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FOCUS

CORPORATE GOVERNANCE FROM A COMPARATIVE PERSPECTIVE

COMMUNICATION STRATEGIES ON SOCIAL CORPORATE RESPONSIBILITY: THE ROLE OF FREEDOM OF EXPRESSION

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The political and the economic spheres increasingly overlap. Consumption is viewed not only as an economic act, but also as an act of political and moral significance. Due to the blurring of the commercial and the political spheres, consumers use their purchasing power as a carrot and a stick for corporations to comply with corporate social responsibility (CSR) standards. As a consequence, corporate communication strategies tend to highlight commitment to CSR standards, portraying companies as "good corporate citizens." Conversely, other stakeholders expose unethical business practices so as to induce corporate change. Both sides tend to invoke freedom of expression with a view to opposing limitations on their communication strategies. Taking two well-known examples as a starting point, the present article explores the role of freedom of expression as a means to incite corporate actors to both adopt and comply with CSR standards from a comparative perspective. Using an economic framework, it argues that non-commercial expression critical of corporate practices deserves a higher level of protection than corporate communication strategies.

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INTRODUCTION

Corporations' communication strategies increasingly highlight compliance with corporate social responsibility (CSR) standards in order to attract and retain customers. Conversely, other stakeholders resort to naming and shaming to monitor compliance with CSR standards and to induce corporate change.[1] Both sides tend to invoke the right to freedom of expression[2] with a view to opposing limitations on their communication strategies. The present paper explores the role of free speech as a means to both promote and enforce CSR standards. The main question examined is the following: What level of protection should be afforded to different types of expression related to CSR standards?

The paper is structured as follows. The first part briefly sets out the broader context in which communication strategies involving CSR standards take place. Against this backdrop, the second part, by way of example, introduces two prominent cases involving freedom of expression with respect to corporate or commercial practices. They are discussed in a comparative perspective so as to highlight different approaches and outcomes in adjudicating free speech claims related to CSR. The third part builds on the case law, drawing some more general insights about the role of freedom of expression as a means to further compliance with CSR standards. The main claim advanced in this paper, which is defended mainly based on economic analysis, is that corporate expression involving responsible business practices ought to be granted a lower level of protection than critical statements made by civil society about corporations.

I. THE CONTEXT OF COMMUNICATION STRATEGIES ON CSR STANDARDS

Traditionally, freedom of expression has mainly been thought of as a right relating to the political, social, or moral sphere. First vindicated to oppose censorship aimed at

[1] For a well-known example, see the Hall of Shame, exposing corporate bad practices at http://publiceye.ch/de/hall-of-shame/(last visited Sep. 27, 2014).

[2] The terms "freedom of expression" (prevalent in Europe and in Canada) and "free speech" (prevalent in the US) will be used interchangeably.

enforcing religious orthodoxy,[3] freedom of expression has come to be cherished as a right "indispensable to the discovery and spread of political truth,"[4] forming "one of the essential foundations"[5] of a democratic society and "one of the basic conditions for its progress and for the development of every man."[6] By contrast, the commercial sphere and consumer choice were not viewed as primarily raising free speech concerns. In the same vein, purchasing decisions and consumption were mainly looked upon as acts of economic significance, largely based on intrinsic product characteristics (*e.g.* quality) and price.

Increasingly, however, consumption decisions have been politicised.[7] Consumers regard many purchasing decisions not merely as economic acts aimed at satisfying subjective preferences; instead, they view consumption itself as an act of political or moral significance.[8] Consumers may, for example, consider it important to buy products made according to certain environmental or labor standards. More generally, they may favor goods or services produced by a corporation perceived as a "good corporate citizen,"[9] acting responsibly towards society as a whole. These consumers base their purchasing decisions not primarily on intrinsic product characteristics but on how the product was made. They have "preferences for processes"[10] being concerned not only with product standards but also with process and production methods (so called PPMs). These "preferences for processes" frequently reflect visions of justice and fairness traditionally debated in political fora.

Globalisation is among the main factors that have contributed to the politicisation of consumption decisions. In a globalised economy, with corporations operating across different countries and able to delocalise, citizens' ability to both influence and control corporate power through domestic and democratic channels has been weakened. At the

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[3] See for instances the famous defenses of freedom of thought and discussion by John Milton, *Areopagitica. A Speech for The Liberty of Unlicensed Printing to the Parliament of England*, first published in 1644, available at http://www.gutenberg.org/files/608/608-h/608-h.htm (last visited Sep. 27, 2014) and John Stuart Mill, *On Liberty, Chapter II*, first published in 1859, available at http://www.bartleby.com/130/ (last visited Sep. 27, 2014).

[4] United States Supreme Court, *Whitney vs California*, 274 U.S. 357 (1927), Brandeis J. concurring.

[5] ECtHR, App. No. 5493/72, Dec. 7, 1976, *Handyside vs United Kingdom*, para. 49.

[6] Id.

[7] The following section draws on Maya Hertig Randall, *Human Rights within a Multilayered Constitution: The Example of Freedom of Expression and the WTO*, 16 Max Planck Yearbook of United Nations law 217, (2012).

[8] See *e.g.* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 Harvard Law Review 525 (2004). For a more general analysis of the evolution of consumption, see Roger Mason, *The Economics of Conspicuous Consumption: Theory and Thought Since 1700*, Edward Elgar (Northampton), (1998).

[9] For a comprehensive study of corporate citizenship, see Andreas Georg Scherer, Guido Palazzo eds. *Handbook of Research on Global Corporate Citizenship*, Edward Elgar (Northampton), (2008).

[10] See Kysar, fn. 8 at 525.

same time, tackling environmental and social standards on the global level has turned out to be virtually intractable.[11] Within the WTO, for instance, linking trade with core labor rights has been discussed for almost two decades. The linkage debate opposes two camps: those arguing that trade liberalisation, which is divorced from human rights concerns, favors a race to the bottom, and those rejecting attempts to define and/or enforce minimal labor rules within the WTO as ill-disguised protectionism.[12] The difficulties to break this stalemate are highlighted on the webpage of the WTO, which refers to the question of international enforcement of labor standards as "a minefield."[13] In this context, citizens use their purchasing power as a carrot and a stick to incite economic actors to act in a socially responsible way and to satisfy certain minimal standards. Put differently, the politicization of consumption decisions fulfils a compensatory function. As citizens cannot influence PPMs in other jurisdictions effectively, they vote with their dollars and attempt to influence corporate behaviour in an indirect way.[14]

The increasing politicization of consumers' purchasing decision illustrates a more general trend: the growing overlap and interdependence between the political and the commercial spheres. As is well known, globalization has been a context favorable to the rise of big corporations, the financial assets of which may exceed those of small or developing countries, and enables these corporations to exert greater influence on the political process.[15] Their effective oversight is essential for society as a whole: Business practices of multinational companies have an impact far beyond the commercial sphere, affecting the financial system, the labor market, the social security systems and ultimately the taxpayer. The social, economic, and environmental impact of corporations often calls for political action, making speech on corporate issues clearly a matter of public concern.

