

## Ban on Benetton “Shock Ads” Argued Before Federal Constitutional Court.

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[1] The Federal Constitutional Court (FCC) heard oral arguments on November 8th in the constitutional complaint filed by the publisher of *Stern Magazine* which sought to run an ad campaign for the Italian fashion retailer United Colors of Benetton. Court orders prohibited the advertisements on the grounds that they constituted a violation of competition and consumer protection laws as well as the constitutional right to human dignity. The publisher, supported by a number of independent advertising and publishing associations as well as the Federal Anti-Trust Office, alleges that the 1995 decision of the Federal Court of Justice upholding the ban constituted a violation of its rights to freely form an opinion and freedom of the press (Article 5.1(1) and (2)).

[2] The advertisements, which have come to be known as “shock advertisements,” employ large format photography of controversial subjects that are unrelated to Benetton’s business. The photograph is bordered by the company’s name in small print in a corner or along the side of the photograph. The advertisements at issue in the constitutional complaint include: (1) a duck thickly coated in oil presumably following an oil-spill at sea; (2) child laborers; and (3) a close-up of a naked human buttock with the tattoo “HIV Positive.”

[3] The arguments presented to the First Senate ranged between practical constitutional expositions (free press rights, the right to freely hold an opinion and the protection of human dignity) to more existential themes like photography unique power over the human spirit. It was the latter of the two directions that seemed to most interest the Reporting Judge and the Senate President. The unique power of photography as an “ambassador of communication” was underscored in the argument by reference to a recent interview with the Benetton photographer who raised questions about the significance of photography in establishing the meaning of the Nazi-era concentration camps. The philosophical elements of the argument also raised questions about the risk to the diversity of opinion that photography might pose. The implication of these lines of argument was that photography’s unique power might justify greater limitations on free speech.

[4] The Complainant pursued more proletarian constitutional arguments and some of the judges, along these lines, sought to clarify the boundaries between the constitutional freedoms at stake and the protection of other interests. The FCC has a long line of cases addressing these questions and has developed a line of jurisprudence that permits limitations on the rights to freely form and express an opinion. In the *Lueth* case (7 BVerfGE 198 (1958)), the Court held that the courts were required to weigh the constitutional and private values in conflict with one another and that the right to freely form and express an opinion may be limited where the exercise of those rights would violate a more important interest. The Court concluded that “[h]ere the relationship between ends and means is important. The protection of speech is entitled to less protection where exercised to defend a private interest – particularly when the individual pursues a selfish goal within the economic sector.” With the *Lueth* standard in mind, the argument raised questions about whether similar “shock ads” when employed by public or political initiatives which aim impact political opinion and not trigger economic activity might receive less strict scrutiny and thereby enjoy greater freedom of speech.

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### For more information:

The FCC *Lueth* decision on the web:

<http://www.uni-wuerzburg.de>>[www.uni-wuerzburg.de](http://www.uni-wuerzburg.de)