



---

---

## ARTICLES

# Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising

*Theodore F. Haas\**

*In recent years, the Supreme Court has begun a revolutionary reinterpretation of the constitutional status of commercial advertising. In light of these changes, this Article explores the problem of advertisements that use a persons name or likeness in some way to bolster the consumer's opinion of the product. The Article adapts the Supreme Court's four-part commercial speech analysis to this problem and applies the adapted test to an array of cases decided before the advent of the Court's commercial speech cases or in disregard of their existence. The Article argues that the new tests would alter both the analyses and results in these cases.*

---

\*Assistant Professor, University of North Carolina School of Law. A.B. 1968, Boston College; Ph.D. 1978, Stanford University; J.D. 1980, Yale University. I am grateful for the research assistance and the financial support that I received in the writing of this Article. For the former I thank Brian Aus and for the latter the University of North Carolina (for an R.J. Reynolds Junior Faculty Development Award) and the University of North Carolina School of Law (for a Faculty Research Grant). I also thank my colleague Arnold Loewy for his comments on an earlier draft of the Article.

*John Milton  
Never Stayed in a Hilton  
Hotel,  
Which was just as well.*

W.H. AUDEN  
*Academic Graffiti*<sup>1</sup>

Whether the hotel chain has ever exploited the name of the author of *Areopagitica*, and one of the demigods of free speech,<sup>2</sup> I do not know. It would hardly be surprising, however, in a world in which a distiller has appropriated the violinmaker Stradivari,<sup>3</sup> and a confectioner, King Henry VIII.<sup>4</sup> This Article is a descent from the Miltonic heights of first amendment theory to one of its more serpentine and ill-lit corridors, a journey the Supreme Court itself set off on when it carried the first amendment over the threshold of private litigation in *New York Times v. Sullivan*<sup>5</sup> and into the realm of commercial advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>6</sup>

The law has long protected persons whose names or likenesses have appeared in commercial advertisements without their permission.<sup>7</sup> In

<sup>1</sup> W. AUDEN, *ACADEMIC GRAFFITI*, poem no. 40, unnumbered pages (1970); also in *COLLECTED POEMS* 515 (E. Mendelson ed. 1976). © 1972 by W.H. Auden. Reprinted by permission of Random House, Inc.

<sup>2</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 458 (1972) (Douglas, J., concurring); *New York Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233, 245-46 (1936); Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 1, 198 (1941); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576 (1978).

<sup>3</sup> Above a photograph of a person holding a violin, with the instrument and the hands accentuated by the person's wearing black clothes against a black background, are the words: "Did anyone dare tell Antonio Stradivari he could speed up production if he stopped fiddling around?" Below the photograph are the words: "No one can turn up the speed of a master craftsman's hands. Or shorten the time needed to make a great Scotch. That is why it takes twelve long years to create Johnnie Walker Black Label. It has every right to be expensive." *NEW YORKER*, May 6, 1985, at 17.

<sup>4</sup> Below a portrait of the king, the question is posed: "Guess what candy bar he would eat if he were around today?" The answer is given immediately below: "Rich, delicious Skor. Truly a total indulgence." *NEW YORKER*, May 13, 1985, at 67. Such advertisements are not confined to the ancients. See *Celebrities' Ghosts are Hanging over Advertisers*, *BUS. WK.*, June 3, 1985, at 108. As for the living, see *infra passim*.

<sup>5</sup> 376 U.S. 254 (1964).

<sup>6</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>7</sup> The American Law Institute has denominated the relevant tort "appropriation of name or likeness." *RESTATEMENT (SECOND) OF TORTS* § 652C (1977). Throughout

other contexts, such as newspaper or magazine articles, name-or-likeness claims have confronted significant free speech interests;<sup>8</sup> however, the law historically has accorded commercial advertising little or no value when it has conflicted with name-or-likeness interests.<sup>9</sup> Before 1976, the low value placed on commercial advertising was entirely consistent with the denial of first amendment protection to commercial speech.<sup>10</sup> Since 1976, however, the Supreme Court has extended first amendment protection to speech that merely proposes a commercial transaction.<sup>11</sup> At the same time, the Court has stated that “commercial speech” is not entitled to parity with political speech,<sup>12</sup> but it has not fully articulated the relation of “commercial speech” to other, more highly protected kinds of speech.<sup>13</sup> Thus it is now an unsettled constitu-

this Article, I refer to such claims as “name-or-likeness claims.” The case law refers to the rights invaded — not without some confusion — as the “right of privacy” and the “right of publicity.” See *infra* notes 18, 21 & 32.

Early name-or-likeness cases include *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) and *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), both of which arose from commercial advertisements. Although the court denied recovery in *Roberson* on the ground that there was no common law right of privacy, the New York legislature immediately remedied that problem with a “Right to Privacy” statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976), which presumably would have permitted recovery in *Roberson*.

<sup>8</sup> In earlier days, the courts did not always recognize that the first amendment itself limited the protection afforded names and likenesses. See, e.g., *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 782, 295 N.Y.S. 382, 388 (Sup. Ct. 1937) (“public policy . . . in leaving unhampered the channels for the circulation of news and information . . . [is] of primary importance” — no mention of first amendment).

<sup>9</sup> The third category of portrayals consists of those that neither inform nor entertain, but that serve primarily to sell a product. Portrayals of this kind are exploitative by their very nature: they derive their appeal from the commercial possibilities of a particular celebrity’s name, likeness, or other attributes . . . . The unauthorized use of a person’s attributes to create or sell a product, therefore, will typically lie outside the scope of First Amendment protection and thus will often incur liability.

Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1606 (1979); see *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971); *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 460 N.Y.S.2d 235 (Sup. Ct. 1983).

<sup>10</sup> See, e.g., *Breard v. Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>11</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980); *Virginia State Bd. of Pharmacy*, 425 U.S. at 748. See *infra* text accompanying notes 68-74.

<sup>12</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978); *Virginia State Bd. of Pharmacy*, 425 U.S. at 748, 771 n.24.