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[11] For an overview of the debates relating to the linkage of international trade and other issues, see for instance Jose E. Alvarez, *Symposium: The Boundaries of the WTO*, 96(1) American Journal of International Law 1, (2002); Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals*, Cambridge University Press (Cambridge), (2011).

[12] For studies favorable to linking trade and labor rights, see *e.g.* Christine Kaufmann, *Globalization and Labor Rights: The Conflicting Relationship between Core Labor Rights and International Economic Institutions*, Hart Publishing (Oxford), (2007); *Trade and Labor Standards*, in Rüdiger Wolfrum eds. *Max Planck Encyclopedia of Public International Law*, Oxford University Press (Oxford), at 988–996 (2011); Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 Journal of World Trade Law, 61–78 (1986); Robert Howse, Brian Langille & Julien Burda, *The World Trade Organization and Labor Rights: Man Bites Dog*, in Virginia A. Leary & Daniel Warner eds. *Social Issues, Globalisation and International Institutions: Labor Rights and the EU, ILO, OECD and WTO*, Martinus Nijhoff (Leiden), at 125–156 (2006); for a contrary view, see Amit Dasgupta, *Labor Standards and WTO: A New Form of Protectionism*, 1(2) South Asia Economic Journal, 113–129 (2000); Jagdish Bhagwati, *Free Trade and Labor*, available at http://www.columbia.edu/~jb38/papers/pdf/ft_lab.pdf (last visited Sep. 24, 2014).

[13] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited Sep. 27, 2014).

[14] See Kysar, fn. 8 at 525; Alfred C. Aman, *The Democracy Deficit: Taming Globalization Through Law Reform*, New York University Press (New York), at 134 (2004).

[15] See *e.g.* D. Mark Jackson, *Note: The Corporate Defamation Plaintiff in the Era of Slapps: Revisiting New York Times vs Sullivan*, 9 William & Mary Bill of Rights Journal, 492 (2001).

The Canadian Supreme Court eloquently highlighted the blurring of the commercial and the political spheres in a judgment handed down in 2002.[16] The case *R. vs Guignard* involved a discontented customer who placed a sign on a building he owned, expressing his dissatisfaction with an insurance company. Charged and convicted of contravening a municipal by-law, which prohibited the erection of advertizing signs outside an industrial area, he appealed to the Supreme Court invoking a breach of his right to freedom of expression. The Court stressed that the right to freedom of expression, as protected under the Canadian Charter of fundamental rights, covered both the constitutional right of corporations to engage in commercial speech (*e.g.* commercial advertizing)[17] and consumers' right to warn other consumers against the practices of a business. Highlighting the "tremendous importance of economic activity" in contemporary society, the Court stressed the social importance of consumers' "counter-advertizing," "even beyond the merely commercial sphere."[18] The Canadian Supreme Court Justices also emphasized the increasing overlap between the commercial and the political spheres, stating that:

> *"Counter-advertizing" is not merely a reaction to commercial speech, and is not a form of expression derived from commercial speech. Rather, it is a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens."*[19]

As the Court points out, the role of consumers and citizens are not clinically separated in a modern market economy. This finding is of particular relevance when expression relates to CSR standards due to the far reaching politicisation of consumption in that field. Two prominent cases underscore this point and help to exemplify different ways, in which courts strike a balance between freedom of expression on one hand and competing public or private interests, on the other.

II. TWO PROMINENT EXAMPLES

As the Canadian Supreme Court pointed out in *R. vs Guignard*, communication that is relevant to the purchasing decisions of the "citizen-consumer" can be provided both by corporations ("advertizing") and other stakeholders, such as consumers ("counter-advertizing"). For this reason, the following section discusses both forms of

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[16] *R. vs Guignard*, (2002) 1 S.C.R. 472.

[17] The Supreme Court of Canada extended the reach of freedom of expression to commercial speech in *Ford vs Quebec (Attorney General)*, (1988) 2 S.C.R. 712; for subsequent commercial speech cases, see for instance *Rocket vs Royal College of Dental Surgeons of Ontario*, (1990) 2 S.C.R. 232 (concerning advertizing by dentists); *RJR-MacDonald Inc. vs Canada (Attorney General)*, (1995) 3 S.C.R 199 (concerning tobacco advertizing) and *Irwin Toy Ltd. vs Quebec (Attorney General)*, (1989) 1 S.C.R. 927 (concerning advertizing targeting children).

[18] *R. vs Guignard*, fn. 16 para. 23.

[19] Id. para. 24.

communication. It outlines first a prominent "counter-advertizing" judgment handed down by the European Court of Human Rights (hereafter also "ECtHR" or "the Court") and thereafter a well-known case involving corporate expression on CSR standards decided in the U.S.

A . The Steel and Morris ("McLibel") Case

1. The Facts. — The Steel and Morris case (also known as the "McLibel" litigation)[20] arose in the context of a campaign launched in 1986 by a small local environmental campaign group London Greenpeace, unconnected with the Greenpeace International. As part of the campaign, a six-page leaflet entitled "What's Wrong with McDonalds" was distributed. The pamphlet contained a broad range of sharply worded allegations, charging the corporation, amongst other, with being complicit in Third World starvation, destroying the environment, exploiting children through commercial advertizing, banning trade unions and paying unfair wages, engaging in cruel practices of raising and slaughtering animals and selling junk food detrimental to public health. Confronted with these accusations, the McDonald's corporation infiltrated London Greenpeace and brought libel proceedings against several activists who had participated in handing out the pamphlet, including Ms. Steel and Mr. Morris, both either unemployed or earning an extremely low wage during the proceedings.

The libel suit against Ms. Steel and Mr. Morris turned into the longest trial (either civil or criminal) in English legal history. The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing extended over 23 days. The factual allegations that the applicants had to prove were highly complex, involving 40,000 pages of documentary evidence and the hearing 130 oral witnesses. Despite the length and complexity of the trial and the applicants' financial condition, they were refused legal aid and defended themselves during the trial with limited help from *pro bono* lawyers.

Having concluded that some of the vigorous attacks published in the pamphlet were false, while others were true, the first instance judge awarded McDonalds' GBP60,000 damages for libel, subsequently reduced on appeal to GBP40,000.

Failing to obtain redress on the domestic level, Ms. Steel and Mr. Morris filed an application with the ECtHR, alleging a violation of their right to a fair trial [Article 6 of the European Convention on Human Rights[21] (ECHR)] and their right to freedom of

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[20] For the European Court of Human Right's judgment, see ECtHR, App. No. 68416/01, Feb. 15, 2005, *Steel and Morris vs the United Kingdom*. The outline of the facts below is based on this judgment. For information of the background of the case and access to the rulings of the British courts, including court transcripts, available at http://www.mcspotlight.org/case/index.html (last visited Oct. 10, 2014).

