

Edge, P Believer beware: the challenges of commercial religion

Edge, P (2012) Believer beware: the challenges of commercial religion. *Legal Studies*, 2012

doi: 10.1111/j.1748-121X.2012.00252.x

This version is available: <https://radar.brookes.ac.uk/radar/items/6590f97d-7ced-17b3-ffd0-9b2596d14303/1/>

Available in the RADAR: October 2012

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

This document is the preprint version of the journal article. Some differences between the published version and this version may remain and you are advised to consult the published version if you wish to cite from it.

# Applied Study of Law and Religion Group.

School of Law.

**Believer beware.**

**The challenges of commercial religion.**

Professor Peter W Edge, Oxford Brookes University, [pwedge@brookes.ac.uk](mailto:pwedge@brookes.ac.uk)

Forthcoming, Legal Studies.

For further information:

Email the author:  
[pwedge@brookes.ac.uk](mailto:pwedge@brookes.ac.uk)

View his profile:

[http://www.brookes.ac.uk/profiles/staff/peter\\_edge](http://www.brookes.ac.uk/profiles/staff/peter_edge)

## **Introduction.**

In this paper I will argue that in a wide range of circumstances religious activity and commercial activity may overlap, leading to what may fairly, albeit novelly, be categorised as commercial religion. This overlap is potentially problematic to law, raising as it does the possibility of inappropriate over-regulation of religious activity and religious claims *and* the possibility of inappropriate under-regulation of commercial activity and claims. One way to resolve this problem is to create a binary division between the commercial and the religious, so that any situation might be categorised as one or the other, and the appropriate legal framework and philosophies applied. This is the preferred route under the European Convention on Human Rights which, as I show in Part II, treats an activity as either commercial or religious. Such a separation does not, however, properly address the complexity of regulating commercial religion in practice. By exploring one case-study, the regulation of commercial religion in UK consumer law, in Part III I will show that the problems of commercial religion do not disappear even when an activity is categorised as commercial rather than religious. Part IV moves to consider strategies by which the European Court of Human Rights, UK courts and other legal actors such as Trading Standards Officers (TSOs), and those subject to regulation, may reblend the commercial and religious elements. The paper concludes with a brief consideration of the wider ramifications of this discussion.

## **I. Commercial and religious: The problems.**

Before doing so, however, it is important to set the parameters of this paper through some working definitions, and indicate through illustrative examples the importance of the problems raised.

By religious, my general working definition is that religion consists of truth claims concerning metaphysical reality, and ancillary truth claims and practices flowing from such truth claims. So a belief in God, for instance, is a religious truth claim, from which may flow other religious beliefs, such as a duty of obedience to God, and religious organisations such as churches, and religious practices such as baptism. Increasingly, however, we are seeing an emphasis on a ‘certain level of cogency, seriousness, cohesion and importance’,<sup>1</sup> or ‘a clear structure and belief system’.<sup>2</sup> Rather than critique this increasingly dominant theme here, I will narrow my working definition of religion: *a clear structure and belief system concerning metaphysical reality*. This will undoubtedly exclude some activities which would be included in my broader definition – for instance palmists who did not share a clear structure and belief system beyond their belief in the efficacy of palmistry as a divination technique. It will, however, continue to include a broad range of activities, as my examples in the sections that follow will show.

Commercial, too, may easily bear a variety of meanings. For instance, in relation to sales, one may categorise producing goods or services intending to exchange them for money them as commercial; or may restrict the term to sales intended to produce an operating profit, or to sales intended to produce a surplus which can be taken by the owners of the concern,<sup>3</sup> or to

---

<sup>1</sup> Campbell and Cosans v UK, (1982) 4 EHRR 293 para. 36.

<sup>2</sup> Explanatory Notes to Equality Act 2006, para. 170.

<sup>3</sup> See for instance W. Schimetta et al, “Wann ist eine klinische studie nicht-kommerziell”, (2004) Wiener medizinische Wochenschrift 155, 233-6.

sales intended to go beyond meeting the basic human needs of the seller.<sup>4</sup> At the core of the various definitions of commercial however, is the earning of money – for instance in a study of internet users commissioned by the Creative Commons, although many areas were unclear and contested, ‘creators and user generally consider uses that earn users money or involve online advertising to be commercial’.<sup>5</sup> Accordingly, I will take as a working definition of commercial: *carried out in part to generate an operating profit*. This will include activities intended to generate an operating surplus to support loss-making activities, such as charging above break-even for wedding services in order to pay for heating of a place of worship during quieter services.

Bringing these two working definitions together, a commercial religious activity is one which the person carrying it out sees as part of their clear structure and belief system concerning metaphysical reality, and which is also carried out in part to generate an operating profit. Commercial religion is capable of taking a wide range of forms. To anticipate examples used later, this can include, for instance, the provision of goods or services for profit as a religious duty (e.g. auditing by the Church of Scientology), or the provision of goods or services which possess value only within a particular religious system (e.g. the saying of a Mass within Catholicism). It can also include the operation of a business in accord with a religious

---

<sup>4</sup> See for instance G.M. Branch et al, “Defining fishers in the South African context: Subsistence, artisanal and small-scale commercial sectors”, (2002) South African Journal of Marine Science 24, 475-487.

<sup>5</sup> Creative Commons, “Defining ‘Noncommercial’: A study of how the online population understands ‘noncommercial use’”, September 2009 at 11 ([http://mirrors.creativecommons.org/defining-noncommercial/Defining\\_Noncommercial\\_fullreport.pdf](http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf), accessed 31 October 2011).

value system (e.g. the hotel run by the Bulls). Thus, commercial religion does not constitute a legal doctrine, but rather a factual nexus which may pose particular problems to a range of legal doctrines.

Entanglement of the commercial and the religious in the way this definition emphasises has been identified as a marker for conflict between state and religious organisation.<sup>6</sup> One reason that this is so problematic is that it may appear to outsiders to ‘indicate an increased probability that an organization is actually being operated to enrich insiders’.<sup>7</sup> An activity comprehensible in purely commercial terms may in some cases be feared to constitute not a genuine exercise of religion, but rather a fraud, or exercise of undue influence, upon those who genuinely believe carried out by one who does not. Seeking to address the problem of the insincere or exploitative religious claimant who gains a financial benefit by their action may impact on other religious claimants, for instance one whose genuine religious belief is explained by the state as insincere.

The disquiet with commercial religion, however, goes much deeper than the insincere claimant to religious interests. There is a recurrent perception that ‘proper religions don’t

---

<sup>6</sup> C.L. Harper and B.F. Le Beau, “The social adaptation of marginal religious movements in America”, (1993) 54(2) *Sociology of Religion* 171 at 180. Entanglement with the commercial poses problems beyond religion – consider for instance commercial sex, discussed below, and commercial human reproduction – on which see for instance K. Drabiak et al, “Ethics, law and commercial surrogacy: A call for uniformity”, (2007) *Journal of Law, Medicine & Ethics* 35(2), 300-309.

<sup>7</sup> T.A. Brown, “Religious nonprofits and the commercial manner test”, (1990) 99 *Yale Law Journal* 1631 at 1632.

charge'.<sup>8</sup> Certainly, religions with a very significant cultural footprint in the UK do not see a natural linkage between the commercial and the religious. From some mainline Christian perspectives, for instance, religious officers should devote themselves to poverty, rather than anticipate a wage for religious services.<sup>9</sup> The provision of religious services in return for payment is not only dubious but, in some cases, the sin of simony.<sup>10</sup> From a pluralist position, however, it is equally clear that other religious communities in the jurisdiction see things rather differently. The Church of Scientology<sup>11</sup> has been criticised for its provision of religious services for a fee, with some critics referring to it as \$cientology to ensure this criticism is made throughout their discussions.<sup>12</sup> From the Church's point of view, however, the requirement of payment is in part a decision as to the fairest way in which to pay for the activities of the Church,<sup>13</sup> but also theologically driven by the doctrine of exchange.<sup>14</sup>

---

<sup>8</sup> Lucy Jones, quoted at [news.bbc.co.uk/1/hi/magazine/7354089.stm](http://news.bbc.co.uk/1/hi/magazine/7354089.stm) (accessed 29 April 2009). See further J. Carrette and R. King, Selling spirituality: The silent takeover of religion, Routledge, 2004.

<sup>9</sup> For instance, religious in the Catholic Church – see D. O'Murchu, Consecrated religious life: The changing paradigms, Orbis Books 2005.

<sup>10</sup> For an introduction to the development of simony, see T.A. McVeigh's introduction to his translation of John Wyclif, On Simony, Fordham University Press 1992.

<sup>11</sup> See further [www.scientology.org.uk](http://www.scientology.org.uk) accessed 1/11/2011.

<sup>12</sup> For instance Britons Against 'Church' of Scientology, <http://www.againstscientology.co.uk/> (accessed 5/9/08).

<sup>13</sup> See <http://www.scientology.org/religion/catechism/pg028.html> (accessed 5/9/08).

<sup>14</sup> For a judicial view of this doctrine, see the US Supreme Court in *Hernandez v Commissioner*, 490 US 680 (1989).

It is oversimplistic, however, to assume that commercial religion is an activity only undertaken by members of a small number of religious communities in the UK – or to put it another way that commercial religion describes particular belief systems rather than particular activities. Approaches to commercial religion may well vary extensively within a single religious community.<sup>15</sup> Even religions which do not emphasise commercial activity theologically will frequently charge for religious services, generating an operating profit in doing so.<sup>16</sup> A good example is the marriage ceremony within the Anglican tradition of Christianity. The fees that may be charged for marriage are set by the Church,<sup>17</sup> at a level so

---

<sup>15</sup> Consider, for instance, D. Ezzy “White witches and black magica: Ethics and consumerism in contemporary witchcraft”, (2006) 21(1) *Journal of Contemporary Religion* 15; D. Cush, “Consumer witchcraft: Are teenage witches a creation of commercial interests?” (2007) 28(1) *Journal of Beliefs & Values* 45; P.E. Klassen, “Radio Mind: Protestant experimentalists on the frontiers of healing”, (2007) *Journal of American Academy of Religion*, 75(3), 651; S.Hunt, “‘Winning Ways’: Globalisation and the impact of the health and wealth gospel”, (2000) 15(3) *Journal of Contemporary Religion* 331 at 333; S. Hunt, “Magical Moments: An Intellectualist Approach to the Neo-Pentecostal Faith Ministries.” (1998) 28(3) *Religion* 271.

