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Commercial Speech in the United States and Europe

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COMMERCIAL SPEECH PROTECTION IN THE UNITED STATES AND EUROPE

by

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(Under the Direction of Peter J. Spiro)

ABSTRACT

This research focuses on the protection of the commercial speech in the United States and Europe. The protection of commercial speech is regarded as one of the most controversial issues in both European and American free speech jurisprudence. The purpose of this work is to compare different approaches to the protection of the commercial speech in the American and European countries through an analysis of the decisions of the United States Supreme Court, the European Court of Human Rights and the European Court of Justice of the European Union. This analysis demonstrates that the U.S. Supreme Court gives commercial speech intermediate level of protection. In contrast, while the European Court of Human Rights and European Court of Justice declared commercial speech to be protected, in practice both Courts deny the protection by refusing to overrule limitations on commercial speech. Moreover, both European Courts leave much discretion to Member States to decide whether or not the commercial speech should be restricted.

INDEX WORDS: Commercial speech, Freedom of speech, U.S. Supreme Court, European Court of Human Rights, European Court of Justice, Concept of “margin of appreciation”, European Convention on Human Rights, First Amendment.

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DEDICATION

To The Two Most Important People in My Life: My Mother and My Husband.

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I. INTRODUCTION

Freedom of speech is "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self fulfillment."[1] Freedom of speech is one of the most important conditions for the progress and self-realization of each person in society. One cannot develop one's own personality without first being able to voice whatever one wishes to think.[2] Several other reasons exist for the special protection of speech. First, "speech is recognized as valuable, because public debate is a useful instrument for achieving other social objectives."[3] Second, the possibility for personal expression is a public good itself.[4] The freedom of speech is an instrument for achieving truth and knowledge.[5]

Freedom of speech is currently is one of the most widely recognized human rights. The overwhelming majority of constitutions throughout the world have an article or specific clause for the protection of the freedom of speech.[6] While about ninety percent of the constitutions in the world guarantee the freedom of speech, only sixty-six percent prohibit the use of torture.[7]

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[1] Lingens v. Austria , 103 Eur.Ct.H.R. (ser. A) at 41 (1986).
[2] Liz Heffernan ed., Human Rights: A European Perspective 201 (1994).
[3] Mark W. Janis et al., European Human Rights Law 158 (1996).
[4] *Id.*
[5] *Id.*
[6] *See* Hence van Maarseveen & Ger Van Der Tang, Written Constitutions: a Computerized Comparative Study 105, 110 (1978).
[7] *Id.*

The first versions of the freedom of speech assurance can be found in the United States Constitution and in the French Declaration of the Rights of Man and Citizen. The First Amendment to the United States Constitution says that "Congress shall make no law abridging the freedom of speech, or of the press."[8] The freedom of speech in the United States is based on "the power of reason as applied through public discussion so they [judges] eschewed silence coerced by law."[9]

A great number of European Court of Human Rights cases involved freedom of speech issues. Section 1, Article 10 of the European Convention on Human Rights states that "everyone has the right to freedom of expression" and "this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." [10]

Nevertheless, in the decisions of the Supreme Court of the United States (hereinafter after Supreme Court), the European Court of Human Rights and the European Court of Justice of the European Union, it is observed that different categories of speech do not get the same level of protection. Moreover, some categories of speech, such as incitement, fighting words, libel, obscenity and child pornography are left outside the Court's protection.[11]

This paper will be focused on the protection of commercial speech in the United States and Europe. "Europe" in the context of this paper means Member States of the Council of Europe and of the European Union. In this light, this research will be more concentrated on human rights rather than constitutional rights because there is no common constitution existing

[8] U.S. Const. amendm. I.
[9] Whitney v California, 274 U.S. 357, 375-6 (1927) (concurring opinion).
[10] Council of Europe, European Convention on Human Rights: Collected Texts, art.10 (1987).
[11] *See* Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 984 (15th ed. 2004).

for all of Europe.[12] Therefore analysis of the European Court of Human Rights and the European Court of Justice decisions will demonstrate the basic principles of the doctrine in Europe.

The European Court of Human Rights is a body of the Council of Europe and includes virtually all the countries of Europe as members (46 members).[13] The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) is a legal document of the Council of Europe.[14] The European Court of Human Rights is responsible for making judicial decisions on issues raised under the Convention.[15]

The European Court of Justice belongs to a completely different supranational organization - the European Union, which includes 25 Member States,[16] most of which are Western European countries. However, there is a tendency towards including more Eastern European countries as well. The European Court of Justice is the central court for the settlement of disputes arising out of the Union's legislation.[17] The Treaty on European Union (Maastricht Treaty) was signed in 1992 incorporates the European Convention on Human Rights.[18]

Therefore, the European case law analyzed in this research developed either under the European Convention on Human Rights as applied by the European Court of Human Rights; or under European Law as applied by the European Court of Justice.

The protection of the commercial speech is regarded as one of the most controversial issues in the history of the both European and American jurisprudence. In the United States,

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[12] *See* Roger A. Shiner, Freedom of Commercial Expression 94 (2003).
[13] *See* http://www.coe.int (last visited on Mar. 2005).
[14] *See* Shiner, *supra* note 12 at 94-95.
[15] *Id* at 95.
[16] *See* "Member States" at http://europa.eu.int/abc/index_en.htm# (last visited on Mar. 2005).
[17] *See* Shiner, *supra* note 12 at 94.
[18] Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, art.F (Treaty of Maastricht).

commercial speech was excluded from the coverage of the First Amendment until 1976.[19] Since the 1976 Supreme Court decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[20] commercial speech has been protected, although not absolutely protected.[21]

In the European Court of Human Rights, expressions involving commercial or economic interests receive less protection than speech involving political issues. The European Court of Justice of the European Union has required that expression have a commercial aspect if its restriction is to raise a question under the mainly economic treaties under which the Court operates.[22]

The purpose of this work is to compare different approaches to the protection of commercial speech in the American and European legal doctrines through an analysis of the cases of Supreme Court, the European Court of Human Rights and the European Court of Justice of the European Union. These cases also involve the historical and cultural traditions of the respective member states and nations involved. One of the main questions to be answered in this research is whether one kind of the commercial speech would be protected by one court and would not be protected by the other. Another problem that arises concerns the reduction in the level of commercial speech protection. Unfortunately, the volume of research on this topic is very small. Moreover, there is a limited amount of research that compares US Supreme Court and European Court cases.

What is the value of the commercial expression? Why should it be protected? While everybody understands the importance of political speech protection, necessity of commercial speech protection usually is not so obvious. However, it is impossible to imagine operation of the

[19] *See* Eric Barendt, Freedom of Speech 54 (1985).
[20] 425 U.S. 748 (1976).
[21] *See* Sullivan & Gunther, *supra* note 11 at 1158-9.
[22] See Janis, *supra* note 3 at 208-209

economic market without market participants having access to the information.[23] Free flow of information defines a free society. Notwithstanding the great value of the commercial speech, its protection was denied for a long time in the United States and Europe.

However, for better understanding the subject at hand, it is important first to conduct a review of the nature of speech, and commercial speech particularly, and justifications for limits on speech. Thus, the next part will be focused on common tendencies in freedom of speech protection in the United States and Europe. The meaning of commercial speech and importance of its protection will be discussed in the third chapter. The fourth chapter is based on the historical emergence of the commercial speech doctrine in the United States. In the fifth chapter, the European doctrine of commercial speech protection will be analyzed. In the sixth chapter, courts' decisions in the United States and Europe on the same subject matter as contraceptive and abortion advertisement; regulation of advertising of the legal professions and tobacco advertisement will be compared.

This analysis will demonstrate that the U.S. Supreme Court gives commercial speech intermediate level of protection. In contrast, while the European Court of Human Rights and European Court of Justice declared commercial speech to be protected, in practice both Courts deny the protection by refusing to overrule limitations on commercial speech. Moreover, both European Courts leave much discretion to Member States to decide whether or not the commercial speech should be restricted.

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[23] *See* Shiner, *supra* note 12 at 94.

II. FREEDOM OF SPEECH: DEFINITION, REASONS, RATIONALE AND LIMITS ON PROTECTION

A. The Meaning of Speech

What should the definition "speech" or "expression" include?[24] The nature of the "expression" protected by Article 10 of the European Convention, or by the First Amendment is not entirely clear. Courts have the power to interpret the law and answer the question whether or not the particular words or activity would be covered by the rule protecting freedom of speech.[25]

One kind of "speech" at least is clear:[26] verbal speech, writing, or conduct "falls under the dictionary meaning of speech".[27] However, what about questions concerning fraud, dishonest advertisement or provocation to murder?

There is the important question of whether the "expression" should be distinguished from action. The intention or effect of some various forms of activity may be more "to convey ideas more generally transmitted by discussion or writing".[28]

In the American legal doctrine "speech" does not just cover words but such actions as burning the flag[29] and nude dancing.[30] For example, in *Texas v. Johnson*[31] the U.S. Supreme

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[24] In the American Constitution there is term "freedom of speech" used. European Convention on Human Rights talks of "freedom of expression". Courts use both words with the same meaning. However, there is an argument that the word "expression" is broader. See, e.g., F.Shauer, Free Speech: A Philosophical Enquiry 50-2 (1982). Throughout this paper both words will be used interchangeable.
[25] *See* Barendt, *supra* note 18 at 37.
[26] *Id.*
[27] *Id.* at 38.
[28] *Id.* at 37.
[29] Texas v. Johnson, 491 U.S. 397 (1989).
[30] Schad v Borough of Mt.Ephraim, 425 U.S. 61 (1981).

Court held that "act of burning American flag during a protest rally was an expressive conduct within protection of First Amendment".[32] According to the Supreme Court, to determine whether the First Amendment would cover the particular activity, "it is necessary to determine whether there was intent to convey a particularized message and whether the likelihood was great that the message would be understood by those who viewed it".[33]

The European Court of Human Rights in its decisions has not focused on drawing distinctions between different types of actions.[34] Rather, the Court has concentrated more on the question of when public interference with expression may be permissible.[35]

B. Justifying Limits on Expression

1. Textual argument

This section is focused on textual analysis and comparison of section 2, article 10 of the European Convention on Human Rights and provisions of the U.S. Constitution concerning freedom of speech.