<sup>13</sup> See *infra* text accompanying notes 75-85.

tional question how name-or-likeness claims arising from commercial advertisements should be resolved. This Article explores that question.

The structure of the Article is based on the structure of a commercial advertisement. Typically, commercial advertising is a complex kind of speech, involving both a commercial proposal<sup>14</sup> (which is essentially a statement that a certain product is for sale) and other material the function of which is rhetorical (to attract attention to the advertisement or to induce or awaken a desire to purchase the advertised product).<sup>15</sup> In some name-or-likeness cases, the plaintiff is herself advertised as part of the product being sold.<sup>16</sup> In other cases, the plaintiff is simply part of the rhetorical matter.<sup>17</sup> Name-or-likeness claims of the first

---

<sup>14</sup> The Court has occasionally used the sentence "I will sell the X product at the Y price" to illustrate the term "commercial speech." See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. at 748, 761. My use of the term "commercial proposal" does not mean that there is necessarily a statement of both product and price. As I use the term "commercial proposal," it refers to a statement that an identified product exists, with the fact that it may be purchased often left implicit. The commercial proposal may include additional statements about the nature and quality of the product, about where it may be purchased and at what price. But an advertiser need not say all these things for its speech to be understood as a commercial proposal.

<sup>15</sup> Of course, the commercial proposal itself, or parts of it, may be rhetorical. For example, a photograph of the product advertised may be included in the advertisement for its attention-getting, rather than for its informative, quality. Thus, a distinction between commercial proposal and rhetorical matter may seem artificial. The distinction is useful, not in order to make the incorrect claim that the elements of an advertisement are either making a commercial proposal or are rhetorical, but rather in order to emphasize that some elements in an advertisement are present not to make a commercial proposal but simply to enhance the commercial proposal. Thus, as used in this Article, "rhetorical matter" refers to those parts of an advertisement that are not parts of the commercial proposal.

<sup>16</sup> For example, an advertisement by Expensive Resort states that tennis lessons are given by Billie Ace, a well-known professional tennis player, or an advertisement in *Slick Magazine* for *Glossy Magazine* states: "Read this week's *Glossy Magazine* for an exclusive story about Billie Ace." See *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 460 N.Y.S.2d 235 (Sup. Ct. 1983) (advertisement for bank department in which plaintiff worked); *Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467, 178 N.Y.S. 752 (1919) (advertisement for newsreel story in which plaintiff was a prominent figure). See *infra* text accompanying notes 93-145.

<sup>17</sup> For example, a still photograph of Billie Ace from one of her matches is used to attract attention to an advertisement for a cola or a computer, products that she is not represented as using or endorsing. See, e.g., *Negri*, 333 F. Supp. at 101 (plaintiff's likeness appears in photograph used to call attention to advertisement); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959) (plaintiff's name appears in news story used to call attention to advertisement). See *infra* text accompanying notes 177-219.

kind raise significantly different first amendment problems from those raised by claims of the second kind, and this Article treats them separately. The Article begins, however, with an exposition of the competing interests — the plaintiff's interest in controlling the use of her name or likeness and the defendant's interest in free speech.

## I. THE COMPETING INTERESTS

### A. *The Right to Control the Use of One's Name or Likeness*

A person whose name or likeness is used in a commercial advertisement without her consent may suffer both financial and dignitary losses. The financial losses are of three sorts.<sup>18</sup> First, she is not compensated for enhancing the advertisement and the product; second, the demand for her name or likeness may be reduced simply by the number of her advertising appearances; third, such demand may be reduced by association with a particular advertiser, advertisement, or product.<sup>19</sup> The product, for example, may be of inferior quality or of low status or simply incompatible with the image that another advertiser who would otherwise be interested in using her wants to project.<sup>20</sup>

Distinct from these financial losses is a potential dignitary loss.<sup>21</sup> A

---

<sup>18</sup> Courts have come to use the term "right of publicity" to refer to name-or-likeness cases in which the loss complained of is financial rather than dignitary. The leading case is *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (likeness of baseball player on chewing gum cards). *See generally* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954).

<sup>19</sup> *See* *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

<sup>20</sup> *Id.* at 258-59; *cf.* *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 983-84 (S.D.N.Y. 1981) (recognizing loss of publicity value because unauthorized publication of nude photographs was in "low quality and very explicit pornographic magazine").

In the related area of trade names, this injury is referred to as "dilution," which is defined as "an act which threatens two separable but related components of advertising value. Junior uses may blur a mark's product identification or they may tarnish the affirmative association a mark has come to convey." 3 R. CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 84.2, at 954-55 (4th ed. 1981); *see* *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema Ltd.*, 604 F.2d 200 (2d Cir. 1979) (copies of Dallas Cowboys Cheerleaders' costumes used in adult film); *Polaroid Corp. v. Polaroid, Inc.*, 319 F.2d 830 (7th Cir. 1963) (corporation installing refrigeration and heating systems adopts name similar to well known photographic equipment company).

<sup>21</sup> The right of privacy is aimed at protecting this dignitary interest. The "right of privacy" is a rather sprawling term covering a number of distinct injuries, including appropriation of name or likeness. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (describing four distinct kinds of invasions of privacy). *But see* Bloustein, *Privacy as an*

person's name and likeness are generally considered intimately associated with the person herself. She may experience annoyance and humiliation from having her name or likeness widely publicized even when the presentation is not embarrassing.<sup>22</sup> Moreover, it may be annoying or humiliating to a person to be used to sell anything, or to sell a particular product.<sup>23</sup>

Having recognized these potential losses, there remains the question of whether a plaintiff owns the value in her own name or likeness. The claim that a person has a right to control the use of her name or likeness rests on several bases: possession, labor, social utility, dignity. The person with a handsome or beautiful face usually was simply born with it. Thus her asserted right to control its use cannot rest on her labor, but must arise simply from possession.<sup>24</sup> Of course, a person's appearance is in the usual course of social interaction a beneficial externality; enjoying it will not subject one to an action for unjust enrichment. However, if the pleasure in looking at a person's face is actually used to generate income, then arguably the right to that income belongs to that person.<sup>25</sup>

---

*Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964) (proposing unified theory of right of privacy). In addition to the four privacy torts, the Supreme Court has recognized a constitutional right of privacy. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (condemning on constitutional grounds unwarranted governmental intrusion into certain very personal decisions).

