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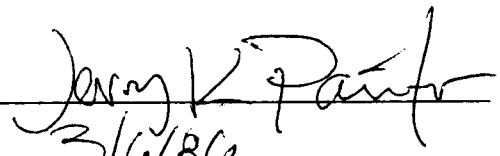
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# PUBLIC POLICY AND ALCOHOLIC BEVERAGE ADVERTISING

A Thesis

Presented for the

Master of Science

Degree

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Jerry K. Painter

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ABSTRACT

Alcohol abuse is thought to be a major social problem in America. A recent wave of concern has resulted in the formation of action groups, each attempting to prevent further alcohol abuse. One of the larger groups, Project SMART, has proposed either a complete ban on broadcast commercials for beer and wine or equal-time for messages warning about the dangers of alcohol. Project SMART holds that alcohol advertising increases alcohol consumption.

Parallel to Project SMART is the "Fairness in Alcohol Advertising Act of 1985," a pending Congressional bill that would require a radio or tv station to ensure that for every alcoholic beverage commercial run equivalent advertising time for the broadcast of counterbalancing messages would be given to a responsible spokesperson.

Advertisers/producers of alcoholic beverages disagree with both Project SMART and the Congressional bill. They believe their ads are legitimate attempts to make consumers aware of the availability of various brands and that advertising does not lead to excessive consumption.

Overriding the debates of alcohol advertising is public policy for alcohol advertising. Regulations for advertising are set on federal and state government levels, as well as within the industry. Interstate and intrastate regulations are somewhat different and advertisers may find themselves caught in a confusion of which regulations are applicable in a given situation. A ban on broadcast ads might further add to the confusions advertisers must face.

Most research indicates that alcohol advertising has no link with alcohol consumption. Many researchers have conducted experiments con-

cerning the effects of such advertising and the results are all much the same: no causal link between the ads and consumption.

The concern would be more appropriately directed to educating alcohol abusers than banning alcohol advertising.

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# INTRODUCTION

An important advertising issue in 1985 was the "Fairness in Alcohol Advertising Act." This Congressional bill, still pending, would require a radio or television licensee or a cable operator to ensure that for every alcoholic beverage ad run equivalent advertising time for the broadcast of counterbalancing messages would be given to a responsible spokesperson. Should the bill be passed, the cost to alcoholic beverage advertisers would double. For example, for every broadcast ad the Coors company ran, another slot of equal time would need to be paid for. The time would be given to any of a number of spokespersons warning the public about the dangers of excessive drinking. The double cost would probably lead advertisers to reduce the number of ads in broadcast media.

An overriding issue in the debates of alcohol advertising is the policy that advertisers use to promote alcoholic beverages. There is currently no one "policy" that is applicable to alcohol advertising. At least three policies exist for alcohol advertisers--one from the federal government, one from state government, and one from the alcohol industry. Each of these areas makes certain restrictions concerning alcohol advertising. Alcohol advertisers are often caught in a confusion of which regulations are applicable in a given situation. State governments are responsible for regulating their intrastate alcohol advertising. Most states' policies are similar to the federal regulations. Federal regulations govern all interstate alcohol advertising. A few states are defined by the Bureau of Alcohol and Tobacco Tax Division of the Internal Revenue Service as being "very restrictive" in their intra-

state policies on alcohol advertising; however, such restrictions may be completely overlooked in an interstate campaign, resulting in the state's own regulations becoming ineffective.

The industry's own regulations are broad. Distilled spirits, wine, and malted beverages each have regulations for their advertising. The restrictions of each industry are somewhat different, and somewhat different from federal and state regulations. The alcohol industry is in need of one set policy that would encompass federal and state regulations, as well as those of the industry.

Supporters of the Ad Ban

Despite the complexities within the industry, some people believe that restrictions on alcohol advertising are not strict enough. Most outspoken of the supporters of more advertising control is Michael Jacobson, executive director of the Center for Science in the Public Interest, and president of Project SMART (Stop Marketing Alcohol on Radio and Television). Project SMART is supported by many groups, including Action for Children's Television, the National PTA, the United Methodist Church, Remove Intoxicated Drivers, and at least 125 other organizations or groups working against the problems of alcoholism. Project SMART's banner proposal is: "Ban all advertising for alcoholic beverages on radio and television or require the broadcast media to give equal time to warnings about alcohol."

Advertisers/Producers of Alcoholic Beverages

Obviously, the advertisers/producers of alcoholic beverages take offense to Project SMART's proposal, as well as the pending "Fairness in Alcohol Advertising Act." Advertisers believe the bill to be econ-

omically unfair and illogical.

The "Fairness in Alcohol Advertising Act" stems, in part, from a belief by ad ban supporters that alcohol advertising leads to alcohol abuse, and that the advertisers and marketers of such products direct their ads to easily influenced target markets.

Advertisers hold that their advertisements are a legitimate effort by brewers to make consumers aware of the particular types, brands, and prices of malt beverages that are available.[1] Dr. Morris Chafetz, President of the Health Education Foundation, in a report from Miller Brewing Company, states that he has searched the world of literature on the effects of alcohol advertising and has been "unable to find a single creditable study that correlates abusive use of alcohol with advertising."[2]

This paper examines the controversy of alcoholic beverage advertising and the major issues involved in the debates over such advertising. Chapter I focuses on the applicability of a policy to alcohol advertising by examining the regulations set forth by federal and state governments and the alcohol industry. Chapter II explores the debates on alcohol advertising and reviews arguments from both sides of the issue. Since much rests on evidence of a causal link between advertising and consumption, Chapter II also addresses consumer behavior and the consumer's relationship with advertising. Chapter III discusses alcohol advertising

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[1]Joint Committee of the States to Study Alcoholic Beverage Laws, Uniform Standards for Advertising of Alcoholic Beverages in Newspapers and Magazines (Washington, D.C.: GPO, 1963), p. 40.

[2]Miller Brewing Company, Report: Alcohol Beverage Advertising and Freedom of Speech (Milwaukee, Wisconsin: Miller Brewing Company, n.d.), p. 6.

from a legal perspective, examining the protections of the First Amendment and Fairness Report, and the role these two legal documents play when alcohol advertising goes to court. Chapter IV presents concluding arguments from the debates and suggests a solution to the controversy.

# CHAPTER I

## PUBLIC POLICY FOR ALCOHOL ADVERTISING

Public policy may be best defined as a "response to and source of problems."[3] As a political science term, "policy" itself has at least two different meanings. First, policy is a way things are done or a predetermined manner set by some administrative procedure--for example: It is the policy of this management to handle such requests in this manner." This kind of policy answers "How do you do things around here?" and "What are your rules and procedures?"[4] Second, policy may relate to the substance of a program rather than the manner in which the program is followed. In this sense, policy acts more on content and answers such questions as "What is being done here?" or "What kinds of problems do you deal with?"[5]

Despite the name "public" policy, an actual policy is determined on a governmental level. Public policy is the policy of the government. As Peter Woll, a noted author on public policy has written, both public interest and public policy are "defined as such after the governmental process has taken into account and compromised divergent viewpoints."[6]

In this paper, policy will refer to the specific substantive policy

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[3]Miller Brewing Company, p. 6.

[4]Lewis Froman, "Public Policy," Encyclopedia of the Social Sciences, 1967 ed., p. 204.

[5]Froman, p. 206.

[6]Peter Woll, Public Policy (Cambridge, Massachusetts: Winthrop Publishers, Inc., 1974), p. 14.

of alcohol advertising--a policy set by both the Bureau of Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, and the state governments. This is a public policy because it regulates how alcoholic beverage advertisers plan their advertising as determined by the government for the public. This policy came into effect for distilled spirits and wine on May 1, 1936, and for malt beverages on December 15, 1936.[7]

The Policy for Alcohol Advertisers

The need for a policy on alcohol advertising became public after the repeal of the 18th Amendment. The 18th Amendment was added to the Constitution in 1919 and banned production of alcohol in the United States. The Amendment was repealed in 1933 by the 21st Amendment. While advertising for alcoholic beverages prior to prohibition was small, it ranked high in bad taste and false information.[8] Prior to prohibition, alcohol advertising was completely uncontrolled; not only did the ads invite excessive consumption, they also promoted the beverages as cure-alls for many ailments.

With the passing of the 21st Amendment, liquor control came "under the jurisdiction of the several States."[9] However, both the enormity of the alcohol industry and the "interstate complexion"[10] demanded that the federal government become involved rather than the individual state governments.