The European Court of Human Rights' focus on the limits of expression may be explained by looking at the words of section 2, article 10 of the European Convention:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.[36]

It should be noted that the U.S. Constitution does not contain such a provision. However, there are limits in the U.S. approach. For example, according to the U.S. Supreme Court decision

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[31] 491 U.S. 397.
[32] *Id.*
[33] *Id.*
[34] *See* Janis, *supra* note 3 at 158-9.
[35] *Id* at 159.
[36] European Convention on Human Rights, *supra* note 10, art.10 § 2.

in *Near v Minnesota,*[37] the government has a right to prohibit "the publication of the sailing dates of transports or the number and location of troops".[38]

According to the text of the European Convention, limitations on the right of free expression are justified if they are for the reasons provided in the Convention.[39] Such reasons are

> National security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, prevention the disclosure of information received in confidence or maintaining the authority or impartiality of the judiciary.[40]

For the European Court of Human Rights, the concept of "margin of appreciation" is the doctrine applicable to deciding whether or not a state's interference with a protected right is "necessary in a democratic society".[41] There are two hypotheses in this doctrine.[42] First, each state may construe what should be necessary in its society differently; second, the European Court of Human Rights can reserve judgment, to a certain degree, on issues concerning Member States.[43]

In *Handyside v. United Kingdom,*[44] the Court explains the meaning of the term "necessary" within the scope of section 2, Article 10.[45] The Court says that "necessary" "is not synonymous with "indispensable"…neither has it the flexibility of such expressions as "admissible", "ordinary", "useful" or "desirable."[46] In *Handiside,* the issue in front of the Court was whether authorities of the United Kingdom had exceeded their power by prohibiting the obscene publication of, and by it prosecution, of its author, Richard Handyside.[47] The Court held

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[37] 236 U.S. 697 (1931).
[38] *Id.* at 716.
[39] European Convention on Human Rights, *supra* note 10, art.10 § 2.
[40] *Id.*
[41] *See* Janis, *supra* note 3 at 244.
[42] *Id.*
[43] *Id.*
[44] Handyside v. United Kingdom, 74 Eur.Ct.H.R. (ser.A) (1976).
[45] European Convention on Human Rights, *supra* note 10, art.10 § 2.
[46] *Handyside,* 74 Eur.Ct.H.R. at paras 38, 42.
[47] *Id.*

that it is impossible to define the uniform European concept of morals.[48] The Court held that national authorities are better able than international judges to understand and comprehend situation in their country.[49] Thus, the European Convention on Human Rights leaves Member States a margin of appreciation[50].

The European Court of Human Rights used the same rationale in its decision in *Muller and Others v. Switzerland.*[51] Josef Felix Muller was convicted under the Swiss Penal Code for displaying obscene materials.[52] The Court did not find any violation of Article 10 of the European Convention on Human Rights.[53] The Court stated that "the applicant's conviction was intended to protect morals."[54] The Court noted again that it is impossible to define a uniform European conception of morals and Contracting States know better whether such convictions are "necessary in a democratic society".[55]

According to the U.S. Supreme Court "the word "necessary" is…limiting the right to pass laws for the execution of the granted powers, to such as be indispensable."[56] The Court also notices that "necessary" may have such meanings as "useful" or "essential".[57]

In *Texas v. Johnson,*[58] the Supreme Court had to decide whether it is necessary to protect the American flag by the limiting the freedom of speech right. Gregory Lee Johnson was convicted of burning an American flag in violation of the Texas Penal Code, sentenced to one year in prison, and fined two thousand dollars. The Supreme Court held that Johnson's burning

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[48] Zaim M. Nedjati, Human Rights Under the European Convention 186 (1978).
[49] *Id.*
[50] *Id.*
[51] 133 Eur.Ct.H.R. (ser. A) (1988).
[52] Id.
[53] European Convention on Human Rights, *supra* note 10, art.10.
[54] *Muller,* 133 Eur.Ct.H.R.at para 35.
[55] *Id.*
[56] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[57] *Id.*
[58] 491 U.S. 397.

of the flag constituted expressive conduct of free speech.[59] The Court also held that State's interest did not justify Johnson's conviction.[60] The Court stated that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[61]

In 1989, shortly after the U.S. Supreme Court's decision in *Texas v. Johnson,* Congress passed The Flag Protection Act of 1989.[62] However, in *United States v. Eichman,*[63] the U.S. Supreme Court upheld its decision in *Johnson* and stated that Flag Protection Act[64] violates the First Amendment.[65] Moreover, the Court held that the Flag Protection Act violates freedom of speech. Thus, speech had preference over the State's interest, even when a majority of people were against flag burning.[66]

In *Ginsberg v. New York,*[67] the U.S. Supreme Court upheld a statute prohibiting the sale of sexually-oriented literature to minors under the age of 17. In *Handyside,* [68] the European Court of Human Rights extended such prohibition to adults. In contrast, the Supreme Court in *Buttler v. Michigan*[69] overruled a state statute, which prohibited generally the sale of material unsuitable for children. The Court noted that "the incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[70]

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[59] *Id.* at 406.
[60] *Id.* at 412.
[61] *Id.* at 406
[62] Flag Protection Act, 18 U.S.C. § 700 (1989).
[63] 496 U.S. 310 (1990).
[64] 18 U.S.C. § 700.
[65] *Eichman*, 496 U.S. at 314.
[66] *Id.* at 315.
[67] 390 U.S. 629 (1968).
[68] *Handyside*, 74 Eur.Ct.H.R. (ser.A).
[69] 352 U.S. 380 (1957).
[70] *Id.*

The European Court of Human Rights gives the power to the Contracting States to decide whether or not it is necessary to limit particular freedom of expression in their "democratic society". Hence, the principles set in the case-law are minimum standards.[71] The U.S. Supreme Court strongly protects freedom of speech from limitations even in the cases when majority of people supports such limitation. This could be explained by a textual analysis of both major acts on Human Rights. Section 2, Article 10 of the European Convention on Human Rights[72] provides a list of circumstances when the right or freedom of expression could be limited by the state. The recognition of freedom of speech has a different history in the United States and Europe. The history of the free speech doctrine development in both areas will be discussed in the next part.

2. Historical Analysis

This analysis is focused on freedom of speech recognition in Europe and the United States. While in the United States freedom of speech was protected centuries ago with the creation of the Bill of Rights, some countries in Eastern Europe recognized freedom of speech only in the end of the 20th century.

In Europe, since the 17th century, there has been a struggle for the recognition of the freedom of expression and for removing the interference of church onto the state.[73] For example, in England, all published materials had to be submitted to the royal officials for approval.[74] The English Bill of Rights of 1688 provided "freedom of speech", but only in the Parliament.[75] In

[71] See Michael O'Boyle, *Right to Speak and Associate Under Strasbourg Case-Law with Reference to Eastern and Central Europe*, 8 Conn. J. Int'l L. 263, 285 (1993).
[72] European Convention on Human Rights, *supra* note 10, art.10 § 1.
[73] *See* Hefferman, *supra* note 2 at 211.
[74] *See* Sullivan & Gunther, *supra* note 11, at 985.
[75] Gabor Kardos, *Freedom of Speech in the Time of Transition*, 8 Conn. J. Int'l L. 529, 535 (1993).

some Eastern European countries censorship lasted until the beginning of 1990s. The fall of Berlin Wall in 1989 brought freedom of speech in Eastern Europe.[76] Soon after this event, Hungary, Bulgaria, Poland, Czech and Slovak Republics ratified the European Convention on Human Rights and accepted the jurisdiction of the European Court of Human Rights.[77] However, there are still such problems as the lack of an independent press and television stations, dismissal of the government opposition journalists, state control of the broadcasting media and censorship and hate speech.[78] Moreover, problems of nationalism and conflicts between different ethnic and cultural groups bring up other issues.[79] For example, there is a tendency to discriminate against minority groups by prohibiting distribution of foreign publications.[80]

The institution of free speech and its protection is relatively new in some countries of central and Eastern Europe. Therefore, there are still problems of censorship and prohibitions of free expression arise. It will take time for a free speech tradition to become fully established.

Thus, events since 1989 brightly illustrate that freedom of speech is a basis for a democratic society.[81] However, it is clear that freedom of speech does not get enough protection in some countries in central and Eastern Europe. Moreover, according to the doctrine of the margin of appreciation, the Contracting States has more power than the European Court of Human Rights to decide what is necessary in their society. Thus, completely different results may be reached in cases in Europe than those in the United States.[82]

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[76] *See* Hefferman, *supra* note 2 at 212.
[77] See O'Boyle, *supra* note 71 at 263-4.
[78] *Id.* at 269.
[79] *Id.* at 268-269.
[80] *See id.* at 270 about Latvian policy against Russian publications.
[81] *Id.* at 268.
[82] *See* Shiner, *supra* note 12 at 109.

The Framers of the American Constitution were aware of the restriction of freedom of speech in England.[83] Thus, in the United States, freedom of speech was provided in the Bill of Rights, and since that time the Supreme Court included more and more types of "speech" in the protection of the First Amendment.[84] However, the Sedition Act enacted in 1798 prohibited the defamation publications against the Government and the President.[85] The Act expired a few years later in 1801 and President Jefferson pardoned all of those convicted under the Act.[86]

During the next century there were several efforts made to suppress "abolitionist literature during the slavery controversy" and "attempts to suppress seditious publications during the Civil War."[87] However, freedom of speech cases first reached the Supreme Court during the World War I period.[88]

In contrast to Eastern Europe, in the United States freedom of speech was recognized centuries ago with the creation of the Bill of Rights.[89] Nowadays, there is a great number of different types of speech included under the coverage of the First Amendment.

Nevertheless, there is one type of speech, commercial speech, which has a controversial history in both American and European approaches and still does not receive full freedom of speech coverage.

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[83] Daniel E. Troy*, Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 96 (1999).
[84] *See* Barendt, *supra* note 18 at 38.
[85] *See* Sullivan & Gunther, *supra* note 11, at 986.
[86] Id. at 987.
[87] *Id.*
[88] *Id.*
[89] U.S. Const. amendm. I.

