the effect that the tobacco advertising will be moved offshore. This will mean that there will not be less advertising, but that the advertising expenditure will now be outside South Africa.

\textsuperscript{59}Section 3(5) of the Tobacco Products Control Act of 1993. However, the regulations do not make provision for any unintended consequences as stated in section 3(5) but rather restricts the freedom of commercial speech even further by creating additional duties for advertisers, agencies and those in the print and electronic medium. See the discussion of these regulations by the Freedom of Commercial Speech Trust n 3 above.

\textsuperscript{60}The Freedom of Commercial Speech Trust n 57 above.
Although there is a total ban on advertising,61 the question is whether the Act provides any defence or exemptions for 'accidental' broadcasting or broadcasting that has 'unintended consequences'62. 'Accidental' broadcasting of tobacco advertisements should not lead to criminal liability simply because an 'accidental' act implies that the requisite mental element necessary to establish the offence is absent. In the case of the electronic medium, the exemption for unintended consequences63 will only apply if the 'radio or television or any other electronic transmission' is not 'targeted primarily at people living in the Republic'.64 It is clear that the practical effect of the regulations are that no exemptions are allowed for unintended consequences, but that the freedom of commercial speech is restricted even further and new duties65 are created for advertisers, agencies and the electronic medium.

The Freedom of Speech Trust66 concludes that the statutory67 ban on tobacco advertising exceeds the measures necessary to protect the interests

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61Section 3 of the Tobacco Products Control Act of 1993.
62In Australia the federal Tobacco Advertising Prohibition Act 1992 makes it an offence to broadcast tobacco advertisements. Armstrong, Lindsay & Watterson Media law in Australia (1995) 239 notes that there is an exception in the case of incidental broadcasts, such as the tobacco-sponsored events held overseas, provided the broadcaster receives no benefit. See also Butler & Rodrick Australian media law (1999) 402-404. Rothmans of Pall Mall (Aust) Ltd v Australian Broadcasting Tribunal (1985) 5 FCR 330 at 341; Action on Smoking and Health Ltd v Australian Broadcasting Tribunal (1993) 27 ALD 709.
63Regulation 5 provides that '[a]dvertisements, including the use of tobacco trade marks, logos, brand names or company names used on tobacco products, which appear in any a) film or video transmission made outside the Republic are exempted from the provisions of the Act. In terms of Regulation 6 the exemption does not apply in an instance where b) the primary purpose of such a ... film or video is the promotion of the use of tobacco or tobacco products; or c) such an advertisement in any radio or television or any other electronic transmission is targeted primarily at people living in the Republic.' See these regulations at http://www.acts.co.za.tobacco/RegsEx2.htm.
64According to the Freedom of Commercial Speech Trust n 3 above at par 7.3.3 the problem here is that it would be impossible for the South African (signal) distributor to determine whether a transmission is targeted 'primarily' at people living in the Republic. They state that if sole distribution rights are contracted for, it could be 'primarily targeted' at South Africa. If not, the information may be confidential and therefore impossible to obtain. They conclude that this is an important criterium, as it determines, whether there is an exemption, subject to the other obligations, or a total ban.
65The following obligation is placed on importers and distributors of videos and films: they should annually submit a list to the Director-General of Health of the names of all the videos and films that contain tobacco advertisements, together with their countries of origin, and the numbers of copies imported and distributed by them. It must be noted that according to the definition 'advertisement' means any 'drawn, still or moving picture, sign, symbol, other visual image or message or audible message aimed at the public and designed to promote or publicise a tobacco product ...'. 'Advertisement' therefore refers not only to traditional advertising, but also to product usage in films and 'indirect' advertising eg on Formula 1 racing cars, as these actions are clearly 'signs' designed to promote a tobacco product.
66See the comments of the Freedom of Commercial Speech Trust n 3 above at par 6.
67The Tobacco Products Control Act of 1993 (as amended by The Tobacco Products Control Amendment Act 12 of 1999).
of government and others, and that restrictions instead of a total ban would, on a balance, have served those interests as effectively. They argue that this is in accordance with the principle that no right, not even the right to freedom of expression in section 16 of the constitution is absolute, but that a limitation of a right within the stated parameters is acceptable while a total abrogation of a right is not.

IDENTIFYING THE HARM THAT THE GOVERNMENT SEEKS TO REDUCE WITH ITS RESTRICTIVE LEGISLATION?

