200 MPH Cigarette Ads: A Comparison of International Restrictions on Tobacco Sports Sponsorship

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By RANDALL H. STONER*

Member of the Class of 1992

“Gentlemen start your engines!” These famous words traditionally start the Indianapolis 500. They also ring out at race tracks across the world to signal the start of other races. Almost every weekend from February to November, races put on by the major motorsports sanctioning bodies—FISA (Federation Internationale du Sport Automobile), NASCAR (National Association for Stock Car Auto Racing), CART (Championship Auto Racing Teams), IMSA (International Motor Sports Association), AMA (American Motorcyclist Association), and NHRA (National Hot Rod Association)—draw huge crowds to race tracks throughout the world. The race fans come to see sleek Porsche 962 GTP cars race around the clock at the IMSA Daytona 24 Hour. They come to see Lola Indy cars turn 225 mile-per-hour lap speeds during the Indianapolis 500 and to see multi-million dollar Ferrari Formula One Grand Prix cars race at tracks from Europe to Brazil to Japan. The crowds come to watch Chevrolet Luminas and Ford Thunderbirds race door-handle to doorhandle on short-tracks throughout the southeast United States. They come to see 300 mile-per-hour top fuel dragsters and 180 mile-per-hour superbike motorcycles.

The crowds come to the tracks for the noise, the excitement, and the thrills of high speed motorsport competition. The crowds find one more thing at the track. From NASCAR’s Winston Cup series to IMSA’s

* B.A., California State University, Northridge, 1989. The author was the recipient of the Albert G. Evans Award in Private Enterprise for this Note. The author wishes to thank the library staffs at University of California, Hastings College of the Law; University of California, Boalt Hall; and the Library of Congress. The author also desires to thank Laurelle Kennedy of the Embassy of Australia, Washington, D.C. and Dr. Peter Frost of the Department of Sport and Recreation, Melbourne, Victoria, Australia. The author especially thanks his parents for their support and for introducing him to motorsports. The author is an inveterate motorsports fan and all his comments should be read in light of this known prejudice.
Camel GT, and from Marlboro-sponsored Indy cars to Lucky Strike-sponsored motorcycles, the race fans find cigarette advertising.

Since tobacco advertising was banned from the United States airwaves in the early 1970s, the tobacco companies have searched for alternate methods to keep their cigarette brand names before the public eye. One of their most successful methods has been the sponsorship of sporting activities. This sponsorship includes billboards at the stadiums, personal service contracts with individual athletes, and sponsorship of sports series such as the Virginia Slims Women's Tennis Tour.

Tobacco sponsorship is perhaps most visible in the realm of motorsports. The tobacco companies often sponsor individual racers, such as Indianapolis 500 winner Emerson Fittipaldi. They sponsor race teams, like the Marlboro McLaren Formula One Team. The sponsorship ranges from individual races, for example the Marlboro Grand Prix, to entire racing series, such as the NASCAR Winston Cup series and Camel Super-Cross motorcycle racing.

The high visibility of tobacco logos and trademarks in televised sports is a way of circumventing the ban on television commercials for tobacco products. Consequently, several countries have barred the display of tobacco brand names in televised sports. Canada has banned

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3. A personal service contract is a contract between a sponsor and an individual athlete wherein the athlete participates in advertising for the sponsor. The advertising may involve endorsement of the sponsor's product or personal appearances by the athlete at events promoting the sponsor.
5. CART Who's Who, ON TRACK, April 5, 1990, at 36.
8. *Id.*
10. See Alan Blum, *Get Tobacco Ads Out of Stadiums, Off TV*, USA TODAY, Aug. 22,
sponsorship in the name of tobacco brands. In Germany and Great Britain regulations restrict the display of cigarette logos in televised sports. France and the United States have considered laws which would restrict tobacco sponsorship. The European Economic Community is considering a complete ban on tobacco advertising to take effect in 1993.

This Note addresses the use of tobacco sponsorship in sports, focusing on motorsports. The Note discusses two bills that have been introduced in the United States and investigates the constitutionality of a complete ban on tobacco company sports sponsorship in the United States. The Note then examines the approaches used in Canada, Great Britain, and Australia. The Note discusses the possible effect on motorsports of a complete ban and the alternatives and then recommends the approach the United States should follow to address tobacco company involvement in sports.

I. SPORTS SPONSORSHIP

Sports sponsorship may be defined as an "agreement under which one of the parties (the sponsor) supplies materials, financial or other benefits to another (the sponsored) in exchange for its association with a sport or sportsman . . . for advertising, especially television advertising purposes." Sponsorship is distinct from patronage because sponsorship

1990, News, at 15. See also Luken Lights Up Hearing, supra note 9, at 55 and De Parle, supra note 2, at 5.
is a commercial relationship. The sponsor's objective is the promotion of his or her business. This objective is absent in patronage where the benefit supplied by the patron is a gift. A sponsor may be promoting a product, service, or the company's image. The sponsor's association may be with an individual, an event, or other aspects of the sport.

Sponsorships are essential in professional motorsports. Motorsports are extremely expensive, especially at the highest level such as the Formula One World Championship and the major series in the United States, the CART Indy Car and NASCAR Winston Cup series. The average annual budget of a Formula One team is fifteen million dollars and the top teams may spend twice that. Honda has about 150 engineers and designers working on their Formula One engine projects and is reported to spend more than 100 million dollars a year participating in Grand Prix racing. The drivers themselves receive salaries which rival those of other athletes. Three-time Formula One World Champion

18. Id.
19. Id.
20. Id. at 13.
21. Id. at 5. Sponsors have been defined as "[i]nvestors with [an] unlimited supply of decals, 'gimme caps,' banners and money who hitch their future to a race car in order to sell more beer, auto parts, cereal, soap, film or tobacco." Frank J. Murray, Definitely Definitive NASCAR Definitions, WASH. TIMFS, Feb. 20, 1992, at E2.
22. TOWNLEY & GRAYSON, supra note 17, at 5. In a promotional piece, NASCAR listed seventeen popular methods of sponsorship. They are: Sponsorship of a car; Sponsorship of a driver; Car-and-driver combined sponsorship; Track sponsorship; Family-night sponsorship; Series sponsorship; Single-event sponsorship; Lap sponsorship; High performance sponsorship; Trackside-billboard advertising; Program advertising; Prize-money sponsorship; Trophy-and-award sponsorship; Corporate hospitality-area sponsorship; VIP-suite sponsorship; Grand-stand-section sponsorship; and Sponsorship of ironic occurrences. THOMAS L. HARRIS, THE MARKETER'S GUIDE TO PUBLIC RELATIONS 204-05 (1991) (quoting The Art of Moving Products at 200 MPH, NASCAR Inc., promotional flyer).
23. Mark Fogarty, Only Big Companies Play This Game, USA TODAY, May 25, 1990, at E15. See also John Holusha, A New Fast Lane for Business, N.Y. TIMES, June 19, 1987, at D1. A typical Formula One team will employ about one hundred people. These include about seventeen engineers, thirty-five fabricators, four inspectors, twenty-six mechanics, and twelve administrators. Id. The team will build seven cars for a year's racing and go through about forty engines and 120 engine rebuilds with an annual engine manufacturing cost of $9,368,640. Id. The team will spend over $15 million for a year's racing. This includes about $5 million for driver retainers, $3.25 million for wages, $1.5 million for equipment, not including engines, $3.5 million in travelling expenses, and $1.5 million for testing. Id. The team's income includes about $5 million from the primary sponsor, $3.25 million from the engine supplier, $2.5 million from its oil company, and $3.25 million from subsidiary sponsors. The team can also receive another $2 million in prize money and television rights. Id. This does not include the amounts that drivers receive from their personal sponsors. World champion Ayrton Senna is said to receive $5 million from Brazil's Nacional Bank for his personal sponsorship. Full Chat: Senna Stays With McLaren, ON TRACK, Sept. 20, 1990, at 6.
Ayrton Senna’s 1991 salary was said to be between fifteen and twenty million dollars.25

In order to pay these expenses, the race teams sell sponsorships to advertisers. Even small decals on Formula One cars are sold to advertisers for 500,000 dollars. The prime advertising space on the car can be worth ten million dollars.26 Marlboro alone spends about fifty million dollars per year on Formula One sponsorship and associated advertising.27