[21] Convention for the Protection of Human Rights and Fundamental Freedoms of Nov. 4, 1950, ETS No. 005.

expression, enshrined in Article 10 ECHR.

2. The Judgment of the European Court of Human Rights. — What level of protection should speech denouncing unethical corporate behaviour be afforded? The Court's judgment contains interesting insights on this issue. Having acknowledged that the interference with the applicants' right to freedom of expression was prescribed by law (*in casu* the law of defamation) and pursued a legitimate aim, consisting in the protection of the right of others (*e.g.* McDonald's right to reputation), the Court's reasoning focused on whether the restriction of Article 10 ECHR was proportionate to the aim pursued. When examining the proportionality of the interference with freedom of expression, the Court analysed whether the domestic courts had struck a fair balance between the competing interests at stake.

The balancing approach lead the Court to reject the applicants' claim that speech critical of multinational corporations should be granted immunity. In the ECtHR's view, depriving multinational companies of a right to defend themselves against defamatory statements would fail to acknowledge the competing interests against which freedom of expression needed to be balanced. These interests included the protection of commercial success and viability of corporations, "for the benefit of shareholders and employees, but also for the wider economic good."[22] For the same reasons, the ECtHR found that it was not incompatible with Article 10 ECHR to place the burden to prove the truth of defamatory statements on the defendants.[23]

Although the Court refused to lay down a bright line rule in favor of freedom of expression and to call into question the domestic rules on defamation, its reasoning shows that the case at hand did not involve a clash of interests of equal weight: At the outset of the balancing process, the thumb presses on one side of the scales, tilting the balance in favor of freedom of expression. Identifying the weight of the interests underlying freedom of expression in the present case, the Court noted that:

> *[T]he leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertizing and the sale of unhealthy food. The Court has long held that "political expression," including expression on matters of public interest and concern, requires a high level of protection under Article 10 (....)*[24]

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[22] See *Steel and Morris*, fn. 20 para. 94; the Court confirmed this reasoning in subsequent case law, adding that "(…) there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension." (see *e.g.* ECtHR, App. No 23954/10, 19 Jul. 2011, *Uj vs Hungary*, para. 22).

[23] Id. para. 93.

[24] See Steel and Morris, fn. 20, para. 88, emphasis added.

Similar to the Canadian Supreme Court, the ECtHR's reasoning recognizes the overlap between the commercial and the political spheres, classifying "counter-advertizing" related to CSR standards as expression on matters of public concern. This reasoning is consistent with previous judgments, in which the Court afforded a high level of protection to speech critical of market players. The ECtHR considered, for instance, that speech on matters of public concern was at stake in cases involving information about the remuneration of the chairman of a big corporation in an ongoing labor dispute,[25] speech criticising commercial seal hunting methods,[26] the limited opening times of veterinary practices,[27] the complications and lack of care after cosmetic surgery carried out by a renowned physician,[28] a TV spot exhorting the public to consume less meat for the sake of animal protection,[29] and claims made by a scientist alleging the health hazard of microwaved food.[30]

Having recognized in *Steel and Morris vs UK* "the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities,"[31] the Court attached considerable importance to the need to check corporate power, holding that the limits of acceptable criticism were more lenient in the case of large public companies.[32]

The ECtHR was, moreover, sensitive to the fact that the effectiveness of freedom of expression and the impact of speech on the "free marketplace of ideas" are dependent on existing power structures. Rejecting the UK government's argument, according to which a high level of protection should be reserved to journalists, the Court held that

> *[E]ven small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.*[33]

As the Court recognized in later cases, campaign groups act as "social watchdogs."[34]

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[25] ECtHR (GC), App. No. 29183, Jan. 21, 1999, *Fressoz and Roire vs France*.

[26] ECtHR, App. No. 21980/93, May 20, 1999, *Bladet Tromso and Stensaas vs Norway*.

[27] ECtHR, App. No. 8734/79, Mar. 25, 1985, *Barthold vs Germany*.

[28] ECtHR, App. No. 26132/95, May 2, 2000, *Bergens Tidende vs Norway*.

[29] ECtHR, App. No. 24699/94, Jun. 28, 2001, *Verein gegen Tierfabriken Schweiz (VgT) vs Switzerland*; ECtHR (GC), App. No. 32772/02, Jun. 30, 2009, *Verein gegen Tierfabriken Schweiz (VgT) vs Switzerland* (No. 2).

[30] ECtHR, App. No. 25181/94, Aug. 25, 1998, *Hertel vs Switzerland.*

[31] See Steel and Morris, fn. 20 para. 95.

[32] Id. para. 94.

[33] See Steel and Morris, fn. 20 para. 89.

[34] See ECtHR, App. No. 37374/05, Apr. 14, 2009, *Társaság a Szabadságjogokért vs Hungary*, para. 27; ECtHR (GC), App. No. 48876/08, Apr. 22, 2013, *Animal Defenders International vs the United Kingdom*, para. 103; ECtHR, No. 39534/07, Nov. 28, 2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes vs Austria*, para. 34.

They play an important role in stimulating public discussions. For this reason, the chilling effect[35] of measures restricting freedom of expression is an important factor to be considered when weighing and balancing the competing interests.[36]

Turning to the power relations between the parties in the "Mc Libel" litigation, the Court found that the denial of legal aid had resulted in an "unacceptable inequality of arms"[37] between Ms. Steel and Mr. Morris, on one hand, and McDonald's, on the other hand. This inequality deprived the applicants of the opportunity to defend themselves effectively in the defamation proceedings, resulting in a breach of Article 6 ECHR. It also violated Article 10 ECHR: The Court held that if states provide corporations with legal remedies to defend themselves against defamatory statements, "it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for."[38]

The inequality of arms in the defamation proceedings was not the only factor justifying the finding of a violation of freedom of expression. The Court also considered that the amount of damages awarded to McDonald's failed to strike a fair balance and was thus disproportionate. In reaching this finding, the Court was again sensitive to the real power relations between the parties:

> *The Court notes on the one hand that the sums eventually awarded in the present case…although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants. While accepting, on the other hand, that the statements in the leaflet which were found to be untrue contained serious allegations, the Court observes that not only were the plaintiffs large and powerful corporate entities but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication of the "several thousand" copies of the leaflets found by the trial judge to have been distributed….*[39]

It is interesting to note that the Court found a violation of freedom of expression, although some of the allegations contained in the leaflet were found to be untrue. To what

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[35] The U.S. Supreme Court eloquently stressed the need to take into account the chilling-effect when assessing limitations of freedom of expression in *New York Times vs Sullivan*, 376 U.S. 254, 272 & 279 (1964) (The Court underlined the need that free speech be granted a "breathing-space" to avoid self-censorship, detrimental to the dissemination of truthful statements. Strict defamation rules entail the risk that would-be critics…may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone…." The rule thus dampens the vigor and limits the variety of public debate.")

[36] See Steel and Morris, fn. 20 para. 95.

[37] Id. para. 72.