<sup>16</sup> Consider D. Cush, “Consumer witchcraft: Are teenage witches a creation of commercial interests?” (2007) 28(1) *Journal of Beliefs & Values* 45 at 51.

<sup>17</sup> As of January 2011, the charge for a marriage service was £262 – see Table of Parochial Fees Prepared by Archbishops Council (<http://www.churchofengland.org/media/56804/Fees%20Table%202011%20both%20sides.pdf>). These fees are prepared under the Ecclesiastical Fees Measure 1986, and authorised by the Parochial Fees Order 2010.



that the consumer of the marriage service pays an above break-even rate, making ‘a contribution to the provision of a church in your community’.<sup>18</sup>

Cultural tensions around commercial religion do not, as the above illustrates, map directly onto tensions around very small minority religions. In a number of cases, of course, the activity will be outside the mainstream, falling within the range of spiritual practices increasingly categorised as occulture,<sup>19</sup> and even outside the narrow definition of religion I have adopted for working purposes above.<sup>20</sup> In others, however, the activity will be much more mainstream. A striking recent example is from Ireland, a majority Catholic country where Mass cards have for some time been available,<sup>21</sup> and in 2009 were the subject of

---

<sup>18</sup> See <http://www.yourchurchwedding.org/your-wedding/the-cost-of-church-weddings.aspx> (accessed 14 July 2011).

<sup>19</sup> C.H. Partridge, The re-enchantment of the West: Alternative spiritualities, sacralisation, popular culture and occulture, (Continuum International, 2005 and 2006).

<sup>20</sup> This paper does not discuss commercial practices based on non-naturalist beliefs which fall outside the definition of religion under Article 9. Seriousness, cogency, and cohesion may all be absent from some practices based on non-naturalist belief. See for instance W. Spencer, “To absent friends: Classical spiritualist mediumship and New Age Channelling compared and contrasted”, (2001) *Journal of Contemporary Religion* 16(3), 343; W. Spencer, “Are the stars coming out? Secularisation and the future of astrology in the West”, in G. Davie et al (eds), Predicting religion: Christian, secular and alternative futures, (Ashgate, 2003).

<sup>21</sup> See for instance W. Dalton, “Mass stipends, mass offerings, mass cards”, (1990) 41(9) *The Furrow* 500-508; W. Dalton, “Multi-intentional mass cards: The recent decree”, (1991) 42(6) *The Furrow* 366-372;

constitutional litigation in *McNally*.<sup>22</sup> The Charities Act 2009 has, amongst other measures intended to better regulate charitable organisations, criminalised the sale of Mass cards which are not the subject of an arrangement made with a bishop or the provincial of an order of priests of the Roman Catholic Church. As MacMenamin J noted ‘A Mass card conveys the message that a Mass will be celebrated by a Roman Catholic Priest for an intention stipulated by the purchaser or done’.<sup>23</sup>

The tension between religious and commercial arises, pointedly for the purposes of this paper, when we consider the broad textures of laws dealing with religious activity, and those dealing with commercial activity. For instance, to anticipate the discussion that follows, there are serious differences between the conception of autonomy underlying freedom of religion law and theory, and that underlying say consumer law and theory. Freedom of religion law, for instance that under the European Convention on Human Rights or the First Amendment to the US Constitution, is predicated upon a conception of the human being as one whose choices on matters of profound importance as to the good life should be respected. The freedom to make poor religious choices is central to this,<sup>24</sup> as is a deep scepticism about the ability of the state to determine the quality of religious choices.<sup>25</sup> Coupled with this emphasis

---

<sup>22</sup> *McNally & Anor v Ireland & Ors* [2009] IEHC 573, Irish High Court.

<sup>23</sup> *McNally & Anor v Ireland & Ors*, at para 3.

<sup>24</sup> The regulation of inappropriate proselytism under, for instance, the ECHR, does not run counter to this, as the mischief being addressed is not the belief of the proselyte, but rather the danger posed to their manifestation rights of their actual beliefs by inappropriate proselytism.

<sup>25</sup> But cf E. Bever, “Witchcraft prosecutions and the decline of magic”, (2009) 40(2) *Journal of Interdisciplinary History* 263 at 284.

on individual power to judge is an emphasis on organisational religious autonomy as being vital to religious freedom. In both cases, the state defers to the judgment of others.<sup>26</sup> Consumer law, on the other hand, has become much more concerned with the vulnerability of the human being,<sup>27</sup> or at least ‘consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer’,<sup>28</sup> and their need for some protection from poor choices. Additionally, claims by commercial organisations to autonomy against state regulation have met with decreasing success.<sup>29</sup> Buyer beware has lost some of its power in a way which believer beware has not.

This is of more than theoretical significance. Even if commercial transactions involving the provision of religious services were not normally dealt with by recourse to law,<sup>30</sup> it is clear that they are potentially subject to regulation. In particular, a recent legislative development

---

<sup>26</sup> My use of ‘defer’ may fairly be criticised as carrying with it the right of the state to do otherwise, which numerous writers on law and religion would reject – for instance Dooyeweerd’s view of sphere sovereignty in H. Dooyeweerd (tr. J. Kraay), *Roots of Western Culture: Pagan, secular and Christian options*, 2003, The Edwin Mellen Press.

<sup>27</sup> This distinction between the autonomous holder of fundamental rights, and the vulnerable human being, is obviously open to serious criticism. See for instance B.S. Turner, *Vulnerability and Human Rights*, Penn State Press, 2006.

<sup>28</sup> *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 at para. 62 per Briggs J.. See generally O. Bray and M. Starmer, (2011) 22(4) Ent LR 118-122.

<sup>29</sup> Contrast *Adair v US*, 208 US 161 (1908) US S.Ct, *Hammer US Attorney for the Western District of North Carolina v Dagenhart et al*, 247 US 251 (1917) US S.Ct., and *US v Darby*, 312 US 100 (1940) US S.Ct.

<sup>30</sup> An issue beyond this paper, and the methodology used here, to resolve.

in the UK was intended by the sponsor specifically to extend the scope of such regulation. In 1951, following a campaign by the Spiritualist National Union,<sup>31</sup> the Fraudulent Mediums Act 1951 replaced existing penal sanctions<sup>32</sup> in relation to '[acting] as a spiritualistic medium or [exercising] any powers of telepathy, clairvoyance, or other similar powers',<sup>33</sup> similar powers covering all activities within the professed practice of the ability to see beyond what are the normal powers of the human being.<sup>34</sup> The 1951 offence was committed only when the defendant acted for reward,<sup>35</sup> excluded 'anything done solely for the purposes of entertainment',<sup>36</sup> required an intention to deceive,<sup>37</sup> and prosecutions required the consent of the Director of Public Prosecutions.<sup>38</sup> The Act survived substantial changes in criminal law, including even a wide ranging Fraud Act.<sup>39</sup> It did not, however, survive the Consumer

---

<sup>31</sup> See M. Gaskill, Hellish Nell: Last of Britain's Witches, 2001 at 342-347.

<sup>32</sup> Repealing the Witchcraft Act 1735, and amending the Vagrancy Act 1824 s.4 – Fraudulent Mediums Act 1951 s.2.

<sup>33</sup> Fraudulent Mediums Act 1951 s.1(1)(a)

<sup>34</sup> Martin [1981] Crim LR 109, CC; cf. Doheny v England [1955] Crim LR 255, Mag.

<sup>35</sup> Fraudulent Mediums Act 1951 s.1(2).

<sup>36</sup> Fraudulent Mediums Act 1951 s.1(5).

<sup>37</sup> Fraudulent Mediums Act 1951 s.1(1)(a)

<sup>38</sup> Fraudulent Mediums Act 1951 s.1(4)

<sup>39</sup> See S. Ramage, "The UK Fraud Offence Bill – a critical analysis", (2005) 152, 3-5.

Protection Regulations (CPR) which abolished the existing offence,<sup>40</sup> aiming to regulate such activity under the new regime of consumer protection.<sup>41</sup>

The CPR, which implements an EU directive,<sup>42</sup> has been described as ‘the biggest change to the UK consumer protection framework for almost 40 years’.<sup>43</sup> Although obviously not a central issue in the CPR,<sup>44</sup> before the regulations came into effect, it was confirmed that an important change would be the removal of any intent to deceive requirement in relation to suppliers of services currently covered by the Fraudulent Mediums Act.<sup>45</sup> Service providers within occulture in particular saw the change as a serious threat to their activities; or sometimes as a threat to their religious freedom. It led directly to the foundation of the

---

<sup>40</sup> Consumer Protection from Unfair Trading Regulations 2008/1277 sch.2, Part I, cl.3.

<sup>41</sup> For the importance of such activity generally, T. Glendinning and S. Bruce, “New ways of believing or belonging: Is religion giving way to spirituality?”, (2007) 57(3) British Journal of Sociology 399.

<sup>42</sup> Unfair Commercial Practices Directive, Directive 2005/29/EC of May 11, 2005; see generally B. De Groote and K. De Vulder, “European framework for unfair commercial practices: analysis of Directive 2005/29”, (2007) Journal of Business Law 16-42.

<sup>43</sup> Lord Tunncliffe. HL Deb, 23 April 2008, c1565.. See more generally S. Singleton, “The Consumer Protection from Unfair Trading Regulations 2008 and IT/internet viral and buzz marketing issues”, (2008) Communications Law 13(4), 117-119.

<sup>44</sup> See S. Singleton, “The Consumer Protection from Unfair Trading Regulations 2008 and IT/internet viral and buzz marketing issues”, (2008) 13(4) Comms L 117-119.

<sup>45</sup> [www.pm.gov.uk/output/page13563](http://www.pm.gov.uk/output/page13563) (accessed 28 April 2009), as discussed in D.V. Barrett, “Unintended consequences”, (2008) Fortean Times 237,58-60.