III. VALUE OF THE COMMERCIAL SPEECH PROTECTION

This chapter is focused on the meaning of commercial speech and its interpretation by the courts. The research also is focused on commercial speech value, reasons and importance of protection.

A. What Is Commercial Speech?

The European Court of Human Rights and the European Court of Justice does not provide a definition of commercial speech.[90] The Courts, however, have recognized that the coverage of Article 10 of the European Convention on Human Rights[91] includes to some extent "commercial speech".[92] However, the term "commercial speech" is rarely used in the decisions of the Courts in Europe.[93] The term "information", which is used in Article 10, can be interpreted very broadly.[94] It states:

> Every one shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

In *Markt Intern Verlag v. Germany*[95] the Court held that Article 10 protects "commercial speech".[96] However, the Court did not provide any reasoning for "commercial speech" protection. The European Court of Human Rights stated that "such information cannot be

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[90] *See* Shiner, *supra* note 12 at 6.
[91] European Convention on Human Rights, *supra* note 10, art.10.
[92] *See* Hefferman, *supra* note 2 at 235.
[93] *Id.* at 235.
[94] European Convention on Human Rights, *supra* note 10, art.10 § 1.
[95] 164 Eur.Ct.H.R. (ser.A) (1990).
[96] *Id.* at para. 26.

excluded from the scope of Article 10(I)".[97] If there are no reasons and no definitions mentioned, "one cannot be sure of the outer boundaries to the right."[98]

The European Court of Justice has recognized commercial speech as a part of informational rights and economic liberties.[99] In *GB-INNO-BM v. Confederation du Commerce Luxembourgeois,*[100] although the Court did not state what is commercial speech, the Court held that the prohibition of advertising restricts the free movement of goods.

The situation is different in the United States. The U.S. Supreme Court identifies categories of commercial speech in its cases.[101] The Court in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*[102] held that;

> (i) speech is not "commercial" merely because money is spent to project it; (ii) speech is not "commercial" merely because it is carried in a form that is "sold" for profit; (iii) speech is not "commercial" merely because it may involve a solicitation to purchase or otherwise pay and contribute money.[103]

The Court also noted three characteristics of commercial speech. Commercial speech is speech that is "concededly an advertisement refers to a specific product and is motivated by economic interest".[104] In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*[105] the U.S. Supreme Court gives a definition of commercial speech as speech that does "no more than propose a commercial transaction."[106]

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[97] *Id.*
[98] *See* Hefferman, *supra* note 2 at 236.
[99] *Id.* at 239.
[100] Case 362/88, 1990 E.C.R.I-667, (1990).
[101] *See* Shiner, *supra* note 12 at 6-7.
[102] 425 U.S. 748 (1976).
[103] *Id.* at 761.
[104] Securities and Exchange Commission v. Wall Street Publishing Institute Inc. dba Stock Market Magazine 851 F 2d 365 (USCA DC Cir 1988) at 372.
[105] 413 U.S. 376 (1973).
[106] *Id.* at 385.

The Court also defined in its cases what commercial speech does not consist of.[107] It is not a speech on commercial subject;[108] it is not a speech "in a form sold for profit;"[109] it is not a speech that seeks money[110] and it is not an element of commercial speech when money is spent to financial project.[111]

Thus, almost in most cases that U.S. Supreme Court reviewed concerning commercial speech protection, the subject included "advertising, promoting or soliciting for business."[112] The only exception was the *Coors* case[113], a case related to product labeling, which is not that far from product advertising.[114] Nowadays, in the United States commercial speech is "speech that companies use to sell their products to the public."[115]

The European Court of Human Right has a different practice.[116] The Court considers consumer criticism and magazine articles on product safety as presumed commercial expression.[117] Again, the European Court of Human Rights does not offer any rationale for such decisions.[118]

The recent practice of the U.S. Supreme Court broadly interprets commercial speech as speech that does "no more than propose a commercial transaction"[119] and as cases which are

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[107] Alex Kozinski, *Who's Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 638 (1990).
[108] *Virginia State Board of pharmacy*, 425 U.S. at 761-62.
[109] *Id.* at 761; *see* also Kozinski, *supra* note 107 at 638.
[110] *Virginia State Board of pharmacy*, 425 U.S. at 761.
[111] *Id.*
[112] Shiner, *supra* note 12 at 7-8.
[113] Rubin v. Coors Brewing Company 514 U.S 476 (1995).
[114] Shiner, *supra* note 12 at 8.
[115] Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights to Corporations to Speak Their Minds. Will the Supreme Court Let it Stand?*, Fortune, Sept. 2, 2002 at 108.
[116] Shiner, *supra* note 12 at 8.
[117] *Id.*
[118] *Id.* at 6.
[119] *Pittsburg Press Company,* 413 U.S. at 385.

"more complicated than simple cases of informational advertising."[120] However, for a long time, commercial speech protection did not exist in the United States.

B. Why Should Commercial Speech Be Protected?

Importance of commercial speech protection might not be so obvious as the importance of the protection of political speech or artistic expression. However, several reasons exist why commercial speech should not only be protected, but also should get the full level of protection.

First of all, commercial speech is a basic of element a free market.[121] Effective operation of the market would be impossible without freedom of information.[122] There is a public interest "to preserve a predominantly free enterprise economy" and in a "flow of commercial information."[123] It is obvious that commercial speech benefits not only individuals, but also society. Furthermore, commercial speech benefits not only producers, but also consumers because advertising provides them not only with freedom of information, but also with freedom of choice.

According to Article 10 of the European Convention of Human Rights, the right to impart information is a part of the freedom of speech.[124] Thus, it is puzzling why commercial speech does not receive full protection, and in some cases receives no protection. As it was mentioned in the first chapter, freedom of speech is one of the main conditions for one's self-realization, as well as an instrument for achieving different social objectives.[125] Furthermore, it is undisputable that truthful and not misleading advertising provides one with useful knowledge about certain product. It is also evident that advertisement helps consumers to find truthful information.

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[120] Shiner, *supra* note 12 at 8.
[121] *See, supra*, Chapter I.
[122] Shiner, *supra* note 12 at 114.
[123] *Virginia State Board of pharmacy*, 425 U.S. at 765.
[124] European Convention on Human Rights, *supra* note 10, art.10 § 1.
[125] See also Shiner, *supra* note 12 at 125.

What about self-realization and self-fulfillment? The possibility to make economic choices is "an important aspect of individual self-realization."[126] Economic choices help consumers to choose the right product and to buy this product for the best price. However, there is a point of view that the possibility to make economic choices allows the hearer or receiver of information to achieve self realization, but does not do so for the speaker.[127] However, advertisement is the best way for self-realization of the speaker, too. By advertising her products or services, a person gets a chance self-realization in business and in life.

Freedom of commercial expression should not be absolute since false and misleading advertisement should be restricted. The limits on advertisement of dangerous products, like cigarettes or alcohol, seems reasonable. However, courts should be very careful in upholding prohibitions and restrictions on commercial speech.

The next chapter will focus on commercial speech protection in the United States. Commercial speech in the United States came a long way from a complete denial of its protection under the First Amendment of the U.S. Constitution to an acknowledgment of its need for protection and to receiving an intermediate level of protection.

[126] Attorney General of Quebec v. La Chaussure Brown's Inc et al, 54 D.L.R. (4th) 577, 618 (1988).
[127] Shiner, *supra* note 12 at 238.

IV. COMMERCIAL SPEECH IN THE UNITED STATES

The development of commercial speech protection will be discussed in this chapter. The historical analysis shows that commercial speech was recognized by the U.S. Supreme Court only in 1976. Commercial speech still does not receive the full protection from the Court, however the intermediate level of protection has became a standard.

A. Commercial Speech and Its Protection Before 1976

In the United States constitutional protection for freedom of speech is based on the First Amendment to the U.S. Constitution.[128] The Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.[129]

Most of the commentators suggest that the First Amendment did not cover commercial speech in the United States for a long time.[130] However, some commentators contend that there is evidence suggesting that commercial speech was protected.[131] Although there were no restrictions on some types of advertising, some states tried to regulate advertisement of doctors and attorneys, merchants and shopkeepers.[132] Some states also prohibited lotteries and their advertisement and promotion.[133] The U.S. Supreme Court did not decide any commercial speech

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[128] U.S. Const. amendm. I.
[129] *Id.*
[130] *See* Barendt, *supra* note 19 at 54 (1985); see also Sullivan & Gunther, *supra* note 11 at 1158-9.
[131] *See* Troy, *supra* note 83 at 109.
[132] Id. at 104.
[133] *See* i*d*. at 105.

law cases before the Civil War.[134] In the post Civil War period, the U.S. Supreme Court left almost all types of commercial speech outside the First Amendment.[135] For example, in *Ex parte Jackson*[136] the Court sustained the Congress ban on the advertising of lotteries by mail. Taking the opposite point of view, Alex Kozinski and Stuart Banner suggest that the Court "considered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other."[137] The first case in front of the U.S. Supreme Court dealing with the issue of whether or not the First Amendment protects advertising was the 1942 case of *Valentine v. Christensen.*[138]

1. Valentine v. Christensen and commercial speech doctrine.

In *Valentine v. Christensen,* the Supreme Court sustained a New York City ordinance that prohibited commercial and business advertising materials on the streets.[139] Christensen owned a submarine, which he kept at a pier owned by the state of New York, in order to make money from it as a tourist attraction.[140] He printed advertising handbills and had the intent to distribute them.[141] However the police stopped the distribution because it violated a city ordinance prohibiting commercial advertising involving distribution on the streets.[142] Christensen reprinted his handbills advertising the exhibit without reference to a price and another side contained a protest against the city for not allowing him to keep his submarine at a city dock.[143] This

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[134] *Id.* at 113.
[135] *See* Sullivan & Gunther, *supra* note 11 at 1159.
[136] 96 U.S. 727 (1877).
[137] Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex.L.Rev. 747, 765 (1993).
[138] 316 U.S. 52 (1942).
[139] *Id.* at . 53.
[140] *Id*.
[141] *Id.*
[142] *Id.*
[143] *Id.*

distribution was also stopped by the city police.[144] Handbill prohibitions were at that time uncommon.[145]

The Supreme Court held that "the Constitution imposes no such restraint on government in respect to purely commercial advertising."[146] The Court held that the prohibition regulated an economic activity, rather than infringing on protected political speech.[147] Alex Kozinski noticed that the commercial speech doctrine was born when the Court did not cite any authority in its opinion.[148] *Valentine*[149] seemed to completely delete commercial speech from the First Amendment protection list.