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[7]Joint Committee, p. 30.

[8]Joint Committee, p. 3.

[9]Joint Committee, p. 5.

[10]Joint Committee, p. 5.

After a false start in the Federal Alcohol Control Administration (a part of the National Recovery Act, which was declared unconstitutional by the Supreme Court), the Federal Alcohol Administration Act was born and the regulations for alcohol advertising were placed in the hands of the federal government, with the Federal Trade Commission and BATF having concurrent jurisdiction. The new responsibilities included both the "labeling and advertising of alcoholic beverages in interstate commerce."[11] Specific intrastate regulations remained at the state level. The federal government's regulations were more complete and more rigid than any previous regulations on any advertising. The United States was newly released from prohibition and Congress, envisioning the social problems that would occur under lack of strict control, issued regulations to make unlawful any false advertising and to promote applications of truthful advertising.[12]

But how effective are the 1936 policies today? The regulations set then by the Federal Alcohol Administration Act were met with general acceptance by the alcohol industry. In his official reports to Congress, W.S. Alexander, the Federal Alcohol Administrator in 1936, noted the "cooperation of industry and the progress enjoyed as both the advertisers and the public health officials gained experience under the new law."[13]

The major problem with the policy, then and now, is the relationship of interstate to intrastate advertising. State restrictions are

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[11]Joint Committee, p. 5.

[12]Joint Committee, p. 30.

[13]Joint Committee, p. 30.

frequently violated by the influx of interstate advertising.[14] While this may seem to make state regulations ineffective, it doesn't stop the ads from running in a nationwide campaign. Alcohol advertising policy needs to be more consistent between federal and state levels. However, the lack of such consistency has proved of little consequence. The only apparent harm is the lack of applicability of some states' very restrictive regulations on interstate advertising. Still, other states have definite restrictions on the advertising of either distilled spirits, wine, or malted beverages which may cause a campaign to be altered before running in that state, although this is rare.[15] Policies and restrictions for North Carolina and Virginia are among the most restrictive. Both limit advertising not only to the regulations set forth by the Federal Administration, but to additional state regulations. For example, a North Carolina rule reads that "all advertising shall be so construed as to be pleasing to the eye" (as determined by the state officials). In Virginia, "A distilled spirits advertisement in a newspaper or magazine may not be in color."[16] These policies apply to advertising produced and disseminated intrastate and not necessarily to interstate alcohol advertising.[17]

For the advertisers, specific changes in their ads may be needed for different alcohol advertising policies in different states. Adver-

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[14]Joint Committee, p. 67.

[15]Joint Committee, p. 55.

[16]Joint Committee, p. 55.

[17]Joint Committee, p. 78.

tisers are caught in the confusion of which regulations are applicable for which states, such as which intrastate policies require altering interstate advertising.

BATF's Alcohol Advertising Regulations

During the 1930's, BATF formed regulations for alcohol advertising in the Code of Federal Regulations.[18] The promulgation stated that "certain limited disclosures"[19] were required concerning "ingredients, identity and alcoholic content, and listed specific definitions for uniform usage of certain trade terms."[20] Also, in general terms, the regulations prohibited false, misleading, obscene or indecent representations.

BATF has an ongoing compliance network that enforces its advertising regulations.[21] The network consists of 15 professionals and three clericals who provide voluntary ad preclearance and monitoring to assure adherence to the FAA Act and the BATF's policies. The staff reviews over 300 alcoholic beverage ads a month and gives an optional preclearance advice service to 40-50 major alcoholic beverage advertising campaigns. In addition, the staff screens over 6,000 alcoholic beverage labels a month.[22]

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[18] 27 Code of Federal Regulations, Part 4, Subpart G; Part 3, Subpart H; Part 7, Subpart F.

[19] 27 C.F.R.

[20] 27 C.F.R.

[21] 27 C.F.R.

[22] U.S., Cong., Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs and Alcoholism, Alcohol Advertising, Hearing, 99th Cong., 1st sess., 7 February 1985 (Washington, D.C.: GPO, 1985) p. 428.

BATF issued an Advance Notice of Proposed Rulemaking in 1978, asking for comments for any changes in its alcoholic beverage advertising regulations. The Advance Notice noted that revisions might be warranted because of "changes in advertising techniques and practices, and changes in consumer education and awareness."[23]

The response to the Advance Notice drew 4,810 comments and 140 petitions containing over 4,000 signatures.[24] A majority of the comments expressed personal and religious beliefs and not the specific advertising issues. The 89 comments which did address advertising were varied in their concerns.[25]

In December 1980, after BATF had analyzed the Advance Notice record, a Notice of Proposed Rulemaking was made concerning revision of the regulations for advertising. The issues set forth by the proposal were specific. The Notice addressed concerns for permissible use of the terms "light", "natural", "pure", "double distilled", and "triple distilled" in advertising. The Notice also addressed specifically the issues of curative and therapeutic claims, taste test claims, comparative advertising and disparaging claims.[26]

In July 1984, BATF resolved some of the pending issues. A policy was affirmed in favor of "non-misleading product advertising."[27] The

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[23]U.S., Cong., Alcohol Advertising, p. 429.

[24]U.S., Cong., Alcohol Advertising, p. 431.

[25]U.S., Cong., Alcohol Advertising, p. 431.

[26]U.S., Cong., Alcohol Advertising, p. 432.

[27]U.S., Cong., Alcohol Advertising, p. 432.

"non-misleading" referred to comparative claims in alcohol advertising, as well as curative or therapeutic claims, claims of a product's being "pure" or "double distilled," or claims representing results of any taste tests.

The alcohol industry has set advertising guidelines for distilled spirits, wines and malted beverages. These guidelines often extend beyond the restrictions set by the FAA Act.[28] Federal administrators have encouraged advertisers/producers of alcoholic beverages to maintain industry guidelines, to adhere to them, and to help correct advertisements that may be construed as untruthful or misleading.

The brewing industry begins its advertising guidelines with what they claim are "three basic principles which have long been reflected in the policies"[29] of the industry guidelines. The first principle asks producers/advertisers of the brewing industry to "scrupulously comply with" all state and federal policies for their advertising. In the second principle, brewers are reminded to "adhere to standards of candor and good taste."[30] "Good taste" is never defined in the guidelines or in state or federal regulations. Third, brewers are defined as "responsible corporate citizens, sensitive to the problems of the society in which they exist," and their advertising is to project that image.[31]

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[28]Joint Committee, p. 30.

[29]U.S., Cong., Alcohol Advertising, p. 223.

[30]U.S., Cong., Alcohol Advertising, p. 223.

[31]U.S., Cong., Alcohol Advertising, p. 223.

No mention is made of what constitutes a "responsible corporate citizen," or how such brewers are "sensitive to the problems of the society."

The brewers' policies seem to promise more than they deliver. Advertisements for distilled spirits, wines and malt beverages are, at times, pushed to the limits of a "standard of candor and good taste," and some ads leave readers questioning whether the brewers are indeed "sensitive to the problems of the society." The tendency to "mislead" consumers is present in some alcohol advertising. For example, as recently as February 1986, an ad for a liqueur was asking readers to "Invite some friends over and make waves. To know it is to love it."[32] Another ad shows a scantily-clad woman holding a bottle of cognac with the caption, "I assume you drink Martell."[33] However, the majority of alcohol ads do adhere to safer themes, such as camaraderie, relaxation, and moderation in drinking.

## Conclusions

The major problem, and weakness, of the policies for alcohol advertising is not in the few extreme cases of overextending existing guidelines in advertising, but in the lack of consistency in overall regulation. Intrastate advertising is inconsistent, yet advertising in interstate media remains "virtually unaffected by state control."[34] A resolution to this would be a specific policy, combining both federal and state reg-

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[32] Bon Appetit, 31 (February 1986), p. 59.

[33] Bon Appetit, 31 (February 1986), p. 127.

[34] Joint Committee, p. 114.

ulations. This specific policy would be a balance of state regulations, combining the concerns of those classified as very restrictive (North Carolina, Virginia) with those having fewer restrictions on alcohol advertising.

There are those who argue that current restrictions are not enough, that alcohol advertising, especially in the broadcast media, should be counter-balanced with ads warning of the dangers of drinking alcoholic beverages, or banned completely.[35] The argument presented here asserts that if more controls are enacted, less consumption would evolve. Unfortunately, this debate brings forth more heat than light from both sides. Seldom does either side contribute sound facts to confirm its beliefs.[36] An examination of the arguments shows how the alcohol industry stands up to criticisms and allegations of the prosecution.