Sponsorship buys a great deal of visibility for the sponsor. Formula One’s annual television audience is over one billion viewers worldwide.28 Eighty-eight million people attend motor races annually, placing racing behind only baseball in attendance.29 In 1990 over 12 million people attended races in the United States, an increase of over 800,000 spectators from 1989.30 The Coca-Cola 600 and the Indianapolis 500, each held over the Memorial Day weekend, are the two best attended single sporting events in the United States.31

Motorsports fans are not only numerous, they are also “fiercely loyal” to products.32 According to one survey, sixty-one percent of race fans say their buying decisions “would be influenced by a company’s support of motorsports.”33 Similarly, a survey by the J. Walter Thompson advertising agency found that many fans will buy only brands produced by companies that sponsor racing and will go without if that brand is not available.34 One commentator has written that race fans “will fight you for their brand of beer, their brand of cigarettes.”35 Sponsorship is a very cost-effective method of advertising. Tom Cotter, president of Cotter Communications, said:

To advertise for 30 seconds on NBC’s Bill Cosby Show costs 250,000 dollars. Now a million bucks spent in NASCAR will get you a middle-of-the-pack Winston Cup team, a team that will generate literally hours of exposure on national television for thirty races throughout the

27. Id.
28. Id.
32. Id.
34. Boudrow, supra note 29, at 8.
35. Id. (quoting Al Pearce).
year. And it will do so for the cost of two minutes of national advertising.\(^3\)

In addition to exposure on the track, sponsorship can influence clients and customers in other ways. Sponsoring businesses use the races as an opportunity to wine and dine their clients. Businesses also use racers and race cars for promotional events in stores.\(^3\)

II. TOBACCO AND MOTORSPORTS

Tobacco companies have been leaders in developing racing sponsorship. They spend an estimated seventy-five million dollars on motor racing in the United States.\(^3\) Analysts say that “[i]n the last 20 years, no participant has had deeper pockets or a more reliable financial commitment [to motorsports] than the tobacco companies.”\(^3\)

Tobacco companies sponsor motorsports because of the broad exposure that the events provide. Dan Oxberry of Phillip Morris, manufacturer of Marlboro, the best selling cigarette brand and a major sponsor of motor racing,\(^4\) said that “Marlboro is one of the best known brands in the world and racing is a sport watched by millions in many countries. But it’s almost coincidental [that we sponsor] Formula One. If there was a world international tiddly winks championship I’m sure we would consider that as much.”\(^4\) RJR/Nabisco has boasted about its “leadership in sports marketing.”\(^4\) The company claimed that, during 1986, “an estimated 25 million spectators attended the more than 1,400 events sponsored by R.J. Reynolds Tobacco U.S.A. The company is a leading corporate sponsor of American motor sports—stock cars, sports cars, drag racing, and motorcycle racing.”\(^4\)

Through motorsports sponsorship, the tobacco companies reach the television audience. Since the 1970s, cigarette advertising has been

\(^3\) Dutch Mandel, Autopower in the 90's; Advertising & Marketing The Persuaders, AUTOMOTIVE NEWS, Nov. 29, 1989, at 120.

\(^4\) Feona McEwan, Marketing and Advertising; Tobacco Rides a Rough Road, FIN. TIMES, Aug. 7, 1986, § 1, at 12.
banned from television in several countries. Opponents of tobacco advertising see the exposure that cigarette companies receive at televised sporting events as a way to circumvent this ban. Critics also say that sponsorship allows the cigarette manufacturers to "associate their product with the things with which they'd wish it to be associated: Glamor, health, vitality, success—rather than lung cancer, bronchitis and emphysema.

Motor sport sponsorship allows tobacco companies to reach the blue-collar segment of the population which is most likely to smoke. The tobacco companies try to sponsor events which appeal to the sort of person who will take the risk of smoking. They have become the "lead-

44. See, e.g., 15 U.S.C. § 1335 ("After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Trade Commission."). See also LMBG, supra note 12, § 22(1) ("Es ist verboten, für Zigaretten, zigarettenähnliche Tabakerzeugnisse und Tabakerzeugnisse, die zur Herstellung von Zigaretten durch den Verbraucher bestimmt sind, im Rundfunk oder im Fernsehen zu werben.").

45. See, e.g., Richard Woodman, 'Ban Cigarette Sport Sponsorship' Call, PRESS ASS’N NEWSFILE, Dec. 1, 1990, available in LEXIS, Nexis Library, Panews File ("The BBC's coverage of the 1988 British Grand Prix gave Marlboro the equivalent of eighteen 30-second TV advertisements because of the logos allowed on cars and participants, and signs behind the track."). See also Luken Lights Up Hearing, supra note 9, at 55 (Tobacco company signs were visible during 49% of NBC's coverage of the 1989 Marlboro Grand Prix Indy Car race); Horovitz, supra note 38 (It is estimated that in 1991 Winston received the equivalent of $15.5 million in coverage. Cameras showed the Winston logo for over eleven hours and the Winston name was mentioned by announcers 2,180 times.). But see STUART TURNER, PRACTICAL SPONSORSHIP 95 (1987) ("[O]n no account try to equate that 14 minutes [of TV coverage] with the same amount of paid-for airtime because, while you or your record keeper may have noticed your banners for that long... is it likely that the general public will have studied them so avidly?"). But see Laura Clark, Volvo Fights to Retain Premier Place in World of Tennis, AUTOMOTIVE NEWS, June 12, 1989, at 49 ("In Volvo's view, a newspaper story on Volvo Tennis is worth 30 percent of a newspaper ad of equal size").


47. Id. Representative Fortney Pete Stark (D-CA) blasted tobacco company sponsorships by paroodying the character of Mr. Subliminal, a Saturday Night Live character who uses subliminal suggestions while speaking. The main text below is from the introduction to Phillip Morris and the Arts, a book detailing Phillip Morris' involvement in arts sponsorship, and the parentheticals are Representative Stark's additions as Mr. Subliminal:

The arts (along with tennis tournaments, stock car racing, and billboards in professional and college sports stadiums) have helped (allowed us to get around the prohibition on television advertising) us (the Death Merchants) to appreciate (exploit) creativity (talk about creativity, how'd you like those arguments in court: that cigarette ads don't increase smoking?) in all forms (if deductible from our taxes) . . . .


48. See Phil Rabin & Carolyn Myles, Advertisers Discover Sports Deliver Male TV Viewers, WASH. TIMES, Nov. 7, 1990, at D3 ("Along with bowling, the least upscale sports are baseball and auto racing."). See also WHITE, supra note 42, at 163 ("[S]moking is rapidly becoming a blue-collar phenomenon.").
ing sponsors of events that appeal to risk-taking or rebellious adolescent instincts: dirtbike, hotrod, and motorcycle racing.\textsuperscript{49} Sports sponsorship by tobacco companies also "build[s] a constituency of thankful and financially dependent recipients who can often be relied on to support the industry."\textsuperscript{50}

Sponsorship of sports targets young people.\textsuperscript{51} Teenagers see sports stars as glamorous.\textsuperscript{52} Tobacco companies use racers in material aimed directly at teenagers. For example, United States Tobacco, manufacturer of Skoal Bandit snuff, produced a driver's education film starring Harry Gant who drives a Skoal sponsored car in the NASCAR Winston Cup series.\textsuperscript{53} The car in the film had plainly visible Skoal sponsorship decals.\textsuperscript{54}

Children are particularly susceptible to tobacco sponsorship. In England, despite the fact that cigarette advertising has been banned from television since 1965,\textsuperscript{55} more than seventy percent of the children questioned by one poll believed cigarettes were still advertised on television.\textsuperscript{56} Another British study has found that the children surveyed were most aware of the cigarette brands which were most closely associated with sponsored televised sporting events.\textsuperscript{57}

The television exposure of motor racing has led many people to call for a ban on tobacco company sports sponsorship.\textsuperscript{58} The proponents of


\textsuperscript{50} Simon Chapman, \textit{Cigarette Advertising and Smoking: A Review of the Evidence, in SMOKING OUT THE BARONS: THE CAMPAIGN AGAINST THE TOBACCO INDUSTRY} 79, 93 (1985). This is not necessarily always true. 500cc motorcycle grand prix star Kevin Schwantz strongly opposes smoking despite being sponsored by Lucky Strike cigarettes. Joe Salzo, \textit{Yankee Cycle Dandies: Americans on Two Wheels Face Few Challenges in Grand Prix Bike Competition}, \textit{AUTOWEEK}, Dec. 31, 1990, at 44. Perhaps more typical, however, is the response of NASCAR racer Michael Waltrip, who wrote in defence of tobacco company sponsorship that "[s]tudies have shown that advertising of tobacco products had little if anything to do with the decision by consumers to use the products." Michael Waltrip, \textit{R.J. and the Racer}, \textit{AUTOWEEK}, July 8, 1991, at 12. It should be noted, however, that the sponsor of Michael Waltrip's race car is Pennzoil rather than any tobacco company. \textit{Id.}

\textsuperscript{51} 92 \textit{PARL. DEB.}, H.C. (6th ser.) 639 (1986) (Eng.).