[38] Id. para. 95.

[39] Id. para. 96, emphasis added.

extent should false factual statements be protected if the speaker is not an NGO but the corporation disseminating information about its compliance with CSR standards? This question was at the heart of the *Nike vs Kasky* litigation.[40]

B. The Nike vs Kasky Case

1. The Facts. — The *Nike vs Kasky* case arose in a context of lively debates on globalisation and labor standards.[41] Beginning in 1996, Nike had become the target of fierce criticism, charging the corporation with maintaining dangerously unsafe factories as well as mistreating and underpaying workers in its Southeast Asian factories. As part of a PR-campaign, Nike issued rebuttals to the allegations that it was selling sportswear produced in "sweatshops." The channels it used were not traditional commercial advertizing but press releases, and letters to newspapers around the country and to officers of national universities.

Considering that the rebuttals contained untruthful or misleading allegations, a Californian citizen, Kasky, initiated proceeding against Nike under California Unfair Competition Law and False Advertizing Law. Nike filed a demurrer to the complaint, arguing that the lawsuit was barred by the right to free speech protected by the First Amendment, as the contested statements were not commercial advertizing but speech on a matter of public concern. Nike's view prevailed in the first instance trial and on appeal. The California Supreme Court reversed the ruling in a four to three decision, confirming Kasky's view. It held that Nike's messages were commercial expression, as they were issued by a commercial speaker to a commercial audience and made factual representations about the corporation's business operations. Following Nike's appeal, the U.S. Supreme Court dismissed the writ of certiorari after hearing oral argument.[42] The Supreme Court had received 34 briefs on the merits, including 31 amicus briefs, which illustrates the vast controversy the *Nike vs Kasky* litigation had spawned.[43]

2. The Legal Controversy. — The *Nike vs Kasky* case confronted the courts and the legal community squarely with the politicisation of consumption and the blurring of the

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[40] Much background material (legal briefs of the parties, comments in the press, information on the sweatshop controversy) is available at http://reclaimdemocracy.org/nike/ (last visited Sep. 27, 2014).

[41] For a succinct overview of the facts, the context and the proceedings of the *Nike vs Kasky* case, see *e.g.* Tamara Piety, *Brandishing the First Amendment: Commercial Expression in America*, University of Michigan Press (Ann Arbor), at 4–9 (2012).

[42] U.S. Supreme Court, *Nike, Inc. vs Kasky*, 539 U.S. 654 (2003).

[43] For studies of the legal issues of the *Nike vs Kasky* case, see *e.g.* Ronald K. L. & David M. Skover, *Symposium: Nike vs Kasky and the Modern Commercial Speech Doctrine*, 54 Case Western Reserve Law Review, 965 (2004); for a good overview of the legal controversy, see Ronald Collins, Mark Lopez & Tamara Piety, et al, *Corporations and Commercial Speech*, 30 Seattle University Law Review, 895 (2007); for an analysis from the point of view of international human rights, see Sarah H. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart (Oxford, Portland Oregon), at 107 (2004).

commercial and the political spheres. In the words of the Supreme Court's majority opinion, Nike's speech "represents a blending of commercial speech, non-commercial speech and debate on an issue of public importance."[44] The "semi-commercial"[45] nature of the expression raises difficulties under the First Amendment doctrine:[46] in contrast with the approach adopted by the European Court of Human Rights, the Supreme Court does not decide free speech issues based on a proportionality analysis, which entails weighing and balancing the countervailing interests at stake on a case-by-case basis.[47] To this standard-based approach, which is prevalent in many European jurisdictions[48] and also in Canada[49], the Supreme Court prefers a rule-based approach.[50] The categorisation of expression is a central element of this methodology. Under this approach, speech on issues of public concern is afforded the highest level of protection, which makes it virtually immune from restrictions that are based on the content of the message. Content-based measures abridging political expression, broadly defined, are subject to strict scrutiny, described as being "strict in theory, fatal in fact." Commercial speech, by contrast, is not considered as expression lying at the heart of the First Amendment.[51] It is afforded a lower level of protection, with restrictions being subject to intermediate

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[44] *Nike vs Kasky*, 539 U.S. 654, 663 (2003).

[45] Id.

[46] Many U.S. commentators have focused on the question of whether Nike's speech ought to be classified as commercial or non-commercial expression; see for instance Thomas C. Goldstein, *Nike vs Kasky and the Definition of "Commercial Speech*", Cato Supreme Court Review 62–79 (2002–2003); Catherine Fisk & Erwin Chemerinsky, W*hat Is Commercial Speech? — The Issue Not Decided in* Nike v. Kasky, 54(4) Case Western Reserve Law Review, 1143 (2004).

[47] Regarding the balancing approach adopted by the ECtHR, see *e.g.* Paul Mahoney, *Emergence of a European Conception of Freedom of Speech*, in Peter B.H. Birks eds. *Pressing Problems in the Law*, Oxford University Press (Oxford), at 150 (1995) ("The Strasbourg Court has recognized that freedom of expression involves a balance of interests between the liberty of the individual to impart and receive information, on the one hand, and the need to protect the community and other individuals against the perceived harm that be inflicted by speech the other hand.")

[48] See the limitation clause contained in Art. 52 para. 1 of the Charter of Fundamental Rights of the European Union of Dec. 14, 2007, which can be viewed as codifying constitutional traditions common to the Member States: "Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of *proportionality*, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." (emphasis added).

[49] The Canadian Supreme Court examines limitations of freedom of expression applying the so-called Oakes Test, developed in *R. vs Oakes*, (1986) 1 S.C.R. 103. To be compatible with freedom of expression, the restrictive state measure must (1) pursue an objective of pressing and substantial concern in a free and democratic society; (2) be rationally connected to the objective; and (3) respect the proportionality between the effects of the measure and the objective pursued.

[50] For a discussion of rules and standard based approaches in the U.S., see *e.g.* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harvard Law Review, 22 (1991).

[51] The U.S. Supreme Court extended the reach of the First Amendment to commercial speech in *Virginia State Board Pharmacy vs Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

scrutiny.[52] In a similar vein, defamatory speech targeting public officials or public figures (including big corporations)[53] is granted extremely vigorous First Amendment protection.[54] As a consequence, NGOs and other stakeholders engaging in "counter-advertizing" directed against multinational corporations are granted virtual immunity from sanctions under defamation laws.

The categorical approach employed in the U.S. to assess limitations on free speech explains why the classification of Nike's statements as either commercial or non-commercial expression was decisive for the outcome of the case. It was thus not surprising that Nike and Kasky and their supporters defended opposing views: The former camp framed the rebuttals as a form of participation in a debate on issues of general moral and political concern; the latter highlighted the promotional nature of the statements and the impact of CSR standards on consumers' purchasing decisions.