Although there is a lot of debate regarding the health risks of smoking and whether the link between smoking and ill health can be disproved by scientific studies, let us start off by accepting that smoking cigarettes is more likely than not harmful to one's health and that of others. It may lead to pain, suffering and even death.

From a legal point of view the enquiry must centre around the reasonableness of the aim to reduce this harm by banning tobacco advertisements. Such reasonableness must be weighed up against the potential impact which the withdrawal of advertising will have on the likelihood of people smoking, irrespective of whether they are existing smokers or future smokers. Although the issue of harm is important, one needs to make distinctions here: although it may be reasonable to ban tobacco advertisements aimed at children or in places where children often go, it may not necessarily be reasonable to ban such advertisements aimed at adults.

In other words, the ban on cigarette advertisements must be weighed against the harm which the government seeks to reduce. If the objective of the ban is to discourage underage smokers, then the ban must be tailored to do just that, and must be no more restrictive than necessary. However, if the ban is aimed at the health of the general public, then issues surrounding the freedom of the individual to choose to smoke will also have to be considered.

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68 The Liggett Group in the USA has for example publicly admitted that cigarettes are addictive and may cause lung cancer. Silver n 9 above at 567.

69 Ibid at 567 et seq.

70 Ibid at 567. It is submitted that the reasoning applied to the discussion surrounding freedom of speech in the case of pornography is also relevant here in that the ban against tobacco advertising should be weighed up against the harm which the State seeks to reduce. In the case of Reno v American Civil Liberties Union at http://www.ciec.org/SC_appeal/opinion.shtml the Supreme Court held that the Communications Decency Act (CDA) (dealing with pornography) violated the First Amendment and concluded: 'We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the contents of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to each other. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'

71 Lemieux 'The Economics of Smoking' (2000) at http://www.econlib.org/library/Features/feature5.html criticises the principle of infringement of an individual's choice to smoke and states convincingly: 'All human activities carry costs that have to be weighed against their benefits. Risk to limb or life is merely a type of cost that will occur with a probability lower than one but
words, if the government wishes to ban something, it must clearly delineate the harm that such a ban seeks to reduce. If the harm is identified as being the risks associated with smoking, then the question is whether the ban will be successful in reducing such a risk, or reducing the number of people who choose to expose themselves to such a risk.

THE BAN ON TOBACCO ADVERTISING — DOES IT RESULT IN THE REDUCTION OF HARM?
The emphasis should not be on the perceived effectiveness of the ban, but rather on the actual evidence of any such effectiveness. The fact that such evidence may be difficult to obtain should not mean that the test should be changed to make the government's job a little easier. Good intentions alone should not be a reason to allow such extreme (or, in fact, any) kind of censorship. Although tobacco advertising may be persuasive, it must be weighed against the individual's right to make a legal choice, namely to choose to smoke. The government's attempts to reduce smoking should not result in silencing all opposing viewpoints, because it is then that education campaigns begin to resemble propaganda and exercises in thought control if opposing views are censored out of a fear of their persuasiveness.

higher than zero. Economist Kip Viscusi reports that, in the US, the annual death risk from motor vehicle accidents is 1/5 000. In France, 115 000 skiers are injured every year, and more than fifty killed. In a typical year, 390 Canadians drown, and five are killed by lightning. Individuals presumably take risks into account when they make choices. They believe that the pleasure of driving, skiing, swimming, or walking outweighs the risk; otherwise, they don't engage in such activities.

72RJR MacDonald Inc v Canada (Attorney General) (1995) 127 DLR (4th) 1 at 289 it was held that the onus rests on the state to offer evidence which indicates the existence of a reasonable basis for the adoption of the impugned legislation. At 292 a distinction was made between 'lifestyle' advertisements and more informative brand advertising. According to the evidence it seemed that the lifestyle advertisements would in all probability be more likely to induce young people to smoke than other advertising. The court concluded that the ban could have been tailored more effectively to restrict the 'lifestyle' type of advertising which would cause young people to smoke and informative and purely brand advertisements could have been excluded from the ban.

73RJR MacDonald Inc v Canada (Attorney General) (1995) 127 DLR (4th) 1 at 99-100 the court held that the legislation prohibiting advertising of tobacco products was unconstitutional because the government was unable to explain why a less intrusive and equally effective measure was not taken to achieve its goal. The court stated that despite the fact that tobacco advertising is the advertising of a lawful product, consumers were deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health. Woker n 18 above at 221 refers to earlier Canadian cases and concludes that it is more difficult to justify a complete ban on a form of expression than a partial ban. See also Silver n 9 above at 568.