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[35]Joint Committee, p. 114.

[36]Joint Committee, p. 86.

## CHAPTER II

## THE DEBATES OF ALCOHOL ADVERTISING

While the scope of concerns in alcohol advertising is wide, the debates focus on a few specific issues. This chapter emphasizes the most discussed issues in the debates of alcohol advertising control. The advertising is examined at two levels. The first level is concerned with the argumentation over banning alcohol advertising. Allegations are heard from Michael Jacobson, John Seiberling (who introduced the "Fairness in Alcohol Advertising Act"), and other advocates of the control issue. They contend that advertisers and marketers of alcoholic beverages have overstepped the guidelines for alcohol advertising. Such defiance of regulations has led to heavy drinkers being encouraged to drink more, children being persuaded to drink at earlier ages, and the unsuspect being swayed into drink by subliminal images in the ads.[37]

Counter to those beliefs, presentations are made by the advertisers/producers of alcoholic beverages showing that scientific research has found advertising has very little effect on consumption. Alcoholic beverage advertising does not lead to excessive drinking, alcohol abuse, or alcoholism.[38]

The second level of examination explores a broader theme--consumer behavior. Some theories of consumer behavior show consumer to be affected in different ways by advertising. Advertising is a part of modern civil-

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[37]Michael F. Jacobson, The Booze Merchants, (Washington, D.C.: Center for Science in the Public Interest, 1983), p. 5.

[38]Miller Brewing Company, p. 14.

ization, yet it is often the blame of society's problems. Is advertising so powerful that it can change man's values? Could it sway a person not inclined to drink alcohol to drink?

The format begins with the alcohol advertisers, followed by the first arguments of advocates of control. Counter arguments are made by the advertisers. Consumer behavior is addressed, and its applicability to alcohol advertising is examined. A summary of the issues ends the chapter.

## Alcohol Advertising Expenditures

A ban on broadcast alcohol advertising would greatly alter the way alcohol advertisers currently plan their budgets. The companies of Adolph Coors, Van Munching, Anheuser-Busch, Miller Brewing, and Stroh Brewing each placed over 70% of their total tv network ad budgets in sports events. In 1983, Adolph Coors Company allotted 99% of their network expenditures to network sports--over 35 million dollars in one advertising medium. Anheuser-Busch, leader in the beer market, and Philip Morris, a close number two, each allotted almost 75% of their ad budget to network sports.[39]

The wine industry, also a broadcast advertiser, would be hurt by an ad ban, though not as drastically as the beer industry. A 65% increase in per-capita consumption of wine in the last decade[40] has caused a growing wine supply market, and, with increased competition, increased advertising expenditures have followed.

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[39]Verne Gay, "Beer Ad Ban Won't Hurt Nets," Advertising Age, 11 March 1985, p. 18.

[40]Jacobson, p. 17.

In 1983, Ernest & Julio Gallo allotted 29% of their ad budget to network sports. R.J. Reynolds (owners of network advertised Harvey's Bristol Cream sherry and Lancer's wine) gave 16% to network sports revenues, and Seagram (Christian Brothers, Paul Masson wines) allotted 3%.[41]

If current advertising expenditures are adjusted for inflation and the growth of the market, they are actually lower than they were 20, or even 30 years ago.[42] The Analysis of Measured Media shows spending for malt beverages increased in 1974. However, in 1974, light beer and super-premium beer were introduced to the market and they have "changed the competitive structure of the brewing industry."[43]

The Statistics of Income Reports, which are compiled by the Treasury Department and are tabulated from corporate tax returns, shows total alcohol advertising in 1983 to be $1.032 billion.[44] Dividing this figure by the barrels of malt beverages shipped in 1983 (177,495 million) shows a per-barrel ad expenditure of $5.81. However, in 1957, the Reports showed a $7.16 expenditure per barrel, $1.35 more per barrel than in 1983.[45]

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[41]Gay, p. 18.

[42]Scott Hume, "Study Snips at Ad's Ties to Beer Demand," Advertising Age, 4 March 1985, p. 2.

[43]Hume, p. 2.

[44]Hume, p. 2.

[45]Hume, p. 2.

The ad expenditures for traditional brands--on the market before 1970--was $252.1 million (1980 dollars) in 1983.[46] Oddly enough, in 1971, the expenditures for traditional brands were $251.7 million (1980 dollars), only slightly below 1983 expenditures.[47]

If a ban on broadcast alcohol advertising is enacted, the most noticeable loss to the public, aside from the lack of broadcast commercials, would be in sports programming. Frank Flynn, chairman of the Alcohol and Drug Abuse Committee for the Florida Association of Broadcasters, has predicted that if the ban is enacted, sports programming will become the rights of pay channels on cable television. Fans would be paying per view, and would be restricted to viewers "who can pay the $10 to $25 per sporting event, assuming, of course, that the event, as well as access to cable television, are available in his or her area." [48]

The National Association of Broadcasters agree. They warn that an imposed ad ban would reduce sports programming. "Local and regional play-by-play accounts for team sports--basketball, football, and baseball coverage would diminish," they warn.[49] While alcohol advertising helps pay for many network sports events, it also helps keep many small radio stations in business. Also, the NAB asserts, even if alcohol advertising did somehow influence teenagers, the audience for most sporting

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[46]Hume, p. 2.

[47]Hume, p. 2.

[48]U.S., Cong., Alcohol Advertising, p. 85.

[49]U.S., Cong., Alcohol Advertising, p. 27.

events is, according to Nielsen data, middle-aged men. Less than 3% of teens are in the sports audience.[50]

Responses by Control Advocates

The opponents to alcohol advertising labeled the NAB's contentions of impending economic disaster "unbelievably ludicrous." These advocates of control, recalling the broadcast ban of cigarette ads, likened the gulf left by the loss of "those cigarette ads to the hole left in a bucket of water when one pulls his hand out."[51] The control advocates assert that other advertisers moved in so quickly to replace the cigarette ads the "viewing public barely noticed the absence of the cigarette ads."[52]

In examining the economic costs of the "Fairness in Alcohol Advertising Act," the control advocates believe a scrutiny of network stations' current voluntary commitment of time for a considerable number of drunk-driving spots should reveal no apparent "overwhelming"[53] hardship. Project SMART followers believe that many broadcasters have demonstrated a capacity to air public service announcements, and, at the same time, maintain high levels of profitability. Protestations of financial ruin are exaggerated and self-serving dodges by broadcasters to "avoid public responsibility regarding their drug promotions."[54]

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[50]U.S., Cong., Alcohol Advertising, p. 27.

[51]U.S., Cong., House, Committee on Telecommunications, Consumer Protection and Finance, Supplementary Testimony, Hearing, 99th Cong., 1st sess., 21 May 1985, (Washington, D.C.: GPO, 1985), p. 14.

[52]Supplementary Testimony, p. 15.

[53]Supplementary Testimony, p. 15. [54]Supplementary Testimony, p. 15.

Advocates of Alcohol Advertising Control

Project SMART is a major proponent of the "Fairness in Alcohol Advertising Act." Founded in June 1984, Project SMART is a "national petition campaign calling for either an end to broadcast beer and wine commercials or equal time for health messages about alcohol."[55] Since its birth, Project SMART has received support from groups across the nation. In a February 1985 Business Week/Louis Harris poll, 57% of Americans surveyed agreed with Project SMART that beer and wine ads should be banned from broadcast media.[56] (The survey was conducted among a population of 1,254 adults, and, according to the poll, should be accurate to within three percentage points either way.)

Why the concern over broadcast ads? Why not all alcohol advertising? Project SMART lists three reasons for choosing to ban broadcast ads:

> (1) They (broadcast ads) can be so much more riveting and intrusive than print ads, which sit politely on a page;
> (2) radio and tv stations use publicly regulated air waves, and are licensed to serve the public interest; and
> (3) the broadcast audiences include millions of young children and teenagers who watch and listen to everything adults tune in on.[57]

Leading the way for Project SMART is the "Fairness in Alcohol Advertising Act of 1985." If passed it would amend the Communications Act of 1934 to require that, "when any alcoholic beverage is advertised on tele-

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[55] U.S., Cong., Supplementary Testimony, p. 3.

[56] Daniel Moskowitz and Irene Pave, "The Sobering of America," Business Week, 25 February 1985, p. 113.