Both sides relied on further arguments to justify the classification of the speech at issue as either commercial or non-commercial. In a nutshell, lawyers and scholars supporting Nike's stance[55] argued that subjecting corporate expression to unfair competition law provisions would have a chilling effect on corporate expression: The fear of sanctions would prevent corporations from providing valuable information to the public. As corporations would be discouraged from disseminating information on their ethical business practices, they would have a lesser incentive to respect CSR standards in the first place. Applying unfair competition law to Nike's rebuttals was also opposed for another reason. It was argued that it would create unlevel playing fields, putting one party

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[52] Restrictions of commercial expression are examined under the test developed in *Central Hudson Gas & Electric Corp. vs Public Service Commission*, 447 U.S. 557 (1980). For an analysis and an overview of the commercial speech doctrine as developed by the United States Supreme Court, see *e.g.* Thomas S. Shiner, *Freedom of Commercial Expression*, Oxford University Press (Oxford), at 25 (2003). The book also gives an overview over commercial expression in Canada and in Europe (EU law and ECHR).

[53] For an analysis of corporations as public figures, see *e.g.* Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 Minnesota Law Review, 455 (2013).

[54] The privilege afforded defamatory statements targeting public figures originated in the seminal judgment *New York Times Co. vs Sullivan*, 376 U.S. 254 (1964). According to the so-called New York Times privilege, plaintiff bears the burden of proof to establish the falsity of the statements and needs to establish with clear and convincing evidence that defendant acted with actual malice (*e.g.* that he knew that the statement was false or that he acted in reckless disregard of the truth). This exacting standard makes it extremely difficult for plaintiffs to prevail in defamation proceedings. For a critical discussion of the New York Times privilege, see for instance the judgment of the Canadian Supreme Court, *Hill vs Church of Scientology of Toronto*, (1995) 2 S.C.R. 1130, para. 122. (with further references), in which the Court refused to constitutionalize the common law of defamation; in the UK, the Law Lords adopted a more nuanced approach. Although they did not follow the *New York Times vs Sullivan* ruling, they altered the common law of defamation by adopting the so called Reynolds privilege which benefits mainly defamatory statements on matters of public concern (see *Reynolds vs Times Newspapers Ltd* (2001) 2 AC 127).

[55] See for instance the *Amici Curiae* Briefs submitted to the Supreme Court by the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner, available at https://www.aclu.org/files/FilesPDFs/nike.pdf (last visited Oct. 10, 2014) ; See Goldstein, fn. 46.

in the debate at a disadvantage. Although corporations could be held liable for misleading or untruthful statements related to CSR standards, their critics were able to engage in "counter-advertizing" without facing similar constraints.

Rejecting this line of reasoning, Kasky's supporters argued that exempting Nike's statements from unfair competition law rules would amount to granting corporations a "right to lie,"[56] enabling them to intentionally misinform the public and consumers about their business practices. Such a far reaching right to freedom of expression would be detrimental to furthering corporations' compliance with CSR standards. Moreover, the claim that unfair competition laws put big corporations at a competitive disadvantage in the free marketplace of ideas failed to take into account the real power relations, which lead the speech market in favor of multinational companies with vast resources to make their voices heard.

C. Comparative Assessment

Which insights can be drawn from both the *Steel and Morris* and the Kasky cases? A first point that deserves attention is the high level of protection afforded to "counter-advertizing" both under the ECHR and in the U.S. Underscoring the "social watchdog" function of NGOs, the ECtHR treated the controversial leaflets as expression relating to matters of public concern and granted it a level of protection similar to political expression. In the Nike litigation, the strong protection of "counter-advertizing" was perceived as self-evident. There was a general agreement that detractors of big corporations (such as Mr. Kasky) enjoyed extremely vigorous protection under the First Amendment, which results in virtual immunity of statements even if they are demonstrably false. "Counter-advertizing" is thus considered as expression of primary importance under the respective free speech guarantees. However, in contrast with the situation in the U.S., the ECtHR did not go as far as to grant corporate criticism virtual immunity. The European Court also refused to question the common law of defamation and to consider that placing the burden of proof on the defendants was contrary to freedom of expression. Several factors may explain this cautious approach. Firstly, the ECtHR is an international court operating in a very diverse setting. For the Court's legitimacy, it is crucial to strike a subtle balance between exercising effective supervisory control over the 47 Member States within the Council of Europe, on one hand, and respecting national particularities, on the other. The recent insistence on the principle of subsidiarity of the European human rights system shows that the right balance is hard to

[56] See *e.g. Kasky vs Nike — Do Corporations Have a Right to Lie?* available at http://reclaimdemocracy.org/nike/ (last visited Sep. 27, 2014); for an academic study supporting the arguments raised by the "Kasky" camp, see *e.g.* David C. Vladeck, *Lessons from a Story Untold: Nike vs Kasky Reconsidered*, 54 Case Western Reserve Law Review 1084, (2004).

achieve.[57] To avoid the charge of judicial activism, the Court may prefer a minimalist approach whenever possible. In *Steel and Morris vs UK*, the ECtHR opted for this solution, focusing on the specific circumstances of the case (absence of legal aid; amount of damages) instead of questioning the common law rules on defamation. Secondly, the Court's approach reflects the more general differences, which exist with respect to the level of protection afforded to freedom of expression and the method of adjudication on both sides of the Atlantic.[58] European courts generally engage in balancing free speech against competing values and rights (including reputation) without elevating freedom of expression into a trump card over other rights and interests. This approach contrasts the privileged position enjoyed by free speech in the U.S. and the Supreme Court's preference for a rules oriented approach over balancing.

A second point of interest is the constitutional protection afforded to corporate expression on CSR standards. While the European Court has not yet had the opportunity to address this issue, the U.S. Supreme Court decided to avoid it in *Nike vs Kasky*. Under the American free speech doctrine, coming to terms with the politicisation of the commercial sphere is a considerable challenge: Hybrid speech like Nike's, combining political and commercial elements, defies easy categorisation. In the European context, the flexibility inherent to proportionality analysis may make it easier to accommodate hybrid speech. Nevertheless, European courts would also need to engage in more principled reflections on the adequate treatment of corporate speech related to CSR standards in order to structure the balancing process. They may not be able to avoid the controversial question raised in the *Nike vs Kasky* litigation: Should hybrid corporate

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[57] The principle of subsidiarity was widely discussed at the ministerial conferences in Interlaken (2010), Izmir (2011) and Brighton (2012), which led to the adoption of Protocol N° 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 1 of the Protocol, which was adopted on Jun. 24, 2013, amends the Convention so as to include a specific reference to the principle of subsidiarity and the margin of appreciation left to the Member States in the Preamble of the ECHR. Documents on the ministerial conferences can be found on http://www.coe.int/t/dgi/brighton-conference/default_en.asp (last visited Oct. 3, 2014).