74Silver ibid. Mize n 6 above at 430 states quite correctly that 'the government has a tremendous amount of power. It has the authority to ban products, and the ability to silence opposition. Making use of this ability to silence other viewpoints is pragmatically as well as philosophically wrong. The government can err, and whether the members of the public believe that it is done so in the case of tobacco is irrelevant to the principle at stake. If discussion of the desirability of any illegal or officially discouraged product is permitted, it provides an avenue through which the minority can attempt to persuade the government of the error of its ways. A silenced opposition is unable to solicit the necessary public support. Thus to prohibit debate is to inhibit democratic checks on the exercise of government
have revealed that there is not necessarily a correlation between past or current advertising bans and reduced consumption.\textsuperscript{75} Such restrictions do little more than reduce the amount of consumer information in the marketplace. According to High,\textsuperscript{76} the conclusion of studies in various countries\textsuperscript{77} is that there is no statistically significant relationship between expenditure on tobacco advertising and tobacco consumption. It seems that the precise opposite is sometimes observed to occur — smoking is more prevalent in certain countries with bans than in those without bans.\textsuperscript{78} High concludes that there is impressively little evidence that people generally, and children in particular,\textsuperscript{79} consume tobacco products as a result of advertising. In view of this it is clear that governments cannot successfully demonstrate that the advertising bans serve to diminish tobacco consumption, since they are of little or no effect; and they could not use means less intrusive of the right to free speech, and a free press, to attain their desired goals.

If smoking is harmful, and advertisements for tobacco encourage smoking,
then any attempt to ban such advertisements must be shown to reduce the likelihood of people smoking. If the government cannot do this, then the ban must fail to pass the test of constitutional scrutiny. All types of restriction on freedom of speech must be subject to the same checks and balances to be in line with the constitution.

I submit that the arguments around the issue of so-called 'passive smoking' or 'secondhand smoking' should not have any effect on the principle of freedom of commercial speech. In my opinion secondhand smoking is a consequence of the act of smoking as such and not of any advertising campaign. It has nothing to do with the principle of freedom of commercial speech, which entails that if one can buy a product legally, one should in principle be able to advertise it. If the state is against smoking as such, then there is always the option of placing a total ban on cigarettes as a product. Whether this will stop people from smoking is debatable, if one bears in mind America's experience of the prohibition on liquor in the 1930s. The state will also have to bear in mind that a total ban on cigarettes will of course stop the inflow of taxes on the sale of cigarettes to the government purse. Since it is not the state's intention with the current legislation to prohibit smoking altogether, I submit that one should still be allowed to advertise it. The debate around secondhand smoking should not affect this principle. The harm of secondhand smoking has already been addressed, to a large extent, by the prohibition on smoking in public places and by the warning labels required by the Act. I submit that an anti-smoking advertising campaign that sensitises smokers regarding the negative effects of smoking, and in particular secondhand smoking, can in fact be beneficial to those around smokers.

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80 Silver n 9 above at 568. Corner states that numerous studies performed by the American scholar Dr John Calfee, amongst others, have revealed, no correlation can be drawn between past or current advertising bans and reduced consumption. Such restrictions do little more, Calfee argues, than reduce the amount of consumer information in the marketplace. See Calfee *Fear of Persuasion* (1997). In *RJR MacDonald Inc v Canada (Attorney General)* (1995) 127 DLR (4th) 1 doubt was expressed regarding the effectiveness of bans on tobacco advertising to reduce consumption of tobacco. See also Paul n 79 above at 48. 81 Bearing in mind that the advertising should be within the limits set out by the Code of the ASA. 82 At the time of introduction of the Tobacco Products Control Amendment Act of 1999 in April 2001 the excise tax on tobacco products was increased by between 11,8 percent and 20,2 percent. The government raises in about R5,5 billion each year from the tobacco industry — Paul n 79 above at 50. 83 As stated in the preamble to Act 83 of 1993. 84 In terms of the definitions section of the Tobacco Products Control Act of 1993 a 'public place' means any indoor or enclosed area which is open to the public or any part of the public and includes a workplace and a public conveyance. Furthermore in practice non-smokers who don't wish to be exposed to secondhand smoke will choose to limit their risk, for example, by sitting in a non-smoking area in a restaurant — they exercise their freedom of choice. See Lemieux n 71 above. 85 Section 3(4) of Act 83 of 1993, and particularly the warning that 'Your smoke can harm those around you' required by the Regulations relating to the Labelling, Advertising and Sale of Tobacco Products Annexure 2 at http://www.acts.co.za/tobacco/Regs_LA6.htm
ADVERTISING BANS ARE IN CONFLICT WITH THE PREMISE OF A RATIONAL PUBLIC WHICH UNDERLIES RESPECT FOR FREEDOM OF EXPRESSION.