[57] U.S., Cong., Supplementary Testimony, p. 4.

vision, radio, or cable, equivalent time shall be provided for public service announcements and programming regarding alcohol consumption."

The bill has been introduced to the 99th Congress by John F. Seiberling, Congressman from Ohio. In introducing the bill, Seiberling begins with 11 "findings;" the first six are findings concerning the nature of alcoholism and are not connected with advertising. Finding 18 suggests that "a very small fraction of the amount of money spent on (broadcast) advertisements for beer and wine is spent on public service announcements about the adverse effects of alcohol consumption."[58] Seiberling believes an equal time amendment would educate a lot more people about the dangers of alcohol, leading to less per-capita consumption. Seiberling argues that, while alcohol advertisements may not "promote misuse of alcohol or directly cause it, they certainly promote alcohol use."[59] His criticism of the ads is that they leave the impression that alcohol leads to a better, more enjoyable life, not the "doorway to trouble, illness, and tragedy that it really can be."[60] The "Fairness in Alcohol Advertising Act" would, Seiberling suggests, at least give the public a different view of alcohol and the dangers of alcohol use and abuse.[61]

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[58]U.S., Cong., House, Committee on Telecommunications, Consumer Protection and Finance, Fairness in Alcohol Advertising Act of 1985, Hearing, 99th Cong., 1st sess., 21 May 1985, (Washington, D.C.: GPO, 1985), p. 1.

[59]John F. Seiberling, "Equal Air Time for the Dangers of Alcohol," The New York Times, 10 June 1985, p. 14.

[60]Seiberling, p. 14.

[61]Seiberling, p. 14.

Project SMART believes that the children of the 1980s are growing up in a media world that links "social, business and athletic success to the alcoholic beverage of choice."[62] The radio and tv ads act in a paternalistic role, telling the children "time after time, day after day, that drinking is an essential ingredient of a happy, successful, American life."[63] Because the problems of alcoholism and alcohol abuse are "epidemic" and children are trying alcoholic beverages at a younger age, the alcoholic beverage ads on broadcast media are inappropriate and are not respectful with society's attempts to curve such abusive tendencies.[64]

Michael Jacobson authored, in 1983, a book about alcoholic beverage advertising, Booze Merchants. In the book, Jacobson critically examines alcoholic beverage advertisers as well as the advertising. He accuses alcoholic beverage advertisers of aiming their ads at such specific target markets as the heavy drinker, the young, the light drinker, and women. He also examines themes in advertising content, such as life-style ads, risky activities, sex, taste, and unidentified printed objects (subliminal advertising). A major section of the book is directed to the marketing tactics of advertisers.

The aim of marketers, according to Jacobson, is to get the drinker to drink more.[65] Marketers may well agree with that. In a concluding

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[62]Jacobson, p. 99.

[63]Jacobson, p. 73.

[64]Jacobson, p. 73.

[65]Jacobson, p. 73.

section that criticizes the marketers, Jacobson says, "How terrible the executives must feel when they see per-capita alcohol consumption rising steadily."[66] That statement doesn't seem to follow his argument.

Another section of the book deals with the effects of alcohol ads on children. Jacobson is convinced that the ads do irreparable damage to young people. He believes the "thousands and thousands"[67] of commercials viewed by children who are forming conceptions of society will lead them to "associate beer and wine with good times, relaxation, friends and success."[68]

How does Jacobson defend his position when so much evidence shows that advertising has little or no effect on consumption? He believes that any demands for "quantitative proof" [69] showing a causal link between alcohol ads and consumption would "blind this committee to evidence of the acculturating effect of ads."[70] (The committee referred to is the Subcommittee on Children, Family, Drugs and Alcoholism, February 7, 1985). Jacobson insists that, despite research findings to the contrary, young children are influenced to a point where the ads "form a vision of the world; they help define choices, formulate norms, create values."[71]

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[66]Jacobson, p. 99.

[67]U.S., Cong., Supplemental Testimony, p. 8.

[68]U.S., Cong., Supplemental Testimony, p. 8.

[69]Jacobson, p. 73.

[70]U.S., Cong., Supplemental Testimony, p. 8.

[71]U.S., Cong., Supplemental Testimony, p. 8.

Jacobson is not alone in his concern over the effects of such ads on children. In testimony before the Senate Subcommittee on Alcoholism and Narcotics in 1976, Robert Hammond, director of the Alcohol Research Information Service, stated,

> The youthful flavor of much of the advertising--particularly beer and wine--is aimed at youth. Liquor ads have the same kind of appeal to those just under the legal age, particularly when the stress is given to the things youth want the most in life--good times, social acceptance, and sex. [72]

The concern over alcohol advertising and its effects often becomes involved with alcoholism and alcohol abuse. Advocates of control believe the less advertising of the beverages, the less consumption--causing fewer cases of alcohol abuse.

For years, advertisers and researchers have conducted experiments to see if advertising does, in fact, lead to purchase or consumption. More specifically, many studies have been done on alcoholic beverage advertising. The bulk of evidence does not show any link between alcohol advertising and consumption. For this reason, advocates of control cannot rely on scientific studies in their defense. However, in November 1980, a study was submitted to (and paid for by) four federal agencies which detailed findings of a "large scale research project on alcoholic beverage advertising."[73] The information was submitted to the Bureau of Alcohol, Tobacco, and Firearms, the Federal Trade Commission, the National Institute on Alcohol Abuse and Alcoholism, and the Department of Trans-

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[72] Jacobson, p. 68.

[73] Donald E. Strickland, "Content and Effect of Alcohol Advertising: Comment on NTIS pub. No. PB82-123142," Journal of Studies on Alcohol, 45, 1984, p. 87.

portation. Produced by Charles Atkin and Martin Block, of Michigan State University, the $100,000, 400-page study, "Content and Effects of Alcohol Advertising," was introduced by the authors as ". . . exploratory in nature, and some of the samples employed were basically judgmental or convenient in nature. Therefore, conclusions should be generalized with caution."[74] This study concluded that advertising increased adult alcohol consumption by 10% and youth consumption by 15 to 31%. Unfortunately for the researchers, much of the information was publicized in popular press articles. As presented later in this chapter, the research done by Block and Atkin has fallen to heavy criticism and has been discounted as scientific evidence of any causal link.

The advocates of alcohol advertising control rely mostly on statistics of alcoholism and what they believe to be true about the effects of the ads and the advertisers.

Position of the Producers/Advertisers

The alcohol industry's advertising guidelines urge that moderate consumption be an overriding factor in any alcoholic beverage advertising. The Brewing Industry Advertising Guidelines state in the opening sentence that beer is "a refreshing, wholesome beverage meant to be consumed in moderation."[75] Likewise, the Wine Grower's Advertising Guidelines express an importance of moderation: "A distinguishing and unique feature of wine is that is is traditionally served with meals or immediately before or following a meal."[76]

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[74]Strickland, p. 87.

[75]Alcohol Advertising, p. 223. [76]Alcohol Advertising, p. 34.

A series of studies using different methodologies all conclude that alcohol advertising does not lead to consumption.

One extensive study in 1981 examined television alcohol ads aired during the 1979-80 television season.[77] This research was done specifically for use in the "Fairness in Alcohol Advertising Act." Researchers videotaped 131 unique advertisements for alcoholic beverages aired on network television and analyzed their content. Of the 131 ads, only one implied heavy consumption. The ad was for Lite beer, from Miller Brewing Company, "in which a tavern customer, having shown fellow patrons a coin trick declares, 'I can put away a lot of beer by the time they figure this one out.'"[78] The researchers concluded that the themes that had been criticized as being inappropriate appeared infrequently. Themes of achievement and success, two appeals criticized often, occurred in only 4.6% of the ads. Sexual connotations occurred in 6.1% and appeals of love and romance appeared in 3.0% of the ads.[79]

The theme appearing most often was camaraderie, which appeared in more than two-thirds of the ads. A total of 40.5% of the ads had relaxation as the theme--relaxation defined by the researchers as "portrayals of 'change of state' relaxation: drinking in order to relax after engaging in some other activity."[80] Comparing beer televised ads to wine televised

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[77] T. Andrew Finn and Donald Strickland, "A Content Analysis of Beverage Alcohol Advertising," Journal of Studies on Alcohol, 43 1982, p. 964-989.

[78] Finn, p. 967.

[79] Finn, p. 967.