Spiritual Workers Association,<sup>46</sup> which is seeking to become ‘the code sponsor (government recognised self regulating body) for the spiritual sector’.<sup>47</sup> Why did the founders of the SWA, and indeed others who lobbied against this change, have cause to be concerned?

A central concern in this discussion of commercial religion, as touched on above, is that of autonomy, and the authority of legal actors to restrict autonomy. In particular, as I will demonstrate below, the removal of the intent to deceive requirement means false claims are primarily assessed on their truth or otherwise, not the sincerity of the person making them. In the context of commercial religion, this could lead to statements of religious or non-scientific fact being treated as statements which can be resolved, as any other, by legal actors making findings of fact. We can find this approach in a number of nineteenth and twentieth century cases,<sup>48</sup> and concern about the approach led directly to the Fraudulent Mediums Act 1951. The central difficulty with this approach is that it brings legal actors immediately into areas which, if the law seeks to be neutral between religious truth claims, are extremely difficult to resolve. A claim to assist in avoiding eternal damnation, for instance, may quickly result in courts, and indeed trading standards officers, needing to resolve the traditionally contentious

---

<sup>46</sup> A UK organisation following in the footsteps of a French predecessor established in 1975 “aid, guide and counsel fortune-tellers against the complexities of the law, the persecution of state agents, the temptations of charlatanism, and a failure to prepare for the future” (Cited in translation by Harvey, above, at 156).

<sup>47</sup> <http://www.theswa.org.uk/Public/Law.aspx> (accessed 11 July 2011).

<sup>48</sup> See Lawrence (1876) 36 LTR 404; Davis v Curry [1918] 1 KB 109; Bloodworth (1919) 83 Justice of the Peace 460; Stonehouse v Masson [1921] 2 KB 819; Irwin v Barker (1925) 69 Solicitor’s Journal 589; Duncan [1944] 1 KB 773, CA. On Duncan, see further M. Gaskill, Hellish Nell: Last of Britain’s Witches, 2001, London: Fourth Estate, at 207-213.

question of whether there is life after death. This is the sort of subject categorised by Baron Cleasby as ‘a very improper [one] for argument and decision in a court of law’.<sup>49</sup> The same point was made even more strongly by the US Supreme Court in *Ballard*, where Justice Douglas suggested that ‘The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom’.<sup>50</sup> In other words, therefore, when the CPR empowers a Trading Standards Officer to determine whether ‘a gipsy fortune teller on Epsom Downs’<sup>51</sup> is acting lawfully, it raises profound issues of the authority of the state over individuals’ religious beliefs. Additionally, the CPR may lead to a TSO becoming intimately involved in the relationship of the individual to those with religious authority in their community as they seek to determine if that individual has been the victim of an aggressive commercial practice.

Having established a working definition of commercial religion, and demonstrated my principal concerns, in the next section I consider how a key source of overarching legal values in the UK – the ECHR – has dealt with the issue. This is of considerable practical importance because of the pervasive legal impact of the ECHR through the Human Rights Act.

## **II. Separating the religious and the commercial: The approach under the ECHR.**

The exercise of human rights in a commercial context is clearly not restricted to religious rights alone. As the lively debate on human rights and trade illustrates, the extent to which

---

<sup>49</sup> *Monck v Hilton* (1877) 2 Exch. Div. 268, at 275.

<sup>50</sup> *US v Ballard*, 322 US 78 (1944) US Supreme Court. at 87.

<sup>51</sup> A phrase used by Theo Mathew, DPP in 1952, to indicate unimportant cases of this kind – see Gaskill, above, at 347.

fundamental rights carry with them the right to profit from them is a matter of some general concern.<sup>52</sup> This has not, however, resulted in a Convention-wide approach to the issue.<sup>53</sup> The issue falls to be resolved, instead, by a consideration of Article 9 itself.

Article 9 is typically seen as providing an absolute right in relation to belief, and a qualified right in relation to actions. Article 9 provides:

9(1). Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

9(2). Freedom to manifest one's religions or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Only one decision under the ECHR deals directly with the reach of Article 9 in relation to commercial activities.<sup>54</sup> In *X and Church of Scientology v Sweden*,<sup>55</sup> the Church of

---

<sup>52</sup> Contrast E.-U. Petersmann, "Taking human dignity, poverty and empowerment of individuals more seriously", (2002) 13(4) EJIL 845 with P. Alston, "Resisting the merger and acquisition of human rights by trade law", (2002) 13(4) EJIL 815 at 828.

<sup>53</sup> Contrast rights under Article 8 with those under Article 1 of the First Protocol. See further, *Taavitsainen v Finland*, app.25597/07, Chamber; *Schluga v Austria*, app.65665/01, Chamber; see also *Douiyeb v The Netherlands*, app.31464/96, Grand Chamber; *Wloch v Poland*, app.27785/95, Chamber; *Huber v Switzerland*, app.12794/87, Court; *Pavletic v Slovakia*, app.39359/98, Chamber; *Dudek v Poland*, app.633/03, Chamber; *Wojciechowski v Poland*, app.522/04, Chamber; *Maciej v Poland*, app.10838/02, Chamber; T. Allen, "Liberalism, social democracy and the value of property under the European Convention on Human Rights", (2010) ICLQ 1055.

<sup>54</sup> A separate line of cases, notably *Kustannus v Finland*, (1996), DR 85, Commission, concern the implications of associations adopting corporate structures. See more broadly M Emberland, *The Human Rights of Companies: Exploring the structure of ECHR protection*, Oxford, OUP, 2006.



Scientology had placed an advertisement in a periodical circulated to its membership for the sale of e-meters, stating that ‘there exists no way to clear without an e-meter’, and also describing it as ‘an invaluable aid to measuring man’s mental state and changes in it’. The Consumer Ombudsman became involved, and secured an injunction against the latter part of the description. The Church of Scientology and a Pastor of the Church claimed a violation of Articles 9, 10, and 14. I will return to the discussion of Articles 10 and 14 later. In relation to Article 9, the Commission concluded that the activity fell outside the protection of the Article entirely. It found that Article 9’s restricted protection of manifestation of religion ‘does not confer protection on statements of purported religious belief which appear as selling ‘arguments’ in advertisements of a purely commercial nature by a religious group ... although it may concern religious objects central to a particular need, statements of religious content present, in the Commission’s view, more the manifestation of a desire to market goods for profit than the manifestation of a belief’.<sup>56</sup>

This decision receives some support, albeit by analogy, from other threads within Article 9 jurisprudence. Article 9 does not generally guarantee a person the right to exercise their religion through employment. The right to exit is normally regarded as a sufficient safeguard of Article 9 rights.<sup>57</sup> Religious freedom is preserved by allowing the individual to choose freely between their employment and their beliefs, rather than requiring that employment to be modified to eliminate the need for choice.<sup>58</sup> Further support for this emphasis on exit from the commercial sphere can be drawn from the Commission case of *Kustannus v Finland*,<sup>59</sup> where an association of freethinkers had set up a limited liability company which was

---

<sup>55</sup> *X and Church of Scientology v Sweden*, app. 7805/77, Commission.

<sup>56</sup> *Ibid*, para. 4.

<sup>57</sup> P. Van Dijk et al, *Theory and practice of the European Convention on Human Rights*, 2006, Antwerp and Oxford, at 766.

<sup>58</sup> *Consider Ahmad v UK*, (1982) 4 EHRR 126; *Stedman v UK* (1997) 23 EHRR CD168.

<sup>59</sup> *op.cit*, Commission.

required to pay church tax. The Finnish courts upheld the requirement on the basis that the company was a commercial enterprise rather than a religious community. The Commission found that a limited liability company could exercise Article 9 rights, but found the application to be manifestly ill-founded:

“this applicant was registered as a corporate body with limited liability. As such it is in principle required by domestic law to pay tax as any other corporate body, regardless of the underlying purpose of its activities ... *it has not been shown that the [religious] association would have been prevented from pursuing the company’s commercial activities in its own name*”.<sup>60</sup>

By analogy, then, religious rights may be protected for commercial religion not by guaranteeing a right to sell, but rather by ensuring a right to give away. As in US cases such as *Bartha*, a provision prohibiting a practice for remuneration, when applied to a religion which allows but does not require remuneration, still allows the religion to be practised.<sup>61</sup>

An implication of this stark reading of Article 9 would be that commercial religion is to be treated as simply commercial, with the protection of Article 9 not extending to the activity, despite its religious nature. The question of whether a particular activity is to be categorised as religious *or* commercial becomes of considerable significance. There are undoubtedly

---

<sup>60</sup> Ibid, at 29 (emphasis added).

<sup>61</sup> *Re Barth* (1976) 64 Cal App 3d 584. Consider also *Dill v Hamilton* (1939) 137 Neb 723. But contrast *State v De Laney* (1923) 1 NJ Misc 619, 122 A 890; *Commonwealth v Blair* (1927) 92 Pa Super 169; *Trimble v City of New Iberia*, 73 F Supp 2d 659 (W.D.La. 1999). In both this example, and the employment law example, however, the right to exit is of less value when the practice is theologically mandated, as for instance with the Church of Scientology and the doctrine of exchange.

instances when a purely commercial activity will take place in a religious context – in *McNally*, for instance, the commercial sale of Mass cards by a plaintiff who did not mention his religious belief was categorised as a situation where ‘[t]he sole interest that may be placed at risk is a commercial activity, albeit with a religious dimension.’<sup>62</sup> We might also expect commercial religious activity where such activity was acknowledged by the provider as being contrary to their religion, as falling outside the scope of religion.<sup>63</sup> However, we have already seen in relation to *Church of Scientology*, that it is possible for categorisation of an activity as either religious or commercial to be contentious. In *Church of Scientology*, for instance, we see reference in separate parts of the opinion to a ‘purely commercial’ nature, and to a transaction being ‘more the manifestation of a desire to market goods for profit than the manifestation of a belief’. These are not necessarily the same, with the first emphasising the nature of the transaction, and the second the motivation of the supplier.

