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# AD BREAK

Why curbs on advertising harm  
free speech

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# Summary

- Advertising – ‘commercial speech’ - is a form of communication which brings considerable benefits to the economy and society, and restrictions on it need clear justification.
- Until the mid-1950s advertising was for the most part unregulated, subject only to laws relating to fraud and defamation which also affect other forms of speech.
- Since then, direct government restrictions have grown, and are still growing, in an attempt to serve public policy objectives of one kind or another. Some of these interventions may achieve little gain at excessive cost, but at least they are discussed in Parliament.
- However, many restrictions come from what is ostensibly industry self-regulation by the Advertising Standards Authority (ASA), a private body which has morphed from concern with ensuring that advertising is ‘legal, decent, honest and truthful’ to a much wider and more problematic brief.
- Today the ASA does not simply respond to complaints; it proactively seeks out breaches of its own rules. Moreover it deliberately attempts to change public attitudes through forbidding representation of certain types of otherwise lawful behaviour which may give offence to some groups.
- The ASA is an unrepresentative body which imposes its own attitudes on the advertising industry and thus on the general public.
- Its interpretation of ‘offence’ and ‘harm’ appears to differ from the view taken by others concerned with regulatory issues, such as Ofcom and Clearcast.
- As a consequence, creative expression which is permissible in television and films, YouTube, the theatre, books and newspapers is in effect

forbidden in advertising. Rules are continually being expanded to cover more areas of our society and culture, and the ASA recently argued that even political manifestos should be regulated.

- We should reflect much more carefully on the often unthinking way in which we have acquiesced in restrictions on commercial speech while permitting similar material under the banner of entertainment or intellectual free speech.
- As Nobel prize-winning economist Ronald Coase discerned, the case for free speech is indivisible. If certain types of speech and imagery are forbidden in advertising, it may not be long before there will be pressure to forbid them in the arts, entertainment and politics.

# Introduction

Among the many growing restrictions on free speech, advertising regulation is rarely mentioned. We seem to accept without question the way in which regulators determine what advertisers can say to us, and how they can say it, in a way which most of us would not tolerate in other areas of public discourse. My contention in this paper is that we should pay far more attention to this issue.

It is more than 150 years since modern advertising techniques and agencies began. Since then, advertising has become ubiquitous, and a major economic and social influence on our lives. The UK spent over £22 billion in 2019 on advertising and the industry also generated £8 billion of exports, making it the country's second largest service exporter. The sector employs about half a million people in the UK; it provides one third of television revenue, two thirds of press revenue, and sponsors large numbers of social, cultural and sporting institutions. Its creatives have a worldwide reputation, with many going on to stellar careers as movie directors and producers (Gurevich 2013).

In nineteenth-century Britain the only legal constraints on what has been called 'commercial speech' – then mainly posters, billboards, flyers and newspaper advertisements – were those, such as the laws on fraud and defamation, which also covered other forms of communication. Otherwise, the *caveat emptor* principle prevailed.

In the twentieth century, however, concerns about risks to public safety from dangerous products, and belief in the need to protect people from misleading claims, produced specific legislation covering the advertising of goods such as medicines and tobacco. There are also longstanding



controls on the location of advertisements in public places,<sup>1</sup> and restrictions on product placement and the amount of time taken up by adverts on terrestrial television and radio. Wider concerns, though, crystallised into a system of self-regulation.

Initially this quasi-voluntary system focused on relatively uncontentious issues raised by consumer complaints, but in recent years advertising regulation has become far more proactive. It has inevitably had to widen its scope as a result of the explosion of new forms of digital advertising,<sup>2</sup> including the role of ‘influencers’ and ‘native advertising’.<sup>3</sup> But career regulators have also developed ambitions to regulate more and more subjects, with these ambitions often being unclear to the general public.

Critics charge firstly that advertising restrictions have become a key component in the ever-growing reach of the ‘nanny state’; and secondly that regulators have given themselves a disturbing new role in social engineering, attempting to reshape cultural and social attitudes to gender issues, the family, ethnicity and other concerns. This may be a portent of much tighter restrictions to come, which could threaten wider notions of free speech.

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- 1 Dating back to the Advertisement Regulation Act 1907, which allowed local authorities to restrict advertising in parks and beauty spots.
  - 2 Between 2005 and 2016, the proportion of advertising spend on print fell from 39 per cent to 11 per cent, while the proportion on digital advertising rose from 8 per cent to 48 per cent. The third main area of spend, TV advertising, remained constant at around 23 per cent, although spread over many more channels (House of Lords 2018: 10).
  - 3 ‘Native advertising’ refers to ‘an array of digital products advertisers can purchase, such as sponsored in-feed social media posts, video content, or sponsored listings on e-commerce sites. The defining feature of a native advertisement is the ability to seamlessly blend into the flows of digital content rather than interrupting user experience’ (Asquith and Fraser 2020: 5730).

## 'Good' and 'bad' advertising?

Attitudes to advertising have long been ambivalent. They have been characterised by a never-ending search for a distinction between 'good' and 'bad' advertising. Thorstein Veblen's *The Theory of the Leisure Class* (1899) saw advertising as encouraging wasteful 'conspicuous consumption' while simultaneously being a necessary element in the capitalist system. Around the same time the great economist Alfred Marshall tried to distinguish between 'constructive' advertising and 'combative' advertising. Constructive advertising made people aware of opportunities for buying and selling which they would otherwise not know about, and thus served a useful purpose. Combative advertising, however, was designed to push brand names and lock consumers into habitual purchases; Marshall thought it tends to reduce competition and raise prices (Liebhafsky 1993: 77).

Half a century later Nicholas Kaldor (1950) produced an influential critique of advertising which, while recognising that it might stimulate investment and innovation, and usefully boost consumption in recessions, nevertheless saw it as wasteful (consuming more resources than necessary to carry out its informational role) and as tending to increase industrial concentration.

