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Advocacy Advertising: A fillip for democracy or a bidding war for special interest groups?

In Pulp Fiction, Vincent, the character played by John Travolta, famously observes that the differences between Europe and the United States are the little things, like the names on the menu in McDonalds. But when it comes to concepts such as free speech, there are some very profound differences, particularly when it comes to advocacy advertising by special interest groups. Turn on your television in the US, and you will be bombarded with all manner of 'political' messages that would never be allowed in this country.

We live in a time when broadcasters bemoan the loss of traditional sources of advertising revenues. Newspaper readership is in steady decline. The turn out rate at the last General Election was just over 60%.

Yet these are what the Chinese call 'interesting times'. We are fighting a controversial war in Iraq, to say nothing of a global war on terror. The Make Poverty History campaign has galvanised millions of people to join the battle against poverty in Africa. And perhaps the biggest challenge of all is the response required to global climate change.

So why do we have an anachronistic ban on advocacy advertising on television? Broadcasters need the money. Campaigners need the exposure. Voters need the information.

Historically, the fear has been that well funded special interest groups would be able to pervert the democratic process by exploiting the power of television, particularly if they could win a bidding war for the air time.

This fear is reflected in Rule 4 of the Television Advertising Standards Code, which prohibits commercials that:

(a) may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature;

(b) may be directed towards any political end;

(c) may have any relation to any industrial dispute (with limited exceptions); or

(d) may show partiality as respects matters of political or industrial controversy or relating to current public policy.

This presents a potential conflict between the Broadcast Advertising Clearance Centre ('BACC') and Ofcom, both of whom are duty bound to ensure that Rule 4 is observed,

and the right to free speech of under the European Convention of Human Rights (the 'Convention'), as implemented into British law under the Human Rights Act 1998.

How can this rule be enforced against commercials designed to raise awareness of broader issues with political elements, such as global poverty, global warming or human rights abuse, but which are not purely 'political' and certainly not 'party political'?

The content of Rule 4 has its origins in section 321(2) of the Communications Act 2003 (the "Act"), effectively just reproducing that section of the Act. The definitions of 'political ends' in the Act are very broad, and even include "influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere" (section 321(3)(c)).

Therein lies the problem for the BACC and Ofcom. Paragraph 680 of the official Explanatory Notes to the Act state that the Minister responsible for the passage of the Act through Parliament was unable to make the 'statement of compatibility' with the Human Rights Act 1998. This was because the ban on political advertising may offend against the Convention, following the decision of the European Court of Human Rights in the case of *Vgt Verein gegn Tierfabriken v Switzerland*.

In fact, during the passage of the Broadcasting Act 1996, which was the precursor to the 2003 Act, an attempt was made to replace 'political' with 'party-political' in the wording of the ban; clear evidence that the deficiencies of the ban have been known for a decade.

Against that background, with the serious possibility that the ban in Rule 4 and section 321(2) is unlawful, the burden of proof should be on the BACC and Ofcom to prove that they are justified in any attempt to restrict the right to free speech under the Convention, rather than on individuals or groups to prove that they have not offended against Rule 4.

Each commercial should also be considered on its own merits. There may be instances where a restriction or ban on 'advocacy advertising' in accordance with Rule 4 would be permissible under the Convention. Article 10 of the Convention states that any restriction on the right to freedom of expression (including advertising) must be:

1. prescribed by law, (which it is by s.321 of the Act);

2. necessary in a democratic society (which is interpreted as a "pressing social need"); and

3. pursuant and proportionate to one of the specified legitimate aims for a democratic society, i.e. national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

There is a bold but reasonable argument that no form of ban on political advertising is compatible with the Convention, because it does not address any of the 'legitimate aims' set out in the Convention. A more cautious argument is that a ban on particular commercial is not proportionate to one of the legitimate aims.

That is a persuasive argument, especially if the commercial does not result in any of the potential 'mischief' that Rule 4 is intended to prevent, such as the 'subversion of democracy by private wealth' by one political party or lobby group outspending another in order to buy off public opinion or secure an electoral advantage.

In order to have any prospect of securing pre-clearance from the BACC, television commercials with a 'political' element must also avoid the shock tactics often used in 'advocacy advertising' in other media. There is a long history of campaigning groups using offensive images that offend against public taste and decency to press home a particular point. In the much vaunted *ProLife* case, the commercial was banned on the grounds that it used images of a dismembered foetus that would be shocking and distasteful to the public. For that reason, and perhaps because of the polarised nature of the abortion debate, it is arguable that the application of Rule 4 was compatible with the Convention.

Even if the ban in Rule 4 is legal, it must be applied in a way that is proportionate. Given that the right of free speech exists under the Convention, it is for the BACC and Ofcom to justify any inhibition on that right, not for individuals or groups to establish that they should be allowed to exercise that right or satisfy the ban.

Of course, there is a great deal of 'political' advertising on our televisions, depending on how widely one defines that term. It is usually in the form of 'awareness raising' campaigns by charities such as Actionaid, Alcoholics Anonymous, Crisis, Disasters Emergency Committee, NSPCC, UNICEF, World Wildlife Fund, and War on Want. One must assume that they have not been prohibited from advertising because while their objects could arguably be said to be of a *partially* political nature, they are not *wholly or mainly* of a political nature'.

So Rule 4 is in urgent need of an overhaul, partly to allow free speech in accordance with the Human Rights Act 1998; and partly to promote democracy and raise awareness amongst people who may watch *Big Brother*, but will never read a newspaper. That could be achieved while maintaining a ban on advertising by political parties to prevent them from 'buying' an election. As things stand, the only real winner is apathy.

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13th July 2005

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