Among the earliest cases asserting the right to privacy were cases arising from appropriation of name or likeness. *See, e.g., Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (unauthorized use of likeness); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (same). The advertisers simply avoided the cost of a model by using a photograph of a physically attractive person without regard to recognition of face or name.

<sup>22</sup> *See Roberson*, 171 N.Y. at 538, 64 N.E. at 442.

<sup>23</sup> *See Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (famous actor's "renunciation of any desire to exploit the commercial value of his own name and fame"). Although a celebrity might not make such a general renunciation, she might find it upsetting to be associated with certain products — the advertisement of cigarettes by one opposed to smoking or meat by a vegetarian.

<sup>24</sup> In this regard, the protection afforded the attractive person is like that afforded the finder of something valuable, for example, the person who trips over a bag stuffed with \$20 bills. *See Clark v. Maloney*, 3 Harr. 68 (Del. Super. Ct. 1840) (finder of logs after flood); *Edmonds v. Ronella*, 73 Misc. 2d 598, 342 N.Y.S.2d 408, 410 (Sup. Ct. 1973) (finders of bag of money in supermarket trash). Of course, in contradistinction to the finding of such external objects as money or logs, in the case of the person who finds herself possessed of an attractive face, there is no "true owner" to whose rights hers are subordinate.

<sup>25</sup> There has been a substantial amount of variation among the courts on this issue. The most expansive version of the tort would allow recovery to anyone whose name or

In some instances, a person's name or likeness may become valuable as a result of her labor. An athletic celebrity, for example, has a valuable name or likeness because of her achievements, which are the result (at least in substantial part) of her labor. Thus a justification for her right to control the use of her name or likeness rests not only on her simple possession of them, but also on the creation of their value by her labor.<sup>26</sup> Another justification related to the labor basis of property is the social utility of giving the possessor an incentive to increase the value of her name or likeness through labor. Society at large benefits from these labors and rewards the individual by permitting her to profit from the use of her name or likeness.<sup>27</sup>

Still another justification for the protection of name or likeness is that permitting another to publicize a person's name or likeness and to establish associations for them affronts human dignity.<sup>28</sup> Although a person's name and likeness are not intimate facts that the ordinary person desires to remain private,<sup>29</sup> they are intimately connected with the person, and the creation of associations for them creates associations for the person herself. Arguably a person should have the right to deter-

---

likeness has been used by another without permission to generate income. *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); *Brinkley v. Casablancas*, 80 A.D.2d 428, 440, 438 N.Y.S.2d 1004, 1012 (1981). An alternative would limit the tort's application to people whose names or likenesses have commercial value. *Haelan Laboratories, Inc.*, 202 F.2d at 866; *Martin Luther King, Jr. Center for Social Change v. American Heritage Prods.*, 250 Ga. 135, 143, 296 S.E.2d 697, 703 (1982). Still another alternative would require actual exploitation by the person whose right of publicity has been allegedly infringed. *See, e.g., Lerman v. Chuckleberry Publishing*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981). Although *Lerman* involved a living plaintiff, this third version of the right of publicity is typically applied when the right is asserted on behalf of a deceased person. *See, e.g., Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284 (S.D.N.Y. 1978). However, some courts have not required actual exploitation even when the person on whose behalf the right is asserted is dead. *See, e.g., Martin Luther King, Jr. Center for Social Change*, 250 Ga. at 135, 296 S.E.2d at 697.

<sup>26</sup> *See De Laveleye, The Theory of Property* [translated selections from the author's *DE LA PROPRIETE ET DE SES FORMES PRIMITIVES* (1873)], in *RATIONAL BASIS OF LEGAL INSTITUTIONS* 167, 170-73 (J. Wigmore & A. Kocourek eds. 1923); *Locke, The Labor Theory of Property* [selections from the author's *TWO TREATISES ON GOVERNMENT* (1690)] in *id.* at 195.

<sup>27</sup> *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 575-77 (1977).

<sup>28</sup> *See Bloustein, supra* note 21, at 962.

<sup>29</sup> *Bitsie v. Walston*, 85 N.M. 655, 515 P.2d 659 (1973) (assuming publication of Navajo child's name and likeness offended traditional Navajo beliefs, no invasion of privacy because such publication would not be offensive to person of ordinary sensibilities).

mine the degree to which she forsakes privacy for publicity and to determine her associates, whether they be persons or things.<sup>30</sup> In addition, it is an affront to human dignity to be sold by another.<sup>31</sup> When one's name or likeness is sold, it is not unlike being sold oneself, given the intimate connection noted above between name, likeness, and person.

The asserted right to control the use of one's name or likeness rests on a mixture of property and personal interests that may vary from case to case.<sup>32</sup> In one case, the plaintiff may complain of the affront to her dignity in the publication of her likeness on an advertising circu-

---

<sup>30</sup> Even when an advertisement does not state or imply that a person uses or endorses a product, it creates an association that the person has not chosen for herself. *See, e.g.*, Johnnie Walker's Stradivari advertisement described *supra* note 3. A similar advertisement for a mustard consists of a full page photograph showing two Rolls-Royce automobiles stopped in a rural setting. The advertisement contains the following dialogue: "Pardon me, would you have any Grey Poupon?" "But of course." *NEW YORKER*, June 10, 1985, at 91. In one case, a person's name and, in the other, a trade name are associated with the advertised product to give it luster.

*Cf. Dallas Cowboys Cheerleaders, Inc.*, 604 F.2d at 200 (use of facsimile of plaintiff's distinctive costume in pornographic movie); *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962), *cert. denied*, 372 U.S. 965 (1963) (use of advertising slogan, "Where there's life, there's bugs," a variation on Anheuser-Busch's advertising slogan, "Where there's life, there's Bud").