By the mid-1950s, the concerns of economists were augmented by social critics such as Vance Packard, whose *The Hidden Persuaders* (1957) criticised advertisers' use of motivational and other psychological research in an attempt to manipulate consumer preferences. His case was arguably overblown: for instance, Packard attacked subliminal techniques, though there is no evidence that these were ever used in commercial advertising.

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But his critique, together with those of others such as J. K. Galbraith,<sup>4</sup> was influential in creating a climate where some regulation was considered reasonable.

In the USA, however, the First Amendment<sup>5</sup> protects the right to free speech in the press, the public square and nowadays in electronic media - and there is a strong argument, recognised in several legal cases, that commercial free speech – advertising – is also entitled to protection (Redish 2017). In a celebrated judgment, for example, the Supreme Court held that a state cannot limit pharmacists' right to advertise drug prices.<sup>6</sup> US advertisers, though still subject to many constraints, are consequently rather freer than those in the UK.

### ***Coase and commercial free speech***

The economic argument for free speech in the marketplace was developed by Ronald Coase (1974).<sup>7</sup> He pointed out that, while it is widely accepted that governments are competent to regulate product markets where there are believed to be market failures (such as consumer ignorance, externalities, or the threat of monopolies), few accept that intervention in the 'market for ideas' should be treated on the same basis. Moral, religious and political ideas may similarly generate externalities, prey on other people's ignorance and so forth, but liberal democracies do not normally approve of bans and restrictions. Attachment to this type of intellectual free speech is 'the only area where laissez-faire is still respectable', Coase noted (*ibid.*: 385), quoting Aaron Director, Milton Friedman's brother-in-law.

The paradox is that government intervention, which is still widely believed harmful in the market for ideas, is seen as beneficial, even imperative, in the market for goods and services. Coase explains this by the self-interest and self-esteem of intellectuals, who have too much influence. Others

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4 Galbraith's *The Affluent Society* (1958) argued that capitalist businesses didn't simply respond to existing consumer tastes and preferences of individuals, but were rather a 'machinery for consumer demand creation'. Advertising creates demand for products which people don't need, in his view. His own preference for greater public spending should take precedence.

5 See Epstein (1987) for a discussion of the First Amendment's implications for free speech.

6 *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

7 Although his ideas were developed much earlier, in an unpublished 1957 lecture (Harris and Seldon [1959] 2014: 99).

must be regulated, they say, but regulation should not apply to journalists, academics, clerics, or politicians. He quotes Milton's *Areopagitica* as the archetype of intellectual disdain for 'licensors' or censors: the sort of people who want to do such a job are likely to be 'ignorant, imperious, and remiss, or basely pecuniary' (Coase 1974: 388-389). Coase took a different line (ibid.: 389):

I do not believe that this distinction between the market for goods and the market for ideas is valid. There is no fundamental difference ... and in deciding on public policy with regard to them, we need to take into account the same considerations. In all markets, producers have some reasons for being honest and some for being dishonest; consumers have some information but are not fully informed or even able to digest the information they have; regulators commonly wish to do a good job but are often incompetent and subject to the influence of special interests, because, like all of us, they are human beings whose strongest motives are not the highest.

While we probably shouldn't apply the same rules for each individual 'market', Coase argues, we should certainly apply a similar cost-benefit calculus to determine appropriate rules. Doing so, he argues provocatively, we could say that 'the case for government intervention in the market of ideas is much stronger than it is, in general, for the market for goods' (ibid.).

For example, the externalities produced by political ideas are often considerable, for good or ill. Is this evidence of 'market failure', requiring state intervention? Or take consumer ignorance (which economists more politely term 'asymmetric information'): more people are probably capable of choosing between different breakfast cereals or brands of washing-up liquid than are able to evaluate economic and social policy. Yet we regulate the images which can appear on cereal packets but not (at least not at the moment, but see later) the content of party manifestos or economics textbooks.

Coase concludes his 1974 article by saying that we must form a judgment on the competence (and beneficence) of government. If we think it is beyond reproach, it should intervene much more in the market for ideas; if it is very incompetent and venal it should intervene much less in the market for goods.

This tongue-in-cheek conclusion was, predictably, misunderstood and distorted by Coase's critics. They took it to mean that he was in favour of increased government regulation of intellectual free speech. In a later and more substantial article drawing on numerous cases and legal judgments, Coase (1977) spelt out his argument unambiguously. He made it clear that he wanted less regulation all round.

One of the interesting points made in this second article is Coase's criticism of the distinction between information ('good') and persuasion (bad) (ibid.: 9):<sup>8</sup>

Persuasive advertising, which conveys no information about the properties of the goods and services being advertised but achieves its effect through an emotional appeal, is commonly disapproved of ... It is not clear why. Any advertisement which induces people to consume a product conveys information, since the act of consumption gives more information about the properties of a product or service than could be done by the advertisement itself. Persuasive advertising is thus also informative. ... Advertising of new products, I suspect, normally informs ... through inducing the consumer to try the product and thus informing him in the most direct way.

### ***The pragmatic benefits of advertising***

Coase also draws attention to some of the pragmatic benefits of advertising. He says that, rather than creating barriers to entry and promoting monopoly, as Kaldor and others argued, advertising can often lead to greater competition and lower prices. He quotes Lee Benham's well-known empirical examination of the effect of advertising bans on the price of eyeglasses and the services of opticians: Benham (1972) found that the average price of spectacles in US states which forbade optometrists to advertise was 25 per cent higher than in states where they were allowed to do so.<sup>9</sup>

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8 A point also well made by Ralph Harris and Arthur Seldon ([1959] 2014), who note that even the apparently 'pure' information provided by a train timetable is intended to persuade people to travel, while persuasive advertising may lead people to try a product and thus gain more information about its characteristics.

9 Cady (1976) found similar effects for restrictions on the advertising of prescription drugs.

But it is not just price information which benefits consumers and boosts competition. As the philosopher John Gray points out (Gray 1992: 4-5),

the indispensable complement to market pricing is provided by advertising, which focuses on the qualities of the product itself. Indeed, in the absence of advertising, the consumer would inevitably remain ignorant, not only of many of the features of specific products, but also (and perhaps even more significantly) of the range of products that are available.