However, the Court's decision in *Valentine*[150] "did not mean that First Amendment Protection was barred simply because the speaker had a commercial motive."[151] In *Thomas v Collins*[152] the Court held that "the idea is not sound, therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity."[153]

In *New York Times v. Sullivan*[154] the Supreme Court accepted that the First Amendment applies to a "paid 'commercial advertisement".[155] Nevertheless, the Court's decisions in the cases after *Valentine*[156] were based mostly on "commercial-noncommercial distinction."[157] In the

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[144] *Id.*
[145] Shiner, *supra* note 12 at 27.
[146] *Valentine*, 316 U.S. at 54.
[147] *See* Sullivan & Gunther, *supra* note 11 at 1159.
[148] Kozinski, *supra* note 107 at 628.
[149] 316 U.S. 52 (1942).
[150] *Id.*
[151] *See* Sullivan & Gunther, *supra* note 11 at 1159.
[152] 323 U.S. 516 (1945).
[153] *Id.* at 531.
[154] 376 U.S. 254 (1964).
[155] *Id., see* also Sullivan & Gunther, *supra* note 11 at 1159.
[156] 316 U.S. 52 (1942).
[157] Sullivan & Gunther, *supra* note 11 at 1159.

early 1970s in *Pittsburg Press Co. v. Pittsburgh Human Relations Commission*[158] the Supreme Court came back to its *Valentine's* [159]commercial speech doctrine.

2. Pittsburgh Press Co. v. Pittsburgh Human Relations Commission

In *Pittsburgh Press,*[160] the Supreme Court upheld the city of Pittsburgh ordinance against sex discrimination in the newspapers. The Pittsburgh Press newspaper separated employment advertisement into "Male Help Wanted" and "Female Help Wanted".[161] The city found such advertisements in violation of its ordinance.[162] Justice Powell's majority opinion followed "Christensen rather than the [New York Times] advertisement"[163] and found that "discrimination in employment is not only a commercial activity; it is illegal commercial activity under the Ordinance."[164] Even when there is sex discrimination, is "the issue is a sensitive one"[165] and the Court said it is "no more than a proposal of possible employment".[166] The Court concluded: "The advertisements are thus classic examples of commercial speech," which are not covered by the First Amendment.[167]

Two years after the decision in *Pittsburgh Press* the U.S. Supreme Court changed its route.

3. Bigelow v. Virginia

The issue in *Bigelow v. Virginia*[168] was whether or not Virginia could criminalize advertisement in Virginia newspapers of the availability of abortions in New York.[169] Jeffrey

[158] 413 U.S. 376 (1973).
[159] 316 U.S. 52 (1942).
[160] 413 U.S. 376 (1973).
[161] *Id*. at 379.
[162] *Id.* at 378-9.
[163] *Id.* at 385.
[164] *Id.* at 388.
[165] *Id.* at 378.
[166] *Id.* at 385.
[167] *Id.*
[168] 421 U.S. 809 (1975).

Bigelow put in the paper an advertisement about the legality of abortions in the state of New York and the possibility for out-of-state women to get abortions in New York clinics.[170] He was convicted under a Virginia law for encouraging the procurement of an abortion.[171] Bigelow challenged the Virginia statute as a violation of his First Amendments rights.[172] The state of Virginia relied on the Supreme Court's decision in *Valentine.*[173] The U.S. Supreme Court stated that the commercial character of speech does not automatically omit it from First Amendment protection.[174] The Court also narrowed the scope of *Valentine* to the manner of distribution of commercial advertising.[175] The Court reconsidered *Valentine's* theory that commercial advertisement is always unprotected.[176] However, the Court stated again: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."[177]

The Supreme Court started to change the commercial speech doctrine in *Bigelow*. One year after this decision, in *Virginia Pharmacy*[178] the Court stated that "the notion of unprotected 'commercial speech' all but passed from the scene."[179]

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[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] 316 U.S. 52 (1942).
[174] *Bigelow*., 421 U.S. at 819.
[175] *Id.*
[176] *Id.* at 820.
[177] *Id.* at 825.
[178] 425 U.S. 748 (1976).
[179] *Id*. at 759.

B. Commercial speech and its protection after 1976

1. Virginia State Board v. Virginia Citizens Consumer Council. Declaring Commercial Speech Protection

In 1976 commercial speech was finally recognized by the Supreme Court in *Virginia State Board of Pharmacy.*[180] Consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy.[181] They were challenging the validity of a Virginia statute declaring it unprofessional for a pharmacist to advertise the prices of prescription drugs.[182] The United States District Court for the Eastern District of Virginia stated that "commercial speech" is not wholly outside the protection of the First and Fourteenth Amendments."[183] The Supreme Court affirmed this decision. Justice Blackmun delivered the Court's opinion.[184] The Court held that "commercial speech, like other varieties, is protected" but "some forms of commercial speech are surely permissible."[185] Writing for the Court, Justice Blackmun stated the reasons for commercial speech protection:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.[186]

The Court analyzed its previous decisions in *Pittsburgh Press*[187], *NY Times*[188], *Smith*[189], *Burstyn*[190], *Murdock*[191], *Jamison*[192] and *Cantwell*[193] and concluded that First Amendment

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[180] *Id.*
[181] *Id.* at 748.
[182] *Id.*
[183] Virginia Citizens Consumer Council, Inc.. v. Virginia State Board of Pharmacy et all, 373 F.Supp 683 (1975).
[184] *Virginia State Board of Pharmacy*, 425 U.S. at 749.
[185] *Id.* at 770.
[186] *Id.* at 765.
[187] 413 U.S. 376 (1973).
[188] 376 U.S. 254 (1964).
[189] Smith v. California, 361 U.S. 147 (1959).

protected such kind of speech when money were spent on the project; when speech is in a form that is sold for profit; and when speech involves solicitation to purchase or pay and contribute money.[194] The Court concluded that commercial speech does not differ from other forms of speech and should also be protected.[195] For example, political speech is protected because there is a citizens' interest involved. The Court noted that there is also a consumer's interest in the free flow of commercial information.[196] The Court also analogized to the protection extended to labor relations where the speech was directed to the promotion of speaker's economic self-interest. Advertisement is also directed to the promotion of the speaker's economic self-interest.[197]

Furthermore, the Court noticed that it is important to trust such professionals as pharmacists.[198] *Virginia Pharmacy* case raised the question of the professional advertisement. However, the Court noted that its decision does not generally apply to all other professions. The Court stated that physicians and lawyers might be treated differently.[199]

In a later case, *Bates v. State Bar of Arizona,*[200] the Court struck down the state of Arizona's prohibition on attorneys' advertising. The Court repeated its determination to protect commercial speech. Fred S. McChesney noticed that the Court's decision in *Bates* achieved the

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[190] Joseph Burstyn Inc. v Wilson, 343 U.S. 495 (1952).
[191] Murdock v Pennsylvania, 319 U.S. 105 (1943).
[192] Jamison v Texas, 318 U.S. 413 (1943).
[193] Cantwell v Connecticut, 310 U.S. 296 (1940).
[194] *See* Shiner, *supra* note 12 at 38.
[195] *Id.*
[196] *Virginia Pharmacy,* 425 U.S. at 763.
[197] *Id.* at 762-3; *see* also Shiner, *supra* note 12 at 39.
[198] *Id*. at 766-70.
[199] *Id.* at 773, n.25.
[200] 433 U.S. 350 (1977).

highest point of economic analysis and since that case, the quality of the Court's economic analysis has declined.[201]

In *Ohralic v Ohio State Bar Association*[202] the Court distinguished commercial in-person legal solicitation from published legal commercial advertising.[203] The Court held that the first type – in-person-solicitation could be restrained.[204] The U.S. Supreme Court held that commercial speech may get "a limited measure of protection, commensurate with its subordinate position in the First Amendment scale of values."[205] In *Primus,*[206] however, the Court permitted solicitation by mail. However, the Court probably protected this kind of speech because this case involves political speech and the civil liberties because Ms Primus was employed by the American Civil Liberties Union.[207]

Thus, the Supreme Court recognized commercial speech and its protection under the First Amendment. However, the Court does not wish to give commercial speech the full protection.[208]

A few years after its decision in *Virginia Board* the Court faced commercial speech again in *Central Hudson Gas v. Public Service Commission of New York.*[209] The Supreme Court's decision in this case established the modern American approach to freedom of commercial speech.[210]

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[201] Fred S. McChesney, *"De-Bates and Re-Bates: The Supreme Court's Latest Commercial Speech Cases"*, Supreme Court Economic Review 5 (1997) at 81-139.
[202] 436 U.S. 412 (1978).
[203] *Id.* at 455.
[204] *Id.*
[205] *Id.*
[206] *In re Primus*, 436 U.S. 412 (1978).
[207] *Id.*, *see* also Shiner, *supra* note 12 at 52.
[208] *See id*. at 53.
[209] 447 U.S. 557 (1980).
[210] *See* Shiner, *supra* note 12 at 53.

2. Central Hudson and modern commercial speech regulation

In *Central Hudson* an electrical utility brought suit in New York State court to challenge the constitutionality of a regulation of the New York Public Service Commission which completely banned promotional advertising by a utility.[211] Justice Powell delivered the opinion for the Supreme Court:

> Though the state of New York had a legitimate interest in energy conservation and though that interest was directly advanced by the Commission's order, the Commission's complete suppression of speech ordinarily protected by the First Amendment was more extensive than necessary to further the state's interest in conservation and thus violated the First and Fourteenth Amendments.[212]

The Court gave new meaning to commercial speech. Here, it is an "expression related solely to the economic interest of the speaker and its audience."[213] Also, the Court stated that "the First Amendment's concern for commercial speech is based on the informational function of advertising."[214] The Court applied a "four-part" analysis to determine whether or not the commercial speech would not be protected:

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[215]

False and fraudulent statements are not protected. The following parts of the test are similar to the European doctrine of "margin of appreciation".[216] Just like the European Court of Human Rights, the Supreme Court stated that it is important to determine if the governmental (state's) interest could justify the limitations on commercial speech. Again, the commercial

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[211] *Central Hudson Gas*, 447 U.S. at 557.
[212] *Id.*
[213] *Id.* at 561.
[214] *Id.* at 563.
[215] *Id.* at 566.
[216] See supra Chapter II.B.

speech would not be protected if "it is necessary in a democratic society'"[217] to restrict such speech.