[58] For a study of the U.S. Supreme Court's free speech methodology from a European perspective, see Ivan Hare, *Method and Objectivity in Free Speech Adjudication: Lessons from America*, 54 International and Comparative Law Quarterly 49, (2005). For studies comparing the U.S. with European jurisdictions, see *e.g.* Ian Loveland eds. *Importing the First Amendment: Freedom of Expression in American, English and European Law*, Hart (Oxford), (1998); Aernout Nieuwenhuis, *Freedom of Speech: USA vs Germany and Europe*, 18 Netherlands Quarterly of Human Rights, 195 (2000). For comparative studies including jurisdictions other than Europe and the U.S., see *e.g.* Adrienne Stone, *The Comparative Constitutional Law of Freedom of Expression*, in Rosalind Dixon, Tom Ginsburg eds. *Research Handbook in Comparative Constitutional Law*, Edward Elgar (Cheltenham), at 406 (2011); also published as University of Melbourne Legal Studies Research Paper No. 476 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633231 (last visited Oct. 3, 2014); Martha H. Good, *Freedom of Expression in Comparative Perspective: Japan's Quiet Revolution*, 7(3) Human Rights Quarterly, 429 (1985); Ronald J. Krotoszynski, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of Freedom of Speech*, New York University Press (New York), (2006).

speech be afforded the same or a lower level of protection as "counter-advertizing"?

This issue is explored in the following section. The main claim that will be made is that speech by civil society denouncing corporate practices deserves a higher level of protection than corporate speech on compliance with CSR standards. This claim can be defended from an economic perspective.[59]

Ⅲ. DISCUSSION

A. An Economic Approach to Free Speech Regulation

Economic analysis is an unusual way to approach freedom of expression and may face scepticism, since most people consider fundamental rights valuable *per se* and not for the sake of economic efficiency. It is, however, an approach well adapted for the purpose of the present paper, which explores freedom of expression as a means to incite corporations to both adopt and comply with CSR policies.

As the *Nike vs Kasky* case shows, corporations are aware that respecting CSR standards impacts consumers' purchasing decisions and tends to highlight compliance with labor, environmental, and human rights standards in their communication strategies. Without the ability to do so, corporations have lesser incentive to commit to these standards in the first place. Conversely, "counter-advertizing," which was at issue in the *McLibel* litigation, is a means to monitor compliance with CSR standards. In both cases, the communication related to CSR standards may contain truthful and/or false or misleading information. From an economic vantage point, the challenge is to strike an optimal balance between encouraging truthful information against the costs of misinformation, the underlying assumption being that the functioning of markets is dependent on information.

Economists have highlighted the role of information as a condition of well-functioning markets since the 1960s.[60] If consumers lack adequate information, or have to spend excessive amount of time or money searching for it, their purchasing decisions do not lead to the optimal allocation of resources. Insufficient information, both

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[59] This analysis draws on Randall, fn. 7; Maya Hertig Randall, *Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?*, 6(1) Human Rights Law Review 53, 82 (2006); Id., *La société civile face à la société commerciale: quelques réflexions sur la liberté d'expression dans un contexte commercial politisé*, in François Bohnet & Pierre Wessner eds. *Droit des sociétés: mélanges en l'honneur de Roland Ruedin*, Helbing & Lichtenhahn (Basle), at 482 (2006).

[60] See the seminal article by George J. Stigler, *The Economics of Information*, 69 Journal of Political Economy 213, (1961); the best known representatives of this school are Joseph E. Stiglitz, George Akerlof and Andrew Michael Spence. They were awarded the Nobel Prize in Economics in 2001. For an overview of the school of information economics, see *e.g.* Johannes Pieter Mackaay, *Economics of Information and Law*, Groupe de recherche en consommation (Montreal) (1980), available at http://openlibrary.org/books/OL3913021M/ Economics_of_information_and_law (last visited Oct. 7, 2014).

from the quantitative and qualitative point of view, has been recognized as giving rise to market failures. If compliance with CSR standards is to provide consumers with a basis for making purchasing decisions, it is thus important that they be sufficiently informed. Although both commercial and non-commercial speakers (including for instance the media, NGOs, and consumer organizations) can provide market-relevant information, there is a structural imbalance between corporate speech and "counter-advertizing," which is an important reason to afford speech critical of market players a higher level of protection than corporate communication strategies on CSR standards.

B. Structural Imbalance between Corporate Speech and "Counter-Advertizing"

1. Information Asymmetries. — The theory of information asymmetry helps to explain why corporate expression enjoys an advantage over "counter-advertizing." According to this theory, producers and sellers are generally better informed about products or services than consumers,[61] which adversely affects the functioning of markets. In extreme cases, it may fundamentally undermine the trust in the trading partners and cause the market to collapse.[62] The more difficult it is for consumers to check for themselves relevant product related characteristics before purchase, the more pervasive informational asymmetries are.

Information asymmetries generally do not occur with respect to product features that can easily be ascertained prior to purchase through inspection of the product.[63] Consumers can, for instance, check without great difficulty whether clothes fit before buying them.

Information asymmetries do arise, however, for product features that can only be ascertained after purchase,[64] such as the reliability of an electronic device or the taste of a food item. The extent of information asymmetries varies depending on whether consumers tend to engage in repeated purchase of the same or similar products or not. If this is the case, they are able to assess product quality quite accurately based on their previous experiences.[65] By contrast, if goods are not frequently bought or repeated sales

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[61] See U.S. Supreme Court, *Virginia State Board of Pharmacy*, fn. 51, holding that "the advertizer seeks to disseminate information about a specific product or service that he himself provides and *presumably knows more about than anyone else*." (emphasis added). According to the Court, the greater verifiability is one of the "common sense differences" between commercial and non-commercial expression, justifying regulation of false and misleading advertizing.

[62] See the famous article by George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84(3) Quarterly Journal of Economics, 488 (1970).

[63] See Philip Nelson, *Information and Consumer Behavior*, 78 Journal of Political Economy, 312 (1970); Nelson calls goods whose characteristics can be checked prior to purchase "search goods."

[64] Id.

[65] Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill, *Party Autonomy and the Role of Information in the Internal Market — An Overview*, in Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill eds. *Party Autonomy and the Role of Information in the Internal Market*, De Gruyter (Berlin), at 26 (2001).

from the same supplier are unlikely (as is the case for the market of used cars or products bought from door to doors salesmen), information asymmetries are likely to occur.

Information asymmetries are most severe for product-related characteristics that are impossible, very difficult, or risky to ascertain either through prior inspection or through personal experience. Consumers have to base their decision on trust, which will be inferred from reputation, honesty, and qualification of the producer or seller.[66] In the field of many liberal professions (such as the legal or the medical profession), the "distribution of information is structurally asymmetric,"[67] as lay people generally lack the knowledge to ascertain a physician's or a lawyer's competence. Structural asymmetries are also pervasive with respect to production and process methods (including, for instance, the respect for environmental or labor standards). When it comes to CSR standards, consumers are for this reason heavily dependent on the information provided by the seller or manufacturer, who may generally lack an economic incentive to reveal unfavorable information (*e.g.* lack of compliance) Globalization compounds information asymmetries, due to geographical distance, the complexity of the manufacturing chain, and diverging rules and regulation. When goods are manufactured abroad, in a series of countries, it is virtually impossible for consumers to check for themselves whether they have been produced in conformity with labor or environmental standards. Consumers likely moreover face difficulties deriving relevant information indirectly from legislation, as they lack the knowledge of the legal framework applicable to production sites located outside their jurisdiction, not to mention knowledge of effective enforcement. In this context, "counter-advertizing" by NGO or the media is for consumers an important source of information.