Complete bans on advertising have the effect of freezing the structure of an industry, entrenching existing market shares and making it near-impossible for new entry. Holak and Reddy's (1986) classic study of the effects of the cigarette advertising ban, and Clark's (2007) examination of the effects of restrictions on breakfast cereal advertising in Canada, illustrate this clearly.

Advertising has historically played a key role in subsidising newspapers and television. It could also be pointed out that one form of advertising, sponsorship, provides wider benefits to the public by helping to fund a huge range of sporting, cultural and educational activity. This is not done out of the kindness of the corporate heart, but a recognition that association with prestigious events and institutions generates a clear benefit for businesses, a benefit for which they are prepared to pay. The corollary of this is that restrictions on sponsorship harm not only the would-be advertiser, but also organisations which are prevented from monetising the prestige associated with their activities.

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# Advertising regulation in the UK

Regulation of advertising in the UK is not as easy to understand as it could be. There are some statutory restrictions, for instance on advertising and labelling of medicines,<sup>10</sup> food, tobacco and alcohol. Devolved administrations and local authorities have some powers to ban display adverts of which they disapprove. For example, Transport for London has forbidden adverts featuring 'beach-ready bodies'<sup>11</sup> and so-called 'junk food'.<sup>12</sup> There are also some legal restrictions on product placement on TV and radio.

But regulation of most commercial speech is in principle in the hands of the advertising industry itself - albeit, as we shall see, with some statutory back-up. How did this come about?

When commercial television began broadcasting in 1955, this was the first time that advertising was made subject to any general formal regulation. Under the Act setting up the Independent Television Authority, programme contractors were forbidden to show religious or political advertisements (though they were required to provide a certain amount of religious programming, and to carry party political broadcasts) and made responsible for the content of adverts<sup>13</sup> in the same way as they were responsible for

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10 There are rules for advertising laid down by the Medicines and Healthcare Products Regulatory Agency, an executive agency of the Department of Health, which pre-screens adverts for a fee (<https://www.gov.uk/government/organisations/medicines-and-healthcare-products-regulatory-agency/about>).

11 'Sadiq Khan moves to ban body-shaming adverts from London Transport', *Guardian*, 13 June 2016 (<https://www.theguardian.com/media/2016/jun/13/sadiq-khan-moves-to-ban-body-shaming-ads-from-london-transport>).

12 'London transport network junk food advert ban starts', *BBC News*, 25 February 2019 (<https://www.bbc.co.uk/news/uk-england-london-47318803>).

13 This requirement led contractors to set up a system of pre-screening commercials, which continues to the present day. It is now run by Clearcast, a body funded by ITV, Channel 4, Sky and Warner Media.

programme content (Fletcher 2008). They had to set up an Advertising Advisory Committee to draw up a set of principles for advertisers, involving 'good taste and propriety'.

The regulation of television advertising unsurprisingly raised the issue of regulating other forms of commercial speech. Thus in 1961 the Advertising Association and other interested parties proposed that advertisements in non-broadcast media (such as newspapers, magazines, posters, direct mailings or billboards) should be subject to self-regulation rather than government intervention.<sup>14</sup>

As a result, agencies, media and advertisers formed the Committee of Advertising Practice (CAP)<sup>15</sup> and produced the first edition of the British Code of Advertising Practice. In 1962 the CAP established the Advertising Standards Authority (ASA) as the independent regulator under this Code. At first funded on an ad hoc basis, in the 1970s the ASA began to receive an annual levy of 0.1 per cent on advertising space costs.<sup>16</sup> In 1988 the Control of Misleading Advertisement Regulations gave the ASA's decisions some limited legal support<sup>17</sup> as it could refer persistently uncooperative advertisers to the Office of Fair Trading. Changes in government regulations and institutions since then have passed this legal back-up to Trading Standards. It is rarely used, as advertisers almost always end up conforming to ASA judgments.

This century, the ASA's scope has increased considerably. In 2004 the ASA/CAP system assumed responsibility for TV and radio advertisements, contracted out from Ofcom (which had inherited responsibility from earlier broadcast regulators). This created what the ASA refers to as a 'one-stop shop' for advertising complaints. A new committee, the Broadcast Committee of Advertising Practice, was set up to write and maintain the Broadcasting Advertising Code.

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14 This may well have been motivated by fear that the Molony Committee on Consumer Protection, sitting at the time, would impose statutory regulation. In the event, the Committee gave its blessing to the proposed new initiative, concluding that self-regulation 'should be given a chance to prove itself' (quoted in Ramsay 2006: 68).

15 Now 'The UK Code of Non-broadcast Advertising and Direct and Promotional Marketing', the 12<sup>th</sup> edition of which runs to over a hundred pages (<https://www.asa.org.uk/uploads/assets/47eb51e7-028d-4509-ab3c0f4822c9a3c4/The-Cap-code.pdf>).

16 An Advertising Standards Board of Finance, independent from the ASA, collects the levy.

17 In relation to advertisements that were misleading, rather than the wider brief that the ASA now has. The narrow scope of this back-up was because it was in response to the EU Directive on Misleading Advertising (Ramsay 2006: 68).



In 2009 the ASA's powers were extended to cover video-on-demand, a growing format which has increasingly replaced traditional broadcast television. It had already had powers, from 1995 onwards, to cover paid-for space online (banner ads and sponsored search); in 2010 the Committee on Advertising Practice extended the ASA's remit to cover claims made on companies' own websites and advertisements and endorsements on social networking sites.

### ***How the system works***

When the ASA starts an investigation of a complaint, it asks the advertiser for comments and justification. Once the investigation is completed, a draft recommendation is sent to the advertiser and complainant(s) for comments. The draft is then sent to the Advertising Standards Authority Council, which discusses the complaint and the draft recommendation and reaches a conclusion. The full adjudication is then posted on the ASA's website and is publicised in the media. There are facilities for a time-limited appeal to an Independent Reviewer<sup>18</sup> if new evidence is forthcoming, or if there is some flaw in the investigation or adjudication.

