Double-edged vision of freedom - The traditional ban on political advertising is facing a legal challenge. But would this erode freedom of speech? asks Patrick Moloney

Campaigning charities and political action groups await the result of their daring application to the High Court to outlaw the statutory ban on broadcast political advertising (Animal Defenders International v Dept for Culture Media and Sport, July 2006). They have invoked European human rights law to set aside a British media tradition as old as commercial television. But if they succeed, will they fall foul of an even higher law – the law of unintended consequences?

The ban, currently located in the Communications Act 2003, prohibits UK television and radio from carrying any advertising, from whatever source, aimed at influencing elections, referendums, the policies of local, national and international public bodies, or, most wide-ranging of all, 'public opinion on a matter of public controversy'.

In seeking a declaration of incompatibility under the Human Rights Act, the campaigners rely on two arguments of almost irresistible logical force.

First, what could be a clearer infringement of the right of free expression (article 10) than a restriction targeted expressly at the Holy Grail of free speech – democratic political expression on a matter of public interest?

Second, what tenable justification can there be for such a ban applying to the broadcast media alone, when the print media face almost no such regulation?

These types of argument prevailed in the European Court of Human Rights in a recent and similar case involving animal rights activists in Switzerland; they are likely to carry great weight in the High Court too.

But, if one looks not to Europe but to the US, there are two pragmatic counter-arguments, of a different nature but more compelling force, for maintaining the status quo in the interests of free speech itself.

One rests on crude equations, that freedom of speech includes freedom for the opposing view, and that once the opportunity for expression can be sold it is likely to go to the highest bidder. However successful the campaigners' fundraising, their resources will never equal those of the multinationals, and each of their advertisements will be met by five coming the other way.

The other argument relates to broadcasting culture. Lord Reith's vision, of public service broadcasting as something higher than commerce and entertainment, has not been confined to the BBC. It strongly influenced the founders of the original ITV stations. It persists even today in the principle that British commercial broadcasting must, like the BBC, remain politically neutral, both in its ownership and its editorial policies.

Like anti-monopoly law, the culture operates on the premise that in the long run the absolutely unregulated sale of access to the media would limit, not broaden, freedom of expression as a whole.

The result has been to give campaigners almost unlimited free access to the airwaves, in editorial time, whenever their special interests are being debated.

But if the fundamentalist interpretation of 'freedom of speech' requires that anyone who can afford it be permitted to buy two minutes of commercial airtime, why prevent them from buying the whole channel, and using it (like a newspaper) as a vehicle for the 'free' expression of the proprietor's special vision?

Will the court action be the campaigners' Pearl Harbor – a brilliant tactical victory, opening the way to a strategic defeat?

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