\textsuperscript{53} \textit{WHITE, supra} note 42, at 111.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} 92 \textit{PARL. DEB.}, H.C. (6th ser.) at 642.

\textsuperscript{56} \textit{Id.} at 643.


\textsuperscript{58} \textit{See supra} notes 11-16. \textit{See also} Tobacco Products (Sports Sponsorship) Act 1985 (House of Commons Bill 53); Tobacco Products (Sports Sponsorship) Act 1986 (House of
such a ban argue that it is necessary to prevent children from becoming addicted to tobacco. Most smokers begin to smoke before adulthood. The Royal College of Physicians has reported that, "Learning to smoke usually occurs in childhood or in adolescence. The matter is largely settled by the age of 20; if a person is still a non-smoker at this age he is unlikely to take it up." A document subpoenaed from Brown & Williamson Tobacco by the Federal Trade Commission illustrates how the tobacco industry targets young people. The document advises the tobacco company on the advertising approach to take with children:

Thus, an attempt to reach young smokers, starters, should be based . . . on the following major parameters:

- Present the cigarette as one of a few initiations into the adult world.
- Present the cigarette as part of the illicit pleasure category of products and activities.
- In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process.
- To the best of your ability (considering some legal constraints), relate the cigarette to "pot", wine, beer, sex, etc.
- DON'T communicate health or health-related points.

Cigarette smoking has been compared to statutory rape because young people are too immature to understand fully the significance of smoking. Significantly, the tobacco companies target young people even though it is illegal in most states to sell cigarettes to those young

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59. Woodman, supra note 45.
60. Chapman, supra note 50, at 85. It is also argued that tobacco is a "gateway" drug which leads to abuse of other, illegal, drugs. See 137 Cong. Rec. S6036, at S6047.
III. PROPOSALS FOR CHANGE

There have been several proposals designed to ban sports sponsorship worldwide. In the United States two principal bills have been introduced to restrict sports sponsorship: the Tobacco Control and Health Protection Act and the Protect Our Children from Cigarettes Act.

The Tobacco Control and Health Protection Act was introduced in 1990 by Representative Henry Waxman (D-CA) and joined by thirty co-sponsors. House Bill 5041, called for a complete prohibition of tobacco company sports sponsorship. The relevant sections declare that, "No tobacco product advertisement shall be located—(A) in or on a sports stadium or other sports facility or any other facility where sporting activity is regularly performed, (B) on cars, boats, or other sporting equipment used in or associated with any sporting event." The bill further provides that:

It shall be unlawful within the United States for the manufacturer, packager, or distributor of tobacco products . . . to sponsor or cause to be sponsored any athletic, music, artistic, or other event in the name of a tobacco product trademark or in a manner so that a tobacco product trademark is publicly identified as a sponsor of, or in any way associated with, such an event, . . . [or] to pay or cause to be paid to have any tobacco product trademark appear on any vehicle, boat, or any other equipment used in sports.

The restrictions in this bill are so extensive that all tobacco company sports sponsorship would end regardless of whether the event was televised or not. Although H.R. 5041 failed to make it out of committee, both Representative Waxman and Senator Edward Kennedy (D-MA) are expected to reintroduce bills calling for a ban on tobacco sports sponsorship.

The proposed Protect our Children from Cigarettes Act of 1989 also

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64. See, e.g., CAL. PENAL CODE § 308 (West Supp. 1990); Protection of Children (Tobacco) Act, 1986, ch. 34 (Eng.).
65. See supra note 58 and accompanying text.
68. H.R. 5041, supra note 15, § 6(a)(3).
69. Id. § 6(b)(2), (5).
would have restricted sports sponsorship. House Bill 1250, sponsored by former Representative Thomas Luken (D-Ohio), declared that, "No person may engage in the consumer sales promotion of any tobacco product in or affecting commerce if that consumer sales promotion is or may be seen or heard by any person under the age of 18." This bill would have allowed "sponsorships of athletic, artistic, or other events under the registered brand name of a tobacco product" only if "the brand name is the name of a corporation in existence on August 1, 1988." The bill would have prohibited "displaying the registered brand name or logo of a tobacco product on cars, boats, animals, or other sporting equipment ... unless the brand name is the name of a corporation in existence on August 1, 1988." This provision would allow sponsorship in the name of a cigarette brand such as Phillip Morris which is the same as the name of the corporation but would not allow sponsorship in the name of Phillip Morris' best-selling brand Marlboro. Thus, the bill would end sponsorship by the three brands most associated with motorsports in the United States (Marlboro, Winston, and Camel) because these are the names of brands and not of separate corporations.

The bill would also have provided additional restrictions on sports sponsorship. While the bill would have allowed "tombstone" advertising on billboards, it would not allow signs or billboards advertising tobacco products to be "located in a sports stadium or other sports facility." Trackside advertising, which is one of the main benefits of sponsoring a race, would thus have been prohibited by this bill.

Finally, H.R. 1250 would have allowed state legislatures to enact further restrictions on tobacco advertising. Thus, the states could ban even the limited amount of sports sponsorship allowed under the Act.

Both bills were opposed by groups which saw the bills as infringe-
ments upon First Amendment rights. An American Civil Liberties Union spokesperson testified that "[t]he warning requirements of H.R. 5041 go so far beyond reasonable regulation they impose an unconstitutional burden on the speech chosen by commercial advertisers." Tom Lauria of the Tobacco Institute contended that "[o]ur marketing activity is clearly protected by the First Amendment." However, the extent to which tobacco advertising is protected by the First Amendment is controversial.

IV. CONSTITUTIONAL ISSUES

The proposition that the United States Constitution protects commercial speech was first established in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council in 1976. In Virginia State Board of Pharmacy, the Supreme Court struck down, as a violation of the First Amendment, a Virginia law which provided that pharmacists who advertised "any amount, price, fee, premium, discount, rebate or credit terms" for prescription drugs were guilty of unprofessional conduct. The Court held that the First Amendment protects speech which does "no more than propose a commercial transaction." The Court declared that, "society also may have a strong interest in the free flow of commercial information." The Court saw a societal interest in ensuring that decisions made by the public in allocating resources in a free enterprise economy were "intelligent and well informed."


Id. at 749-50.

Id. at 762.

Id. at 764. This interest has also been recognized by the EEC. "Advertising that is honest and fair is not only a service at the disposal of advertisers, but in general also represents a means of informing consumers, making it easier for them to meet their requirements in terms of goods and services." Anthony Lester, Written Communication on Advertising and Freedom of Expression in Europe, in PROC. OF SIXTH INT'L COLLOQUIY ABOUT EUR. CONVENTION ON HUM. RTS. 434, 438 (1985) (quoting Television without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting especially by Satellite and Cable, COM(84)300 at 266).

Mitchell declared that, "Congress has the power to prohibit the advertising of cigarettes in any media." In *Capital Broadcasting*, the District Court held that the Public Health Cigarette Smoking Act of 1969 did not violate the First Amendment by prohibiting cigarette advertising on radio and television. The court saw this ban as being justified by either "Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce." The court reasoned that the "unique characteristics of electronic communication" made it "especially subject to regulation in the public interest."