[80] Finn, p. 970.

ads, the researchers found that several of the themes occurred more frequently in the beer ads than in the wine ads--camaraderie, 74.6 vs. 35.3%; relaxation, 45.6 vs. 5.9%, and achievement and success 11.4 vs. 0%.[81]

According to the research, beer ads tend to have relatively homogeneous themes--namely, camaraderie, relaxation, and physical activity. The typical format for a televised beer commercial shows a group of men at work or during a sports activity breaking for a beer. "If there is a typical beer ads, it consists of this sequence of events."[82]

No typical wine ad was found among those studied. The televised wine ads had "relatively higher frequencies of such themes as quality, foreign settings, and wealth and affluence."[83]

Another study, published in Advertising Age and researched by R.S. Weinberg and Associates for Anheuser-Busch, examined the relationship between advertising expenditures for beer and consumer demand for beer over a 36-year period (1947-1983) and found no significant relationship between the two.[84] It concluded that the demand for beer was determined "neither by advertising nor by any increases in ad spending."[85]

Instead, the demand has been determined by four factors: "real per-

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[81]Finn, p. 971.

[82]Finn, p. 971.

[83]Finn, p. 971.

[84]Hume, p. 2.

[85]Hume, p. 2.

capita disposable income, relative price of malt beverages, the age mix, and size of the adult population."[86] Any changes in the beer consumption level can, the researchers believe, be statistically explained in terms of those four factors rather than any increases in ad spending.

Dr. Donald Strickland has studied alcohol advertising for many years. His research has involved work with students and the effects of tv alcohol advertising on them. A 1982 study involving a large number of students in grades 7,9 and 11 showed that "there was virtually no effect of television alcohol advertising on the alcohol consumption level of teenagers."[87]

Research done at the Addiction Research Foundation at York University in Toronto has revealed that beer commercials shown during a ball game do not "stimulate young men who watch them to drink more beer during the games."[88] In the experiment, male college students were shown closed-circuit telecasts of indoor soccer and football games and told the purpose was to compare their viewer appeal. Different groups were shown zero, four, and nine beer commercials, mixed in with other commercials. Beer, soft drinks, and other refreshments were offered to the viewers. For some of the subjects, the beer came late because of a mix-up (they were told). The purpose of the mix-up was to see if the beer commercials would lead sober subjects to increase their consumption when the beer came. According to the researchers, the results "did not support strong

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[86] Hume, p. 2.

[87] Alcohol Advertising, p. 134.

[88] Observer (Philadelphia), 12 November 1984, p. 1.

concern" over the effects of televised beer commercials on the group, even with immediate access to beer.[89]

After reviewing existing literature, Gary Wilcox, a professor of advertising at the University of Texas at Austin, concluded that there appeared to be a "lack of empirical evidence that alcohol advertising increases alcohol consumption."[90] Wilcox did note that no study he found had compared alcoholic beverage price advertising to liquor sales. By using information from A.C. Nielsen's in-store audits for the geographic area of Lower Michigan, 65 retail outlets were examined from Summer 1981 to Spring 1984. Wilcox compared total sales before, during, and after price advertising restrictions. He concluded that the findings of his study suggested that "the presence of price advertising had no significant effect on beer consumption."[91]

Reginald Smart, author of several studies on alcohol advertising, studied the effects of an alcoholic beverage ad ban in British Columbia and found that such a ban had "no substantial effect on beer, wine, or liquor consumption."[92]

In countries where such ads have either never existed or have been stopped, alcohol abuse problems have not declined. Miller Brewing Company claims, in Alcohol Beverage Advertising and Freedom of Speech,

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[89] Observer, p. 1.

[90] Gary Wilcox, "The Effect of Price Advertising on Alcoholic Beverage Sales," Journal of Advertising Research, 25, October/November 1985, p. 33.

[91] Wilcox, p. 38.

[92] R.G. Smart and R.E. Cutler, "The Alcohol Advertising Ban in British Columbia," British Journal of Addiction, 71, 1976, p. 13.

that the Soviet Union and other Eastern European countries allow no advertising, yet have alcohol abuse problems far more serious than America's.[93]

In 1973, Bulgaria outlawed all alcohol ads, mandated a 50% increase in alcohol beverage prices, and required a 50% increase in the production of non-alcohol beverages; per-capita alcohol consumption in Bulgaria then increased from 7.6 liters to 13.5 liters in one year. In Norway, four years after a 1971 ban on all advertising, per-capita consumption had increased 25%. In Canada, certain provinces allow advertising and others do not. During 1982, in the five provinces prohibiting advertising of beer on tv or radio, per capita consumption was 67% higher than the national average. Ontario has the highest concentration of distilled spirits advertising in the nation; Saskatchewan bans it. Between 1971 and 1974, per-capita consumption in Saskatchewan increased by three times the increase in Ontario.[94]

Cathy Becker Popescu, representing the American Council on Science and Health, summed up the position of the advertisers/producers of alcoholic beverages with this viewpoint:

> Before any actions to remove alcoholic beverage advertising from tv or radio or to require warning labels are taken, we should require that reasonable evidence be available that: (1) alcoholic beverage producers are actually using seductive advertising strategies to lure youth, women, and heavy drinkers and that (2) these advertising ploys not only increase consumption, but also abuse of alcohol and (3) most importantly,

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[93]Miller Brewing Company, p. 5.

[94]Miller Brewing Company, p. 5.

> that restriction of advertising would, indeed, decrease alcohol consumption and abuse . . . Such evidence is, however, conspicuously lacking . . . no convincing evidence is ever presented.[95]

A Discreditable Study

Advocates of controlling alcohol advertising often rely too heavily on the Martin and Block, Michigan State study for evidence of a link between ads and consumption. Atkin and Block themselves wrote in the introduction to the work that ". . . conclusions should be generalized with caution."[96] The conclusions have, however, been generalized and made sensational by the popular press, appearing as an ABC Television news story and as a subject of press releases and news stories in several magazines and newspapers.[97] Atkin and Block did emphasize the study was faulty and they have not been responsible for the "uncritical dissemination of their results."[98]

The study itself was a broad, in-depth look at the content and effects of alcoholic beverage advertising in the mass media. Within the scope of that heading, such areas as the magnitude and distribution of alcohol advertising, a content analysis of the characteristics of alcohol advertising in magazines and newspapers and on television, and a substudy on individuals' self-reports on how advertising influences their

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[95] Alcohol Advertising, p. 135.

[96] Charles Atkin and Martin Block, Content and Effect of Alcoholic Beverage Advertising, (Michigan State University, 1980), p. 1.

[97] Strickland, p. 87.

[98] Strickland, p. 89.

orientations toward alcohol were examined.

While the study was indeed a mammoth and ambitious undertaking, the conclusions, and the methodologies, have been criticized by other researchers to the point of its being discreditable.

In one critique, Strickland examined two reports in the study (content analysis of advertising and the field survey) and reported several errors.

He found that many category titles were inconsistent with the content as defined by the category definitions. For example, the category labeled "sex objects" included the portrayals of human models as "ornamental decoration" to attract attention. The finding that 44% of human models used in magazine alcohol advertising are classified as "sex objects" is not surprising, but, as Strickland notes, "greatly misleading."[99]

Strickland also finds Martin and Block's category of "excessive consumption" as narrowly defined. One of the definitions of this category was a "ratio of two or more beverage containers to each person in the advertisement."[100] According to Strickland, such a definition would depict excessive consumption in ads showing models next to displays of six-packs of beer, or bar scenes with waitresses carrying trays of glasses. With this category, Martin and Block found 42% of televised alcohol ads to suggest excessive consumption.[101] Most research doesn't seem to show any measurable link between alcohol advertising and alcohol consumption.

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[99]Strickland, p. 89.

[100]Strickland, p. 89.

[101]Strickland, p. 89.

## Consumer Behavior and Advertising

Measuring the effectiveness of advertising on consumers has been a difficult task for researchers because advertising is a part of a marketing mix. To say that sales are a measure of advertising's effectiveness is not a practical or exact testing method. For the most part, researchers have used tests other than sales to measure effectiveness, such as awareness generating or information distribution.

## Theories of How Advertising Works

Most advertising researchers study advertising on a segmental, or stage, level--one stage or segment leading to another. The first stage usually consists of advertising's relationship to awareness of a product, the final stage an examination of advertising to actual purchase. Unfortunately, many businesses, public policies and popular press stories work on the premise of a completed cycle of the stage theory, awareness leading to purchase.