The Court used its test in later cases. However, in each new case the Supreme Court interpreted its *Central Hudson* test in a new way. For example in *Posadas de Puerto Rico Associates dba Condado Holiday Inn v Tourism Company of Puerto Rico et al,*[218] the Supreme Court focused on the third part of the test.[219] The court upheld a Commonwealth of Puerto Rico statute, which prohibited all advertising of gambling in Puerto-Rico. The Court stated that such advertisement may increase public interest in gambling, and moreover, the Court thinks "it is up to the legislature to decide whether or not a "counter speech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."[220]

Again, similar to the European Court of Human Rights, the U.S. Supreme Court leaves power to decide whether or not commercial speech should be restricted to the state.

However, in *City of Cincinnati v Discovery Network Inc et al*[221] the Court started to require the government to show concrete evidence that the restriction of commercial speech would directly advance the stated interest. Moreover, the Court held that commercial speech can not be treated differently from non-commercial speech.[222] The Court invalidated the city ordinance prohibition on distributing "commercial handbills" on public property.[223]

However, in *United States v Edge Broadcasting Company* the Court held:

> Federal statutes prohibiting the broadcast of lottery advertising by broadcaster licensed to state that does not allow lotteries, while allowing such broadcasting by broadcaster licensed

[217] European Convention on Human Rights, *supra* note 10, art.10 § 2.
[218] 478 U.S. 328 (1986).
[219] *See* Shiner, *supra* note 12 at 56.
[220] *Posadas*, 478 U.S. at 344.
[221] 507 U.S. 410 (1993).
[222] *Id.*
[223] *Id.*

> to state that supports lottery, regulated commercial speech in manner that did not violate First Amendment, as applied to broadcaster located in nonlottery state but near border of lottery state.

The Court stated that such prohibition directly advanced the state's interest.[224]

In *Board of Trustees, State Univ. of New York v. Fox*[225] the Supreme Court stated that to satisfy the fourth part of *Central Hudson* analysis, "the governmental restrictions upon commercial speech need not be the absolute least restrictive means to achieve desired end."[226] Thus, commonly the Court does not protect commercial speech in cases where the government proved that its interest is extremely high. The Supreme Court's decision in *Fox* shows that commercial speech still does not receive the full protection.

44 Liquormart Inc. v. Rhode Island[227] deserves special attention. The Court held that the Rhode's Island total ban on liquor prices advertisement was unconstitutional.[228] The Supreme Court used *Central Hudson* test again, and held that the statute does not meet the fourth part requirement.[229] The government might use other methods, such as establishing a minimum price or increasing sales taxes to achieve its goal of decreasing sale of alcoholic beverages.[230] In this case Justices Stevens, Kennedy, Ginsburg and Thomas recognized strict scrutiny for some kinds of commercial speech regulations.[231] However, the majority of the Court has never admitted strict scrutiny for commercial speech.[232]

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[224] *Id.* at 428.
[225] 492 U.S. 469 (1989).
[226] *Id.*
[227] 517 U.S. 484 (1996).
[228] *Id.*
[229] *Id.* at 487.
[230] *Id.*
[231] *See* Sullivan & Gunther, *supra* note 11 at 1186
[232] *Id.*

Thus, the Court established a higher degree of scrutiny in *44 Liquormart* than in *Fox* or *Posadas*. The Court now requires the government to forge a link between its substantial interest and possible methods for achieving this interest.

3. Commercial speech in the most recent cases. Intermediate Standard of Scrutiny

In a recent case, the Supreme Court still applied the *Central Hudson* test. For example in *Greater New Orleans Broadcasting Association Inc. v. United States*[233] the Supreme Court held that prohibition on broadcasting lottery information could not be applied to advertisements of lawful private casino gambling. The Court noticed that the government's interest did not satisfy the third and fourth parts of the *Central Hudson* test.[234]

However, in *Glickman v Wileman Bros.,*[235] the Court did not apply the *Central Hudson* test. Moreover, the Supreme Court decided not to implicate freedom of speech. In this case, fruit producers challenged assessments to pay for generic advertising under marketing orders issued by the Secretary of Agriculture pursuant to Agricultural Marketing Agreement Act.[236] The Court found that mandatory fees did not violate the First Amendment.[237] However, in his dissent, Justice Souter, Chief Justice Rehnquist and Justice Scalia applied the *Central Hudson* test and found that government's regulation does not meet the requirements of the test.[238]

In *United States v United Foods Inc.*[239] the same issue arose. This time the Court invalidated the same scheme. However, the Court distinguished this case from *Glickman*. The main distinction was that the mandated payments in this case were not part of a comprehensive

[233] 527 U.S. 173 (1999).
[234] *Id.* at 174.
[235] 521 U.S. 457 (1997).
[236] *Id.*
[237] *Id.*
[238] *Id.* at 499.
[239] 533 U.S. 405 (2001).

statutory agricultural marketing program as in *Glickman*.[240] The Court did not apply the *Central Hudson* test even when commercial speech was involved. Instead of that, the Supreme Court held that the issue belongs to the doctrine of compelled speech.[241]

In *Thompson v Western States Medical Center,*[242] licensed pharmacies brought an action challenging provisions of the Food and Drug Administration Modernization Act (FDAMA) of 1997 that prohibited advertising and promotion of particular compounded drugs. The government stated that there were three substantial interests to adopt the FDAMA: protection of the public health; "preserving the availability of compounded drugs for those individual patients who cannot use commercially available products" and achieving the proper balance between the previous two interests.[243] The Supreme Court held that "provisions were unconstitutional restrictions of commercial speech."[244] However, the Court again applied the *Central Hudson* test and held that "the Government has failed to demonstrate that the speech restrictions are 'not more extensive than is necessary to serve [those] interest[s]" and "the Government can achieve its interest in a manner that does not restrict commercial speech."[245] For example, the government "could prohibit pharmacist from compounding more drugs in anticipation of receiving prescriptions" or sale drug products for resale.[246] Justice Breyer, in dissent, noticed that the issue in this case concerned public health, and not freedom of speech.[247] However, both

[240] *Id.*
[241] *Id.* at 408.
[242] 535 U.S. 357 (2002).
[243] *Id.* at 368
[244] *Id.*at 405.
[245] *Id*. at 358; *see* also *Central Hudson Gas*, 447 U.S. at 566.
[246] *Id.* at 372.
[247] *Id.* at 389.

parties in the case agreed that "advertising and soliciting prohibited by FDAMA constitute commercial speech."[248]

A new question arises whether the state can ever succeed if lawful and not misleading commercial speech is involved in the case. In *Anderson v Treadwell,*[249] the Court of Appeals for the Second Circuit applied the *Central Hudson* test and upheld New York's restriction on in-home real estate advertisements. The Court held that even when prohibited advertisement is unlawful and misleading commercial speech, the State's interest in protecting neighborhoods and the privacy of homeowners "from blockbusting and harassing in-home real estate solicitations" is substantial.[250] The U.S. Supreme Court denied petition for writ of certiorari.[251]

Thus, the commercial speech protection has a long and controversial history in the United States. Nowadays, commercial speech in the United States is "an established constitutional right."[252] Commercial speech still does not receive the full protection from the U.S. Supreme Court. The Supreme Court will probably uphold restrictions on commercial speech protection if the State has a substantial interest according to the *Central Hudson* test. However, an intermediate level of protection for commercial speech has become standard.[253]

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[248] *Id.* at 366.
[249] 294 F.3d 453 (2002).
[250] *Id.* at 461.
[251] Anderson v. Treadwell, 538 U.S. 906 (2003).
[252] *See* Shiner, *supra* note 12 at 69.
[253] *See* Shiner, *supra* note 12 at 69.

V. COMMERCIAL EXPRESSION IN EUROPE

There is no common constitution in Europe and all the European countries are independent, sovereign states. Thus, it is important to analyze decisions of the European Court of Human Rights and European Court of Justice to be able to understand the common principles of commercial speech protection within Europe. The analysis illustrates that both European Courts *recognized* commercial speech protection, but on practice they simply *do not protect* it in their decisions.

A. Case Law

1. European Court of Human Rights

The European Court of Human Rights is the main judicial institution of the Council of Europe. It is based in Strasbourg and includes judges from Member States which signed the European Convention on Human Rights.

The European Commission on Human Rights, which until 1998 was accepting applications and heard cases under the Convention, recognized commercial expression and its protection under Article 10 in 1979.[254] In *Church of Scientology v. Sweden*[255] the European Commission held that the Swedish Marketing Improper Practices Act of 1970, which prohibited commercial advertisement of the scientologists' material, violated Article 10 of the Convention.

[254] *Id.* at 96.
[255] 16 Eur. Comm'n H.R. Dec & Rep. 68 (1979).

However, it was mentioned that the level of protection of commercial expression must be less than that of political speech protection.[256]

For example, in *Barthold v. Germany,*[257] the European Commission held that the case did not concern commercial speech, but rather public discussion. Barthold had the only emergency veterinary clinic in Hamburg. During an interview with one of the local newspapers, Barthold mentioned that fact and also said that his clinic is open for business. He was sanctioned in the German court for violations Germany's Unfair Competition Act, which applied to professional advertising.[258] The Commission holds that Barthold's speech was indeed public discussion and his rights had been violated.