Commentators have suggested that had *Capital Broadcasting* been decided after *Virginia State Board of Pharmacy*, the protection provided for commercial speech would have required that *Capital Broadcasting* be "decided differently, or at least [have] require[d] [a] more specific rationale." Judge J. Skelly Wright vigorously dissented in *Capital Broadcasting*, arguing that the legislation infringed the cigarette companies' free speech rights because "cigarette advertising implicitly states a position on a matter of public controversy." In his dissent, Judge Wright argued that even though "the real 'Marlboro Country' is the graveyard. . . . the First Amendment does not protect only speech that is healthy or harmless." Judge Wright also expressed concern that banning cigarette advertisements on television would result in the loss of the anti-smoking commercials that the networks had been required to run along with the cigarette ads.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, decided in 1980, the Supreme Court created a four-pronged test to determine the validity of governmental regulation of commercial speech. In *Central Hudson*, the Court struck down a regulation banning promotional advertising by an electrical utility. As a re-

88. Id. at 584.
89. Id. at 583.
90. Id. at 584.
91. Id.
92. Id.
95. Id. at 587 (Wright, J., dissenting).
96. Id. at 588-89.
98. Id. at 572.
sult of the fuel shortage of 1973, the Public Service Commission of the State of New York ordered electrical utilities to cease all advertising which promoted the use of electricity.99 The prohibition was extended in a policy statement issued on February 25, 1977, despite the easing of the fuel shortage.100 The utility challenged the prohibition in state courts on the grounds that the regulation violated the First and Fourteenth Amendments by restraining commercial speech.101 The state courts upheld the order of the Commission.102

In overturning the restriction on Central Hudson's advertising, the United States Supreme Court recognized that, "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interests in the fullest possible dissemination of information."103 The Court did declare, however, that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”104 The Court first declared that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”105 Thus, the first prong of the Central Hudson test requires that the advertising be truthful and promote a legal product. If this first prong is not met, the speech can be banned without any further analysis. The Court declared that where the first prong is satisfied, the analysis continues to the second prong. For the second prong to be satisfied, "The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest."106 If the first two prongs are satisfied, the constitutionality of the regulation will be determined by the third and fourth prongs. The third and fourth prongs ask "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."107

In Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,108 decided in 1986, the Supreme Court interpreted the third prong of the Central Hudson test to require only that the legislative judgment not be

99. Id. at 558-59.
100. Id. at 559.
101. Id. at 560.
102. Id. at 560-61.
103. Id. at 561-62.
104. Id. at 563.
105. Id. (emphasis added).
106. Id. at 564.
107. Id. at 566.
In Posadas, the Supreme Court held that a Puerto Rican law prohibiting the advertising of casino gambling to Puerto Ricans while allowing advertisements aimed at tourists was constitutional. The Court held that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." The Court showed great deference to the legislative judgment that "advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised."

For a regulation to satisfy the fourth prong, it need not employ the least restrictive means possible to serve the governmental interest. In Board of Trustees of the State University of New York v. Fox, the Supreme Court in 1989 upheld a state university regulation prohibiting the operation of "private commercial enterprises" on university property. The Court held that the "not more extensive than is necessary" language of Central Hudson does not require that regulation of speech be done by the "least restrictive means." The Court required a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends. Within those bounds, the Court is willing to "leave it to governmental decisionmakers to judge what manner of regulation may best be employed."

The Central Hudson four pronged test must be applied to determine whether a ban on tobacco sponsorship would be constitutional. The first prong requires that the speech must be nondeceptive and about a legal product. Tobacco is a legal product. However, if the advertising is inherently deceptive, then it can be banned without further analysis. It is argued that tobacco advertising is inherently deceptive because "its

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109. Id. at 342.
110. Id. at 331.
111. Id. at 345-46.
112. Id. at 342.
114. Id. at 471.
116. Bd. of Trustees of the State Univ. of New York, 492 U.S. at 479.
117. Id. at 481 (quoting Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986)).
118. Id.
119. See, e.g., 46 U.S.C. § 11103(a)(7) (1988). This law requires that ships carry "a slop chest containing . . . a complete supply of tobacco."
120. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it.")
purpose is to induce people to buy a product that is both harmful and addictive."\textsuperscript{121} Opponents of a ban argue that cigarette advertisements are no more deceptive than advertisements for other products.\textsuperscript{122} While cigarette ads do not mention the adverse health effects of smoking, except in the required warning labels, other advertisers such as butter manufacturers do not mention the adverse health effects of their products either.\textsuperscript{123} Furthermore, although some commentators see the use of young healthy models in tobacco advertising as inherently deceptive,\textsuperscript{124} the tobacco industry denies that the use of these models is deceptive. The industry states that, "Most persons in their twenties and thirties, whether smokers or not, look perfectly healthy. The models used in cigarette advertising are not more attractive, healthy or successful looking than the models used in most advertising."\textsuperscript{125} One commentator has argued that a definition of deceptiveness should look at the "potential for a predetermined and justified criterion percentage of consumers to believe the claim, . . . based on their response solely to the conveyed claim"\textsuperscript{126} and further that "a predetermined substantial number of consumers seeing the claim conveyed are unlikely to learn the truth elsewhere . . . ."\textsuperscript{127} In light of surveys which show that over ninety percent of Americans are aware of the relationship between smoking and disease, the argument that a substantial number of consumers could believe that cigarettes will make them attractive or healthy is weak.\textsuperscript{128} Based on other types of ad-

\begin{footnotesize}
121. Kenneth L. Polin, \textit{Argument for the Ban of Tobacco Advertising: A First Amendment Analysis}, 17 Hofstra L. Rev. 99, 113 (1988). \textit{See also} H.R. 5041, supra note 15, § 2(15) ("Through advertisements during and sponsorship of sporting events, tobacco has become strongly associated with sports and has been deceptively portrayed as an integral part of sports and the healthy lifestyle associated with rigorous sporting activity.") \textit{See also supra} text accompanying notes 47-54.


123. \textit{Id.}

124. \textit{See, e.g.,} Eisner, supra note 46, at 3.


127. \textit{Id.}

128. \textit{Tobacco Control and Health Protection Act: Hearings on H.R. 5041 Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, 101st Cong., 2d Sess. 581 (1990) (statement of Gerald M. Goldhaber, Ph.D.). Specifically, these surveys show that 95\% of Americans believe that cigarette smoking increases the risk of lung cancer, 92\% believe that it increases the risk of emphysema, and 91\% believe it increases the risk of heart disease.} \textit{Id.} at 582. This can be compared to surveys showing that only 89\% of Americans could name George Washington as the first president; that in 1976 only 72\% of Ameri-
\end{footnotesize}
vertising and the slim likelihood of deception, it is unlikely that the courts will find cigarette advertising to be inherently deceptive.\textsuperscript{129}

Since “the government interest in minimizing the adverse health effects of smoking represents a substantial state interest,”\textsuperscript{130} the second prong of the \textit{Central Hudson} test as applied to upholding the constitutionality of a ban is easily met. Approximately 350,000 people die annually in the United States from smoking related diseases.\textsuperscript{131} Tobacco has been described as the “only legal product that is harmful when used as directed.”\textsuperscript{132} In 1985 the treatment of smoking related diseases cost the United States an estimated 22 billion dollars, of which the Federal Government paid 4.2 billion dollars.\textsuperscript{133} The loss of productivity due to smoking related illness and death cost another forty-three billion dollars.\textsuperscript{134} The death toll and expense seem sufficient to create a substantial governmental interest.