This "stage theory" has been called by several names, such as the "communications spectrum," and more popularly, the "hierarchy-of-effects" model. Several researchers have worked with that model's theory using similar set ideals. Colley visualized consumer's reactions to advertising as being in five stages beginning with unawareness, leading sequentially to awareness, comprehension, conviction, and finally, action. As Colley defines his approach,

> This concept is applied common sense. It breaks the subject up into logical and comprehensible steps. It begins with the obvious assumption that advertising is a communication force. Advertising does not physically impel the consumer toward the purchase of goods; its purpose is to create a state of mind conducive to purchase. Advertising, therefore,

> is one of several communication forces which, acting singly or in combination, move the consumer through successive levels of the 'communications spectrum.' [102]

Similar to Colley's view is that of Lavidge and Steiner, who, in 961, wrote that the sequence began with awareness and advanced to knowledge, liking, preference, conviction and purchase. According to them, advertising is a "force which must move people up a series of steps,"[103] mental levels which work like blocks, building up to, ultimately, the purchase.

This theoretical model gives to advertising a great responsibility. Not only does advertising create awareness, but, if the sequence of mental levels is not aborted, will lead to a purchase.

Foxall and Driver reviewed the hierarchy-of-effects model and found it to be not as impressive as it sounds. They believe that if the hierarchy-of-effects model is representative of a sound policy which is capable of changing a consumer's mind, as well as his behavior, two definite patterns should be exhibited from it. First, the consumer should move in a rational and predictable manner "from cognition to affect to conation."[104] The assumption is that decisions by the consumer are made in a logical, economic manner based on the information obtained. Any other sequence, or no sequence, or a consumer making an unplanned

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[102] R. Colley, Defining Advertising Goals for Measured Advertising Results, (New York Association of National Advertisers, Inc., 1961), p. 14.

[103] R.J. Lavidge and G.A. Steiner, "A Model for Predicative Measurement of Advertising Effectiveness," Journal of Marketing, 25, 1961 p. 87.

[104] John Driver and Gordan Foxall, Advertising Policy and Practice (New York: St. Martin's Press, 1984), p. 87.

choice, would "invalidate the general view of consumers' response to advertising."[105] Second, the correlational consistency should be high between behavior in purchase and "psychological factors which are assumed to be its precursors, over a variety of situations and contexts."[106] Consumer's attitudes for a given product should remain consistent with their behavior towards that product.

Further, Foxall and Driver believe that the whole idea of a rational consumer is "at best a highly limited description."[107] Consumers seem to buy more on a "routinised"[108] pattern rather than extensive problem solving. Also, the concept of conspicuous consumption, or, buying for social status, seems to make the notion of a rational consumer unrealistic.[109]

Thomas Robertson, who has written several articles on advertising and consumer behavior, has proposed a new model--a low-commitment model, which, he believes, is very different from the hierarchy-of-effects model. The low-commitment model views the consumer as "not particularly committed in his or her brand selection for many products."[110] In this sit-

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[105]Driver and Foxall, p. 87.

[106]Driver and Foxall, p. 87.

[107]Driver and Foxall, p. 87.

[108]J. Howard, Consumer Behavior: Application of Theory (New York: McGraw Hill, 1977), p. 9.

[109]Driver and Foxall, p. 87.

[110]Thomas Robertson, "Low-commitment Consumer Behavior," Journal of Advertising Research, 16, 1976, p. 19.

uation, the hierarchy-of-effects processes are not applicable--"particularly the selective-avoidance process which operates to screen out discrepant brand information."[111] Advertising will be processed by the consumer without "thorough message evaluation."[112]

While plenty of theories exist about how advertising works, little can be done to prove any of them right. Martin Fishbein wrote in 1981 that after more than 75 years of research,

> . . . there is still little, if any, consistent evidence supporting the hypothesis that knowledge of an individual's attitude toward some object will allow one to predict the way he will behave with respect to that object. Indeed, what little evidence there is to support any relationship between attitude and behavior comes from studies that a person tends to bring his attitude into line with his behavior rather than from studies demonstrating that behavior is a function of attitude.[113]

This supports claims by researchers who found no link between advertising and consumption of alcoholic beverages. While the hierarchical models are efficient models for teaching the ideals of advertising, no model should be used for the practical purpose of saying "advertising ultimately leads to purchase." Just as there are many theories about the psychological makeup of man, so too are there theories of how man processes incoming information. Advertising is a modern, mass method of information dissemination but no research can determine

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[111]Robertson, p. 21.

[112]Robertson, p. 21.

[113]Martin Fishbein, "The Search for Attitudinal-Behavioral Consistency," in H.H. Dassarjian and T.S. Robertson, eds., Perspective in Consumer Behavior (Glenview, Illinois: Scott, Foresman, 1981), p. 251.

the actual processing of that incoming information. Models like the hierarchy-of-effects model help researchers and advertisers study proposed methods in processing. The models represent places to begin in the understanding of advertising processing by consumers.

The problems of alcohol advertising usually begin with the "effects" of messages about the image of alcohol as portrayed by the advertisements. The hierarchy-of-effects model is inappropriate for study in alcohol advertising because of the model's lack of adequate evidence for information processing. A major flaw of the hierarchy-of-effects model is that is assumes a generic public, "equally affected by verbal and visual messages, unselective in their attention to the range of media output."[114] This model is seen by some as "more of a caricature of the real world than a reflection of it."[115]

Advertising and the Consumer

Any theoretical model concerning the processing of advertising has failed to produce any conclusive research. For alcoholic beverage advertising, no conclusive evidence has shown that the mental processing of an alcohol ad leads to purchase and/or repeated buying. Blane and Hewitt have concluded that while both liquor sales and consumption have increased "in direct proportion to increased liquor advertising over the past twenty years,"[116] there may be no direct relationship between the

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[114]Nicholas Dorn and Nigel South, Message in a Bottle (England: Gower Publishing Company Limited, 1983), p. 33.

[115]Dorn and South, p. 33.

[116]H.T. Blane and L.E. Hewitt, "Alcohol, Public Education and Mass Media; An Overview, "Alcohol Health and Research World, 5, Fall 1980, p. 3.

two. Liquor prices have come down, the level of affluence has gone up. There are more consumers able to buy more now than there were twenty years ago.

Interestingly, Blane and Hewitt point out that "we do know that the depiction of drinking alcohol on tv programs occurs far more frequently than alcohol commercials."[117]

Charles Sandage holds that advertising should be viewed as an institution. By looking at advertising as the sum of many parts, a large part of the criticisms directed at advertising are in fact "criticisms of such basic concepts as abundance, persuasion, and freedom of choice."[118] In a society that holds freedom of choice as a constitutional right, the purchases made by consumers are determined by the consumers themselves. In Sandage's view, if consumers do not seem to be making purchases in their best interests, the solution is not "substituting a commisar for the free consumer but raising the level of education in consumerism."[119] Advertising's purpose is to "implement freedom of choice by supplying consumers with adequate and accurate information about all of the alternatives available to them."[120]

Along these lines of liberal thought, Rotzoll, Haefner, and Sandage hold that advertising "attempts to fulfill existing generalized or specific needs through a variety of different products and services."[121]

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[117]Blane and Hewitt, p. 5.

[118]Kim B. Rotzoll, James Haefner, and Charles Sandage, Advertising in Contemporary Society (Columbus, Ohio: Grid, Inc., 1976), p. 27.

[119]Rotzoll, p. 28.

[120]Rotzoll, p. 28.

[121]Rotzoll, p. 115.

To clarify their definition they give the example of "esteem of others" as a general need for a consumer. An imaginary company developed a new perfume and advertised that "esteem of others" would result from using the perfume. Neither the advertiser nor the advertisement has created esteem. "There may be no objective evidence that a product could lead to more esteem, but if consumers believe that it can, it may do just that."[122] Consumers who believe that smelling good will lead to esteem of others should "have the right to buy a product that will help them accomplish their goal."[123]

Both objective and subjective levels of examination indicate that advertising has no effect on overall consumption. While this hurdle may seem to be conquered by the advertisers, it does not necessarily make their case any easier. As will be seen in the next chapter, courts often rely on their own judgements about advertising rather than scientific evidence or existing theories in reaching verdicts.

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[122]Rotzoll, p. 115.

[123]Rotzoll, p. 115.

## CHAPTER III

## LEGAL ASPECTS OF ALCOHOL ADVERTISING

Banning or restricting any form of advertising is seen by some broadcasters and advertisers as a type of censorship. The attack, they feel, is on commercial speech. However, commercial speech is a privilege granted by the First Amendment.