<sup>31</sup> *See* U.S. CONST. amend. XIII, § 1.

<sup>32</sup> The courts had a difficult time coming to terms with this fact. Earlier cases denied recovery for appropriation of name or likeness when framed as an invasion of privacy based on the view that the plaintiff was seeking publicity, not trying to protect his privacy. *See, e.g.*, *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941); *Man v. Warner Bros.*, 317 F. Supp. 50, 53 (S.D.N.Y. 1970) (New York Right to Privacy statute "never intended to apply to professional entertainers who are shown giving a performance before a public audience"); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 360, 107 N.E.2d 485, 489 (1952).

More recent cases have recognized that publicity (*i.e.*, financial injury) claims are distinct from privacy (*i.e.*, dignitary injury) claims and are permitted either by common law or, in New York, by that state's privacy statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). *Bi-Rite Enter., Inc. v. Button Master*, 555 F. Supp. 1188, 1198-99 (S.D.N.Y. 1983) (distinguishing right of publicity from right of privacy); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429-30 (S.D.N.Y. 1978) (recognizing common law right of publicity); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (statutory basis for right of publicity); *Brinkley v. Casablancas*, 80 A.D.2d 428, 438-39, 438 N.Y.S.2d 1004, 1012 (1981) (statutory and perhaps common law basis).

Of course, a particular act can give rise to both privacy and publicity claims. *See Celeb Publishing, Inc.*, 530 F. Supp. at 983 (compensatory damages awarded for mental distress, lack of compensation and loss of publicity value because of unauthorized publication of nude photographs in "low quality and very explicit pornographic magazine").

lar.<sup>33</sup> In another, the plaintiff may complain of insufficient compensation for such a use: her dignity is not affronted, her privacy has not been invaded, but her bank account is put out.<sup>34</sup>

### B. Advertiser's Speech Rights

Outside the realm of commercial advertising, these interests, appealing as they are, typically fail in the face of the strong countervailing interest in free speech. Thus, celebrities do not have exclusive rights to tell (and thereby profit from) their own stories, the interest in which may be the result of the celebrity's labor and creativity.<sup>35</sup> In addition, persons may find themselves with associates they have not and would not have chosen.<sup>36</sup> In some cases the undesired associate may be the very publication in which the story appears.<sup>37</sup> While the courts may at times express some sympathy for the plaintiff's plight, they always rule in favor of the defendant's speech rights.<sup>38</sup>

Against this background, can a less favorable treatment for commercial advertising be justified? This question requires some consideration of the foundations of free speech. One of the core values of the first

---

<sup>33</sup> *E.g.*, *Roberson*, 171 N.Y. at 538, 64 N.E. at 442.

<sup>34</sup> *E.g.*, *Namath v. Sports Illustrated*, 80 Misc. 2d 531 (Sup. Ct.), 363 N.Y.S.2d 276, *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

<sup>35</sup> *See, e.g.*, *Koussevitzky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct.), *aff'd*, 272 A.D. 759, 69 N.Y.S.2d 432 (1947) (biography of famous conductor); *Jeffries v. New York Evening Journal Pub. Co.*, 67 Misc. 570, 124 N.Y.S. 780 (Sup. Ct. 1910) (newspaper biography and photographs of famous boxer).

<sup>36</sup> *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (story of family held hostage by escaped convicts); *Arrington v. New York Times*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982) (use of plaintiff's photograph as most prominent illustration for article about the views of the black middle class, some of which plaintiff alleged were not his); *Merle v. Sociological Research Film Corp.*, 166 A.D. 376, 152 N.Y.S. 829 (1915) (photograph of plaintiff's name on factory in film about white slave trade).

<sup>37</sup> *See, e.g.*, *Jackson v. Playboy Enter., Inc.*, 574 F. Supp. 10 (S.D. Ohio 1983) (photograph of plaintiff boys with policewoman used as part of *Playboy* article that featured nude photographs of policewoman); *Colyer v. Richard K. Fox Publishing Co.*, 162 A.D. 297, 146 N.Y.S. 999 (1914) (high diver pictured in diving costume on page with women vaudeville entertainers in publication that court describes as "carr[ying] a very considerable amount of reading matter that scarcely appeals to a refined mind, and likewise a great number of advertisements of quack nostrums and trivial things").

<sup>38</sup> *Arrington v. New York Times*, 55 N.Y.2d at 441-42, 434 N.E.2d at 1323, 449 N.Y.S.2d at 945 (noting "plaintiff's perfectly understandable preference that his photograph not have been employed in this manner and in this connection"); *Colyer v. Richard K. Fox Publishing Co.*, 162 A.D. 297, 146 N.Y.S. 999 (1914) (*see supra* note 37).

amendment is self-determination.<sup>39</sup> Self-determination entails, in part, determining values and truth by individual decisions rather than by government paternalism.<sup>40</sup> This value and its concomitant rule — government should not prevent assertions of fact and value — has been applied in the religious sphere, the political sphere, and other spheres of ethical and aesthetic values.<sup>41</sup> Most recently this rule has been extended from the “marketplace of ideas” to the marketplace for products in the form of the commercial speech doctrine.<sup>42</sup>

Self-determination, especially as it concerns doing rather than thinking or saying, is not absolute even in the religious sphere. The government may prohibit child labor, or polygamy, no matter how sincerely and deeply felt the religious mandate to engage in such practices.<sup>43</sup> Similarly, the government may regulate goods and services in the interest of protecting the health and well-being of members of society.<sup>44</sup> Before *Virginia Board of Pharmacy*,<sup>45</sup> however, even truthful statements in commercial advertising about lawful products could paternal-

---

<sup>39</sup> See M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984).

<sup>40</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976); *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964).

<sup>41</sup> Historically, the Supreme Court's modern first amendment jurisprudence began with and has been largely dominated by speech that is readily characterized as political. *Schenck v. United States*, 249 U.S. 47 (1919). Somewhat later, constitutional protection was extended to entertaining speech not because it was acknowledged to be valuable in itself but because of the difficulty of readily distinguishing speech that was entertaining from speech that was politically informative. *Winters v. New York*, 333 U.S. 507, 510 (1948). By now this weak beginning for the constitutional protection of entertainment seems to have been disregarded. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977).