The third prong of the \textit{Central Hudson} test requires that the ban on sponsorship be shown to advance the substantial governmental interest in reducing the use of tobacco.\textsuperscript{135} In \textit{Central Hudson}, the Court stated it would not “uphold regulations that only indirectly advance[d] the state interest involved.”\textsuperscript{136} The effect of banning tobacco advertising on cigarette consumption is not clear-cut.\textsuperscript{137} For example, in 1973 Norway banned tobacco advertising and promotion.\textsuperscript{138} While there was a reduction in the number of male smokers, the rate for women smokers remained the same and other factors may have accounted for the decrease in the rate of male smoking.\textsuperscript{139} In conjunction with the ban, the Norwegians knew that American independence was declared in 1776; and a 1954 Gallup Poll that found that only 34\% of Americans knew who had delivered the Sermon on the Mount. \textit{Id.} at 583.

\begin{itemize}
  \item \textsuperscript{129} See, \textit{e.g.}, Weber & Marks, \textit{supra} note 122, at 69.
  \item \textsuperscript{131} Weber & Marks, \textit{supra} note 122, at 69.
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} H.R. 5041, \textit{supra} note 15, \textsection 2(5).
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} See \textit{Tobacco Issues}, \textit{supra} note 72, at 126, (statement of Jean J. Boddewyn, Professor of Marketing and International Business, New York City University); \textit{Cf. id.} at 105 (\textit{Tobacco Advertising: The International Experience}, attachment to statement of Scott D. Ballin) (both Boddewyn and Ballin discuss the effect of tobacco advertising bans on consumption in Norway, Finland, and Sweden, but come to opposite conclusions).
  \item \textsuperscript{138} Weber & Marks, \textit{supra} note 122, at 70.
  \item \textsuperscript{139} \textit{Id. See also} Chapman, \textit{supra} note 50, at 90-93.
\end{itemize}
gian Government instituted programs to educate people about smoking and to help smokers quit.\textsuperscript{140} It is not clear how to evaluate the individual effect of the advertising ban on smoking.

Moreover, the tobacco companies argue that their advertising is primarily designed to affect the relative market share of the manufacturer,\textsuperscript{141} and that it has no significant effect on aggregate consumption.\textsuperscript{142} Les Zuke, director of communications for Phillip Morris, USA, has stated that, "[a]pproximately 15,000 smokers per day switch cigarette brands. Our purpose in sponsoring race cars and events is to keep people already using our brands loyal and to convince others to switch."\textsuperscript{143} The proponents of a ban dispute this claim. Emerson Foote, former chairman of a leading advertising agency, wrote that:

This is the public position of the tobacco industry but I don't think anyone really believes this. I am not even convinced that competition among brands is the most important purpose of such advertising. I suspect that creating a positive climate of social acceptability for smoking, which encourages new smokers to join the market, is of greater importance to the industry.\textsuperscript{144}

As a further argument against an advertising ban, the tobacco industry points to the increased cost of advertising after the 1971 ban on broadcast advertising and argues that a ban on sponsorship and other forms of advertising will lead to lower cigarette prices and thus higher consumption.\textsuperscript{145} If this argument were true, however, it would indicate that it is in the tobacco companies' best economic interests to stop advertising and so increase consumption.

Under the \textit{Posadas} standard, a ban on sports sponsorship would not be a "manifestly unreasonable" approach for Congress to take in attempting to combat smoking. Because Congress has the power to ban tobacco, it likewise has the power to ban tobacco advertising. Chief Justice Rehnquist's dicta in \textit{Posadas} suggests that denying the legislature the power to ban cigarette advertising when they have the power to ban cigarettes completely, "would require more than we find in the First Amend-

\textsuperscript{140} Weber & Marks, \textit{supra} note 122, at 70.
\textsuperscript{142} Garrison, \textit{supra} note 130, at 179. \textit{See also} O'Donnell, \textit{supra} note 81, at 52. ("[T]here is no evidence to show that when we sponsor an automotive event, it leads people to smoke . . . .") (quoting Tom Lauria of the Tobacco Institute).
\textsuperscript{144} Chapman, \textit{supra} note 50, at 85.
\textsuperscript{145} Garrison, \textit{supra} note 130, at 181.
ment."\textsuperscript{146} In sum, the ban would likely fulfill the third prong criteria since Congress has a reasonable and substantial interest in decreasing the use of tobacco.

The fourth prong of the \textit{Central Hudson} test requires that the regulation not be "more extensive than is necessary"\textsuperscript{147} to serve the state interest. Proponents of a ban argue that the Government can prove that numerous less restrictive measures have been unsuccessful in decreasing smoking.\textsuperscript{148} These include the health warnings which are required on cigarette packages and advertisements\textsuperscript{149} and the complete ban on advertising through the electronic media in effect since 1971.\textsuperscript{150}

The position of the proponents of an advertising ban is strengthened by the Supreme Court's decision in \textit{Fox}.\textsuperscript{151} Because the Court is willing to "leave it to governmental decisionmakers to judge what manner of regulation may best be employed,"\textsuperscript{152} it is likely that the Court will be willing to find that the "'fit' between the legislature's ends and the means chosen to accomplish those ends" is reasonable.\textsuperscript{153}

The opponents of a ban argue that a total ban on sponsorship would be more extensive than is necessary since there are several alternative approaches.\textsuperscript{154} The opponents note that the proposed regulations are very extensive. Not only would H.R. 5041 have prohibited tobacco companies from sponsoring "any athletic, music, artistic, or other event in the name of a tobacco product trademark,"\textsuperscript{155} it would also have prohibited placing tobacco product advertisements in any "facility where sporting activity is regularly performed,"\textsuperscript{156} or "on cars, boats or other sporting equipment."\textsuperscript{157} H.R. 1250 would likewise have barred cigarette sponsorship signs or billboards "located in a sports stadium or other sports

\textsuperscript{146} Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 347 (1986).
\textsuperscript{148} Weber & Marks, \textit{supra} note 122, at 71. \textit{See also} Polin, \textit{supra} note 121, at 133 ("This operational reality leads to a broader conclusion—a complete ban of tobacco advertising, in all general forums of communication, is the least restrictive means necessary to serve the government interest in the reduction of tobacco use.") (footnote omitted).
\textsuperscript{149} 15 U.S.C. § 1333.
\textsuperscript{150} \textit{Id.} § 1335.
\textsuperscript{151} Bd. of Trustees of the State Univ. of New York v. \textit{Fox}, 492 U.S. 469 (1989).
\textsuperscript{152} \textit{Id.} at 481.
\textsuperscript{153} \textit{Id.} (quoting \textit{Posadas de Puerto Rico Assoc.}, 478 U.S. at 341).
\textsuperscript{154} Garrison, \textit{supra} note 130, at 204.
\textsuperscript{155} H.R. 5041, \textit{supra} note 15, § 6(b)21(2) (emphasis added).
\textsuperscript{156} \textit{Id.} § 6(a)(3)(A).
\textsuperscript{157} \textit{Id.} § 6(a)(3)(B).
facility,”158 as well as prohibiting “displaying the registered brand name or logo of a tobacco product on cars, boats, animals, or other sporting equipment.”159 This regulation would have prevented the owners of privately owned race tracks and racing vehicles from displaying tobacco product trademarks even if the event was not televised, and even if only adults were allowed as spectators.

Given the Supreme Court’s deference to legislative judgement, a ban would probably not be found to be more extensive than necessary and the fourth prong would be met. Therefore, either of the proposed bills would likely have passed constitutional muster.

V. OTHER NATIONS’ APPROACHES

The approaches that other nations have taken to restrict cigarette advertising in motorsports is instructive to the development of a United States law. This Note examines the approaches taken in Canada, Great Britain, and Australia.

A. Canada

The Canadian law is similar to the proposed Tobacco Control and Health Protection Act, but goes even further in restricting cigarette advertising. The Canadian Tobacco Products Control Act declares that “No person shall advertise any tobacco product offered for sale in Canada.”160 The law also provides that “No person shall, for consideration, publish, broadcast or otherwise disseminate, on behalf of another person, an advertisement for any tobacco product offered for sale in Canada.”161

The Canadian law does provide an exception for the sponsorship of sports and cultural activities. The law allows tobacco companies to continue to sponsor sporting and cultural activities if they do so using “the full name of a manufacturer or importer of tobacco products.”162 Thus, the sponsorship of a racing series such as the former Rothmans Porsche Turbo Cup which was named after a cigarette company could continue while sponsorship of the NASCAR Winston Cup which is named after a cigarette brand would be banned. This exception is similar to the exception provided in the Protect Our Children from Cigarettes Act of 1989163 which, if passed, would have forbidden “sponsorships of athletic, artistic,
or other events under the registered brand name of a tobacco product unless the brand name [was] the name of a corporation in existence on August 1, 1988."164 It is unclear how the distinction between brand and company sponsorship improves upon existing laws.