Another case that concerned The German Unfair Competition Act was *Markt Intern Verlag v. Germany*.[259] The applicant in this case was a small publishing firm from Düsseldorf distributed bulletins accusing big mail-order firm of not paying reimbursement to consumers.[260] Such publications were prohibited under the Act. When this case reached the European Court of Human Rights, it held that the bulletins "conveyed information of a commercial nature" and such information cannot be excluded from the scope of Article 10(1) which does not apply solely to certain information or ideas of forms of expression".[261] However, the Court noted that "the statements made "for purposes of competition" fell outside the basic nucleus protected by the freedom of expression and received a lower level of protection than other "ideas" or "information".[262] The Court held by ten votes to nine with the decisive casting vote of the

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[256] *Id.* at 73.
[257] 90 Eur.Ct.H.R. (ser. A) (1985).
[258] *Id.*
[259] 133 Eur.Ct.H.R. (ser. A) (1989).
[260] *Id.*
[261] *Id*. at *para* 26.
[262] *Id.* at *para* 32.

President that there had been no violation of Article 10. Again, the Court based its decision on the concept of "margin of appreciation" and left the German Federal Court of Justice to decide whether such limit is necessary in a democratic society. The Court did not provide any reasoning for why the coverage of the Article 10 should be extended to the commercial speech but not in this case.[263]

Another case involving commercial speech, which involved German Unfair Competition Act was *Jacubowski v Germany.*[264] The Court stated that the case concerned commercial speech and again held that there was no violation of Article 10.[265]

A large number of cases, which involved commercial speech and professional advertisement in particular, reached The European Court of Human Rights. However, the Court kept recognizing commercial speech and finding no violation of the Article 10.[266]

In contrast, in a recent case, *Stambuck v Germany,*[267] the Court reversed the Stuttgart Disciplinary Appeals Court's decision and protected commercial speech. In this case, Stambuck, an ophthalmologist, was interviewed by a local newspaper about his new laser surgery method. The lower court had found that this kind of advertisement and co-operation with the press violated German Rules of Professional Conduct.

Why did the Court protect commercial speech in this case and find no violation in other cases? In *Stambuck,* the main purpose of the Court was to protect the freedom of press but not

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[263] *See* Hefferman, *supra* note 2 at 236.
[264] 291-A Eur.Ct.H.R. (ser. A) (1994).
[265] *See* Shiner, *supra* note 12 at 99.
[266] See, e.g. Colman v UK, 258-D Eur.Ct.H.R. (ser. A) (1993); Casado Coca v Spain, 285-A Eur.Ct.H.R. (ser.A)(1994).
[267] Stambuck v Germany, 37928/97 Eur.Ct.H.R. (2002).

commercial speech. The Court noticed that the article was not commercial and that protecting freedom of speech is more important than restricting advertisement.[268]

In 2001, an interesting and controversial case reached the European Court of Human Rights. In *Verein gegen Tierfabriken v Switzerland,*[269] the Plaintiff, an organization of animal rights activists, wanted to show a program on Swiss television concerning the awful conditions in which animals raised for food are living. Such a film was prohibited under the Swiss Federal Radio and Television as a film with "clear political character".[270] Verein gegen Tiefabriken was arguing that its film is commercial advertisement; made as a counter-argument to the advertisements of the beef industry.[271] The Court found for the Plaintiff. However, the Plaintiff's rights were protected not on the basis of commercial speech protection but as a freedom of political discussion.[272]

Thus, though European Court of Human Right has recognized commercial speech protection, the Court does not want to protect purely commercial expression. In all cases where the expression was related only to advertisement like in *Markt Intern*[273], *Colman*[274] and *Jacubowski*[275], the Court did not find any violations of the Article 10.[276] However, when there were other rights involved and the expression involved "as much political as commercial"[277] the Court protected such expression. For example, in *Barthold*[278] and *Verein gegen Tierfabriken*[279]

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[268] *Id.; see also* Shiner, *supra* note 12 at 99.
[269] 24699/94 EurCt.H.R. (2001).
[270] *Id*. at *para.* 11.
[271] *Id.* at *para.* 69.
[272] *Id.* at paras. 57, 79.
[273] 133 Eur.Ct.H.R. (ser. A) (1989).
[274] 258-D Eur.Ct.H.R. (ser. A) (1993).
[275] 291-A Eur.Ct.H.R. (ser. A) (1994).
[276] *See* Shiner, *supra* note 12 at 106-7.
[277] *Id.* at 107.
[278] 90 Eur.Ct.H.R. (ser. A) (1985).
[279] 24699/94 EurCt.H.R. (2001).

the Court found violation of freedom of expression under Article 10. However, in both cases the expressions concerned political discussion and debates rather than commercial speech. In *Stambuck,*[280] the Court was concerned about freedom of press protection.

Therefore, purely commercial speech "inciting the public to purchase a particular product"[281] is not protected by the European Court of Human Rights.[282] The concept of "margin of appreciation" plays a great role in the European Court of Human Rights decisions in commercial speech cases. In *Markt Intern,* the Court stated that "a margin of appreciation appears essential in commercial matters."[283] The Court included advertisement in this conception in *Casado Coca v Spain.*[284]

It is worth mentioning that Contracting Members are independent states. Thus, the European Court of Human Rights cannot overrule judgments of independent governments as the U.S. Supreme Court can overrule acts of the states' governments.[285] However, in these cases when political speech is involved, the Court does not give any discretion to the Contracting Members.

According to Mark W. Janis and Roger A. Shiner, there are few reasons why commercial expressions do not get any protection in contrast to political expressions. First, restrictions on commercial speech are generally regarded as less of a threat to human rights than those on political speech.[286] Secondly, there is an argument that there is a practice established "of economic regulation which necessarily includes restriction of speech related to economic

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[280] Stambuck v Germany, 37928/97 Eur.Ct.H.R. (2002).
[281] *Verein gegen Tierfabriken*, 24699/94 EurCt.H.R. *para.* 11.
[282] *See* Shiner, *supra* note 12 at 106-107.
[283] 133 Eur.Ct.H.R. (ser. A) at *para.* 33.
[284] 285-A Eur.Ct.H.R. (ser.A) at *para.* 55.
[285] *See* Shiner, *supra* note 12 at 109.
[286] Janis, *supra* note 3 at 206.

transactions."[287] Nonetheless, questions tend to arise. Why did the European Court of Human Rights declare the protection of commercial speech under Article 10 of the European Convention? Why does it refuse to protect purely commercial speech at all? As it was mentioned before, The European Court of Human Rights did not provide any explanation as to what is commercial speech and what kind of speech should be protected.

It is important to analyze The European Court of Justice's decision on related matters to understand the full picture of commercial speech protection in Europe.

2. European Court of Justice

The European Court of Justice is the main judicial body of the European Union. The Court is responsible for the settlement of litigation arising out of legislation of the European Union's law-making institutions.[288]

The protection of economic freedoms is one of the basic elements of the European Union just as the creation of the common marketplace was one of the main purposes for the European Community.[289] Thus, it is difficult to understand why such a system does not provide informational rights and allows the common regulation of commercial information.[290]

Hence, the European Court of Justice held that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection and Fundamental Freedoms."[291] In relation to commercial speech protection, the Court does not talk about producers' rights but consumer's rights'. In *GB-INNO-BM v. Confederation du Commerce*

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[287] *Id.*
[288] *See* Shiner, *supra* note 12 at 94.
[289] *See* Hefferman, *supra* note 2 at 239.
[290] *Id.*
[291] *See* Shiner, *supra* note 12 at 100-1.

Luxembourgeois,[292] the Court held that consumers from one "Member State must be able to enter freely into another Member State and make purchases under the same conditions as the local population….and that right was curtailed when consumers were denied access to advertising material available in the country of purchase."[293]

However, The European Court of Justice does not focus on commercial speech issues from the producer's point of view. In the large number of cases dealing with the issues of trade-mark protection and product-labeling restrictions, the European Court of Justice, in contrast to the U.S. Supreme Court, does not give any suggestions that "the value of freedom of speech bears on their resolution."[294]

The commercial speech question was raised after the Directive 98/43/EC, which prohibited all tobacco advertisement, was issued by the European Parliament and Council. The European Court of Justice, after complaints from Germany and Great Britain, annulled the Directive.[295]

Besides the tobacco cases, the commercial expression issue was raised in a few other cases that reached European Court of Justice. For example in *Konsumentombudsmannen v. Gourmet International Products Aktiebolag*[296] the publishers of food and drink magazine Gourmet challenged a Swedish ban on the advertisement of spirits, wines and strong beers in magazines. The Court held that the Swedish restrictions did not violate trade regulations of the European Union since there were no other measures available to protect public health against the harmful effects of alcohol. However, the commercial speech issue was not raised again.

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[292] Case 362/88, 1990 E.C.R.I-667, (1990).
[293] *Id.*
[294] *See* Shiner, *supra* note 12 at 101.
[295] Case C-376/98, *Germany*, 1998 E.C.R. I-8419; *see* also, *infra*, Chapter V, Part III about tobacco advertisement in Europe and the United States.
[296] Case C-405/98, 1998 E.C.R. I-1795 (1998).

In *Society for the Protection of Unborn Children Ir. Ltd. v. Grogan,*[297] the Society for the Protection of Unborn Children (SPUC) sought an injunction against a group of Dublin college students to prevent the group from publishing abortion information in its annual student guide. The European Court of Justice found that the law against publishing abortion information did not violate Article 10(1) of the Convention. However, the Court noted that this decision concerned only students and not professional clinics.[298] Later, the European Court of Human Rights found a violation of the freedom of speech in a similar case.[299]

Most of the cases involved the European Union Directive which contained bans on tobacco advertisement. The Court found violations of the freedom of speech and annulled the Directive. However, a great role in the Court's decision turned on the fact that Member States were against the ban because in every commercial speech case the courts leave much discretion to Member States. Otherwise, the Court would likely, on the basis of the "margin of appreciation" doctrine, uphold commercial speech limitation, as in the *Gourmet*[300] and *Grogan*[301] cases.

B. The Concept of Commercial Speech Protection in Europe

Both the European Court of Human Rights and The European Court of Justice declared commercial speech protection. However, both courts provided no explanation for such protection.