If a complaint is upheld, the ASA can demand an ad campaign be amended or withdrawn. It can require future campaigns to be pre-vetted. But these powers are by consent: there is little legal basis for them. If an advertiser refused to play ball, there's not much the ASA could do. In principle companies could just brazen it out, confident that the grounds under which Trading Standards could intervene are limited. But of course companies worried about reputational damage usually acquiesce (with varying degrees of grace)<sup>19</sup> and withdraw the relevant campaign. This often means that they incur considerable costs.

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18 Imposed following a court ruling that ASA decisions were subject to judicial review.

19 The ASA has repeatedly upheld complaints against Ryanair, whose CEO Michael O'Leary has made clear his distaste for their judgment, while ultimately accepting them. On one occasion he described the ASA as a 'bunch of complete idiots'. 'Michael O'Leary: The ASA are a "bunch of complete idiots"', *Management Today*, n.d. (<https://www.managementtoday.co.uk/michael-oleary-asa-bunch-complete-idiots/article/1119915>).

Self-regulation has certain advantages, being able to draw upon expertise which might not be available to a government regulator and often able to negotiate and compromise in a way which a legally-constrained body could not. But it does mean that self-regulators are typically subject to less scrutiny than if rule-making was the responsibility of a public body.

Moreover, independent self-regulatory bodies (like charities and the innumerable quangos which administer great swathes of publicly-financed business in the UK) arguably attract certain types of individual to work for them. Such employees may often have their own agendas and develop new objectives and projects with few external constraints on their behaviour – a form of ‘regulatory capture’ which is too often overlooked.<sup>20</sup>

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<sup>20</sup> The standard theory of economic regulation, as developed by George Stigler (1971) tends to focus on the effects of industry interests coming to dominate regulators. While this certainly happens, a clique of professional regulators, flitting from one body to another, has grown up in the UK. This presents a different set of challenges.

## Increasing restrictions on commercial free speech

Coverage of new media is not the only extension of ASA regulatory powers and influence in recent years. Its role is now very different from that when it began.

When the ASA was set up, it aimed to ensure advertising was 'legal, decent, honest and truthful'. This seems at first glance unexceptionable, although a classical liberal could find it problematic. John Gray (1992: 9), for instance, objects to advertising rules which

transfer the responsibility for making an assessment of the risks from the responsible individual to the state. Implicitly, they thereby deny the capacity of the individual to make a reasonable evaluation of the relevant risks on the basis of the information that unrestricted expression would make available. This is an implication with far reaching consequences for freedom of expression in other, non-commercial spheres of social life.

Of these original aims, ensuring legality is reasonably clear-cut, although it might be argued that laws against fraud and defamation make separate regulation unnecessary. Decency, honesty and truthfulness are virtues to which we may all aspire, but their correlates are contestable: opinions may differ. And rules are applied far more strictly in commercial speech than in other forms of discourse.

For example, in films, the theatre, TV drama, social media and the press it is still just about possible for an individual to make a legal, decent, honest and truthful statement such as 'I enjoy smoking cigarettes'. This can't be done in an advertisement. In films and the theatre, since the abolition of

the Lord Chamberlain and relaxation of film certification, actors can swear or take their clothes off and simulate sexual intercourse. They can't do so in an advertisement.<sup>21</sup> Politicians can make speeches or give interviews which are economical with the truth – although more of this later – while any factual statement in an advertisement must be verifiable.

The ASA now interprets its brief rather differently from the way it did in the past. In its most recent Annual Report (2019) this is spelt out: 'We work to make ads responsible. We do this by taking action against misleading, harmful or offensive advertising and ensuring compliance'.

In the 1960s, complaints were arriving at a rate of around 300 in a full year, mostly about misleading offers, mail order goods which failed to arrive, the accuracy of pricing and similar problems. Only a handful (3 out of 244 in a nine-month period in 1967) seem to have been about matters of taste and appropriateness of adverts.<sup>22</sup>

By contrast there were 34,717 complaints in 2019 about 24,886 advertisements. While the majority of complaints were still about advertisements which were misleading, many were now about 'harm' (very broadly defined) or offensiveness. This was particularly true in respect of broadcast advertisements where 3,549 complaints were about offensiveness and 2,405 about harm, considerably outnumbering the 3,179 complaints about commercials which are misleading.

In the 1960s, the ASA was essentially reactive, though there was some monitoring of newspapers and magazines. Another difference from the early years is the ASA's own proactive enforcement. Nowadays, rather than simply responding to complaints, it investigates on its own account: in 2019 it resolved 4,469 'own-initiative compliance cases'. The techniques employed are often innovative. One might be seen as a form of entrapment: using avatars (which mimic the online profiles of child internet users) to identify likely exposure of children to online advertisements for high fat, salt or sugar (HFSS) food and drinks (ASA/CAP 2020: 10).

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21 It could be said that people voluntarily choose to watch controversial films, plays and TV programmes, while they do not choose to be exposed to all types of advert. This might argue for some difference in the rules, although - as in the Misguided swimwear example discussed later – this is not necessarily justified.

22 See the ASA's annual reports (<https://www.asa.org.uk/advice-and-resources/resource-library/annual-reports.html>).

The technique is also being used to track Botox adverts on Instagram, and other projects are planned to monitor whether children are exposed to age-restricted ads, including alcohol and gambling, as well as HFSS products.

These examples show the 'mission creep' of the Advertising Standards Authority and the Committees of Advertising Practice, which now have an agenda going well beyond the prevention of misleading or dishonest advertising. These bodies are not alone: they can be seen as part of a wider project (promoted strongly since 2013 by Public Health England and similar bodies in other parts of the UK) which uncritically accepts that the state has a responsibility to prevent or reduce 'harms' to the population, rather than leave that responsibility to individuals and their families.

### ***'Harms'***

Harms were at first associated with health. The process began with tobacco. In 1965 cigarette advertising on television was banned. In 1990 cigars and loose tobacco followed. From 2003 press advertisements and billboards were banned; from 2005 sports sponsorship. The last ten years have seen the end of vending machines and displays in shops; most recently plain packaging has been mandated.