Commentators disagree about the proper scope of first amendment protection. Robert Bork would limit it to political speech, narrowly defined. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971). Alexander Meiklejohn would limit it to political speech, broadly defined. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 16-27, 94 (1948); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256, 258-59. Others would extend it beyond political speech. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979).

<sup>42</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

<sup>43</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy).

<sup>44</sup> The Constitution affords government a wide ambit in regulating such matters. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>45</sup> 425 U.S. at 748.

istically be banned by the state.<sup>46</sup> *Virginia Board of Pharmacy* held that this power was an unwarranted constraint on the general first amendment principle of self-determination.<sup>47</sup> Value decisions are for the individual to make — even mundane decisions about everyday goods and services.<sup>48</sup> However, the Court did recognize that the government has a greater legitimate role in regulating the factual content of commercial advertising than it does in regulating the factual content of other kinds of speech.<sup>49</sup>

The speech that is at the core of the first amendment is laden with ethical values. As the Court has put it, “Under the First Amendment there is no such thing as a false idea.”<sup>50</sup> Displaying flags,<sup>51</sup> wearing armbands<sup>52</sup> or mottos,<sup>53</sup> and advocating unlawful acts to accomplish political ends<sup>54</sup> are all expressions of ethical values and attempts to persuade the audience to adopt and act on these values. The only thing that can be true or false about statements of value is the speaker’s representation that she holds these values.

Less constitutional protection is afforded speech that is informational rather than ethical.<sup>55</sup> The state may, for example, afford a private cause of action to those whose reputations have been injured by negligent — or, in the case of public figures, knowing or reckless — false factual statements about them.<sup>56</sup> In general, the strong American preference is for little governmental involvement even in informational statements. The government is too powerful and not sufficiently competent or disinterested to ensure that the information individuals receive is correct. The American preference is to rely on the critical faculties of the audience and additional, responsive speech to correct factual errors.<sup>57</sup>

The preference for individual determinations is weak with respect to

---

<sup>46</sup> *Id.* at 758-59; *Breard v. Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>47</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 773.

<sup>48</sup> *Id.* at 770.

<sup>49</sup> *Id.* at 771-72.

<sup>50</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

<sup>51</sup> *Stromberg v. California*, 283 U.S. 359 (1931).

<sup>52</sup> *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

<sup>53</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>54</sup> *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>55</sup> *Gertz*, 418 U.S. at 339-40. (“Under the First Amendment there is no such thing as a false idea . . . . But there is no constitutional value in false statements of fact.”).

<sup>56</sup> *Id.* at 341-48.

<sup>57</sup> *Id.* at 339-40.

statements about a product incident to a transaction (even in its incipient, advertising stage) — for example, whether a razor will or will not soften sandpaper and whether its ability to soften sandpaper is indicative of its ability to improve shaving.<sup>58</sup> Here there is often a correct answer, and the consumer would prefer to have the correct answer than to incur individually the cost of determining a correct answer herself. Both because the advertiser controls the object about which it speaks and because the advertiser profits from misrepresentation, the advertiser is properly held to a high level of accuracy in making a commercial proposal.<sup>59</sup> A court does not violate the first amendment in permitting an injured consumer to sue for misrepresentation. In addition, given the multiplicity of products available to consumers and the cost of testing such products against the claims made for them by their producers and sellers, it is efficient for an expert (a government agency) to test the validity of such claims. Thus, the government has a greater legitimate role in policing the content of commercial proposals than it does in policing other kinds of statements. More specifically, no first amendment restriction on name-or-likeness claims arises from either false statements or mere opinions about a product made in a commercial advertisement.<sup>60</sup>

In addition to the commercial proposal itself, commercial advertisements often include rhetorical matter to call attention to the commercial proposal and to enhance its attractiveness. This rhetorical matter may include social commentary,<sup>61</sup> news,<sup>62</sup> other information of public interest,<sup>63</sup> or entertainment.<sup>64</sup> Insofar as the rhetorical matter does not con-

---

<sup>58</sup> See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

<sup>59</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 & n.24.

<sup>60</sup> See *infra* text accompanying notes 137-45.

<sup>61</sup> See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 62 n.4 (1983) (pamphlet discussing the problem of venereal disease and the use and advantages of condoms in its prevention); *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942) (handbill with one side consisting of protest against action of City Dock Department in refusing advertiser wharfage facilities at a city pier).

<sup>62</sup> See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975) (reporting that abortions were legal in New York); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959) (reproduced newspaper report of fire).

<sup>63</sup> A recent advertisement contains a brief account of the origins of the tennis tournament held at Wimbledon. *NEW YORKER*, June 17, 1985, at 12.

<sup>64</sup> See, e.g., *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971) (still from old movie with added humorous dialogue). A recent advertisement contains a scene from the movie *Casablanca* with robots playing the parts of the piano player and the bar owner (complete with cigarette). *NEW YORKER*, May 20, 1985, at 56; June 3, 1985, at 57; June 17, 1985, at 79. Interestingly, the advertisement informs the audience

tain information about the product, the predicate for protection under the commercial speech doctrine is arguably absent. There is no constitutional interest in protecting the rhetorical matter of commercial advertising. More specifically, there is no first amendment interest in constraining name-or-likeness claims arising from the rhetorical matter. On the other hand, the commercial speech doctrine is arguably an exception to the general rule of protection for all speech apart from specific limited exceptions, namely, knowingly or recklessly or, in some cases, negligently false defamation,<sup>65</sup> obscenity,<sup>66</sup> or fighting words.<sup>67</sup> Assuming the rhetorical matter does not amount to any of these, it is entitled to full constitutional protection because it does not make claims about a product, which is the sole province of the commercial speech doctrine and its limited protection. Arguably, the rhetorical matter should receive the same first amendment protection that social commentary, news, other information of public interest, or entertainment receive when they occur in forms other than commercial advertisements.