Previous analysis of the European cases leads to the conclusion that both courts justify limitations on the commercial speech by Member States. As many authors suggest, there is a

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[297] Case C-159/90, 1991 E.C.R. I-4685 (1991).
[298] *Id.* at para 33.
[299] *See infra*, Chapter V, Part I.
[300] Case C-405/98, 1998 E.C.R. I-1795 (1998).
[301] Case C-159/90, 1991 E.C.R. I-4685 (1991).

more "community-oriented" conception of freedom of expression in Europe than in the United States.[302] Moreover, in the decisions of both courts, Member States' interests prevail over individual's interests.[303]

Both European Courts base their decisions on the concept of "margin of appreciation". This concept allows Member States to decide whether the freedom of expression should be protected. For example, in *Markt Intern*[304] the European Court of Human Rights held that "a margin of appreciation appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition"[305] The Court repeated its holding in *Markt Intern* in several other cases and extended the principle to commercial advertisement.[306]

The main purpose of applying "margin of appreciation" in the commercial speech cases seems to support Member States' ability to control commercial expression in their territories. Thus, while both European Courts declared that there was protection of commercial expression, in practice they have never overruled Member State's restrictions on commercial expression. Unfortunately, in the decisions of the European Courts, "communitarian" values prevail over individual values. In contrast, the U.S. Supreme Court decisions usually focus on individual rights protection.[307]

It is hard to imagine the Supreme Court giving "a margin of appreciation" to state laws. However, there are several explanations for why this doctrine dominates in Europe. The Contracting Members are independent states with its own state government. Europe or the European Union is not a federation. There is no central federal government and there are no

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[302] *See* Shiner, *supra* note 12 at 107; see also P.Birks, ed., Pressing Problems in the Law (1995).
[303] *See* Shiner, *supra* note 12 at 107.
[304] 133 Eur.Ct.H.R. (ser. A) (1989).
[305] *Id.* at *para*. 3.
[306] *See* Casado Coca v. Spain, 285-A Eur.Ct.H.R. (ser. A) (1994) at *para.* 50.
[307] See John E. Nowak & Ronald D. Rotunda, Constitutional Law 1171 (6th ed., 2000).

states (provinces or subjects of federation). It is seems almost impossible for the Court to develop the same principle of commercial speech protection for all European nations, when in some countries of Eastern Europe the freedom of expression is limited. Commercial speech may be "necessary" in one European society, and less important in another. The European Court of Human Rights and the European Court of Justice do not have as much power and respect in Europe as the Supreme Court does in the United States. Thus, one sees the completely different result may be achieved in the cases in Europe than in the United States.[308] However, to prove this contention, it is necessary to compare European cases and in the United States on the same subject matter.

[308] *See* Shiner, *supra* note 12 at 109.

VI. DIFFERENT KINDS OF COMMERCIAL SPEECH AND THEIR PROTECTION IN THE UNITED STATES AND EUROPE

In this chapter, cases in both Europe and in the United States on the same subject matter; contraceptive and abortion advertisement; regulation of advertising of the legal professions and tobacco advertisement are analyzed. The analysis shows that in the United States legal and non misleading commercial speech is protected in approximately all of the cases. While in Europe, commercial speech does not receive any exclusive protection from the courts.

A. Contraceptive and Abortion Advertising

In Europe, most of the cases concerning contraceptive and abortion advertisement originated in Ireland, which has the "most restrictive abortion laws in the West."[309] Such laws prohibit almost all the types of abortions and advertisement of the abortion services available in other States, in particular in the United Kingdom, are also prohibited.[310]

In *Society for the Protection of Unborn Children v. Grogan,*[311] the European Court of Justice did not find the prohibition inconsistent with European Community law. In this case, however, the information on abortion services was published by student groups but not by the clinics. The Court held that Member State may prohibit student associations from publishing information about the abortion services in clinics of the other Member States, when "the clinics

[309] Elizabeth Porter, *Culture, Community and Responsibilities: Abortion in Ireland*, 30 Soc. 279 (1996).
[310] *See* Rich, *supra* note 282 at 272.
[311] Case C-159/90, 1991 E.C.R. I-4685 (1991).

in question have no involvement in the distribution of the said information."[312] The information was "not distributed on behalf of an economic operator established in another State."[313] Thus, the Court's decision was very narrow and applied only to student groups and not to the clinics.

The European Court of Human Rights, in another case, which involved Ireland and its prohibition on abortion services advertisement, held that such a ban violates Article 10 of the European Convention.[314] The Court held that Ireland cannot prohibit the organization from providing consultations about abortion services in another State to pregnant women in Ireland. In deciding the question whether such a restriction is "necessary in a democratic society" the Court noted that Irish laws do not prohibit women from obtaining abortion services in another State and that such a ban harms women's health.[315] The year after the Court's decision Ireland allowed distribution of the information about abortion services available in another State.[316]

However, it is obvious that the European Court of Human Rights was concerned more about woman's health than commercial speech protection. If only commercial speech had been involved, then the Court's decision would have been different.

In the United States, the issue of abortion services advertisement reached the U.S. Supreme Court in *Bigelow v. Virginia*.[317] The Supreme Court held that Virginia's statute, which criminalized advertisement in Virginia newspapers of abortion services in New York, infringed protected speech.

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[312] *Id*. at para 33.
[313] *Id.*
[314] Open Door Counseling & Dublin Well Woman v. Ireland, 15 Eur. Ct. H.R. (ser.A) at 268 (1992).
[315] *Id.* at 267.
[316] *See* Porter, *supra* note 303, at 285-6.
[317] 421 U.S. 809 (1975); *see supra*, Chapter III, Part III.

In *Carey v. Population Services Int'l,*[318] the Court invalidated a New York statute which banned advertising and display of contraceptives. The Court quoted *Virginia Pharmacy* and stated that there are "substantial individual and societal interests in the free flow of commercial information."[319] Thus, the Supreme Court invalidated commercial speech restrictions not because a woman's health issue was involved, as in the European cases, but because commercial speech had to be protected.

Again, in *Bolger v. Young Drug Products Corp.*[320] the Supreme Court found a federal statute "prohibiting unsolicited mailing of contraceptive advertisements" to be unconstitutional.[321] The Court held that such mailings constituted commercial speech because they are "concededly advertisements, refer to specific products, and are economically motivated" even when "they contain discussions of important public issues such as the prevention of venereal disease and family planning."[322]

The Court again protected advertising for contraceptives because it "not only implicates 'substantial individual and societal interests' in the free flow of commercial information, but also relates to activity that is protected from unwarranted governmental interference."

Thus, even when contraceptive and abortion advertisement was protected by both courts, the motivations for protection were different. For the European Court of Human Rights the most important reasons were the "moral implications", the fact that restrictions on information of abortion services create a risk to the health of women. The U.S. Supreme Court protected such advertisement because of "substantial individual and societal interest in the free flow of

[318] 431 U.S. 678 (1977).
[319] *Id*. at 700-1.
[320] 463 U.S. 60 (1983).
[321] *Id.*
[322] *Id.*

commercial information"[323], and because such advertisement constituted commercial speech which should be protected under the First Amendment.

A. Regulation of Advertising of the Legal Profession

In Europe, most of the states allow lawyers to advertise.[324] However, there are different restrictions, which vary from state to state.[325]

In the leading European case on this issue, *Casado Coca v. Spain,*[326] the European Court of Human Rights held that governmental prohibitions in Spain on almost all lawyer advertising did not violate Article 10 of the European Convention. The lawyer, in this case, had been sanctioned by the Barcelona Bar Council for advertising his legal services in a local homeowners' newsletter.[327] The European Commission recognized the right of the citizens to the information and held that Article 10 had been violated.[328] The Court, however, held that even "objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions."[329] The court held that in this case such circumstances existed and there was no violation of Article 10.

In the United States in *Virginia Pharmacy,*[330] the U.S. Supreme Court noted that on questions concerning commercial advertisement, lawyers might be treated differently.[331] However, in *Bates v State Bar of Arizona*[332] the Court held that the state cannot prohibit lawyers from

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[323] *Id.*
[324] *See* Louise L. Hill, *Lawyer publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 Geo. Wash. J. Int'l L. & Econ. 381, 383 (1995).
[325] *Id.*
[326] 18 Eur.Ct.H.R. (ser.A) (1994).
[327] *Id.* at 3.
[328] *See* Shiner, *supra* note 12 at 98.
[329] *Casado Coca*, 18 Eur.Ct.H.R. at 24.
[330] 425 U.S. 748 (1976).
[331] *Id.* at 773, n.25.
[332] 433 U.S. 350 (1977).

advertising their legal services. The Court rejected a number of justifications provided by the state, such as "adverse effect on professionalism" and the claim that attorney advertising was "inherently misleading".[333]

However, one year later in *Ohralik v. Ohio State Bar Association,*[334] the Court held that in-person solicitation might be restrained. The case involved "ambulance chasing" by an attorney who solicited contingency-fee employment from accident victims.[335]

In *Primus*[336] the Court permitted solicitation by mail. However, it is easy to distinguish this case from *Oharlik* because in *Primus* political issues were involved. The attorney, during her volunteer work for the ACLU, wrote a letter to a woman who had been sterilized asking her if she wants to file a lawsuit against a doctor who participated in the program of sterilizing pregnant mothers.[337] In another case, the Court invalidated Missouri restrictions on lawyer advertisement and held that it should be protected by the First Amendment because it concerned lawful activity and was not misleading.[338]

In later cases the Court struck down a number of limitations on lawyer advertisement. In *Zauderer v. Office of Disciplinary Councel,*[339] an attorney from Ohio, "ran a newspaper advertisement advising readers that his firm would represent defendants in drunk driving cases and that his clients' "full legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING."[340] Later, the same attorney ran another newspaper advertisement about his availability to represent women who had suffered injuries resulting from their use of a

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[333] *Id.* at 368-70.
[334] 436 U.S. 447 (1978).
[335] *Id.*
[336] In re Primus, 436 U.S. 412 (1978).
[337] *Id.*
[338] In re R.M.J., 455 U.S. 191 (1982).
[339] 471 U.S. 191 (1982).
[340] *Id.*

contraceptive known as the Dalkon Shield Intrauterine Device. The advertisement contained a line drawing from the device and stated "if there is no recovery, no legal fees are owed by our clients."[341] The office of Disciplinary Counsel of the Supreme Court of Ohio filed a suit because such advertisements violated a number of Disciplinary Rules of the Ohio Code of Professional Responsibility.[342] The Court held that such advertisements were not misleading, and the state could not restrict such advertisements. Justice White noted that the fact that "some members of the population might find advertising embarrassing or offensive can not justify suppressing it."[343]