The Supreme Court, in 1980, granted that "true and nondeceptive commercial speech gets First Amendment protection,"[124] and that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that is to open the channels of communication rather than to close them."[125] This ruling was a reconsideration of a previously held opinion that "purely commercial advertising" was unprotected by the First Amendment.[126] The Court's holding was changed to read that a state may not "completely suppress the dissemination of concededly truthful information about an entirely lawful activity," and that advertising is not "wholly outside the protection of the First Amendment," and should not suffer from being outside "all protection."[127]

The Federal Trade Commission has the legal authority to regulate

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[124] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

[125] Central Hudson.

[126] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

[127] Virginia Pharmacy.

what are deceptive or unfair advertisements of alcoholic beverages under Section 5 of the FTC Act (which sets regulations for advertising and commerce, 15 U.S.C. § 45 et.seq.). Enforcement of that authority is limited to the protections afforded to advertising (commercial speech) by the First Amendment.

Deception is defined by the FTC as any representation, included or excluded in an advertisement, that is "likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[128] The Commission noted that an advertisement will not be considered false or deceptive just because it might be misunderstood by "an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."[129] If, however, the FTC determines that an ad is aimed at an especially susceptible group of people (i.e. children), "its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed."[130]

Unfairness is a broader term and is used to cover acts that are not necessarily misleading but lead to "unavoidable substantial injury to consumers."[131] To fall under the label of unfairness, the FTC requires evidence to show that:

> (1) the injury produced by the practice is substantial;
> (2) the injury produced by the practice is not outweighed

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[128] Alcohol Advertising, p. 407.

[129] Alcohol Advertising, p. 407.

[130] Alcohol Advertising, p. 407.

[131] Alcohol Advertising, p. 407.

> by countervailing benefits to consumers or competition that the practice produces; and (3) the injury is one that consumers could not reasonably have avoided.[132]

The authority of the FTC to govern unfairness does not extend to any trivial or speculative harm. However, an injury may be defined as substantial if "it does small harm to a large number of people, or a great injury to a small number of people."[133] No definitions were made as to what would constitute "small harm" or "great injury."

Because advertising serves an informational function, it is protected as commercial speech under the First Amendment. If, however, that commercial speech is deemed more likely to deceive than inform, or it relates to unlawful activity, it may be banned by the FTC. When advertising is not misleading, deceptive or unfair, the authority of the government to ban is much more restrained.

In cases where regulation may be warranted, the courts have used a four-part analysis, developed in 1980 in the Central Hudson Gas and Electric Corp.[134] case. According to the case, the first analysis concerns whether the ad pertains to lawful activity and is not misleading. Next, the courts must decide whether the ad serves a substantial governmental interest. If it does, the courts determine if the proposed regulation would directly advance the governmental interest asserted, and finally, whether the regulation is not more extensive than necessary to serve that interest.[135]

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[132] Alcohol Advertising, p. 407.

[133] Alcohol Advertising, p. 407.

[134] Central Hudson.

[135] Central Hudson.

The 10th Circuit Court of Appeals, in 1983, evaluated the constitutionality of "partial statewide bans on alcoholic beverages"[136] using the Central Hudson test. The court concluded that, because of the 21st Amendment's policy to grant states special authority to regulate alcohol, any state's decision to impose a partial ban on alcoholic beverage advertising is "entitled to great deference, and by implication, greater deference than might be accorded to similar federal actions."[137]

Precedent Cases for Alcohol Advertising

Relevant to this issue is the 1983 Oklahoma Telecasters Assoc. v. Crisp[138] case. The 10th Circuit upheld a ban that included several restrictions for alcohol advertising in Oklahoma. One such restriction upheld was a requirement that all Oklahoma cable operators omit wine advertisements from interstate signals transmitted over their systems.[139] The 10th Circuit Court found that using the Central Hudson test did not mandate such evidence in the case before it "in light of the additional deference owed to the legislature as a result of the 21st Amendment."[140]

As cited by the FTC, the Oklahoma Telecasters court emphasized:

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[136] Alcohol Advertising, p. 414.

[137] Oklahoma Telecasters Assoc. V. Crisp, 699 F. 2d 490 (10th Cir. 1983), rev'd sub nom., Capital City Cables, Inc. v. Crisp, 52 U.S.L.W. 4803 (1984).

[138] Oklahoma Telecasters.

[139] Oklahoma Telecasters.

[140] Alcohol Advertising, p. 416

> The Central Hudson test is essentially a balancing test. When the 21st Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. [141]

The 5th Circuit Court of Appeals, in Dunagin, et al. v. City of Oxford, Mississippi, upheld Mississippi's policies prohibiting most forms of alcohol advertising. In its decision, the court pointed out the ad ban was "sufficiently justified to pass constitutional muster."[142] Going against scientific evidence, the court held that sufficient reason existed to justify the ad ban, "whether or not 'concrete' scientific evidence exists to that effect."[143]

While the criteria to be met in advertising are set forward by Central Hudson, they are more subjective than objective, resulting in inconsistent judgements from different courts. As pointed out by Haefner and Haefner, the third part of the analysis of Central Hudson asks the courts to decide the effectiveness of ads upon purchase decisions. The courts have too often relied on their own beliefs concerning advertising's effectiveness rather than "existing theories and behavioral data in the mass communications, advertising, and consumer behavior literature."[144] Because of the reliance on beliefs rather than proof,

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[141] Alcohol Advertising, p. 416.

[142] Dunagin v. City of Oxford, Mississippi, 718 F. 2d 738 (5th Cir. 1983).

[143] Margaret Haefner and James Haefner, "Freedom of Commercial Speech: The Special Case of Liquor Advertisements," Proceedings of the 1984 Convention of the American Academy of Advertising, p. 103.

[144] Haefner and Haefner, p. 103.

conflicting court rationales have resulted, as well as inconsistencies concerning protections afforded to commercial speech.[145]

While a relationship between cigarettes and alcohol may seem somewhat unrelated, the advertising of those products is frequently compared. Both issues have in common the concern over broadcast advertising.

A Broadcast Ban on Cigarette Advertising

On January 11, 1964, the Surgeon General released a report from the Advisory Committee on Smoking and Health stating that cigarette smoking had been determined to be a causal link to "lung cancer, bronchitis, and probably contributes to the development of coronary heart disease and various other less common diseases."[146] On January 18, one week later, the FTC prepared a regulation "requiring a health warning to appear in all cigarette advertising and on cigarette packages."[147] Two years later, in January 1966, warnings of the hazards of smoking, as determined by the Surgeon General, were printed on all cartons and packages of cigarettes sold in America.

On December 5, 1969, the Senate Commerce Committee reported a bill to ban cigarette advertising from broadcast airwaves starting January 1, 1971. The Senate passed the Bill seven days later and on January 1, 1971, all cigarette advertising on broadcast media stopped.

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[145]Thomas Whiteside, Selling Death (New York: Liverright, 1970), p. 2.

[146]Lee A. Fritscher, Smoking and Politics (New Jersey: Prentice-Hall, Inc., 1975), p. 158.

[147]Banzhaf v. FCC, 405 F. 2nd 1082 (D.C. Cir, 1968), cert. denied, 396 U.S. 842 (1969).

This all sounds simple, but the process of developing the policies took many years. Also important to note is that a definite, scientifically researched causal link had been found by the Surgeon General between smoking and health.

The cigarette industry claimed a violation of First Amendment protection. The Court responded that the ruling did not ban any speech, rather, the ruling was only to have a "chilling effect"[148] on the exercise of First Amendment freedom by making broadcasting more apprehensive about carrying advertising. As the court said, "The speech which might conceivably be 'chilled' by this ruling barely qualifies as constitutionally protected 'speech.'"[149] Also, the court added that

Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect."[150]

The cigarette ad issue also set precedence for the Fairness Doctrine. The Fairness Doctrine, as determined by the Federal Communications Commission, has two duties:

> The broadcaster must devote a reasonable percentage of broadcast time to the coverage of public issues, and the coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.[151]

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[148] Banzhaf v. FCC.

[149] Banzhaf v. FCC.

The Fairness Doctrine may be held as an instrument of public policy. The Doctrine was brought about for purposes of giving the public a complete story, to make sure the public knew all sides of an issue, and that each side was equally represented. Working with public policy, the Fairness Doctrine strives to give those wishing to air a view a chance.