Nike, for instance, contracts with approximately 719 factories employing almost a million workers in 44 countries.[68] Under these conditions, it may not always be easy for the corporation itself to ensure compliance with its CSR policies and to be aware of all instances of non-compliance. From an economic vantage point, strict liability rules for inaccurate information may thus not be optimal:[69] They risk discouraging corporations from providing information regarding CSR standards, reducing their incentive to adopt CSR policies in the first place. The obstacles other stakeholders face to verify corporate information, however, caution against endorsing Nike's argument and granting immunity to corporate expression. Having greater difficulties to access the relevant information than corporations, other stakeholders will face greater problems in proving their critical allegations and will likely be more prone to error than corporate speakers. For this reason,

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[66] Goods having these characteristics have been named "credence goods" by Michael R. Darby, Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 Journal of Law and Economics, 67 (1973).

[67] Id. at 21.

[68] See http://nikeinc.com/pages/manufacturing-map (last visited Sep. 20, 2014).

[69] Critical of strict liability, from the vantage point of human rights, see also Joseph, fn.43 at 108.

it seems questionable to place the burden of proof in libel proceedings instigated by corporations on the defendant, as was the case in *Steel and Morris* under the common law of defamation.[70] Consumers and other stakeholders should be allowed a greater margin to err than corporate actors making statements on CSR standards. The applicable rules (defamation law, unfair competition law) should take this into account through different standards of liability. For the same reason, courts examining CSR-related communication from the vantage point of freedom of expression should afford a higher level of protection to "counter-advertizers" than to corporate speech. In addition to information asymmetries, the specificity of the information market supports this finding.

2. Specificity of the Information Market. — From an economic perspective, information is a commodity that, like other goods, can be bought and sold. Unlike most market commodities, however, information is not a private but a public good. This entails that information is generally under-produced.[71] Since it can be shared and disseminated at a low cost, it tends to benefit not only the paying customer but also third parties. The beneficiaries of information thus have an incentive to "free-ride." As producers of information cannot translate all the social benefits flowing from the distribution of information into personal gain, they lack the motivation to produce as much information as would be socially optimal. For the same reason, they have less incentive to oppose censorship of information than to challenge governmental regulations of goods other than information. With regard to lobbying efforts from recipients of the information, the free-riding problem exacerbates the general ineffectiveness of consumer pressure groups as compared with other special interest groups. Government will thus be inclined to yield to demands for restrictions on information. In summary, information tends to be both under-produced by the market and over-regulated by the state. Elevating freedom of expression to a fundamental right can thus be understood, under public-choice theory, as an attempt to counteract these problems.[72]

These general considerations do not apply to the same extent to all categories of speech, as the public good features can be more or less pronounced depending on the type of expression at issue.[73] Comparing the expression at stake in *Steel and Morris*, on one hand, and *Nike vs Kasky*, on the other, it is sound to argue that the former has stronger public good features than the latter. Like consumer information more generally, "counter-advertizing" by NGOs provides information that is not only useful for the

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[70] See also Christopher Harding, Uta Kohl & Naomi Salmon, *Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors*, Ashgate (Aldershot, Burlington), at 216 (2008).

[71] The characteristics of public goods are their non-rivalry and non-excludability. The first property requires that the consumption of the good by one person does not preclude consumption by others, and the second refers to the impossibility (or excessive difficulty) of preventing others from using the public good.

[72] Daniel Farber, *Commentary: Free Speech Without Romance: Public Choices and the First Amendment*, 105 Harvard Law Review, 562 (1991).

[73] Id.

speakers or members of the organization but also for consumers and other stakeholders (such as investors). The benefits produced by "counter-advertizing" are three-fold: First, due to the blurring of the commercial and the political spheres, it provides information that is relevant for purchasing and investment decisions. Second, it assists policy makers, highlighting deficiencies in the economic marketplace that may call for governmental regulation. Third, to the extent that "counter-advertizing" is able to induce corporate actors to change unethical business practises, it also produces benefits for the public at large. As a consequence, consumers and citizens have an incentive to free-ride and to leave it up to others to scrutinize corporate compliance with CSR standards. Conversely, if unable to capture a good part of the social benefit flowing form their expression, "counter-advertizers" may be reluctant to commit time and resources to gather and disseminate information and to take the risk of incurring sanctions. For this reason, the chilling effect of measures restricting "counter-advertizing" is an important factor weighed in favor of freedom of expression, as highlighted by the ECtHR in *Steel and Morris*.

Compared with "counter-advertizing," corporate communication strategies on CSR standards have weaker public good characteristics. From an economic perspective, expression similar to the speech at stake in *Nike vs Kasky* has strong affinities with commercial advertizing, bearing strong resemblance with private goods.[74] Although it is generally directed at the public at large, it is similar to a private good in as much as advertizing increases the speaker's turnover. Most of the benefits of the information thus accrue to the producer. The direct profit motive means that the market for advertizing is entirely dependent on the market for the commercialised product or service. In that sense, advertizing has been characterised as a complementary product to the main commodity, entirely financed through sales revenues. It is the wholly ancillary nature of commercial speech,[75] and its direct profit motive that distinguish it from other types of information with more pronounced public good characteristics. Although filmmakers and authors may also pursue an economic interest, unlike commercial speech, their work does not have the advantage of being financed through the profits of a main commodity. This explains why they are much more dependent on state subsidies than on advertizing.

Compared with traditional commercial advertizing, corporate speech on CSR standards is less directly connected to a concrete product. However, its purpose is also promotional and it is thus dependent on sales. The speech at issue in *Nike vs Kasky* is part of the more general trend towards image advertizing for which the corporation is well known. Like its advertizing campaign based on the famous slogan "Just do it," efforts to portray the corporation as a good corporate citizen, respectful of CSR standards, is a promotional strategy whose purpose and effect is very similar to traditional commercial

[74] Id. at 565.