Under the Canadian Tobacco Products Control Act, the tobacco companies are also allowed to use the brand name of a tobacco product provided that it is not used "in association with a tobacco product,"165 and it is "required by the terms of a contract entered into before January 25, 1988."166 This exception would allow the continuation of an existing series such as NASCAR Winston Cup which is named for a cigarette brand if the use is only in connection with the race and not in connection with Winston cigarettes.

On July 26, 1991, the Quebec Superior Court167 struck down the Tobacco Products Control Act.168 Justice Jean-Jude Chabot held that the law violated the tobacco companies' right to freedom of expression under the Canadian Charter of Rights and Freedoms.169 He further declared that the law denied consumers the right to make their own choices and that the Government exceeded its authority by trying to regulate advertising which according to the Charter falls under provincial jurisdiction.170 The Canadian Government has appealed this ruling.171 Under Quebec civil law, the Act continues in effect and prevents the tobacco companies from advertising until after the decision of the appeals court.172 It may be as long as four years before there is a decision on the appeal.173

The appeals court will have to determine whether the Act violates the tobacco companies' freedom of expression. The Canadian Supreme Court follows an approach similar to the Central Hudson four prong test to determine whether a restriction on advertising violates the freedom

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164. Id. § 3(b)(2)(D).
165. Tobacco Products Control Act § 6(1).
166. Id.
167. The Superior Court is an intermediate level provincial court. The judges are federally appointed. GERALD L. GALL, THE CANADIAN LEGAL SYSTEM 105 (1977).
170. Id.
172. Id.
guaranteed in the Charter. The Canadian Supreme Court has held, in *Ford v. Quebec (Attorney General)*,\(^{174}\) that "there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*."\(^{175}\) Some commentators would exclude tobacco advertising from the protection of section 2(b) of the Charter on any of three bases: tobacco could be prohibited by the Government, tobacco advertising encourages illegal conduct, or tobacco advertising is inherently misleading.\(^{176}\) If however, tobacco advertising is not excluded from the protection of section 2(b) and the effect of the law is to restrict the content of expression, then section 2(b) is violated.\(^{177}\)

The violation of section 2(b) is not sufficient in itself to strike down the law. Section 1 of the Charter "guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can be demonstrably justified in a free and democratic society."\(^{178}\) Before a limitation can be found reasonable, the legislature's objective must be "pressing and substantial"\(^{179}\) and of "sufficient importance to warrant overriding a constitutionally protected right or freedom."\(^{180}\) The limitations chosen must be proportional to the objective. This requires that:

> [T]he limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."\(^{181}\)

While it seems likely that the Canadian Supreme Court will find that the legislation's objective is of "substantial importance,"\(^{182}\) the proportionality of the limitations is subject to the same objections as raised under the third and fourth prongs of the *Central Hudson* test.\(^{183}\) The final result of the appeal cannot be predicted.

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175. *Id.* at 767 (emphasis in original).
176. Rob Cunningham, Note, *Cigarette Advertising and Freedom of Expression: The Case for the Tobacco Products Control Act*, 48 U. TORONTO FAC. L. REV. 304, 309 (1990). *See also supra* note 145 and accompanying text (argument that advertising for product that could be made illegal is without constitutional protection); *see supra* note 63 and accompanying text (argument that tobacco advertising encourages illegal activity); *see supra* notes 120-29 and accompanying text (argument that tobacco advertising is inherently deceptive).
178. *Id.* at 314 (emphasis added).
182. *See supra* notes 130-35 and accompanying text.
183. *See supra* notes 135-58 and accompanying text.
B. Great Britain

Great Britain's regulation of cigarette advertising exemplifies a less restrictive alternative to Canadian law. The Government and the tobacco industry follow the Voluntary Agreement which took effect in January 1987 and was to remain in effect until at least October 31, 1989. The agreement has remained in effect past that termination date. The agreement bans tobacco company sponsorship of "sporting activities which appeal mainly to spectators under 18." While it is not clear that motorsports fall within this category, this age requirement has had the effect of banning tobacco sponsorship of motorsports in Great Britain. Even so, the agreement does not completely ban tobacco company sponsorship of sporting events.

The tobacco companies also agreed to reduce the annual expenditure on sports sponsorship to 1985 levels and placed a ceiling of twenty percent of the total expenditures on advertising and promotional activity related to the sponsorship. The agreement further provided that the content of health warnings in sponsorship advertising be consistent with other cigarette advertising and increased the size of the warning for televised events from ten percent to fifteen percent of the sign area.

The compliance with the Voluntary Agreement has not always been complete. The British Broadcasting Corporation (BBC) was criticized in 1990 by the Health Education Authority for showing tobacco company symbols during the coverage of Grand Prix motor racing. In at least one incident, the crew of a race car sponsored by a tobacco company was shown wearing clothing with the tobacco company's logo on it. This type of incident could be prevented through the use of strict fines such as those which are imposed in Germany and Austria. Typically at Ger-

184. FIRST REPORT, supra note 13, at 11.
186. Voluntary Agreement, supra note 13, § 1.
188. SECOND REPORT, supra note 187, at 11-12.
189. Voluntary Agreement, supra note 13, § 2.
190. Id. § 3.
192. SECOND REPORT, supra note 187, at 10.
193. Shav Glick, Strange Cycle: Lawson, A Celebrity in Europe, Little Known at Home, L.A. TIMES, July 10, 1986, Sports, at 13. ("The most difficult time is when we go to West
man and Austrian races, racers sponsored by tobacco companies display
the emblem of the sponsor without the sponsor’s name.\textsuperscript{194} While the
Voluntary Agreement has had the effect of banning tobacco sponsorship
of motorsports, it has reduced the pervasiveness of tobacco company
sports sponsorship without complete prohibition.

C. Australia

The Australian state of Victoria has developed another alternative
to a total ban on sponsorship. A regulation promulgated under the To-
bacco Act of 1987\textsuperscript{195} requires that “every rider, vehicle, or sign with to-
bacco advertising or company colors must also carry a health warning
label 25 percent of the size of the ad.”\textsuperscript{196} The regulations also limit the
number of signs that can be displayed at a sporting event by tobacco
companies to four and only allows their display during the event and for
the twenty-four hours preceding and following the event.\textsuperscript{197} As a further
restriction, both the signs and the tobacco company names or trademarks
must only be visible to “persons to whom the function or event is visi-
ble.”\textsuperscript{198} These regulations recognize the importance of tobacco company
sponsorship to sporting and cultural activities.\textsuperscript{199} The regulations allow
tobacco companies to continue their participation in sports while both

\textsuperscript{194} See, e.g., \textit{SPORT MOTORRAD KATALOG} 1989, at 2. (Shoei helmet advertisement showing Eddie Lawson’s Marlboro Yamaha in German Grand Prix trim). See also Phillips, \textit{supra} note 143, at 49.


\textsuperscript{196} David C. Scott, \textit{Standing Against Tobacco in TV Sports}, \textit{CHRISTIAN SCI. MONITOR}, Oct. 25, 1989, at 6. The regulation requiring this is based on the Tobacco Act 1987, section 10 which allows sponsorship only if it is restricted to the trademark or name of the tobacco product and is done in accordance with regulations regarding signs at the site of the event. The regulation provides that:

\begin{quote}
In the case of a display of a tobacco trademark or name on the outside of any road, sea or air vehicle used in a function or event or on any participant . . . must be . . . accompanied by a prescribed statement, the area of which is not less than 25 per centum of the area of the tobacco trademark or name . . . and otherwise no less visible than the tobacco trademark or name . . .
\end{quote}

\begin{quote}
Tobacco (Promotion of Exempt Sponsorship) Regulations 1989, S.R. 179, \textsection 7(b)(i).\end{quote}

\textsuperscript{197} Tobacco (Promotion of Exempt Sponsorship) Regulations 1989, \textsection 7(a)(ii), 7(a)(iv).

\textsuperscript{198} Id. \textsection 7(a)(v), 7(b)(ii).

\textsuperscript{199} \textit{HEALTH DEPARTMENT, VICTORIA, TOBACCO REGULATIONS & SPONSORSHIPS: WHAT DO THEY MEAN FOR SPORT?} 3 (1990) [hereinafter TOBACCO REGULATIONS & SPONSORSHIP].
limiting their effect and insuring that the government health warning is presented along with the sponsors advertising.