Prolonged use of tobacco carries known, and no longer disputed, health risks. Classical liberals (Gray 1992: 16) can argue that this alone cannot justify a complete ban on advertising tobacco products: 'it may be that a life ruled by a passion for prudence ... is a lesser form of life than one in which ... we take our chances'. Snowdon (2017: 158), more pragmatically, points out that advertising bans make it impossible for companies to market safer tobacco products, an interesting example of the point made by Coase that advertising bans reduce competition.

Be that as it may, as the 'harms' agenda has widened, the risks have become less obvious and the argument for restrictions more tenuous. Alcohol is probably next in line in terms of perceived damage to health, although relatively few users of alcohol suffer life-threatening illness as a consequence.

Rules applying across all media forbid alcohol advertising which may appeal to young people (such as cartoons) or reflect youth culture. Any individuals featuring in advertisements must appear to be over the age of

25 (even though drinking is legal at 18). More generally, nothing in adverts must give the impression that alcohol boosts confidence, increases popularity, is associated with sporting success<sup>23</sup> or sexual prowess.

A still further remove from direct damage to health is the emphasis on HFSS food and drink, which in moderate quantities will harm very few people, but which is seen as contributing to obesity and possibly implicated in heart disease and other ailments. The government has recently reacted to the overweight Prime Minister's brush with Covid-19 death by proposing substantial new curbs on advertising.<sup>24</sup>

Since 2007, there has been a prohibition on scheduling HFSS advertising around programming commissioned for or likely to appeal particularly to children. To determine whether a programme is likely to appeal particularly to children, broadcasters rely on 'audience indexing' in which audience data are used to determine which programmes would attract a high percentage of children compared with the total audience watching; the 'particular appeal' prohibition applies throughout the broadcast day, including after 9pm.

As children now view a great deal of YouTube and other internet content, restrictions have since 2017 also been imposed on online HFSS advertising. A significant further step was taken in the Queen's Speech on 11 May 2021. This set out the government's intention that no TV adverts for HFSS products will be permitted before the 9pm watershed, and that no online advertising for these foodstuffs should be permitted at all. The first of these restrictions can be imposed virtually overnight by Ofcom fiat, but restrictions on internet advertising will require legislation.

HFSS foods are often carelessly described in the media as 'junk food' – with cakes, burgers, crisps, fizzy drinks and chocolate coming to mind. However, as critics of these restrictions have pointed out, the definition is

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23 Yet no TV or newspaper coverage of FA Cup giantkillers or Formula 1 champions omits to show sportspeople necking quantities of champagne. As in so many areas, advertising is constrained where other forms of expression are not. If politicians are really convinced that representations of young people drinking alcohol are a social menace, why are they not banned from all media?

24 A consultation was launched in November 2020 on a government proposal to ban all online adverts for foods high in fat, sugar and salt as part of a strategy 'to tackle the obesity crisis and get the nation fit and healthy'. 'New public consultation on total ban of online advertising for unhealthy foods', press release, 10 November (<https://www.gov.uk/government/news/new-public-consultation-on-total-ban-of-online-advertising-for-unhealthy-foods>).

based on nutritional profiles which also include many products which are normally considered part of a balanced diet – eggs, raisins and sultanas, tinned fruit, orange juice, most yoghurts, cheese, butter, ham, tomato soup, and certain types of bread (Snowdon 2019). A farm delivery business, for example, recently fell foul of Transport for London’s interpretation of advertising restrictions.<sup>25</sup>

A still wider definition of harm has led to tight restrictions on advertising gambling. The Committee of Advertising Practice, the Broadcast Committee of Advertising Practice and the Advertising Standards Authority are supplemented by the Gambling Industry Code for Socially Responsible Advertising Practice. Although gambling does not pose direct threats to people’s health, these codes assert that some people’s gambling behaviour ‘could lead to financial, social or emotional harm’ and ‘exploit the susceptibilities, aspirations, credulity, lack of knowledge of children, young persons or other vulnerable persons’.<sup>26</sup>

These concerns lead to frequent interventions. In April 2018 CAP ‘guidance’<sup>27</sup> restricted adverts creating artificial urgency (‘Bet now!’) and emphasising monetary gains from gambling. In April 2019 restrictions<sup>28</sup> came into force on the use of celebrities, licensed characters from movies and TV, sportspeople, animated characters, and anybody appearing to be under 25. The prime intention was to protect under-18s, although there is little evidence of underage gambling or that children are significantly affected by gambling advertisements.

In April 2020 the Betting and Gaming Council voluntarily introduced further restrictions on advertising during the Covid-19 pandemic.<sup>29</sup> There are now suggestions that gambling logos on football shirts should no longer be allowed. A ban on gambling sponsorship, currently worth hundreds of

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25 ‘Can you spot the Junk Food in this Ad? TfL could’, *Farmdrop*, 1 March 2019 (<https://www.farmdrop.com/blog/the-contradictions-in-tfls-junk-food-advertising-ban/>).

26 Advertising codes quoted in Woodhouse (2020).

27 ‘Gambling Advertising: responsibility and problem gambling’, Advertising Standards Authority (<https://www.asa.org.uk/uploads/assets/uploaded/9d0bca96-290b-4fad-9ba33df7103a3fa9.pdf>).

28 Committees of Advertising Practice ‘Regulatory Statement: gambling advertising guidance. Protecting children and young people’, 13 February 2019 (<https://www.asa.org.uk/uploads/assets/uploaded/43072c78-8a0e-4345-ab21b8cbb8af7432.pdf>).

29 ‘10 Pledge Action Plan announced’, Betting and Gaming Council, 27 March 2020 (<https://bettingandgamingcouncil.com/news/10pledges-safergambling/>).

millions of pounds to UK sports organisations, is under consideration.<sup>30</sup> The list of potential ‘harms’ which could be claimed to justify advertising restrictions can be extended indefinitely. One area where we can expect pressure for bans in the future is products which may be implicated in climate change.