The following sections of the Article will attempt to harmonize these competing interests and their attendant conceptual problems in the context of an array of name-or-likeness claims arising from, first, the commercial proposal and, second, the rhetorical matter.

## II. CLAIMS ARISING FROM THE COMMERCIAL PROPOSAL

### A. *The Commercial Speech Analysis*

The basic rule of the United States Supreme Court's cases on commercial speech is that the government cannot, absent a substantial state interest, suppress truthful information regarding lawful goods and services. This rule applies even when that information is part of a seller's invitation to consumers to purchase a particular product.<sup>68</sup> Thus, bans on price advertising of prescription drugs by pharmacists,<sup>69</sup> advertising

---

not only how additional information about the primary product being advertised (computerized ceiling fans) can be obtained — "by calling Rick or Sam" — but that a poster reproducing the advertisement can be purchased. This fact underscores that advertisements may be interesting quite apart from the commercial proposal they contain.

<sup>65</sup> *Gertz*, 418 U.S. at 323.

<sup>66</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>67</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>68</sup> *Zauderer*, 105 S. Ct. 2265; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980).

<sup>69</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

of legal services by lawyers,<sup>70</sup> and promotional advertising by an electrical utility<sup>71</sup> have been struck down as violating the first amendment.<sup>72</sup>

The Court has developed a four-part test for commercial speech cases.<sup>73</sup> First, the court determines whether the commercial speech concerns a lawful activity and is truthful. Second, it determines whether the asserted governmental interest is substantial. If the first two steps result in affirmative answers, the court determines, third, whether the regulation directly advances the asserted governmental interest, and fourth, whether the regulation is only as broad as necessary to serve that interest.<sup>74</sup> Thus the court applies a balancing test, using an intermediate level of scrutiny.

### 1. Applicability of the Commercial Speech Doctrine and Analysis to Private Litigation

The commercial speech doctrine has developed in lawsuits to which the government or a governing body is a party. Hence, as a threshold matter, it may be asked whether the doctrine and its analytical framework apply to purely private lawsuits such as name-or-likeness actions. In *New York Times v. Sullivan*,<sup>75</sup> the Court recognized that private litigation can have as great, if not greater, an inhibiting effect on the exercise of free speech and therefore that first amendment protection must be provided in private as well as government lawsuits.<sup>76</sup> The fact that *New York Times v. Sullivan* was a libel suit rather than a name-or-likeness action is of no import. The essential point is that the person who is the subject of speech cannot be given a veto power over that speech without implicating first amendment concerns.

The analytical framework of the commercial speech test readily accommodates the plaintiff's name-or-likeness interest in the second prong, the government's interest in opposing speech. Here that interest

---

<sup>70</sup> *Zauderer*, 105 S. Ct. 2265; *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (prohibition of in-person solicitation by lawyer permissible).

<sup>71</sup> *Central Hudson*, 447 U.S. at 557.

<sup>72</sup> Of course, commercial advertisements are subject to time, place, and manner restrictions as are noncommercial statements, and these restrictions may be more stringently applied to commercial speech than to noncommercial speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

<sup>73</sup> *Central Hudson*, 447 U.S. at 564.

<sup>74</sup> *Id.* at 566.

<sup>75</sup> 376 U.S. 254 (1964).

<sup>76</sup> *Id.* at 277-78.

is the granting of an injunction or damages to a plaintiff on the basis of her particular injuries caused by the use of her name or likeness in a particular commercial advertisement.

## 2. Speech as the "Real Evil"

In applying the four-pronged commercial speech analysis to name-or-likeness cases, the third prong is unproblematic. The governmental regulation — the award of damages or an injunction for the unauthorized use of a person's name or likeness — directly advances the governmental interest in protection of the individual's name-or-likeness rights. Speech in these cases is being regulated not because it is a convenient way of minimizing the real evil (for example, unprofessional conduct), but because speech itself is the real evil.<sup>77</sup> The defendant's speech directly appropriates the plaintiff's financial or dignitary interest in her name or likeness. Thus with regard to this third prong, governmental regulation is better justified in name-or-likeness cases than it is in the commercial speech cases that the Supreme Court has decided.

## 3. The Basis of the Lesser Protection Afforded Commercial Speech

As to the first prong of the analysis — the value of the speech — the Court has not yet thoroughly explored the issues. The Court has said repeatedly that commercial speech will not receive full first amendment protection,<sup>78</sup> but the basis of that position is not altogether clear. Is it because the state can, without seriously threatening underlying first amendment values, regulate the truthfulness of such speech whereas it cannot, without seriously threatening those values, regulate political speech or entertainment? In short, is state regulation of commercial speech permissible only to the extent that it prohibits false and misleading advertising? Or is greater state regulation permissible simply because commercial advertising is less valuable than other kinds of speech?

The Court's commercial speech cases suggest that the central, if not sole, legitimate concern is the truthfulness of commercial speech.<sup>79</sup> The

---

<sup>77</sup> The Court has struck down speech restrictions aimed at protecting the ethical or performance standards of a profession. *Central Hudson*, 447 U.S. at 564-65 (citing *Bates*, 433 U.S. 350 and *Virginia State Bd. of Pharmacy*, 425 U.S. 748).

<sup>78</sup> *Zauderer*, 105 S. Ct. at 2274-75; *Central Hudson*, 447 U.S. at 557.

<sup>79</sup> On numerous occasions, the Court has struck down restrictions on truthful advertising of lawful products. *Zauderer*, 105 S. Ct. 2265; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson*, 447 U.S. at 557; *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S.