The Tobacco Act of 1987 also provides an alternative to tobacco company funding of sporting activities. The Victorian Health Promotion Foundation is empowered to "provide sponsorship for sporting or cultural activities."\(^\text{200}\) The Foundation buys out existing tobacco company sponsorships and provides funds to sports that do not receive tobacco company sponsorships.\(^\text{201}\) The Foundation is funded through a five percent tax on the sale of wholesale tobacco products.\(^\text{202}\) The Foundation is required by law to pay at least thirty percent of this fund to sporting organizations.\(^\text{203}\) This approach seems to be the best compromise between the governmental interest in discouraging tobacco use and the free speech interests of the tobacco companies and motorsports participants.

VI. EFFECT ON MOTORSPORTS OF A UNITED STATES BAN ON SPONSORSHIP BY TOBACCO COMPANIES

A ban on tobacco sports sponsorship would cost American motorsports about seventy-five million dollars per year,\(^\text{204}\) which is the approximate amount that tobacco companies spend in the United States on motorsports competition.\(^\text{205}\) The loss of this money could seriously reduce the amount of prize money at races and hurt the individual race teams that depend on tobacco sponsorship. When Camel cigarettes stopped sponsoring the IMSA GTO/GTU racing series in 1989, it took two racing seasons before IMSA was able to find a new sponsor.\(^\text{206}\)

In the short term, withdrawal of tobacco sponsorship money is likely to hurt motorsports.\(^\text{207}\) Beer company sponsorship may replace some of the tobacco company sponsorship money. However, there is also a movement to ban beer sponsorship of racing.\(^\text{208}\) That movement wants to put "an end to the systematic industry practices which

\(^\text{200}\) Tobacco Act 1987, § 18(c).
\(^\text{201}\) TOBACCO REGULATIONS & SPONSORSHIP, supra note 199, at 3.
\(^\text{202}\) Id.
\(^\text{203}\) Tobacco Act 1987, § 32(4)(a).
\(^\text{204}\) Ingram, supra note 38, at 50.
\(^\text{205}\) Id.
\(^\text{206}\) Camel withdrew their sponsorship in January 1989 and a new sponsor was not found until November 1990. See Is That One Hump or Two? Camel Commits to GTP; But O and U Need Sponsor, AUTOWEEK, Jan. 9, 1989, at 59. See also Full Chat: Exxon Backs GTO/U Series, ON TRACK, Nov. 29, 1990, at 9.
\(^\text{207}\) Ingram, supra note 38, at 51.
\(^\text{208}\) Phillips, supra note 143, at 49.
strengthen linkages between beer and fast cars.”

The long term effects of a sponsorship ban in the United States have not yet been assessed. It seems likely, however, that motorsports will survive a ban on cigarette sponsorship and that other sponsors will step in to replace the tobacco companies. Some of the new sponsors may even be other products of the tobacco companies. For example, R.J. Reynolds' 1988 contract with NASCAR reportedly contains a "golden parachute" clause providing that R.J. Reynolds will continue to pay NASCAR fifteen million dollars per year in the event that they withdraw their sponsorship of the Winston Cup series. It seems likely that should the government prohibit Winston from sponsoring the series, one of the other RJR/Nabisco subsidiaries, such as Planters or LifeSavers would continue the contract.

In other countries, it is predicted that a ban on tobacco company sponsorship of motorsports would be disastrous. Alain Prost, the all time leader in Formula One victories, stated that a proposed French ban on tobacco sponsorship would "be a catastrophe" for racing. A spokesperson for the French Motorcycling Federation said that, "Banning advertising for tobacco brands would deprive motorcycling of more than 100 million francs (18 million dollars) of revenue." Cigarette companies are estimated to contribute sixty-one million dollars to all forms of motorsports in France. One British commentator has questioned, however, whether "sport or the arts would collapse without tobacco funding, because only around 15 percent of sports sponsorship comes from tobacco and drink combined."

The replacement of sponsorship money provided by the tobacco companies would be difficult. In France, Jean-Marie Balestre, the presi-

209. Id. This relationship in the public mind between racing and automobile accidents may have caused Dominos Pizza to stop its Indy car sponsorship the year after Arle Luyendyk won the Indianapolis 500 in a Dominos sponsored car. Dominos was apparently concerned with bad publicity about fatal accidents related to their thirty minute delivery policy and did not want to be associated with racing anymore. Marissa Silvera, It's a Run for the Money: Even Top Indy-Car Racers Need Plenty of Cash to Succeed, NEWSDAY, July 13, 1991, at 96.

210. See Letter from Phillip D. Havens, Office of the General Counsel, NASCAR, to author (Sept. 17, 1990) (on file with Hastings Int'l & Comp. L Rev.) ("We have not had occasion to assess the long term impacts of a partial or total television advertising ban at this point.").

211. TURNER, supra note 45, at 15. See also Ingram, supra note 38, at 51.

212. Phillips, supra note 143, at 49.

213. Id.

214. Wrong, supra note 14.

215. Id. (quoting Marc Fontan).

216. Id.

217. TURNER, supra note 45, at 15.
dent of the International Motor Sports Federation (FISA), the sanction-
ing body for Formula One, declared that the French government would
have to make up the shortfall if tobacco sponsorship ends.218 Government
sponsorship is not a likely solution in the United States.219

Despite the anguished cries of disaster from Europe, it is not likely
that an end of tobacco sponsorship would bring with it an end to motor-
sports. Motorsports were popular long before the ban on televised ciga-
rette advertising brought on the current level of tobacco company involvement in motorsports.220 This popularity will commend the sport
to sponsors even should tobacco be completely barred from participation.

VII. ALTERNATIVES TO A TOTAL BAN ON
ADVERTISING IN THE UNITED STATES

There are several alternatives that would make a total ban on to-
acco company sports sponsorship unnecessary. Members of Congress
have proposed that the United States require warnings on all broadcast
and print advertising of alcohol and tobacco products similar to those
required in Victoria.221 A spokesman for the United States Beer Institute
opposed this proposal saying, “Taken loosely, it means there would have
to be warning messages on anything from sports cars to golf balls [that
appear on television broadcasts]. It’s very unlikely that our members
would continue to do any broadcast advertising.”222 Likewise, Tom
Lauria of the Tobacco Institute opposed the proposal saying “Nobody is
going to pay for a 30-second advertisement if they have to do a 15-second

218. Wrong, supra note 14.

219. Although governmental support is not likely, some governmental involvement is pos-
sible. The United States Postal Service is currently a sponsor of the 1992 Olympics. Michael
Otten, Runners Love Carrying a Torch: Journey of 1,700 Miles Begins This Weekend on Capitol
Steps, SACRAMENTO UNION, June 12, 1991 (reprinted in UNITED STATES POSTAL SERVICE,
DAILY NEWS DIGEST (June 25, 1991)). At the 1991 Daytona 500 each of the five branches of
the United States military was represented by a car in the race. Beth Tuschk & Jerry Potter,
1C. This sponsorship was more apparent than real. NASCAR, Daytona International Speed-
way, and R.J. Reynolds Tobacco provided the financing for “Operation Desert Support” or-
organized by driver Greg Sacks. Id. The participants were Greg Sacks in a blue and white
Chevrolet representing the Navy; Buddy Baker in a red and blue Pontiac representing the
Marines; Mickey Gibbs in a silver, blue, and red Pontiac representing the Air Force; Dave
Marcis in a blue, orange, and white Chevrolet representing the Coast Guard; and Alan
Kulwicki in a black and desert camouflage colored Ford representing the Army. Id.

220. The seventy-sixth running of the Indianapolis 500 will be held on Memorial Day, May

221. O'Donnell, supra note 81, at 52.

222. Id.
warning." 223

A restriction on the amount of time that tobacco company sponsorship messages can be seen on television is an approach which would reduce the pervasiveness of the sponsorship on television while still allowing the message to be presented to those who are present at the event. Those present at the event can avoid looking at the tobacco company sponsorship material, while those watching on television have only the view provided by the broadcaster.