Cigarette advertising brought the Fairness Doctrine to court with the Banzhaf v. FCC case in 1968. Briefly, the case centered around John F. Banzhaf's complaint against a New York television station, WCBS-TV, for not giving him an opportunity to speak out against cigarette smoking, or against the (in his opinion) false images the cigarette commercials showed of smokers (young, healthy, wealthy). By taking the incident to court, the FCC and the broadcast industry were forced to scrutinize the privileges of the Fairness Doctrine and answer to the question, "Does the state have the power to protect the health of its citizens, even if it means violating freedom of speech and the sanctity of the First Amendment?"[152] But what exactly does "health" mean in this case? Any product might be contested.

The way out for the FCC was to label cigarettes a "unique product," and rule that cigarette advertising was a "unique situation."

Several events of major importance followed this ruling. First, the FCC elaborated the decision it had made on reconsideration. The Court of Appeals upheld the "unique situation" ruling and the Supreme Court refused to review the case. Congress banned broadcast ads for cigarettes, effective January 1, 1971 and the FCC ruled that "in the ab-

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[152]Frank J. Kahn, ed., Documents of American Broadcasting (New Jersey: Prentice-Hall, Inc., 1984), p. 38.

sence of such ads, smoking was no longer a matter to which it would apply the Fairness Doctrine."[153] This ruling was upset in 1971 by the Court of Appeals. The court found that air pollution from automobiles was a health hazard "sufficiently akin to those in the cigarette ruling to mandate similar Fairness Doctrine treatment."[154]

A nest of wasps had been stirred and the FCC needed release. From 1971-1974, the FCC examined the "fairness" of the Fairness Doctrine policies and on July 12, 1974 declared a major change concerning the Doctrine policy on commercial advertising. The "Fairness Report," as the change was named, divided commercial advertising into three categories: those that clearly and explicitly are editorials; institutional advertising that implicitly raises controversial issues of public concern; and advertising for commercial products or services."[155] The Report did not substantially alter FCC policy toward the first two types of advertising, but it made a significant change in policy toward the last.[156] For commercials advertising products or services--unless they contain some blatant controversial issue of public concern--they are not subject to the Fairness Doctrine. As noted by Simmons,

> Controversies surrounding a product's use, scientific basis or harmful effects are simply not relevant for fairness

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[153]Kahn, p. 38.

[154]Kahn, p. 39.

[155]Steven J. Simmons, The Fairness Doctrine and the Media (Los Angeles: University of California Press, 1978), p. 113.

[156]Simmons, p. 114.

> doctrine purposes. Simple advocacy of product use does not raise fairness questions. A product's advertisement, like institutional advertising, can affirmatively discuss controversial issues of public importance that call for fairness balancing. But without such discussion in the advertisement's spoken text or visual segment, the fairness doctrine does not impose obligations.[157]

The Fairness Doctrine is no longer applicable to ordinary commercial advertising unless a controversial issue is explicitly raised in a sponsor's message.[158] For alcohol advertising, the courts must decide whether the ads represent a controversial issue. Legally, the evidence supporting no causal link between such ads and consumption is not of such great value; logically, it should be. The courts will not only consider the causal link evidence, but also the ramifications of passing a bill such as the Fairness in Alcohol Advertising Act. In examining the history of the Fairness Doctrine, the courts are sure to see the dizzying effects the FCC entered into, the misinterpretations of the FCC's judgment, and the time and confusions involved in rectifying the situation.

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[157]Kahn, p. 48.

[158]Kahn, p. 48.

# CHAPTER IV

## RESOLUTIONS FOR THE ALCOHOL ADVERTISING ISSUE

While the intricacies of public policy for alcohol advertising may not be as clear as possible for the advertisers, the overall result of public policy has led to quality advertising. Not unlike any large industry, the alcohol industry still suffers from a few advertisements that go beyond the set regulations for alcohol advertising. Advocates of advertising control have chosen these untypical ads as being representative of all alcohol advertising. Despite the shouts of these opponents to alcohol advertising, the current public policy is reliable enough to aid the advertisers in keeping with the policy. As shown in Chapter I, alcohol advertising is a controlled and regulated form of commercial speech and is held in that form by the alcohol industry, and state and federal governmental policies. While one policy is needed for advertisers, the current policies do protect the public. A goal of the BATF is to bring current policies together to form one public policy for alcohol advertising.

Those supporting the restrictions on alcohol advertising are fighting in a blinded fashion. Their cause (decreasing the levels of alcoholism) is noble, but their aim at alcohol advertising is misguided. The bulk of research has shown that advertising does not lead to consumption. While the alcohol industry has spent a lot of money on research concerning consumption, the opponents of alcohol advertising have spent little on research.

Both the CSPI and Project SMART have received strong criticisms from researchers and advertisers, aside from the criticisms of the

alcohol industry. Stephen Lambright, vice-president of Anheuser-Busch, in testimony, has given evidence that he feels is "typical of CSPI's casual willingness to distort statistical evidence . . . In effect, they have provided a half-truth."[159] He believes there is irony in the fact that CSPI "which claims to use science in the public interest"[160] is asking the government to ignore scientific evidence concerning a causal link and "base public policy on an ideology and speculation."[161] The FTC, in March 1985, denied a petition presented by CSPI calling for further regulations of unfair and deceptive alcohol advertising.[162] In listing reasons for the rejection, the FTC listed some ways in which the government could have an impact on reducing the problems of alcoholism. First, the FTC suggested, minimum drinking ages should be established. Second, "greater and more certain civil and criminal sanctions for conduct likely to cause injury."[163] Third, the FTC suggested "facilitating public education, counseling and treatment programs."[164]

As early as 1972, the National Institute on Alcohol Abuse and Alcoholism (NIAAA) was working to educate the public on the dangers of

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[159] Alcohol Advertising, p. 110.

[160] Alcohol Advertising, p. 104.

[161] Alcohol Advertising, p. 104.

[162] Alcohol Advertising, p. 438.

[163] Alcohol Advertising, p. 438.

[164] Alcohol Advertising, p. 438.

alcoholism. Themes of responsible drinking and the warnings of the symptoms of alcoholism were used in all forms of media.[165] In 1980, NIAAA began working with BATF to warn pregnant women about Fetal Alcohol Syndrome.[166] BATF produced, in 1980, an illustrated booklet aimed at young people. Thirteen states ordered the booklet for distribution in liquor stores.[167]

The FTC has said that the number of public awareness efforts undertaken to reduce the alcohol problems is "impressive."[168] Unfortunately, little is known on how the structure of such information is being provided. The efforts are "fragmented and uncoordinated."[169] No current inventory of information regarding the relative effectiveness of specific information campaigns exists.[170] Organization of both the educational information being distributed and any studies on the effectiveness of such information might prove of great benefit to the FTC and the alcohol industry.

Alcohol advertising will suffer little from the accusations made against it, and will remain relatively unchanged. A few changes may come about from the BATF's current review, but no major changes are

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[165] Alcohol Advertising, p. 441.

[166] Alcohol Advertising, p. 441.

[167] Alcohol Advertising, p. 441.

[168] Alcohol Advertising, p. 441.

[169] Alcohol Advertising, p. 446.

[170] Alcohol Advertising, p. 447.

foreseen.

What conclusions are to be drawn from the various issues of alcohol advertising? First, and most importantly, alcohol advertising should not be banned in broadcast media. Alcohol is not a "unique" product like tobacco, and should not fall under the same penalties. Second, the current public policy for alcohol advertising is the result of years of input and editing and should not be changed to include banning any form of alcohol advertising. Current policies serve the public and advertisers. Third, while a few alcohol ads seem to push the limits of regulations, the majority of ads are neither unfair nor deceptive. Petitions presented to the FTC asking for stricter regulations on alcohol advertising will continue to be denied by the FTC because the ads are not unfair or deceptive and because evidence shows that further regulations on advertising would have no effect on total consumption.

The "Fairness in Alcohol Advertising Act" should not be passed because its proposal suggest that such advertising does indeed influence consumption. Evidence shows that advertising has no effect on consumption. Passing the bill would be an illogical move by Congress. The bill has been debated for many months and the urgency of the opponents to alcohol advertising seems to be fading away.

The entire issue of alcohol advertising control has shown the public that the alcohol industry is a responsible institution. The industry is not wholly responsible for increased consumption through its advertising; in fact, the alcohol industry is doing more towards educating the public about the dangers of alcoholism than many of the action groups formed specifically for that purpose.

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