In terms of the limitations clause, the right to freedom of expression may be subject to such reasonable limits as can be justified in a free and democratic society. I submit that a total ban on the promotion of a legal product is not a restriction which seems easily justified in a free and democratic society. Mize\textsuperscript{86} states very eloquently:

In a free and democratic society, the utmost faith is placed in the judgement of the members of the public: they are given the responsibility for electing the government. Viewing people as needing protection from dangerous pro-smoking messages because of the paternalistic belief that they are unable to make rational decision is incompatible with the faith placed in public judgement in a democracy. In a democracy people are given information and left to make up their own minds, with the risk that some of them might not like what others decide. People do not always behave as many of us would like. There is often a trade-off between protecting civil liberties and short-term pragmatic benefits. If freedom were only extended to speech which could be shown to be unpersuasive and ineffectual, it would be a farce.

Mize argues correctly that neither the harm of smoking nor popular support for an ad ban justifies restricting freedom of expression.\textsuperscript{87}

The magnitude of harm caused by a legal product is not a good criterion for deciding when to prohibit advertising. Tobacco advertising does not itself cause cancer — at best, it has an indirect effect by influencing people's smoking behaviour. Tobacco advertising may be persuasive, but it does not overbear people's rational faculties and force them to conform. To the extent that there is an intermediate step — consideration and judgement by the prospective smoker — the harm really stems from the individual's decision. The responsibility for an individual's actions rests primarily on that individual.

He further contends that even if there is public support for an advertising ban, that support does not justify it, since the general public (and the medical community) often fail to appreciate the value of intangibles such as freedom of speech without further education. He refers to the statement that Madam Justice Beverley McLachlin wrote for the majority in overturning the Canadian tobacco advertising prohibition, namely that the task of ensuring that rights are not overridden by government is a difficult one, that 'may require the courts to confront the tide of popular opinion'.\textsuperscript{88}

CONCLUSION

If smoking is harmful and advertisements for tobacco encourage smoking, then any attempt to ban such advertisements must be shown to reduce the likelihood of people smoking. If the government cannot do so, then the ban

\textsuperscript{86}See n 6 above at 429-430.
\textsuperscript{87}Mize n 6 above at 431-432.
\textsuperscript{88}Mize n 6 above at 432 concludes that '[m]ajorities are notoriously hard on the rights of minorities. If majority public opinion is sufficient to override rights, advertising restrictions will be likely to fall most heavily on products and services used by various minority groups. Civil liberties such as freedom of expression are of special importance to minorities, because minority groups lack the majority support which would facilitate political influence and democratic remedies'.
must fail to pass the test of constitutional scrutiny. Evidence that advertising bans reduce consumption of cigarette products, is inconclusive — in fact, critical evaluation has indicated that some of the major findings of research into the advertising-tobacco nexus are so flawed as to render their findings and conclusions unworthy of serious consideration. In view of this it is submitted that the state will not be able to prove on a balance of probabilities that the ban on tobacco products would be a ‘reasonable’ measure to serve the state’s interest in reducing smoking and therefore the concomitant health risks in primary smokers.

If the following two aspects are also taken into consideration, it is submitted that the total ban on tobacco advertising should be re-evaluated:

• The loss to the economy and the severe impact and loss of jobs in the industry and related supporting industries which is in clear contrast to the stated intention of government to create jobs (which is mentioned in virtually every Green and White Paper) as well as the RDP Base Document. In fact, when analysing the so-called ‘social cost of smoking’ — in other words, the effect that smoking has on the economy — it seems that economists generally arrive at conclusions opposite to those of the Public Health approach (that is, the approach of medical specialists and government organisations).