Iin *Shapero v Kentucky Bar Association*[344], the Court followed its decision in *Zauderer* to strike down a Kentucky restriction on mail solicitation by lawyers of specific people known to need legal services. The Court stated that solicitation in this case was not misleading or false. The Court distinguished this case from *Ohralik* because the later case was dealing with face-to-face solicitation.[345]

However, in *Florida Bar v. Went For It, Inc.*[346] the Court upheld, by a vote 5-4, a Florida Bar prohibition denying lawyers the right to send mail solicitations to victims or their relatives during the thirty day period after an accident. The Court held that the State had a substantial interest "in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered."[347] The Court also stated that restrictions are valid only for a short period of time, and that there are alternative sources for

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[341] *Id.*
[342] *Id.*
[343] *Id.* at 648
[344] 486 U.S. 466 (1988).
[345] *Id.* at 467.
[346] 515 U.S. 618 (1995).
[347] *Id.*

lawyers to advertise their services in, for example, television, radio and newspapers.[348] Justice Kennedy, in dissent, joined by Justices Stevens, Souter and Ginsburg stated that restrictions on speech cannot be justified just because the expression might offend someone. “On the contrary,” he noticed, “we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment."[349]

Thus, the U.S. Supreme Court protects lawyers’ advertisement as a form of commercial speech if it is not misleading or false. However, in several cases the Court found that the State’s interest, to protect the privacy of injured victims, is substantial and upheld restrictions on speech.

The European Courts, according to the concept of “margin of appreciation”, leave the Contracting Members a right to decide whether the lawyers’ advertisement should be permitted. Such a passive position by the European Courts raises doubts for any form of commercial speech protection under the European Convention of Human Rights.

B. Tobacco Advertisement

In the United States and Europe, the issue of commercial speech protection was raised when the government imposed restrictions on the advertisement and promotion of tobacco products.[350] However, while the government attempted to lower the damage of cigarettes to the health of the population, tobacco manufacturers sought to relieve themselves from legal and political limits on advertisement of their products.[351]

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[348] *Id.* at 633-4
[349] *Id.* at 638, citing Carey v. Population Services Int'l., 431 U.S. 678 (1977).
[350] *See* Shiner, supra note 12 at 65.
[351] *Id.*

The tobacco advertisement issue was raised in Europe after the Directive 98/43/EC, which prohibited all tobacco advertisement, was adopted by the European Parliament and Council.[352] In *Germany v. Parliament and Council,*[353] Germany requested annulment the Directive. In another case, the United Kingdom wanted to take measures against the Directive's ban.[354] One of the main arguments against the Directive was that it violates freedom of speech. Some authors also suggest that prohibition of all tobacco advertising does not have any sufficient grounds for justification.[355] The Advocate General rejected these claims and stated that "commercial expression does not contribute in the same way as political, journalistic, literary or artistic expression do, in a liberal democratic society."[356] He also noticed that there is a substantial interest in protecting public health here.[357] However, the European Court of Justice, notwithstanding the Advocate General claims, annulled the Directive on the ground of a violation of Article 10.[358]

However, a few years later, the European Parliament and Council issued a second Directive in relation to tobacco products.[359] The Directive contained mandatory health warnings as a labeling requirement. This Directive was challenged by tobacco manufacturers in the European Court of Justice through the request of the United Kingdom government.[360] The basis for the challenge was "the lack of a proper legal basis."[361] However, this time the Court did not

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[352] Parliament and Council Directive 98/43/EC, 1998 O.J. (L 213) 9.
[353] Case C-376/98,1998 E.C.R. I-8419 (1998).
[354] Case C-74/99, R v Secretary of State for Health et al, ex parte Imperial Tobacco Ltd. Et al, 1999 E.C.R. I-8599 (1999).
[355] *See* J. Steven Rich, *Commercial Speech In the Law of the European Union: Lessons for the United States?*, 51 Fed. Comm. L.J. 263, 275-6 (1998).
[356] Case C-376/98, *Germany*, 1998 E.C.R. I-8419 (advisory opinion of Advocate General).
[357] *Id.* at *para* 155.
[358] *Id.*at I-8419.
[359] Parliament and Council Directive 2001/37/EC, 2001 O.J (L 194) 26.
[360] *See* Shiner, *supra* note 12 at 105.
[361] *Id.*

annul the Directive, and the freedom of speech issue was not raised by the tobacco manufacturers.[362]

In the United States, the Food and Drug Administration (FDA) first issued regulations on the tobacco products advertisement in 1995.[363] The Tobacco manufacture challenged these regulations in *U.S. Food and Drug Administration v Brown and Williamson Tobacco Corp*.[364] as a freedom of speech violation. They won on the ground that the "FDA lacks authority to regulate tobacco products as customarily marketed."[365]

In the 1998 Master Settlement Agreement, which regulated tobacco advertisement, was adopted and was signed by almost all the states.[366] One year later Massachusetts adopted much more restrictive regulations with the purpose of limiting any tobacco use.[367] In the United States in *Lorrillard Tobacco v Reilly*[368] manufacturers and sellers of cigarettes challenged a Massachusetts regulations restricting sale, promotion, and labeling of tobacco products. The U.S. Supreme Court used *Central Hudson*[369] test and held that:

> Regulations prohibiting outdoor advertising of smokeless tobacco or cigars within 1,000 feet of school or playground violated the First Amendment; regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than 5 feet from floor of retail establishment located within 1,000 feet of school or playground violated First Amendment; but regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with salesperson before they are able to handle such products did not violate the First Amendment.[370]

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[362] Case C-491/01, R v. Secretary of State for Health, ex parte British American Tobacco Ltd., 2001 E.C.R. I-11453 (2001).
[363] *See* Shiner, *supra* note 12 at 65.
[364] 529 U.S. 120 (2000).
[365] *Id.*
[366] *See* Shiner, *supra* note 12 at 65.
[367] *Id.* at 65-6.
[368] 533 U.S. 525 (2001).
[369] 447 U.S. 557 (1980_.
[370] 533 U.S. at 525

The Court held that the Massachusetts regulations satisfied *Central Hudson's* third step "by directly advancing the governmental interest asserted to justify them."[371] The Court stated that the government provided proof that there is a problem with underage use of smokeless tobacco and cigars and that evidence which limits tobacco advertisement will decrease underage smoking. Notwithstanding the fact that the governmental interest is substantial and compelling, regulations do not satisfy *Central Hudson* fourth step. The Court found that regulations will generate "a complete ban on the communication of truthful information."[372] Thus, the government failed to show that regulations are not more extensive than necessary.[373]

Hence, both courts, the U.S. Supreme Court and the European Court of Justice, did not uphold governmental bans on tobacco advertisement on the grounds of a freedom of speech violation.

However, it is possible to presume that such bans would be upheld by the European Court of Justice on the basis of "margin of appreciation" if the initiator of the tobacco restrictions was a Member State and not the European Parliament.

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[371] *Id.* at 528.
[372] *Id.*
[373] *Id.*

VII. CONCLUSION

There are several conclusions that follow from the summary and comparison of the cases, legislation materials, and doctrines of the United States and Europe.

First of all, the U.S. Supreme Court, the European Court of Human Rights and the European Court of Justice have declared that commercial speech will be protected. Courts in the United States and Europe stated that false and misleading speech would not be protected.

Next, in the United States, the commercial speech doctrine developed from certain civil rights decisions, and commercial speech protection extends to pure commercial speech.[374] In contrast, in Europe, while it was declared that Article 10 of the European Court of Human Rights covers commercial speech, pure commercial speech does not receive any protection in practice. Analysis of the Courts' decisions allows one to conclude that if the expression in the case was purely commercial then both European Courts would uphold the restrictions on advertising.[375] If the case involved not only commercial speech, but also political speech, freedom of press or a health issue, both Courts protected expression. Thus, commercial speech in Europe is *covered* by law but not *protected* by the Courts.

Thirdly, while in the United States, decisions on commercial speech issues stress individual rights, in Europe both Courts base their decisions on the concept of "margin of appreciation". European Courts leaves much discretion to Member States to decide whether or not commercial speech should be restricted. Moreover, European culture lacks "the fundamental

[374] *See* Hefferman, *supra* note 2 at 241.
[375] *See* Shiner, *supra* note 12 at 106.

cultural mistrust of government, which is so influential in the U.S."[376] There are different explanations for this tendency. There is no central government in Europe. European Union or Council of Europe is not a federation. All Contracting Members are independent states. However, there are different questions arise. Which also a "community-oriented" conception dominates the decisions of the European Courts. The European Courts do not protect rights for information even though the European Convention provides them.

Fourthly, in contrast to the European Courts, the U.S. Supreme Court provided a rationale and explanation for the protection of commercial speech. Moreover, the Court developed a four-part test to determine whether or not the commercial speech should be protected. It is impossible to find in European cases any rationale for the commercial speech doctrine.

Analysis of the cases in the United States and Europe of the same kind of commercial speech demonstrate even more that both European Courts do not protect types of commercial speech including advertisements in the legal profession and, in some cases, tobacco advertisement. In contrast, in the United States in most cases concerning lawyers' advertisement and tobacco advertisement, the Supreme Court overruled restrictions on commercial speech.

Finally, the Supreme Court plays a much more important role in commercial speech protection than European Courts. To limit commercial speech in the United States, the state should have a substantial and compelling interest. Both European Courts are passive on this question; they leave absolute power to Contracting Members to decide whether or not commercial speech should be protected in their society. Unfortunately, such a passive position by the Courts makes freedom of expression and right to information, protected by the Article 10, useless. The European Convention on Human Rights might become a part of the constitution of

[376] *Id.* at 114.

the European Union.[377] In that case, Section 2 Article 10, which provides much discretion to the Member States, probably would be revised "in order to offer the most effective protection."[378]

[377] Bernhard Jurgen Bleise*, Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws*, 20 Denv. J. Int'l L. & Pol'y 471, 490 (1992).
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