Discerning whether a particular service should be categorised as commercial, and not religious, is thus not straightforward.<sup>64</sup> Once a legal actor has made this categorisation, however, this reading of Article 9 provides a simple answer to how much of commercial religion is to be treated – it should be regulated as commercial activity, with no special protection derived from Article 9. While possessing the virtue of simplicity, this reading of Article 9 poses a number of serious problems. Firstly, it embeds into the structure of Article 9

---

<sup>62</sup> *McNally*, above, para 156.

<sup>63</sup> Consider the US cases of *Allinger v Los Angeles* (1979) 272 Cal App 2d 391.

<sup>64</sup> The task facing legal actors here may be seen as analogous to policing the distinction between matters *jure imperii* and *jure gestionis* in relation to state immunity – see generally H. Fox, “State immunity: The House of Lords Decision in *I Congreso del Partido*”, (1982) 98 LQR 94.

an incompatibility between commerce and religion which, while well-established in many religious systems present in Europe, is not universal.<sup>65</sup> Secondly, it privileges religious bodies which do not make use of commercial practices either as a matter of doctrine, or as a practical implication of their economic status and history. Religious organisations, and individuals, frequently require resources to carry out their religious activities. The economic position of some religions, perhaps lacking capital resources or a large membership base providing a subscription income stream, may mean that they rely upon commercial income more than others. The state has no Convention obligation to provide such religious communities with the resources to carry out their religious activities, but if intervenes to prevent them from securing such resources, that may constitute an inappropriate exercise of state power. This concern with the economic position of rights holders may seem speculative, but in *Murphy v Ireland* the Court accepted the argument that allowing religious bodies to purchase advertising ‘would lean in favour of unbalanced usage by religious groups with larger resources’.<sup>66</sup> Thirdly, as I will demonstrate in the next section, choosing to treat commercial religion simply as commercial does not eliminate all the special challenges commercial religion poses for regulation.

In this section I showed that the most obvious reading of Article 9 excludes commercial religion from Article 9 protection when it is categorised as commercial rather than religious. It is not supportive of treating all commercial religious activity as religious activity protected by Article 9, unless restriction can be justified under Article 9(2). Some commercial religious activity, and on a flat reading of Article 9, much commercial religious activity, will fall to be

---

<sup>65</sup>Consider also I. Reader and G.J. Tanabe, Practically religious: Worldly benefits and the common religion of Japan, 1998, University of Hawaii Press.

<sup>66</sup>*Murphy v Ireland*, above, at para. 74.

dealt with by the national law concerning commercial activity. In the next section, I will explore in more detail the issues raised by commercial religion by considering its regulation in one area of UK law.

### **III. Regulating commercial religion: UK consumer law.**

Regulation of commercial activity by law, and state actors empowered by law, forms an important part of the UK and European legal landscape. It is a tremendously pervasive part of that landscape, and a fuller discussion of commercial religion would encompass areas of law as diverse as employment law, in the broadest sense, as it applies to religious employers; restrictions on commercial activity carried out by charities; and taxation of religious organisations and religious activities. For the purposes of this article, however, to show the practical significance and importance of considering commercial religion as such, and the continuation of special challenges regardless of a categorisation as purely commercial, it is necessary to focus upon one area of law.

Consumer law highlights problems of the finding of fact in a way which other areas of regulation of commercial religion do not. In *Bull and Bull v Hall and Preddy*,<sup>67</sup> for instance, the operators of a hotel refused to offer a double-bed to a homosexual couple because of their religious beliefs. As the Court of Appeal noted, “the facts were not in issue”,<sup>68</sup> rather the question was whether the religious values of the operators could prevail against general state policy in relation to discrimination on sexual orientation in the provision of goods and services. This can be contrasted with, for instance, provision of spirit mediumship where the provider may not only seek to implement a minority value system based on their religion, but may also put the facts in issue, arguing that they are in accord with their religion.

---

<sup>67</sup> On which, see for instance *Bull and Bull v Hall and Preddy*, [2012] EWCA Civ 83, CA.

<sup>68</sup> *Ibid*, para. 6.

Additionally, as noted earlier, consumer law is an area where specific legislation dealing with commercial religion has recently been replaced with general legislation, intended in part to make it easier to regulate the provision of commercial religious services. The clear policy underpinning the extension of consumer law to areas previously covered by the Fraudulent Mediums Act suggests that those responsible for enforcing consumer law, and ultimately the courts, will be called upon to evaluate religious services against the requirements of consumer law. The Spiritual Workers Association, for instance, reports a Trading Standard Officer's advice that '[b]y using the words heal or healer you are suggesting you can cure, this is not an acceptable term under the [CPR] unless you can give proof of such claims'.<sup>69</sup> Thus, although the CPR was seen by Deft as 'not concerned with religious belief and consequently [lacking] specific mention of religion or faith (or fraudulent mediums)',<sup>70</sup> legal actors will need to engage with some of the particular challenges that this poses in the legal context.<sup>71</sup> It is, accordingly, a useful case study to show, in detail, some of the practical difficulties of regulating commercial religion.

Discussion will be simplified if we take the central concern of consumer protection to be protecting consumers from the harm caused by 'defective goods, substandard services and

---

<sup>69</sup> <http://www.theswa.org.uk/Public/Law.aspx> (accessed 11 July 2011).

<sup>70</sup> Personal correspondence, cited in Barrett, above.

<sup>71</sup> See more broadly P. Greasley, "Is evaluating complementary and alternative medicine equivalent to evaluating the absurd?", (2010) 33 Eval Health Prof 127-139; D. Colquhoun, "Should NICE evaluate complementary and alternative medicine? NO", (2007) 334 British Medical Journal 506; E. Ernst, "Researching the 'absurd'", (2003) 8 Focus on Alternative and Complementary Therapies 308-309.

poor information’.<sup>72</sup> The criminal offences under the CPR are in the tradition of the regulatory offences which have been ‘at the core of the United Kingdom’s consumer protection regime for decades’.<sup>73</sup> The most wide-ranging provision is Reg.3(3), which provides that a commercial practice is unfair if it contravenes the requirements of professional diligence and is likely to materially distort the economic behaviour of the average consumer. When the practice is directed at a particular group, the average consumer ‘shall be read as referring to the average member of that group’,<sup>74</sup> particularly when that group is especially vulnerable, for instance on grounds of credulity.<sup>75</sup>

Although the provision of broadest reach, this provision is of much less practical significance than the more specific provisions of the CPR, which prohibit a range of more specific misconducts, including misleading acts and omissions,<sup>76</sup> and aggressive commercial practices, which are likely to be preferred over the general provision when they apply.<sup>77</sup> The latter defines a commercial practice as aggressive if, “taking account of all features and circumstances ... it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence”.<sup>78</sup> Undue influence is, in turn, defined as “exploiting a position of power in relation to the consumer as to apply pressure, even without

---

<sup>72</sup> OFT Press Notice, 1999 quoted in G. Woodroffe and R. Lowe, Consumer Law and Practice, (London: Sweet and Maxwell, 2010), para. 1.03.

<sup>73</sup> P. Cartwright, “Unfair commercial practices and the future of the criminal law”, (2010) 7 *Journal of Business Law* 618-637 at 618.

<sup>74</sup> CPR Reg. 2(4).

<sup>75</sup> CPR Reg. 2(5).

<sup>76</sup> CPR Reg. 5,6.

<sup>77</sup> P. Cartwright, above, at 622.

<sup>78</sup> CPR Reg. 7(1), 11.

using or threatening physical force, in a way which significantly limits the consumer's ability to make an informed decision".<sup>79</sup>

These are in turn supplemented by a list of specific prohibited practices under Schedule 1, the most relevant of which for our purposes are claiming that a trader or product has been approved or endorsed by a public or private body when it has not,<sup>80</sup> promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing the product is made by that same manufacturer when it is not,<sup>81</sup> claiming that the product is able to facilitate winning in games of chance,<sup>82</sup> and falsely claiming that a product is able to cure illness, dysfunction or malformations,<sup>83</sup> and falsely claiming or creating the impression that the trader is not acting for purposes relating to his 'trade, business, craft or profession'.<sup>84</sup> These prohibited practices do not require consideration of the likely effect on consumers.<sup>85</sup> A key feature to draw out from the offences which accompany these provisions is the mens rea of the trader. In relation to the specific offences of misleading acts and omissions, aggressive commercial practices, and the

---

<sup>79</sup> CPR Reg. 7(3).

<sup>80</sup> CPR Schedule 1, number 4.

<sup>81</sup> CPR Schedule 1, number 13.

<sup>82</sup> CPR Schedule 1, number 16

<sup>83</sup> CPR Schedule 1, number 17. The illustrative example in the CPR Guidance, para. 6.1, adds a reference to a "definitive statement about the curative effects". This offence is characterised as one which "may depend upon hotly contested expert evidence" as obiter dicta of Briggs J in *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 at para 49.

<sup>84</sup> CPR Schedule 1, number 22.

<sup>85</sup> CPR Guidance, para 6.1.



specifically prohibited practices under Schedule 1, there is no explicit mens rea requirement,<sup>86</sup> and the CPR Guidance indicates that these are ‘strict liability offences’.<sup>87</sup>

How should an enforcement authority,<sup>88</sup> bound by the regulations with a duty to enforce them, go about applying these provisions to commercial religion? They have substantial powers to aid them in enforcing the CPR,<sup>89</sup> but these powers do not help them with the fundamental problems posed by determining the satisfactoriness of religious goods and services, discussed in Section I above.

An obvious approach to religious goods and services would be to focus on the sincerity of the seller. This was formerly the case for the specific offence under the Fraudulent Mediums Act, which as discussed above, required an intent to deceive, and a similar requirement has been read into similar statutes in some US cases,<sup>90</sup> and into the Napoleonic Code in France.<sup>91</sup> The CPR, as discussed above, has been intentionally crafted to remove the focus on sincerity in the Fraudulent Mediums Act. Even ignoring the legislative background, the discussion of mens rea above shows that deliberate fraud is frequently *not* required for a criminal offence under the CPR. For instance, falsely claiming that a product is able to cure illness,

---

<sup>86</sup> CPR Reg 9-12.