[75] Nicholas Kaldor, *The Economic Aspects of Advertising*, 17 Review of Economic Studies 1, (1950).

advertizing.[76]

Corporations' direct profit motive underlying commercial expression is relevant for three reasons: Firstly, commercial speech is less prone to being under-produced by the market than "counter-advertizing." The omnipresence of commercial advertizing underscores this point.[77] As corporations lack an incentive to disseminate information critical of a company's CSR record,[78] and "counter-advertizing" tends to be under-produced, an unregulated speech market would be characterised by an imbalance between plenty of one-sided, even false, information on CSR policies on one hand, and little, contrary information on the other. Disclosure requirements and rules sanctioning corporate misinformation (such as unfair competition law rules at issue in *Nike vs Kasky*) aim at counteracting the imbalance between promotional corporate speech and"'counter-advertizing." Secondly, commercial expression is less likely to be chilled through governmental regulation than non-commercial expression.[79] Thirdly, corporate actors will generally have a strong incentive to refute and seek suppression of "counter-advertizing" through lawsuits or other means, as it is detrimental to their commercial interests.[80] The *McLibel* litigation instigated by McDonalds, and Nike's rebuttals of its critiques, are telling examples. Due to these differences, commercial speech has a competitive advantage over non-commercial counter-speech. This imbalance needs to be taken into account when expression is constitutionally protected and regulated. Based on this insight, several jurisdictions subsidise consumer organizations. The financial support offered to non-commercial speakers is a measure aimed at correcting

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[76] See Vladeck, fn. 56 at 1084; for further studies assimilating Nike's speech to commercial expression, see Fisk & Chemerinsky, fn. 46; David Kinley, *Civilising Globalisation: Human Rights and the Global Economy*, Cambridge University Press (Cambridge), at 194 (2009).

[77] See *R. vs Guignard* fn. 16 para. 23: "As we know and can attest, sometimes with mixed feelings, the ubiquitous presence of advertizing is a defining characteristic of western societies. Usually, it attempts to convey a positive message to potential consumers."

[78] Corporations' incentive to name and shame competitors for failing to comply with CSR standards is low, for the same reasons as little incentives exist to disseminate negative information about competitors' products through comparative advertizing; on this issue, see *e.g.* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harvard Law Review, 661 (1977); Richard Posner, *Free Speech in an Economic Perspective*, 20 Suffolk University Law Review, 40 (1986).

[79] According to the U.S. Supreme Court, in addition to the greater verifiability of commercial speech fn. 61, its greater hardiness is another common sense difference between commercial and non-commercial expression; see *Virginia State Board of Pharmacy*, fn. 51 (Also, commercial speech may be more durable than other kinds. Since advertizing is the since qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. The common sense differences "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.")

[80] See Vladeck fn. 56 at 1077 (highlighting the threat of facing protracted litigation by a corporation, including protracted discovery, has in itself a dissuasive effect on corporate critiques). On the more general problem of so-called SLAPPs (strategic lawsuits against public participation), *e.g.* lawsuits intended to intimidate, silence and discourage opponents, see George W. Pring & Penelope Canan, *SLAPPs. Getting Sued for Speaking Out*, Temple University Press (Philadelphia), (1996); See Jackson, fn. 15.

market-failures. Commercial advertizing entails inherent bias, the function of markets depends on sufficient complementary information provided by other sources, such as the media, scientific reports, consumer organizations, and other NGOs.

3. Access to the Media. — Another factor accounting for the general advantage of corporate expression over "counter-advertizing" relates to unequal access to the media. As is well known, commercial advertizing is an important source of revenue for the media. Due to the large corporate expenditure on advertizements, corporations have easier access to newspapers and broadcasters than other stakeholders. There is little risk that the media would turn down Nike's advertorials on the corporation's compliance with labor standards. The same cannot be said for "counter-advertizing." The dependency of the media on commercial advertizing entails a substantial risk that the media are reluctant to publish speech critical of corporate actors or their products.[81] A well-known Swiss case illustrates the danger of private censorship. It arose from the following facts:[82] In response to various advertizements of the meat industry shown on Swiss television, an animal protection association sought to broadcast a television commercial critical of battery farming and urging the public to eat less meat. The commercial company responsible for television advertizing rejected the request. While the legal argument to refuse the broadcasting of the spot was based on Swiss legislation banning political advertizing, the commercial company also made it clear that it was unwilling to disseminate an advertizement that was likely to harm its commercial interests. In other words, it was concerned that a message criticizing cruelty to animals and discouraging meat consumption would displease its clients from the meat industry. It took two applications to the ECtHR for the spot to be broadcast on Swiss television,[83] 16 years after the initial request.

CONCLUSION

Due to politicization of consumption, corporate compliance with CSR standards impacts consumer choice. For this reason, sufficient information on corporations' CSR policies and records is a prerequisite for well-functioning markets. Conversely, the lack of information or misinformation reduces the incentive for corporations to adopt and comply with CSR standards and give rise to market failures. As the two cases discussed in this paper show, relevant information can stem from different sources: Corporations mainly

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[81] Edwin C. Baker, *Advertising and a Democratic Press*, Princeton University Press (Princeton), at Chapter 2, (1994); Lawrence Soley, *Censorship, Inc.: The Corporate Threat to Free Speech in the United States*, Monthly Review Press (New York), (2002).

[82] See the Swiss Supreme Court's judgment BGE 123 II 402. Judgments of the Swiss Supreme Court can be available at www.bger.ch (last visited Oct. 14, 2014).

[83] ECtHR, App. No. 24699/94, Jun. 26, 2001, VgT Verein gegen Tierfabriken vs Switzerland (No. 1); ECtHR, App. No. 32772/02, 30 Jun. 2009, VgT Verein gegen Tierfabriken vs Switzerland (No. 2).

provide "positive" information on their CSR record as part of their PR-campaigns. By contrast, other stakeholders, such as NGOs and consumer groups tend to disseminate mainly "negative" information through "counter-advertizing."

By enabling both sides to oppose excessive limitations of their communication, the right to freedom of expression helps to create the necessary breathing space for statements related to CSR standards. From an economic perspective, speech regulation needs to find the optimal balance between the need to further the dissemination of truthful information while reducing the circulation of false or misleading statements.

To achieve this end, this paper has advocated an approach that is sensitive to the advantages of corporate speakers over counter-advertizers. Although multinational corporations, which operate all over the world, may sometimes lack all the relevant information on CSR compliance, their knowledge is generally superior to that of other stakeholders. As CSR standards are related to the way products are made (*e.g.* credence features), information asymmetries between corporations and "counter-advertizers" tend to be severe. Corporations' easier access to the media reinforces their advantage over "counter-advertizers." Moreover, "counter-advertizing" has more pronounced public good characteristics than promotional speech by corporate actors. For this reason, "counter-advertizing" is more likely to be chilled than corporate expression. This explains why counter-advertizers need to be granted a wider margin to err than corporate speakers.

The various factors detrimental to "counter-advertizing" justify vigorous protection of expression at issue in cases like *Steel and Morris*. Although strict liability rules may place too high a burden on corporations and discourage the dissemination of useful information on CSR standards, claims vindicating the same level of protection for promotional corporate speech as for "counter-advertizing" should be resisted. Against the arguments advanced by Nike's supporters, holding corporations to more exacting standards does not create unlevel playing fields in favor of counter-advertizers, but simply takes into account the structural imbalances on the free marketplace of ideas. This approach allows counter-advertizers to act as "social watchdogs" to monitor compliance with CSR standards without giving corporations a free license to misinform the public.