Court has reiterated, however, that even truthful commercial speech may be regulated if a substantial state interest exists.<sup>80</sup> The only case decided by the Court that has permitted governmental regulation of commercial speech on grounds other than requiring truthful speech about legitimate products is *Metromedia, Inc. v. City of San Diego*.<sup>81</sup> In that case, the city prohibited the use of off-premise outdoor advertising display signs with a limited number of specific exemptions. The ordinance did not prohibit on-site commercial advertising; among the exemptions were government signs, commemorative historical plaques, religious symbols, and temporary political campaign signs. A plurality of the Court would permit a city to ban off-site commercial speech even when it allowed on-site commercial speech; but the plurality would not permit off-site noncommercial speech to be banned when any commercial advertising was allowed, even on-site commercial advertising.<sup>82</sup>

By analogy, the *Metromedia* rule could be applied to a truthful advertisement for a lawful product. Here, the rule would require an individual's permission to use her name or likeness in an advertisement even though this permission could not constitutionally be required for noncommercial speech. The rule would not, in many cases, preclude the advertiser from advertising its product. On the other hand, this broad reading of *Metromedia* would transform the rule into a basis for content regulation, which strikes more at the heart of first amendment concerns than do restrictions on the time, place, and manner of speech.<sup>83</sup> Even noncommercial speech is subject to time, place, and

---

350 (1977); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Linmark Assocs. v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

In other cases, the Court has upheld the restriction on the ground that it prevented the dissemination of false, deceptive, or misleading commercial speech. *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

The only case in which the Court permitted the restriction of even truthful commercial speech is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

<sup>80</sup> *Zauderer*, 105 S. Ct. at 2265, 2275; *Central Hudson*, 447 U.S. at 557.

<sup>81</sup> 453 U.S. 490 (1981).

<sup>82</sup> *Id.* at 514-15.

<sup>83</sup> L. TRIBE, *supra* note 2, § 12-2, at 581 (1978). The *Metromedia* plurality opinion correctly states that the case is not a time, place, or manner case in that the issue turns on whether different time, place, and manner treatment is permissible on the basis of content distinctions, *i.e.*, on-site commercial advertising permitted, some noncommercial not permitted. 453 U.S. at 515-16. The point I am making is that the ordinance regulated time, place, and manner, *i.e.*, it involved the medium of speech (billboards). *Metromedia* should not be extended to cases in which the issue is solely one of message, *e.g.*, whether a person's name or likeness may be used without permission.

manner restrictions.<sup>64</sup> Constitutionally permissible restrictions on the content of noncommercial speech are very limited, especially when the content is true.<sup>65</sup> Given the strong first amendment interest in not suppressing or even burdening truthful speech on the basis of content, *Metromedia* should not be interpreted broadly to permit the burdening of commercial speech by privately enforced content restrictions upon truthful speech.

In sum, three things can be said of the commercial speech analysis generally. First, it applies to name-or-likeness litigation. Second, as to the third prong of the analysis, speech is always the evil complained of. Third, as to the first prong of the test, it should not be applied to devalue the content of commercial speech as a general matter so that even truthful commercial speech is subject to content restrictions. Apart from those generalizations, the application of three of the test's four prongs — the truthfulness of the speech (first), the substantiality of the governmental interest (second), and the extensiveness of the governmental regulation (fourth) — will result in significant variation among the cases. Those prongs are more usefully discussed in the context of specific cases than in a general fashion.

### B. *The Integration of "Incidental Advertising" and the Commercial Speech Doctrine*

Long before the announcement of the modern commercial speech doctrine,<sup>66</sup> the New York courts had developed the doctrine of "incidental advertising" to afford a privilege to publishers and filmmakers to use a person's name or likeness in advertisements when the name or likeness was used in the advertised publication or film itself.<sup>67</sup> Courts have not extended the incidental advertising doctrine to other situations;<sup>68</sup> however, the commercial speech doctrine lends impetus to ex-

---

<sup>64</sup> *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding constitutionality of ordinance prohibiting posting of signs on public property even when applied to political candidate's campaign signs); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (workers had no first amendment right to enter privately owned shopping center in order to make peaceful protest in labor dispute).

<sup>65</sup> Even false noncommercial speech receives substantial constitutional protection. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>66</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>67</sup> *Namath v. Sports Illustrated*, 48 A.D.2d 487, 488, 371 N.Y.S.2d 10, 12 (1975), *aff'd*, 39 N.Y.2d 898, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976); *Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467, 178 N.Y.S. 752 (1919).

<sup>68</sup> So, for example, in *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 460 N.Y.S.2d

tending the right of incidental advertising to other advertisers.<sup>89</sup> Somewhat paradoxically, the commercial speech doctrine may, at the same time, not require a first amendment privilege in some cases in which the New York "incidental advertising" rule has protected the advertiser.<sup>90</sup> Although the Constitution would not preclude the broader protection, it may be that without a constitutional impetus behind the broad privilege of the incidental advertising rule, lower courts will accommodate the interests in advertising and publicity in a way that would give greater recognition to the individual's right to control the use of her name or likeness than it currently receives.<sup>91</sup>

In sum, the commercial speech doctrine requires broadening the incidental advertising doctrine in some cases (those in which the advertiser does not produce products themselves protected by the first amendment) and permits narrowing the doctrine in others, as in *Namath v. Sports Illustrated*,<sup>92</sup> discussed below.

### C. Advertisements for Products Themselves Protected by the First Amendment

#### 1. Applying the Commercial Speech Analysis to *Namath v. Sports Illustrated*

The leading case on advertisements for products themselves protected by the first amendment is *Humiston v. Universal Film Manufacturing*

---

235 (Sup. Ct. 1983), in which plaintiff-employees' names and pictures were used to advertise a bank's electronic customer service department at a trade show; the court granted plaintiffs' motion for summary judgment on their name-or-likeness claim, apparently without considering the doctrine of "incidental advertising."

<sup>89</sup> The trial court in the *Namath* case specifically alluded to first amendment pressures as a factor in extending the doctrine of incidental advertising to the advertisements at issue. *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 898, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976). At the time of that opinion, the United States Supreme Court had not decided that commercial speech was entitled to first amendment protection. Now that such speech does have some constitutional protection, there should be an impetus toward greater extension of the incidental advertising doctrine.

<sup>90</sup> As noted in the previous footnote, the trial court, at least, appeared to feel some first amendment pressure to extend protection under the incidental advertising doctrine in *Namath*. This Article attempts to show that the first amendment does not require that *Sports Illustrated* be privileged to use *Namath* as it did.