<sup>87</sup> CPR Guidance, para. 12.3. See also P. Cartwright, “Unfair commercial practices and the future of the criminal law”, (2010) 7 Journal of Business Law 618-637.

<sup>88</sup> CPR Reg. 19.

<sup>89</sup> CPR Reg.20-22.

<sup>90</sup> E.g. *Chicago v Payne* (1911) 160 Ill App 641.

<sup>91</sup> Cited in translation in D.A. Harvey, “Fortune-tellers in the French courts: Antidivination prosecutions in France in the Nineteenth and Twentieth Centuries”, (2005) French Historical Studies 28(1), 131 at 134.

dysfunction or malformations, is a strict liability offence,<sup>92</sup> where any due diligence defence is based on circumstances other than the mens rea of the seller.

Another obvious approach would be to treat a transaction concerning a religious good or service as one understood by both parties as being of a special nature. In relation to the offence of misleading actions or omissions, Peter Deft, the Assistant Director at BERR, saw an offence as unlikely to occur where ‘a person pays for spiritualistic services (or as another example, astrological services) knowing full well what they are buying ... because the consumer would not have been misled into taking a transactional decision he would not otherwise have taken’.<sup>93</sup> This has limited traction even for the misleading actions and aggressive commercial practices offences – is there not an offence if a portrayed shared understanding between customer and client that mediumship or astrology works is absent? It does not in any case apply to other important offences under the CPR, such as that concerning healing, which do not require any impact on transactional decision making.

A third approach, hinted at by the comment on Deft above, would be to concentrate primarily on the relational elements of the transaction, rather than the product itself. Insofar as this can be brought out from the CPR, this would however serve to extend the reach of criminal sanctions under the CPR, rather than reduce them. The aggressive commercial practice provisions do not require hostility and, through the reference to undue influence,<sup>94</sup> open the possibility of religious power, for instance through a place in an ecclesiastical hierarchy or a status of special holiness or religious knowledge, forming the basis of an offence under the

---

<sup>92</sup> Under CPR Schedule 1, para. 17.

<sup>93</sup> Person correspondence cited by Barrett, above.

<sup>94</sup> It is unclear how far cases on the term in other areas of English law should be used to inform discussion of this provision (see P Cartwright, “Under pressure: Regulating aggressive commercial practices in the UK”, [2011] LMCLQ 123, at 129). As illustrative of the issue of religion and undue influence more generally however, see *Azaz v Denton* [2009] EWHC 1759, QB; *Hollis v Rolfe*, [2008] EWHC 1747, Ch; *Catt v Church of Scientology Religious Education College Inc* [2001] C.P. Rep 41, QB.

CPR. The CPR does not categorise every transaction with an asymmetry of power as involving an aggressive commercial practice, recognising that sometimes “asymmetry is inevitable”.<sup>95</sup> Thus not every relationship where the trader is in a position of spiritual power over the consumer will be covered by this regulation. Its application, however, turns on a number of difficult judgments by the finder of fact – notably whether the conduct was sufficiently culpable as to amount to exploitation of the circumstances, whether it led to a significant potential impairment of the customer’s freedom of choice, and whether it was likely to cause a difference in the transactional decision of the customer.<sup>96</sup> As Lord Donaldson has observed, “[p]ersuasion based upon religious belief can ... be much more compelling and the fact that arguments based upon religious beliefs are being deployed by someone in a very close relationship ... will give them added force”.<sup>97</sup> Determining whether the undoubted influence of religion constitutes undue influence is extremely challenging.<sup>98</sup> Normally, there is a further need to show that the circumstances would have impacted on the average consumer, rather than simply on the customer. In our case, however, the provision that the group is assessed against a particularly targeted group, especially where that group is more vulnerable due to a characteristic such as credulity, is likely to render this relatively straightforward. If by credulity we mean likelihood to believe a particular claim in particular circumstances, rather than some general character trait, it seems difficult to argue that co-religionists will not be more likely to believe the claims of their religion than the general public. Additionally, when evaluating whether a practice is aggressive, one factor to take account of is whether it exploits any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment.<sup>99</sup> So a religious service offered to members of a

---

<sup>95</sup> Cartwright, *op.cit.*, at 123.

<sup>96</sup> Cartwright, *op.cit.*.

<sup>97</sup> *In Re T (Adult: Refusal of treatment)* [1992] Fam 95, CA at 114.

<sup>98</sup> Consider, in a different context, E Wicks, “Religion, law and medicine: Legislating on birth and death in a Christian state”, (2009) *Medical Law Review* 410-437.

<sup>99</sup> CPR reg. 7(2).

religious community to alleviate particular misfortune may be unusually amenable to regulation under this provision.

A straight reading of the CPR, then, suggests that trading standards officers are to interpret commercial religion simply as commerce, and that the structure of the CPR in a number of instances requires them to resolve truth claims, even religious truth claims, and potentially to evaluate the relationship between an individual and their religious community to ensure there are no aggressive practices. If a healing ministry similar to that of the United Reform Church, with ‘prayer with the laying on of hands [to] acknowledge the Lord’s healing touch in body, mind, and spirit for the whole person including the affected part’,<sup>100</sup> were to be carried out commercially, the TSO would need to determine, but only need to determine, if claims as to its efficacy were true or false. If Lucky I-Ching coins were sold by a Feng Shui practitioner to improve success at the National Lottery on the basis that ‘they really work!’,<sup>101</sup> if the TStandards Officer was satisfied that the National Lottery was a game of chance, the relevant offence would be committed even if the practitioner believed the claim to be true. In either example, if the good or service was purchased from an individual in a position of religious power, the TSO may find that that position was being exploited so that, regardless of the efficacy of the good or service, an offence was committed.

As discussed in the introduction, it is evident that resolving this sort of situation in the same way as any other commercial transaction is problematic in terms of religious freedom. There

---

<sup>100</sup> United Reform Church, “Guidelines for good practice in the healing ministry”, at [http://www.urc.org.uk/what\\_we\\_do/healing\\_ministry/docs/urc\\_guidelines](http://www.urc.org.uk/what_we_do/healing_ministry/docs/urc_guidelines) (accessed 2/11/2011).

<sup>101</sup> See <http://www.rising-dragon.co.uk/articles/feng-shui/how-to-strike-it-lucky.htm> (accessed 2/11/2011).

are, however, possible counter-currents within both the ECHR and the UK law which could serve to reduce the impact on religious freedom of treating commercial religion simply as commerce.

#### **IV: Reblending religion and commerce: Counter-currents.**

##### *IV.1. Counter-currents under the ECHR.*

If the religious freedom guarantees of Article 9 were to apply in some form to commercial religious transactions, the Human Rights Act may result in UK courts needing to interpret consumer law terms, such as the prohibition on ‘unfair commercial practices’ in the CPR reg.3(1), so as to ensure activities protected under Article 9 are excluded from the reach of consumer protection. Is there an alternative reading of Article 9 which may have that effect?

I noted earlier that a single decision of the Commission under Article 9 was the only authority directly bearing on commercial religion. There is, however, a more developed line of cases, including decisions by the Court, on commercial speech under the freedom of expression guarantees in Article 10. Article 9 and Article 10 are closely related both structurally, for instance in relation to justifying the restriction of rights embodied in the Article, and as embodying classic human rights rather than rights with ‘characteristics of the social and economic rights’.<sup>102</sup> Additionally, in a number of cases involving Article 9 and Article 10 claims, the Court has chosen to resolve them purely as commercial speech cases under Article 10, rather than discuss Article 9 arguments.<sup>103</sup> Although this reflects a broader

---

<sup>102</sup> T. Allen, above, at 1078.

<sup>103</sup> *Vgt Verein Gegen Tierfabriken v Switzerland*, app. 24699/94, Chamber; see also *Verein Gegen Tierfabriken Schweiz v Switzerland*, app. 3772/02, Chamber; *Verein Gegen Tierfabriken Schweiz v Switzerland* (no.2), app. 32772/02, Grand Chamber. *Murphy v*

willingness by the Court to avoid Article 9 discussion when other rights can be invoked, it does suggest that commercial activity under Article 9 and under Article 10 may be capable of resolution on the same terms.

The commercial speech doctrine under Article 10 can be traced back to the First Amendment jurisprudence of the US Supreme Court, where restriction of commercial speech was subjected to a considerably lower level of scrutiny than restriction of political speech.<sup>104</sup> The ECHR approach, obviously influential in the UK,<sup>105</sup> similarly recognises that commercial speech can fall within Article 10, but subjects State restriction of such speech to a lower level of scrutiny. The key case is *Markt Intern and Beermann v Germany*,<sup>106</sup> where the Court found that speech of a commercial nature could fall within the protection of Article 10,<sup>107</sup> but that the margin of appreciation was ‘essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition’.<sup>108</sup> The decision has been seen

---

Ireland, app. 44179/98, Chamber. See also the Northern Ireland decision of Kirk Session of Sandown Free Presbyterian Church, Re Judicial Review [2011] NIQB 26.

<sup>104</sup> See C.R. Munro, “The value of commercial speech”, (2003) Cambridge Law Journal 134.

<sup>105</sup> See R. Caddell, “Freedom of commercial speech and the UK Courts”, (2005) Cambridge Law Journal 274.

<sup>106</sup> *Markt Intern and Beerman v Germany*, 20 November 1989, 12 EHRR 161, Court.

<sup>107</sup> *Ibid*, para. 26.