• To place advertising bans on consumer products is philosophically in conflict with the notion of a rational public which forms the foundation of respect for freedom of expression. To view people as needing protection from dangerous pro-smoking messages on the basis of the paternalistic belief that they are unable to make a rational decision, is incompatible with the faith placed in public judgment in a democracy.

It is submitted that although restrictions on commercial speech are acceptable, they should be undertaken in such a manner that consumers still have access to information which will enable them to make informed decisions. Furthermore, it is submitted that restrictions be placed on

89 Silver n 9 above at 568.
90 On this aspect the writer agrees with the opinion of the Freedom of Commercial Speech Trust n 3 above at par 6.
91 The estimated effect of a tobacco ban on advertising, media and marketing industries is calculated to be in excess of R240 000 000 with a knock-on effect calculated to be in the billions — The Freedom of Commercial Speech Trust n 57 above at par 11-12. As the Trust indicates this in effect amends existing rights and cannot be justified in the public interest.
92 Lemieux n 71 above.
93 Mize n 6 above at 429-430. Lemieux n 71 above.
94 Mize n 6 above at 426 et seq states that prohibiting speech regarding tobacco ‘affects the health and economic interests of smokers; it silences individual pro-smoking expression even where there is no profit motive involved; it forecloses public debate on the desirability of smoking, which debate serves as a democratic limit on the actions of government; it encourages passivity and naivety on the part of the public; and it conflicts with the faith placed in the people in a democratic society by suggesting that they are unable to make informed, rational decisions.’
freedom of speech rather than a total ban. This should be done against the backdrop of self-regulation\textsuperscript{96} of the advertising industry. Furthermore an anti-smoking campaign\textsuperscript{97} and education programme\textsuperscript{98} would be more effective to counteract advertising in a way consistent with free speech.\textsuperscript{99}

\textsuperscript{95}The Freedom of Commercial Speech Trust n 57 above at par 20 proposes restrictions on the size and type of newspaper and magazine advertisements in line with the principle stated in the preamble to the Tobacco Products Control Act that 'lifestyle advertisements' are unacceptable. Less severe restrictions would apply to magazines with an adult readership profile. It furthermore proposes restrictions on the size and location of outdoor advertising and that cinema advertisements be restricted to screenings where the age restriction of the feature film is 18 years.

\textsuperscript{96}Self-regulation, with or without State supervision is an accepted trend world-wide and it is also seen as the most effective manner of regulation. The provisions of the ASA Code regarding tobacco advertisements address the concerns of the Department of Health as stated in the preamble to the Tobacco Products Control Act and goes even further by requiring these advertisements to merely advertise and not glamorise cigarettes. Furthermore it prescribes that these advertisements should be limited to people over 25 years of age, should not show parents handling cigarettes in front of children, should not be on posters or bulletin boards in the immediate vicinity of schools and should not claim health properties for any cigarette. See the relevant provisions of the ASA Code in Appendix H of The Freedom of Commercial Speech Trust n 57 above.

\textsuperscript{97}Central Hudson Gas and Electric Corp v Public Service Commission of New York 447 US 557 1980. Mize n 6 above at 433 explains that anti-smoking messages need not be as frequent as pro-smoking advertisements to be successful: success in the marketplace of ideas depends on the persuasiveness of the message, and not on the sheer number of times it is repeated. An effective non-smoking campaign should not merely provide basic information which is already contained on cigarette packets, but focus on providing non-smoking role models and counterbalancing the messages in pro-smoking advertising. Mize mentions the following interesting examples, namely the advertisement showed on a \textit{Frontline} programme: the graphic depiction of a fishhook emerging from a cigarette and piercing the smoker's lips, or slogans used in overseas campaigns such as 'kissing a smoker is like licking a dirty ashtray' to create negative imagery to counteract positive imagery from tobacco advertising.

\textsuperscript{98}Mize \textit{ibid} explains that the cost of school smoking education programmes are minimal. By discussing with children the pros and cons of smoking, it not only counteracts advertising in a way consistent with free speech, but teaches children important skills of evaluation which will help in other areas.

\textsuperscript{99}Corner n 47 above states that it may seem unlikely that world-wide restrictions on advertising for disfavoured products can lead to government control over all consumer information. But as long as paternalistic activists and their allies in government frame the debate in terms of protecting consumers from useless or dangerous information, the slope towards such an end remains quite slippery.