For example environmental activists have called for a ban on advertising sports utility vehicles (SUVs),<sup>31</sup> which generate more greenhouse gases than other vehicles. But this is only a matter of degree: a successful ban on advertising SUVs would surely be followed by demands for a ban on all fossil-fuel vehicles. Such a ban, like others mentioned here, would reduce competition and innovation but would probably do little to reduce emissions.

### **‘Offence’**

These ‘harm’ issues, although contested by classical liberals, are one thing. Possibly even more worrying are issues concerning ‘offence’.

Section 4.2 of the BCAP code<sup>32</sup> states that

Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards. Particular care must be taken to avoid causing offence on the grounds of: age; disability; gender; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

The problem is that advertising regulators have taken it upon themselves to define what those ‘moral, social or cultural standards’ are, or perhaps more accurately, what they *ought* to be.

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30 ‘Sport faces end of gambling cash in biggest crisis since tobacco ban’, *Sunday Times*, 31 January 2021 (<https://www.thetimes.co.uk/article/sport-faces-end-of-gambling-cash-in-biggest-crisis-since-tobacco-ban-9zfwk3k27>).

31 ‘Ban SUV adverts to meet UK climate goals, report urges’, *Guardian*, 3 August 2020 (<https://www.theguardian.com/environment/2020/aug/03/ban-suv-adverts-to-meet-uk-climate-goals-report-urges>).

32 ‘The BCAP code: the UK code of broadcasting advertising’, Committee of Advertising Practice (<https://www.asa.org.uk/uploads/assets/846f25eb-f474-47c1-ab3ff571e3db5910/2828d080-b29f-4b6c-8de66fbc7a6cd1f8/BCAP-Code-full.pdf>).



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In 2017 the ASA and the Committee on Advertising Practice published *Depictions, Perceptions and Harms: A report on gender stereotypes in advertising*, which called for ‘a tougher line’ on advertisements which could be held to feature ‘stereotypical gender roles and characteristics’. This report was based on academic research (often qualitative research, from a critical perspective drawing on media theory), submissions from interested parties,<sup>33</sup> consultations and seminars.

It was asserted that stereotypes can be offensive to large numbers of people, and the ASA and CAP thought this particularly important. Interestingly, however, the report notes that offence can sometimes be vicarious: ‘whilst participants often claimed not to feel personally offended by an advert, they did express offence on behalf of other groups in society’ (p. 59). This is classic paternalism, and has been a common feature of middle-class complainants about advertising.

Several participants in seminars held to discuss the issue argued for maintaining freedom of speech in this area. These arguments were countered with the formula that free speech and liberty to offend do not give a right to cause harm. A riposte to this increasingly-heard dismissal of free speech in any context is that harms surely need to be obvious and serious to begin to justify restrictions. Just what are these harms that the ASA report documented?

It was asserted that gender stereotypes have the potential to cause ‘mental, physical or social harm’. But evidence on this was tenuous. The report (p. 42) cited, for example, the claim that high male suicide rates arise partly because men are upset at being unable to live up to cultural expectations of masculinity which advertisements may reinforce. And it was suggested that there could be a loss to the economy of £150 billion because stereotypes help maintain the gender pay gap (p. 25) and therefore lead to slower economic growth - a claim which to economists is debatable, to say the least.<sup>34</sup>

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33 Including pressure groups such as Stonewall, the Women’s Equality Party and the Fawcett Society (which the ASA report’s coordinator Ella Smillie later joined).

34 This type of estimate is based on the assumption that paying men and women the same would mean the economy would gain in size to the full extent of the extra pay received by women. There is no attempt to model the effect on employment of a large increase in pay to women in low-paid jobs. It is as fallacious as assuming that the economy would double in size if we were all suddenly paid twice as much.

As for the view that much stereotyping in advertising<sup>35</sup> is intended to be ironic and humorous, the report sternly argued that research<sup>36</sup> suggested that exposure to sexist humour is linked to increased prejudice and sexist views. So that was that.

The report may have been useful in making some advertisers aware that they might present their products in a more sensitive manner. However it exaggerates the impact of stereotypes and the degree of 'offence' that normal people feel about them. Mild irritation, surely, is the most likely response to old-fashioned imagery. This is not a basis for heavy-handed restrictions.

Nevertheless, the report's conclusions were adopted. Overall, four broad areas of potential harm were listed in the report (pp. 58-59), to be avoided in future: focus on perfect bodies, 'gratuitous and unnecessary sexualisation', stereotypical gender roles and the perpetuation of these stereotypes over time.

These were to be the basis for new guidance to advertisers. Following consultations about the precise wording of new guidelines, the policy<sup>37</sup> came into force in June 2019. The guidelines include examples of now-forbidden scenarios, such as a woman being apparently solely responsible for cleaning, a man looking silly if he tries to carry out a stereotypically female role, or a new mother trying to maintain her make-up and keeping the house tidy rather than prioritising her own emotional wellbeing.

Quite a few adverts have failed to meet the new criteria. An early ban was imposed on one involving two new fathers who chat about Philadelphia cheese<sup>38</sup> while a child disappears on a conveyor belt; another was the Volkswagen advert showing a new mother calmly sitting on a bench alongside a pushchair while men (and one woman) engaged in various acts of

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35 Stereotyping of some sort is probably essential to adverts, which have to tell a story in a short period of time.

36 For example, Ford et al. (2008).

37 'Ban on harmful gender stereotypes in ads comes into force', *CAP News*, 14 June 2019 (<https://www.asa.org.uk/news/ban-on-harmful-gender-stereotypes-in-ads-comes-into-force.html>).

38 'Philadelphia advert first to be banned under gender stereotype rules for suggesting men "can't care for children"', *Evening Standard*, 13 August 2019 (<https://www.standard.co.uk/news/uk/philadelphia-cheese-advert-banned-over-claims-it-suggests-men-unable-to-care-for-children-a4212621.html>).

derring-do.<sup>39</sup> Of course, neither of these brief scenarios could have been banned were they part of a comedy show, a soap or a documentary. Yet if you seriously believe such representations to be harmful, they are surely harmful in any format.