<sup>108</sup> *Ibid*, para. 33. Less clearly deferential language is used later by the Court in *Casada Coca v Spain*, 24 February 1994, 18 EHRR 1.

as laying down for commercial speech ‘a particularly deferential version of the margin of appreciation’.<sup>109</sup>

In relation to Article 10, a number of grounds have been advanced for this treatment of commercial speech. Firstly, a key feature of freedom of expression guarantees is their relationship to the democratic process, and so the protection of fundamental rights more generally. In commercial speech, State regulation poses less of a threat to the democratic process than when the State regulates political speech. Secondly, although varying in intensity from State to State, there is a ‘well-established practice of economic regulation which necessarily includes restriction of speech related to economic transactions’.<sup>110</sup> Thirdly:

commercial speech is generally easier to verify than political speech. Whereas in the political sphere the right policy choices are inherently contested and are expected to emerge from the interplay of opposing ideas, the components and characteristics of a product are, in most cases, not controversial. For this reason, governmental regulations on disclosure requirements and on false and misleading advertisement meet with less suspicion than any similar government regulation in the political sphere.<sup>111</sup>

Subject to a reservation on the point of verifiability, which is that some commercial religious claims are likely to fall nearer to a political truth claim than a classic commercial truth claim, these arguments appear to work well in the context of Article 9. Restriction of religious

---

<sup>109</sup> M.W. Janis, R.S. Kay and A.W. Bradley, European human rights law: Text and materials, Oxford: OUP, 2008 at 296.

<sup>110</sup> M.W. Janis et al, above, at 296.

<sup>111</sup> M.H. Randall, “Commercial speech under the European Convention on Human Rights: Subordinate or equal?” [2006] Human Rights Law Review 53 at 80.

activity entirely poses a much greater threat to religious freedom, and the texture of a democratic state, than restricting religious activity where the provider wishes to charge a fee for its provision. Similarly, restriction of commercial activity frequently can be justified, and in practice is restricted for a variety of state aims across Europe.

If this line of cases, rather than *Church of Scientology*, was adopted in relation to Article 9 the ECHR obligations upon the state in relation to commercial religion would become much more nuanced. Rather than commercial religion falling outside the scope of Article 9 entirely, it would fall within the protection of Article 9, but with restriction of the right under Article 9(2) easier to justify, and Convention regulation of state decision making allowing a wider margin of appreciation. The concerns I raise earlier would need to be reflected in determining whether a restriction on a particular commercial religious activity – such as for instance faith healing – was justified under Article 9(2). Commercial religious interests would not be ruled out at the beginning of Article 9 consideration, but, recognising the complex issues concerning commercial activity in national life, may be easier to restrict than pure religious interests. Interestingly, the recent English case of *Bull and Bull v Hall and Preddy*,<sup>112</sup> although giving considerable weight to the commercial context in finding that the proprietors of a hotel who discriminated on the grounds of sexual orientation were not protected by Article 9, proceeded on the basis that Article 9 was engaged,<sup>113</sup> but that the restriction was justified in part because they remained able to manifest their beliefs outside the commercial sphere.<sup>114</sup>

---

<sup>112</sup> *Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83, CA.

<sup>113</sup> *Ibid*, para. 51.

<sup>114</sup> *Ibid*, para. 50.



A less radical re-reading of Article 9 would be to keep the distinction in *Church of Scientology* between activities which are categorised as religious, and so fall under Article 9, and commercial activities, but to generously characterise commercial religion as religion. While this may not bring Article 9 into play for all commercial religion, it may increase its application to particular cases with, as we shall see in the next section, potential impacts on UK law. That is to say, the greater the willingness to categorise commercial religion as religion rather than commerce, the greater the impact of the ECHR on the reading of UK law.

#### *IV.2. Counter-currents in UK consumer law.*

In Part III, I applied a flat reading to the CPR, which left commercial religion posing considerable challenges. In this section I will consider strategies for reading down the CPR which, if adapted by the courts, could reduce the scope of these challenges.

One strategy would be to seek to sever elements which are justiciable by a legal system from those which are not, and only resolve those which are justiciable. In other words, legal actors would regard as unprovable – but equally undisprovable – some characteristics of a good or service, leaving the issue to be resolved by the burden of proof. A dividing line with which legal actors may be comfortable is that between scientific and non-scientific claims. In an important US decision on creation science, Judge Overton characterised science as being guided by natural law, explanatory by reference to natural law, testable against the empirical world, forming tentative conclusions, and, following Popper, falsifiable rather than provable.<sup>115</sup> Severing along this line would not impact on all religions equally, given the centrality of non-scientific yet world-impacting doctrines and practices to what Albanese has

---

<sup>115</sup> *McLean v Arkansas*, 529 F.Supp. 1255, 1258-64 (Ed.Ark, 1982).

dubbed ‘metaphysical religion’.<sup>116</sup> It would, however, allow legal actors to focus on those issues which are most easily resolved within the legal system. So, for instance, in relation to a Church of Scientology claim that cancer could be cured by Scientology religious practices, Goff J found that ‘I cannot take judicial notice that it is false ... although I think it might well have been proven wrong there is no evidence before me on which I can so find as a fact’.<sup>117</sup> Had evidence of recovery rates of cancer sufferers receiving Church sanctioned treatment been available and put to the court, this issue would have been nearer to resolution as a matter of fact, albeit one with some complicated issues of causation.<sup>118</sup>

The complexity of religious goods and services means that this would not simply result in consumer law being disappplied to commercial religion. Rather, some elements of a commercial religion transaction would remain resolvable, and therefore suitable objects for consumer law protection. Two examples will elucidate this.

---

<sup>116</sup> See C. Albanese, A republic of mind and spirit: A cultural history of American metaphysical religion, 2006, New Haven: Yale UP.

<sup>117</sup> *Church of Scientology of California and Others v Kaufman and Another* [1973] RPC 635, at 645-6.

<sup>118</sup> Severing along this line would follow an approach taken in the US, where a telephone psychic was charged not with misrepresenting her powers, but of misrepresenting her ethnicity as Jamaican. See D.A. Harvey, “Fortune-tellers in the French courts: Antidivination prosecutions in France in the Nineteenth and Twentieth Centuries”, (2005) 28(1) *French Historical Studies* 131.

Firstly, to celebrate the 2000<sup>th</sup> anniversary of the birth of St Paul the Apostle, the Catholic Church offered plenary indulgences to members of the Church who met certain conditions.<sup>119</sup> A plenary indulgence remits the entire temporal punishment due to sin, so that no further expiation is required in purgatory. Although the process takes place in the physical world, the world in which the state is comfortable exercising jurisdiction, the claimed results exclusively fall outside of that world. It would be a bold, and intolerant, state which chose to identify such a service as unsatisfactory because no service could provide the metaphysical benefit. Nonetheless, if this sort of indulgence was to be the subject of a commercial transaction, there may be elements which could be dealt with by consumer law. Let us say a priest offering an indulgence for sale was not a member of the Roman Catholic Church based in the Vatican, but rather the competitor based in the USA. If they claimed that the USA based organisation was the authentic or true Catholic Church, distinct from the inauthentic organisation based in the Vatican, this would not seem to create a significant consumer law issue.<sup>120</sup> But if the minister claimed, falsely, that their authority was derived from the Vatican organisation, this would seem to fall fairly comfortably into Schedule 1 of the CPR, as falsely claiming endorsement by a particular organisation.<sup>121</sup>

Secondly, consider the case of Suzanne Hadwin. A variety of press reports suggest that she was called in by the resident of a council house who was experiencing ‘a series of strange happenings, including doors slamming shut , the ghost of a little girl appearing on the landing

---

<sup>119</sup> See *Urbis et Orbis* decree, 10 May 2008, at [www.vatican.va/roman\\_curia/tribunal/apost\\_penit/documents/rc\\_trib\\_appen\\_doc\\_20080510\\_san-paolo\\_en.html](http://www.vatican.va/roman_curia/tribunal/apost_penit/documents/rc_trib_appen_doc_20080510_san-paolo_en.html) (accessed 29 April 2009).

<sup>120</sup> But see J Rivers, *The law of organized religions*. Oxford: OUP, 2010, Chapter 3.

<sup>121</sup> CPR, Schedule 1, para. 4.

and, bizarrely, even her own dressing gown floating down the stairs'.<sup>122</sup> She then removed the poltergeist by laying salt circles in the house, and then used the power of prayer, sprinkled holy water, and angelic assistance to “take the spirit to the place he needed to be taken”.<sup>123</sup> The local District Council paid half of her fee for doing so. The benefits conferred were not purely metaphysical, as the occupants of the house anticipated, and reported, a considerable improvement in the quality of their environment. Neither were they purely physical, as the removal of a spirit is not a physical phenomenon. To an outside observer, the mechanism for the creation of any benefits might be purely physical – the service making a difference to the social or psychological setting of the recipients. To the sincere participants, however, the exorcism works not because of the psychological mechanisms in play, but because of the power of the exorcist, or the grace of a metaphysical being. These may not be apt to be resolved legally. Other parts of the transaction, for instance claims as to the previous experience of Suzanna Hadwin in dealing with this sort of domestic disturbance, might on the other hand be apt to legal resolution. In resolving issues around this sort of service, however, one disturbing possibility is that a Trading Standards Officer may choose to categorise those who believe in hauntings and exorcism as per se ‘without education, of weak and credulous spirit’,<sup>124</sup> and apply the average consumer test under regulation 2(5)(a) accordingly, particularly when considering whether they have been subjected to an aggressive commercial practice.

---

<sup>122</sup> <http://www.dailymail.co.uk/news/article-513695/Hello-council-ghostbuster-Taxpayers-money-spent-tenants-exorcism.html> (accessed 24 September 2008).

<sup>123</sup> Quotes by Suzanne Hadwin reported *ibid*.

<sup>124</sup> Sernin case, 1879, cited in translation in Harvey, above, at 137.

This severing of naturalist and non-naturalist elements would not always limit the enquiry of a legal actor to easy issues of fact. A claim that a provider of religious services had been a disciple of a particular spiritual leader during their conventional lifetime could be resolved comparatively easily. The legal actor may be more challenged by a claim that a service provider is a genuine gypsy, or the seventh son of a seventh son, but ethnicity and lineage are issues the courts are prepared to deal with in other contexts. But what about a claim that a service provider has spiritual authority because of unbroken apostolic succession from Saint Peter? This is likely to involve a very extensive consideration of ecclesiastical history, and a resolution of historical issues that may tax a court in a different way.<sup>125</sup> It may, nonetheless, allow some of the more problematic issues of commercial religion to be excluded from the consideration of the legal actors.