Counter-advertising is another alternative to a total ban on sponsorship. Counter-advertising involves running anti-smoking advertisements to counter the effect of cigarette advertisements. In 1967 the F.C.C. instituted a policy requiring that television stations provide free air time to anti-smoking proponents under the "fairness doctrine." 224 This counter-advertising policy was approved by the courts in Banzhaf v. F.C.C. 225 In Banzhaf, the Court of Appeals for the District of Columbia Circuit held that "cigarette advertising in general,... necessarily conveys the controversial view that smoking is a good thing," 226 and that therefore, the F.C.C. had the power to require broadcasters to "devote a significant amount of broadcast time to presenting the case against cigarette smoking." 227 The F.C.C. ruling provided for approximately one anti-smoking commercial for every six cigarette commercials shown. 228 These counter-advertisements were very successful in reducing the numbers of people smoking. 229 In the wake of this counter-advertising, the cigarette

223. Id.
224. Garrison, supra note 130, at 173. The fairness doctrine "imposes affirmative responsibilities on the broadcaster to provide coverage of issues of public importance which is adequate and which fairly reflects differing viewpoints." BLACK'S LAW DICTIONARY 537 (5th ed. 1979). The requirement of "fair and balanced presentation of controversial issues of public importance" predates the existence of the F.C.C.. Banzhaf v. F.C.C., 405 F.2d 1082, 1092 n.34 (D.C. Cir. 1968), cert. denied sub nom., Tobacco Institute, Inc. v. F.C.C., 396 U.S. 842 (1969). The F.C.C. has abandoned the fairness doctrine as no longer serving the public interest. This abandonment was affirmed by the D.C. Circuit in Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir. 1989).
225. 405 F.2d 1082.
226. Id. at 1087 (emphasis in original).
227. Id. at 1085.
228. Thain, supra note 93, at 91.
229. Capital Broadcasting v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (Wright, J., dissenting) ("In the immediate wake of Banzhaf, the broadcast media were flooded with exceedingly effective anti-smoking commercials. For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption. The Banzhaf advertising . . . cost the cigarette companies customers . . . .") Id. at 587-88 (citation omitted)). In April 1990, California began to sponsor anti-smoking public service announcements to favorable public response. Luken Lights Up Hearing, supra note 9, at 55 (citing an eight-to-one favorable response to the advertisements).
companies suggested that the Senate "draft legislation permitting the companies to remove their advertisements from the air." Some have speculated that the tobacco industry agreed to the 1969 ban on broadcast advertisements to do away with the counter-advertisements required by Banzhaf. The practical effect of the Congressional ban on radio and television advertising was to eliminate the counter-advertisements.

Although required time restrictions, counter-advertising, and health warnings could cause a withdrawal of tobacco company sponsorships from sports, they would also reduce the pervasiveness of tobacco sponsorship without the extensive restrictions on commercial speech proposed by H.R. 5041 and H.R. 1250.

Because of the Supreme Court's willingness to allow restrictions on commercial speech as exemplified in Fox, which only required that the fit between the legislature's means and ends be "reasonable," it is likely that an advertising ban would satisfy the fourth prong of Central Hudson and thus pass constitutional muster. The presence of alternatives to a total ban is not likely to affect this analysis. According to Posadas, a ban on advertising is not too restrictive even when the same end can be achieved through counter-advertising. In Posadas, the Supreme Court deferred to the legislature's determination that a counter-speech policy would not be as effective as a restriction on advertising.

It seems likely that the Supreme Court would also defer to a legislative judgment that time restrictions, counter-advertising, and health warnings could not replace a total ban on sponsorship. Nevertheless, should the Court determine that the availability of these alternatives

233. Requiring warnings and counter-advertisements may very well not cause tobacco companies to stop sponsoring motorsports. Phillip Morris has agreed to place anti-smoking advertisements in the New York area in connection with its sponsorship of the Marlboro Grand Prix Indy car race. Anti-Smoking Ads, WALL ST. J., Jan. 8, 1992, at B3. Phillip Morris stated that these advertisements would be 30% of the total Marlboro advertising used in the New York area before the race. Id. Marlboro has also stated that it will run ads warning children not to smoke in the program for the Long Beach Grand Prix Indy Car race. Horovitz, supra note 38. The effectiveness of cigarette company sponsored counter-advertising has been questioned by Joseph W. Chernor of SmokeFree Educational Services who stated that, "Trusting Phillip Morris to educate our children about the dangers of cigarettes is like trusting the Ku Klux Klan to educate young people about racial harmony." Id.
236. Id.
makes a total ban unreasonable, the fourth prong of *Central Hudson* will not be satisfied and so a ban would not meet the constitutional require-
ments of the First Amendment.

**VIII. PROPOSAL**

Even should the Court hold that a total ban is constitutional, such a ban would not be the best approach to dealing with the problem. A ban on tobacco company sports sponsorship is not needed because of the availability of alternative means to reduce tobacco addiction without the restrictions on commercial speech such a ban would cause.

First, Congress should pass a law, similar to that of Victoria, Aus-
tralia, requiring that all tobacco sponsorship materials—race cars, hel-
mets, and trackside billboards—carry warning labels where the word "WARNING" is as visible during the race as the name of the tobacco product being advertised. Although the tobacco companies would likely oppose this warning label, as they did in Victoria when the warning was required there,\(^\text{237}\) it seems probable that the tobacco companies would display warnings rather than be banned from sponsorship of motorsports.

Second, Congress should also limit the percentage of time that to-
bacco company names and logos can be show on television during a race. The main effect of the German and Austrian laws, as well as the British Voluntary Agreement, has been to reduce the visibility of tobacco com-
pany advertising while still allowing the tobacco companies to participate in motorsports. Tobacco company names and logos should not be recogn-
izable on camera during more than a given percentage of the race such as fifteen percent.

Third, Congress should require mandatory anti-smoking commer-
cials during televised events with significant tobacco company involve-
ment. The tobacco company involvement could be measured by the amount of time tobacco company names and logos are visible during the race. The greater the percentage of time tobacco company names and logos are visible, the more counter-advertising required. Thus, under this proposal, a Formula One race with large amounts of Marlboro and Camel cigarette involvement would be required to show more anti-smok-
ing commercials than an amateur sports car race where one driver might have a cigarette company sponsor.

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\(^{\text{237}}\) Scott, *supra* note 196, at 6.
IX. CONCLUSION

Motorsports give pleasure to millions of spectators in the United States and throughout the world. Tobacco is a legal product which kills millions of people throughout the world. Tobacco company sponsorship of motorsports links the pleasure and the death. Tobacco sponsorship of motorsports is one of many ways that tobacco companies advertise their products. Sponsorship allows the companies to circumvent the ban on television advertising of tobacco products. The proponents of a ban on tobacco sponsorship contend that this sponsorship is aimed directly at teenagers who are the group most likely to begin smoking. The tobacco companies dispute this contention and state that their advertising is aimed solely at people who already smoke as a way to encourage smokers to change brands.

Tobacco sponsorship benefits motorsports as well as the tobacco companies. The tobacco companies provide millions of dollars in prize money and in support of the teams in motorsports. This money has brought tremendous technological development in its wake. Without this money, most race teams will be unable to continue their present level of expenditure on equipment and personnel. It would likely be many years before motorsports would recover from a complete loss of tobacco company sponsorship money.

There have been several proposals to ban tobacco sports sponsorships in the United States and other countries. These proposals typically deny tobacco companies the right to sponsor sports or cultural activities in the name of cigarette brands, but allow tobacco companies to sponsor activities under their corporation's name.

The tobacco companies contend that these bans would violate their First Amendment right to freedom of speech. The constitutionality of the proposed bans must be gauged by the less protective standards afforded to commercial speech regulation. The test for the validity of a regulation restricting commercial speech is the four pronged test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.* Given the current interpretation of this standard, a complete ban on sports sponsorship is likely to be found constitutional.

However, even if a ban is constitutional, it is not the best solution to the problem. There are several less restrictive alternatives available which should be pursued before a complete ban is enacted. These alternatives include restrictions on the amount of time tobacco company logos can be shown during races, requiring counter-advertising to be
shown during televised coverage of events with a significant level of tobacco company sponsorship, and mandatory display of warning labels on cars and trackside billboards. When the uncertainty of any benefit from the ban is weighed against the restriction on the speech of the tobacco companies, and the damage to motorsports, these less restrictive alternatives must be tried before the United States enacts a complete ban.