A number of such delinquencies involve sexual imagery. While it is perhaps understandable that some people might complain about inappropriate imagery, it seems that the rules can be interpreted regardless of context. Take for instance the judgment against Missguided swimwear, a provocative ad for which appeared in a break during *Love Island*. The ASA ruled:

we acknowledged that there were similarities between the content of the ad and the programme, which was a reality dating show in which male and female contestants were featured often wearing swimwear or other revealing clothing and sometimes engaging in degrees of sexual behaviour. However, we considered that some viewers who enjoyed the programme would nevertheless be seriously offended by advertising that presented women as sexual objects. Because the ad objectified women, we concluded that it was irresponsible and likely to cause serious offence.

This verdict offers a particularly clear example of the way in which there is greater freedom in developing television content than there is in television advertising. We are seriously asked to believe that somebody who watched this programme – the primary appeal of which is to young people who enjoy watching semi-naked young men and women pairing off for sex – would be offended by an advert aimed at a similar demographic. I very much doubt such a person exists. There was apparently only one complaint, and understandable anonymity rules prevent us from knowing whether this was a genuinely offended individual or a person or organisation wishing to make another vicarious political point in our increasingly fractious culture wars. In their response to the ASA, ITV said that ‘the ad depicted similar values, swimwear and scenes as *Love Island* and that they were surprised to learn that a viewer of the programme had considered the content of the ad offensive’.

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39 ‘ASA ruling on Volkswagen Group UK Ltd’, 14 August 2019 (<https://www.asa.org.uk/rulings/volkswagen-group-uk-ltd-g19-1023922.html>).

It seems absurd that if one person finds something – anything – subjectively offensive it can lead to a ban. The suspicion is that ASA regulators seize on any complaint if it suits their particular agenda, rather than balancing one person's 'offence' against other considerations.

Consider by contrast Ofcom's response to dozens of complaints over a four-year period about Channel 4's *Naked Attraction*, where contestants examine the genitals of other contestants – surely the epitome of 'objectification' - before choosing which of them to date, while the presenter offers salacious comments and advice about sexual practices. Ofcom has repeatedly assessed these complaints while rejecting them, arguing that 'the material was justified by the context of the programme, which is aimed at an adult audience'.<sup>40</sup>

The decision in the Missguided case appears even more difficult to defend when we consider that the swimwear advert had, like the Philadelphia and Volkswagen ads, been approved by Clearcast (the organisation which approves scripts and final versions of adverts in advance of their being broadcast) for showing after 9pm.

Clearcast (owned by ITV, Channel 4, Sky and Warner Media) takes considerable care in its pre-approval process, yet can nevertheless find itself on the wrong end of ASA adjudications. This 'double jeopardy' is a feature of advertising regulation; agencies go through an elaborate and costly process of drafts and amendments following Clearcast comments, but this does not seem to offer much protection. In the Missguided case, Clearcast told the ASA that

because the ad was promoting a swimwear range, the body of the models would always be exposed and while some of the poses did have a sexual tone, they did not consider them to be overly sexualised. They said the ad was aimed at women to whom the imagery and clothing would appeal, rather than that its intention or portrayal was to objectify women and that the scheduling within Love Island was appropriate because of the shared themes and imagery.

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40 'Dating show Naked Attraction avoids Ofcom investigation', *The Irish News*, 7 August 2017 (<https://www.irishnews.com/magazine/entertainment/2017/08/07/news/dating-show-naked-attraction-avoids-ofcom-investigation-1103868/>). See also Ofcom Broadcast and On Demand Bulletin, Issue 386 (September 2019) ([https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0019/165430/issue-386-broadcast-and-on-demand-bulletin.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0019/165430/issue-386-broadcast-and-on-demand-bulletin.pdf)).

It is clear, therefore, that there can be legitimate differences of opinion within the industry over the meaning of words such as 'offensive' and 'objectification'. This might suggest that there should be much higher barriers to the imposition of advertising bans than is currently the case.<sup>41</sup>

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41 It might also be borne in mind that some ASA judgments may actually be counterproductive, in giving wider publicity to 'offenders'. For example, just one (again!) complaint against an online underwear advert by PrettyLittleThing led to a ban, but a huge number of further views. It is still out there. See 'PrettyLittleThing advert banned by watchdog for being "overly sexualised"', *Independent*, 5 February 2020 (<https://www.independent.co.uk/life-style/fashion/pretty-little-thing-advert-banned-watchdog-asa-sexualised-women-a9318081.html>).

## The real 'hidden persuaders'?

A significant part of the problem is that the decisions on complaints are made by the ASA Council, a thirteen-member body made up of people who are inevitably unrepresentative of the population.

So far as can be seen from their brief biographies,<sup>42</sup> the Council members are all highly educated. A third of them work in the advertising industry, although none appear currently to be 'creatives'. Most of the rest work or have worked in quangos and charities such as the Financial Services Authority, the British Board of Film Classification, the Mayor's Office, the Consumer Council for Northern Ireland, and the Scottish Legal Complaints Commission. Council members are 'diverse' in that an appropriate proportion are drawn from ethnic minorities. But none of them seem to be part of the demographic which enjoys *Love Island*, nor indeed of the wider population of television viewers and media consumers. They are primarily career regulators.

The new powers of the ASA in relation to gender issues are unlikely to be its only incursion into manipulating and directing public discourse. It already has policies towards representation of ethnicity, and has produced a number of rulings – for example in the case of a Paddy Power newspaper advert featuring the boxer Floyd Mayweather.<sup>43</sup> This ad used the quote 'always bet on black', a line about roulette used by Wesley Snipes in the movie *Passenger 57* – a quote which Mayweather had adopted for his own purposes, displaying it on his underwear at a weigh-in and using it as a Twitter hashtag. Nevertheless, the ASA ruled that the ad 'was likely to cause serious offence on the grounds of race'.