The structure of the CPR is not, however, particularly supportive of severing along these lines. In general terms, one might argue for an interpretation of reg.2(6), intended to prevent mere puffs becoming actionable, so as to incorporate this distinction. Reg.2(6) protects the position of ‘exaggerated statements which are not meant to be taken literally’.<sup>126</sup> If we were to interpret literal as meaning justiciable then, although religious providers may be unhappy at their claims being categorised as ‘exaggerated’, this would seem to be a mechanism for severing the two sorts of claims. As already shown in section II, however, religious rights under the Human Rights Act are unlikely to be engaged in relation to commercial religion; and an interpretation of ‘literal’ which gives effect to this distinction seems so far a departure for the clear meaning of the word as to be impossible short of the interpretative power of the

---

<sup>125</sup> See for instance *R v Zundel*, [1992] 2 SCR 731, Supreme Court of Canada.

<sup>126</sup> CPR Reg. 2(6).

HRA. Thus, this severing may depend upon a change in the interpretation of Article 9 as argued for in IV.1 above.

A second strategy allowing some severing of claims within the jurisdiction of the state from other claims may be to interpret ‘materially distort the economic behaviour’ of the consumer in a very specific way. The CPR defines this as impairing the ability ‘to make an informed decision thereby causing him to take a transactional decision that he would not have taken otherwise’.<sup>127</sup> Consider the sort of claim which does not seem apt to resolution by Trading Standards Officer or court – for instance a claim to communication with a person after their death. When faced with a consumer paying a medium for such communication, it is difficult to argue that a consumer who knew this claim to be untrue would not have acted differently from one who wrongly believed it to be true. There is more ground, however, for arguing that a person who knew *the state had found it* to be untrue might act exactly the same as if they did not know this. The difficulty with this mode of severing, however, is that proof of an impact on the transaction decision, while necessary under the general prohibition under Regulation 3(3) and, in a slightly different form, in the more specific prohibitions under Regulations 5-7, is not required for the prohibitions under Schedule 1.

A third strategy would be to emphasise the provision of services, not results. This was seen as an important distinction by Steven Upton, of the Spiritualist’s National Union, when he suggested that ‘If you are claiming you can prove life after death you’ve got a problem. We never guarantee it is going to work. Trained mediums don’t make false claims’.<sup>128</sup> To return to the example of Suzanne Hadwin, it may be that we cannot demand of exorcism services

---

<sup>127</sup> CPR, Reg. 2(1).

<sup>128</sup> Cited in F. Rohrer and S. Bell, “There may be trouble ahead”, (2008) BBC News Magazine 18 April.

proof that the exorcism has succeeded, but we can demand that it has been carried out properly. If a particular ritual was laid down by a particular tradition for exorcism, and the practitioner failed to perform it in that way, the state may inquire into whether the service met the standards of professional diligence, assessed against the average member of the tradition. A particular problem arises in our context, however, as determining the average member of the tradition may be particularly difficult. Exorcism is a more contested, and splintered, area of human practice than, say, plumbing. How do we determine the tradition against which Suzanne Hadwin is to be measured – is it exorcists generally (even if their theoretical underpinnings and practices are incompatible), spiritualist mediums, or spiritualist mediums who are assisted by a Native American spirit guide, and draw upon Native American practices such as smudging, that is, the burning of particular herbs as part of a purification ritual?<sup>129</sup> Analogous with the second generation of kosher fraud laws in the US,<sup>130</sup> it may be that this can be resolved primarily by fair labelling, with the label that the service provider uses when providing their service being that against which they are judged – so for instance, if Suzanne Hadwin identified herself as a spiritualist medium employing smudging, her competence as a smudging practitioner is the measure. It leaves open the possibility, however, of service providers identifying as a one-person tradition, so that their own practice is the only sensible measure of the professional diligence of an average member of their tradition. Additionally, it may involve legal actors in determining the content of competent practice in marginal practices. We can see this in the French case of Bernard Leborgne in

---

<sup>129</sup> Suzanne Hadwin is now Suzanne Gill, and details her services on her website: [Gabriel-spirituals.com](http://Gabriel-spirituals.com) (accessed 04/07/11). Thanks to Suzanne Gill for confirming this, and commenting on the description of her practices (personal correspondence, September 2011).

<sup>130</sup> See S.M. Sigman, “Kosher without law: The role of non-legal sanctions in overcoming fraud within the Kosher food industry”, (2004) 31 Florida State University Law Review 509.

1967. Here the court engaged in an extended discussion of astrology, concluding that ‘to achieve its practical goal, the horoscope, which is founded on the exact state of the celestial vault at the time and place and birth, requires the utilization of complex rules and calculations as well as mathematical and astronomical knowledge’. <sup>131</sup> The verdict concluded that, as there was no evidence to contradict his claim that he has conscientiously followed those rules, there was no basis for an accusation of fraud. UK courts may be somewhat reluctant to set down standards of competence for, for instance, faith healers and exorcists from a range of traditions.

A fourth strategy could be based upon the definition of ‘trader’ under the CPR. The offences outlined above apply to traders, defined under the Regulations as ‘any person who in relation to a commercial practice is acting for purposes relating to his business’. <sup>132</sup> A straightforward reading of this clause may be useful to providers of commercial religious services on an ad hoc, low volume basis, who may be able to argue that they are not traders. <sup>133</sup> The distinction between a trader and a non-trader is likely to turn on factors such as profit-seeking motive, the number and frequency of transactions, and the time between the purchase and sale of products. <sup>134</sup> A more radical interpretation of this clause would be to exclude commercial religion from the category of ‘his business’, even if it was a regular, large scale, concern. Given the legislative history to the CPR, however, and the policy justifications for appropriate regulation of commercial activity, even when religious, this interpretation again appears unlikely. Even an interpretation of the ECHR which treated commercial religion as

---

<sup>131</sup> Cited in translation by Harvey, above, at 152.

<sup>132</sup> CPR, reg. 2(1).

<sup>133</sup> CPR Guidance para. 14.21.

<sup>134</sup> CPR Guidance, para. 14.22



simply religion – inconsistent with the current jurisprudence – would not justify moving the entire activity completely out of the reach of the CPR.

While some of the strategies outlined above would have some impact on reducing the impact of the CPR on some commercial religious practices, the structure of the CPR is not supportive of judicial strategies to give weight to the religious element of commercial religion across its reach. Another possibility is amendment of the CPR. As mentioned earlier, the CPR gives effect to EU law on consumer protection so, even if there was UK political will to effect change, it may be constrained by the EU framework.

A provision specifically dealing with commercial religion may be able to deal with the issues with greater sensitivity to the complexity of the challenges than the current regime, both in relation to resolving truth claims, and evaluating commercial practices for aggressiveness. There is, however, always the danger that a legislator addressing these issues may see an opportunity for restricting some forms of commercial religious activity, for instance magical practices, as inherently against the interests of consumers.<sup>135</sup> Another possibility is for the legislator to seek to protect particular practices, or to enter into a regulatory partnership with particular trusted religious organisations. We can see both of these in play in the Mass card case of *McNally*, introduced above. In *McNally* the legislation stated that ‘A person who sells a Mass card other than pursuant to an arrangement with a recognised person shall be guilty of an offence’.<sup>136</sup> The Court noted that this legislation, by associating recognised persons with

---

<sup>135</sup> *Re Bartha* (1976) 63 Cal App 3d 584; *Penny v Hanson* (1887) 56 Law Times 235; *People v Elmer* (1896) 109 Mich 493. See further G.G. Sarno, “Regulation of astrology, clairvoyance, fortunetelling and the like”, (first published 1979), 91 ALR 3d 766

<sup>136</sup> Charities Act 2009 s.99(1).

officials of the Roman Catholic Church, created ‘a simple evidential proof’.<sup>137</sup> The proof went to ‘the authenticity issue of Mass cards’,<sup>138</sup> to dealing with the mischief caused by ‘bogus Mass cards’.<sup>139</sup> So the Irish legislation constructs unsatisfactory Mass cards as ones which are inauthentic according to the Roman Catholic Church, and Catholic Canon Law. The principle of state neutrality between religions, however, is difficult to square with prioritising goods and services offered by one religious organisation over competitors. Although the court in the Mass card case did not see the use of officials within ‘the’ Roman Catholic hierarchy as problematic, it would be interesting to have seen their approach had the supplier received suitable endorsement from the Roman Catholic church led by Pope Pius XIII from Springdale, USA; rather than Pope Benedict XVI from the Vatican.<sup>140</sup> Would the court have allowed legislation which criminalised mass cards issued by the former Catholic Church, because they lacked the authority of the latter?

More fruitful than either of these legislative approaches may be the crafting of an exemption, that is a defence, for some truth claims for trade offered explicitly within a religious framework which is sincerely believed by the trader. This could be crafted narrowly, for instance to protect only activities which constituted administering the beliefs, practices, or usages of an individual within a religious organisation;<sup>141</sup> or draw upon the existing discrimination law doctrines of religious ethos to provide some protection. Alternatively, such a defence could adopt the arguments in this article to combine an emphasis on sincerity

---

<sup>137</sup> Ibid, para. 167.

<sup>138</sup> Ibid, para. 171.

<sup>139</sup> Ibid, para. 184.

<sup>140</sup> See further See further [www.truecatholic.us](http://www.truecatholic.us) (accessed 28/11/09).

<sup>141</sup> See for instance *Grunin v Strong*, (1944) 183 Misc 291, 50 NYS 2d 425.

– present in the Fraudulent Mediums Act and deliberately removed in the CPR – with the severing along naturalist lines suggested above. New legislation which ‘recognises genuine mediumship and protects spiritual workers from discrimination and abuse’<sup>142</sup> is the subject of campaigning by the Spiritual Workers Association.

Perhaps more likely an alternative would be for the Office of Fair Trading, together with the Department for Business Enterprise and Regulatory Reform to expand its current guidance on the CPR to deal with the issues of evaluation of factual claims and relationships within a religious community. While of necessity having to operate within the strictures of the CPR, this soft law might at least reduce the chance of uneven enforcement by enforcement officers seeking to apply the law from first principles to this challenging area. The current lack of clear guidance on commercial religion opens up the possibility of uneven enforcement, particularly as the duty to enforce the CPR ‘does not mean that (civil or criminal) enforcement action must be taken in respect of each and every infringement’,<sup>143</sup> and the growing tendency in consumer law is to resolve cases by informal action by regulators.<sup>144</sup> Barrett in particular fears uneven enforcement itself having a religious element,<sup>145</sup> a fear echoed by the Spiritual Workers Association, which warns members that ‘in the event of a complaint ... the outcome may well depend on the views of the person investigating the complaint’.<sup>146</sup> If, however, this danger were to materialise in a particular case, then religious

---

<sup>142</sup> <http://www.theswa.org.uk/Public/Law.aspx> (accessed 3/11/11/).

<sup>143</sup> CPR Guidance, para. 11.1.

<sup>144</sup> See P. Cartwright, “Unfair commercial practices and the future of the criminal law”, (2010) 7 Journal of Business Law 618-637 at 633-636,

<sup>145</sup> Barret, above, at 59.

<sup>146</sup> <http://www.theswa.org.uk/Public/Law.aspx> (accessed 11 July 2011).

freedom law, excluded by the most likely reading of the reach of ECHR Article 9, may return through the concept of religious discrimination tied to a reading of Article 9 and Article 14 together. In the *Church of Scientology* case, an Article 9/14 claim failed, but the Commission's list of factors which were absent in the case may suggest circumstances under which it could succeed:

The case file does not, consequently, disclose that the authorities singled out the applicants for special attention. Nor is there any indication that the authorities have deliberately refrained from intervening against comparable advertisements by other religious communities.<sup>147</sup>

#### *IV.3 Resistance and accommodation by commercial providers of religious goods and services.*

Earlier I mentioned the opposition triggered by the proposals to repeal the Fraudulent Mediums Act. As well as political resistance to the legislation, noted at the end of the previous section, it is important to recognise that the recipients of regulation are not passive objects of law. Rather, we would expect to see them seek to engage with the new legal order so as to minimise the damage it causes to their interests. In this section, I consider a range of strategies which individual commercial providers of religious goods and services may consider. A valuable resource here, in the absence of a socio-legal study, is the advice offered to its members by the Spiritual Workers Association.

Firstly, some providers may seek to avoid the CPR in relation to price. The SWA is sceptical about the extent that consumer law can be avoided no matter how 'money or gifts change hands', warning members that the CPR applies even to donations, fees raised for charity, and

---

<sup>147</sup> X and Church of Scientology v Sweden, above, at para. 6.

entrance fees which include ‘free healing’. The scepticism of the SWA is warranted.<sup>148</sup> In particular, providers of religious services which are usually conditional upon a payment are unlikely to be able to avoid the reach of consumer law simply because the payment is termed a ‘donation’, for instance in relation to masses said at the Roman Catholic National Shrine at Walsingham.<sup>149</sup>

Secondly, providers may seek to use disclaimers as a protection against legal action. As the SWA notes ‘the use of disclaimers has not yet been proven to be a legally effective defence’, although it does include a selection of disclaimers for use by members. Two US cases suggest that detailed, oral, disclaimers which point out the limits of the service being provided may be more efficacious than more general disclaimers. In *People ex rel Priess v Adams*,<sup>150</sup> an astrologer charged with a specific offence of pretending to foretell events testified that she always explained to clients that no astrologer could conscientiously say that any particular thing would happen, that she had advised the detective-client who gave evidence against her that failing to give the exact hour of birth would impair the reading, and that she had merely attempted to explain the positions of the planets and to read their indications. The court accepted this argument. In *State v Neitzel*,<sup>151</sup> on the other hand, an astrologer’s conviction under a vagrancy statute was upheld. His declaration that he could not tell fortunes was considerably diluted by his offering to ‘figure it out’ for a fee. Additionally, again drawing on US jurisprudence, specific oral disclaimers may work better than standard written terms, or a

---

<sup>148</sup> See for instance *Customs and Excise Commissioners v Tron Theatre Ltd* [1994] STC 177, Scotland on the Value Added Tax Act 1983, s.10.

<sup>149</sup> See <http://www.walsingham.org.uk/romancatholic/prayers/> (accessed 8 August 2011).

<sup>150</sup> *People ex rel Priess v Adams* (1914) 32 NY Crim 326.

<sup>151</sup> *State v Neitzel* (1912) 69 Wash 567, 125 P 939.

notice displayed at the venue where the service is provided.<sup>152</sup> Another possibility for a disclaimer may be to emphasise the distinction between truth, and truth as found by the State – for instance, stating that the efficacy of the services has been denied by a local trading standards officer, or even (looking to the future) a decision of the courts.

Thirdly, providers may seek to rely upon the genuineness of the claims made. The SWA advises against this, noting that ‘we live in a litigious society and there are people who earn their living from suing others. The concern with the new legislation is that mediums, however genuine, will be perceived as an easy target’. The problems with evaluating some commercial religion claims have been noted above.

Fourthly, ‘it has been suggested that we should say that we are working for entertainment or that what we do is a scientific experiment’. This has been rejected by the SWA as untrue, and indeed ‘a denial of our beliefs’. Instead, and strikingly put in terms of autonomy, ‘We believe that we should simply explain that those attending demonstrations or sittings have made a personal choice to do so. They are responsible for any decisions they choose to make as a result of the reading or demonstration’. Although closely in line with the view of autonomy to be found in freedom of religion law, it does not, however, match so closely the orientation of consumer protection law, including the CPR.

There is, of course, a final route open to providers of commercial religious goods and services. They may opt out of consumer law by ceasing to offer the religious service for remuneration, and instead making it available free of charge. Taking this approach means that commercial religion ceases to be commercial, and becomes purely a religious practice. The complexities of commercial religion are resolved by its extinction.

---

<sup>152</sup> See *Emuru v Rosenberg* (1957) 6 Misc 2d 529, 159 NYS 2d 912.

## **Concluding thoughts.**

The challenges of commercial religion can be met by simple answers, or by good ones, but sadly not by good, simple, answers. The simple answer to the blending of the commercial and religious, and the clashing views of autonomy and appropriate regulation by the state, is to police the separation of the two. Article 9 of the ECHR treats commercial religion as commerce, as does a flat reading of the CPR. The radical reading of ‘trader’ in the CPR discussed above would treat commercial religion as purely religious, and then privilege it beyond the qualified right in Article 9. Neither provides a good answer to the question of how to regulate commercial activity which is also religious activity. The good answers seek to balance the demands of appropriate regulation of commercial activities, and in this study the goals of consumer law, with the demands of both religious liberty, and, so far as it can be regarded as a separate demand, that of religious neutrality. They are, however, complex, and difficult to square with the current legal rules. These rules were not drafted to accommodate commercial religion, and implementing these answers may depend upon legislative action. The likelihood of such action is beyond this paper. As a recent newspaper columnist has noted ‘in most of the Western world fortune telling has lost its potency – that is, unless the fortune-teller happens to be a scientist, pollster, or economist’.<sup>153</sup>

Beyond the doctrinal and practical problems of how the ECHR and UK consumer law engages with commercial religion, however, this discussion opens up some broader issues. The discussion suggested three areas of possible difficulty in the regulation of commercial religion. Firstly, the clash of values, where a commercial body seeks to give effect to religious values which are not compatible with state policy in the area regulated. This has

---

<sup>153</sup> A. Williams, “Foretelling the future”, (2011) New York Amsterdam News December 30,13.

obvious application to areas such as discrimination law. An interpretation of Article 9 which places commercial religion primarily into commerce simpliciter provides very limited space for the manifestation of religion through commercial activity to be accommodated by variation of the generally applicable rules. An interpretation which moved the focus to Article 9(2), and the justification for restriction of the manifestation of religion, would give more room for those holding such values to seek to argue – but obviously not to simply assert - that their religious rights needed to be taken into account, even contrary to general state policy, and even in the commercial field. Secondly, the determination of facts, where the religious person's understanding of reality differs from that of the finder of the fact. This has been a particular focus of the case-study of consumer law, but could also apply to areas such as the law of obligations. The detailed discussion above has shown the importance, but also the difficulty, of being aware of the issues of Church/State relations raised by seemingly trivial, or even frivolous, factual claims. Finally, the framing of the relationship between an individual and their broader religious community, particularly those in positions of power within that religious community. This has been discussed in relation to undue influence as an aggressive commercial practice, but the concept of undue influence has much broader application, perhaps most significantly in relation to the passing of property and the formation of contractual obligations. This discussion has introduced the difficulty of determining whether a religious context renders an action exploitative, or when the influence of religion becomes undue influence, in a way which gives sufficient weight to religious liberty.

Finally, it is too early to say how the regulation of commercial religion will develop in UK law. This area may, however, come to provide valuable insights into how religion and law interact more broadly.



Firstly, the focus of this paper has been on hybrid activities on the cusp of the commercial and religious. Hybrid religious activities are not restricted to this area, however, and it is easy to imagine scenarios at the cusp of the sexual and the religious, the familial and the religious, or the political and the religious. The way in which UK law constructs commercial religion, particularly if that construction is to categorise hybrid activities as really commercial, may be influential in the categorisation of these other hybrid activities.

Secondly, if commercial religious transactions of the sort outlined above are simply treated as any other commercial transaction, regardless of the special difficulties that they pose in terms of evaluation, it may provide an important marker of the extent to which those with non-naturalist beliefs can expect to find actions based on those beliefs regulated by the legal system. It *may* be that we will see an arc from a willingness of the State to enforce a view on such matters based on a state-approved worldview based on Christianity, through a comparatively brief period where the State lacks the confidence to do this due to ‘the long decline of institutional Christianity and its ability to stigmatise ... as deviant or dangerous’,<sup>154</sup> to a renewed enthusiasm for resolving religious truth claims through the law.

---

<sup>154</sup> T. Glendinning and S. Bruce, “New ways of believing or belonging: Is religion giving way to spirituality?” (2007) 57(3) British Journal of Sociology 399, at 412.