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42 See 'ASA Council' (<https://www.asa.org.uk/about-asa-and-cap/people/asa-council.html>).

43 'ASA ruling on Power Leisure Bookmakers Ltd. t/a Paddy Power', 20 September 2017 (<https://www.asa.org.uk/rulings/power-leisure-bookmakers-ltd-a17-397121.html>).

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In light of the current concern over Black Lives Matter, it seems inevitable that advocacy groups will demand that the ASA tightens rules in this area, even though advertisers have already increased and improved their representation of ethnic minorities substantially in response to changing public attitudes.<sup>44</sup>

The ASA has conducted a review of its recent judgments and concludes that it has usually made correct decisions. According to a blog on its website, however, it is now concerned that 'depictions of race and ethnicity in individual ads, which might seem to be on the right side of the line in isolation, might nevertheless be contributing to a cumulative effect of offence or harm'. This is one of the issues it plans to investigate in a new research project on which it is seeking the advice of 'stakeholders'.<sup>45</sup>

Quite what this will mean in practice is not clear, although with the precedent of the gender policy there may be concern among advertisers and creatives that unrepresentative opinions will be pressed on regulators. The idea that an advert should in future be judged not simply on its own merits, but on how it fits into some wider framework of ethnic representation, looks like a further hurdle to be faced by businesses which want to communicate with potential customers rather than meet ever-changing rules and restrictions.

The Advertising Standards Authority's ever-widening concerns go beyond matters of gender and ethnicity. It has also come out with a strong demand that political advertising be regulated (ASA/CAP 2020: 10):

Why can political parties act with apparent impunity when making claims in ads and other election materials? To many, including those in ad land, it doesn't make sense that ads for commercial products by businesses large and small throughout the UK should be held to greater account than ads that might swing votes and flip seats. We at the ASA agree. That's why we're stating clearly that we think claims in political advertising should be regulated.

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44 The recent proliferation of black and mixed-race families in TV ads is not primarily the result of ASA pressure, but rather a response of advertisers to changing demographics and public attitudes.

45 See 'Tackling racial and ethnic stereotyping in ads – the role the ASA is playing', 11 December 2020 (<https://www.asa.org.uk/news/tackling-racial-and-ethnic-stereotyping-in-ads-the-role-the-asa-is-playing.html>). In this blog post the author notes a backlash of complaints against some TV adverts featuring black families. It would be interesting to know more about these complaints, which are simply dismissed as racist.

Interestingly, the ASA is here repeating Ronald Coase's old argument, but flipping it. While Coase argued that commercial speech should be liberalised and treated in the same way as political speech, the regulator is saying that political speech should be subject to greater strictures in line with the way we treat advertising.

Although the ASA's Chief Executive, Guy Parker, has not demanded these regulatory powers for the ASA itself, he generously stands ready to share its experience and 'to contribute to a more collaborative regulatory arrangement', whatever that means.<sup>46</sup> The prospect of people similar to those on the Advertising Standards Authority's council – whose voting intentions are unlikely ever to mirror those of the electorate – adjudicating what can and cannot be said in party manifestos is one which should worry us.

Regulation has been tried before,<sup>47</sup> in times when politics was marginally less contentious, but was abandoned after the 1997 election. A report by the Electoral Commission (2004) confirmed that political advertising should not be regulated, drawing attention to the practical problems of ensuring a speedy response to claims around election time, the difficulties of distinguishing between fact and opinion, the likelihood of spurious complaints by political opponents and the lack of significant sanctions. All these problems remain today, even though the appetites of would-be regulators have clearly increased.

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46 'British political advertising must be regulated. How to do it is a harder question', *Guardian*, 3 June 2020 (<https://www.theguardian.com/commentisfree/2020/jun/03/british-political-advertising-regulated-parties-support>).

47 See 'Who regulates political advertising?', House of Commons Library, 4 November 2019 (<https://commonslibrary.parliament.uk/who-regulates-political-advertising/>).



## Conclusions

I have tried to demonstrate that there is no hard and fast distinction between free intellectual speech and commercial speech and that there should be no automatic assumption that different rules must apply to both.

Advertising is an important industry in its own right, but it is also of much wider significance in promoting competition and making people aware of the huge range of goods and services available in a complex economy. This paper has shown that the scope of advertising regulation has expanded enormously since its beginnings more than sixty years ago. From a concern with the legitimate complaints of the general public against misleading advertisements and the sharp practices of a minority of advertisers, regulation is now part of a wider paternalistic and neo-puritan project to shape the behaviour of the general population.

Successive governments have laid down advertising restrictions themselves, often without a proper assessment of the costs and benefits, but at least out in the open. Day-to-day restrictions are, however, increasingly created by the Advertising Standards Authority and the Committees of Advertising Practice. As the system is ostensibly self-regulating, policies and practices are not subject to parliamentary scrutiny and approval, and the public is largely unaware of the rules which determine what they are allowed to hear, see and read. They are also unaware of how regulators are trying to change the way in which people think. Ironically it is the regulators who are today's 'hidden persuaders'.

Although it is a defensible classical liberal view that there should be no regulation of commercial speech beyond that of other forms of utterance, there was probably not much wrong with the original brief that advertising should be 'legal, decent, honest and truthful'. It may be that the ASA should

return to that brief, which covers areas where real, measurable costs to consumers can result from bad advertising practice.

The newer concepts of 'harm' and 'offence' are arguably far too widely drawn and too often concern vicarious complaints or subjective emotions rather than definable damage to particular individuals and families. They increasingly inhibit the creative freedom of the UK advertising industry, for a long time among world leaders in the field, and they create uncertainty for businesses which want to do the right thing and play by the rules but also need to reach consumers as they are, not as regulators and vociferous advocacy groups wish them to be.

The ambitions of regulators for further expansion of their powers threaten wider freedoms of expression and their attempts to impose a single view of how we should see the world are dangerous and undemocratic, particularly at a time when there are widespread attempts to 'cancel' individuals and organisations which do not conform to a radical political agenda.

The powers of advertising regulators have increased, are increasing and probably ought to be diminished.

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