<sup>91</sup> See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 567, 568 (1977).

<sup>92</sup> 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 39 N.Y.2d 898, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

Co.<sup>93</sup> In *Humiston*, plaintiff's name and likeness were used in advertisements for a newsreel that included a news story in which she was a key figure. Plaintiff complained of the use of her name and likeness in both the newsreel itself and the advertisement for it. The trial court granted her an injunction, but both claims were rejected on appeal.<sup>94</sup>

The relevant law, New York's right to privacy statute,<sup>95</sup> if read literally, applied to the advertisement;<sup>96</sup> however, the majority chose to exclude this advertisement from the statutory prohibition. The court reasoned that since the legislature did not intend to restrict the presentation of news reports, it did not intend to cover the advertisement of such news reports.<sup>97</sup> Thus, under the *Humiston* rule, if a person is the subject of a news report, her name and likeness can be used without her permission to advertise that report.<sup>98</sup>

A more recent case, *Namath v. Sports Illustrated*,<sup>99</sup> involved advertisements soliciting subscriptions for a publication. The advertisements differed from the one in *Humiston* in that they did not inform the potential audience of the contents of an upcoming issue. Instead, they purportedly represented the general nature and quality of the publication through the use of a cover photograph from a back issue featuring plaintiff in action during a football game. Plaintiff's name and picture had appeared in *Sports Illustrated* on a number of occasions, and he

---

<sup>93</sup> 189 A.D. 467, 178 N.Y.S. 752 (1919).

<sup>94</sup> The first claim, based on the newsreel itself, was rejected unanimously. *Id.* at 476, 178 N.Y.S. at 759. The second claim, based on the advertisement, was rejected by a three to two vote. *Id.* The dissenting justices did not write an opinion.

<sup>95</sup> N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). This statute was enacted in 1903 in response to the New York Court of Appeals' holding in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), that New York did not recognize a common law right to privacy.

<sup>96</sup> The statute provides, in relevant part: "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . and may also sue and recover damages . . ." N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976).

<sup>97</sup> 189 A.D. at 473-74, 178 N.Y.S. at 757. The court put aside any "question of constitutional right" and determined as a matter of legislative intent that by making publication of name or likeness a misdemeanor, the legislature did not intend to include publications in a newspaper or newsreel.

<sup>98</sup> As noted above, the New York courts refer to this doctrine as "incidental advertising." See *supra* text accompanying notes 86-87.

<sup>99</sup> *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

did not complain of those appearances.<sup>100</sup> His complaint arose from the way the publisher used him in its subscription campaign advertisements. The trial court dismissed the complaint and the dismissal was affirmed.

In *Namath* as in *Humiston*, speech is the evil complained of, satisfying the third prong of the commercial speech test. As to the first prong, the advertisements are for a lawful product, but a problem arises under the first prong with respect to the advertisements' truthfulness. The advertisements purportedly attempt to encapsulate the nature and quality of the magazine in a single photograph, and it may be conceded that they do that successfully. A photograph of football action is a fair representation of a magazine devoted to sports. The epitomization of the magazine is not achieved solely through photographs, however, but by means of photographs in conjunction with captions. The captions raise the problem of truthfulness. Those used with the photograph varied depending on whether the advertisement appeared in a "men's magazine" or a "women's magazine." In the former, the caption read, "How to get Close to Joe Namath"; in the latter, "The man you love loves Joe Namath."<sup>101</sup> It would not be unreasonable to find that the advertisement was untruthful in that it represented a much closer connection to Namath than was actually found in the pages of the magazine. Although photographs of and stories about Namath appeared in the magazine on a number of occasions, many issues of the magazine had nothing to say about him. Thus it would not be unreasonable to conclude that the publisher made substantially more of Namath in the advertisements than it did of him in the magazine itself. The advertisement focused on Namath as an individual rather than presenting him as a representative sports star.<sup>102</sup> The informative content of the advertisement

---

<sup>100</sup> *Id.* at 533, 363 N.Y.S.2d at 279.

<sup>101</sup> *Id.* at 533-34, 363 N.Y.S.2d at 279.

<sup>102</sup> In contrast, the well-known actress Shirley Booth was used in a representative capacity to advertise *Holiday Magazine*. The advertisement incorporated a *Holiday* cover photograph showing Booth in a straw hat up to her neck in water. The photograph was taken of Booth while she was at a Caribbean resort. Beside the photograph in the advertisement is the following text: "You're Up to Your Ears in Opulence. *Holiday* wades right in at Jamaica's Round Hill colony for a close-up look at how the other half of one per cent lives it up. The company is entertaining; the mood is delightfully intimate. Slim Aaron's perceptive camera captures these elusive spirits in mid-flight." The text continues in the same vein without mentioning Booth. *Booth v. Curtis Pub. Co.*, 15 A.D.2d 343, 353, 223 N.Y.S.2d 737, 746-47, *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962).

In contrast to Namath, Booth is being used as a representative celebrity rather than as herself. The photograph indicates that one of *Holiday's* interests is stories about

is itself so dubious as to engender little first amendment interest.<sup>103</sup>

As to the second prong of the commercial speech analysis — the government's interest in vindicating the plaintiff's interest — the following features are noteworthy. Namath had exploited his celebrity by appearing in advertisements in which he had endorsed products.<sup>104</sup> By using him in its advertisements, the magazine was probably attempting to capture some of the charm that he had exhibited in those advertisements. In other words, a public that Namath had urged to use, for example, a certain kind of shaving cream, was now being urged to subscribe to *Sports Illustrated*, though of course the advertisement made no explicit or implicit representation that Namath endorsed the magazine. In addition, the magazine was using up some of Namath's advertising exposure,<sup>105</sup> and it was associating him with a product that may not have been compatible with the products of other advertisers who were employing or would employ him. On the other hand, Namath could not have suffered any emotional distress at being exposed to public attention.<sup>106</sup> Thus, the government interest is in protecting a person's commercial charisma, which has been acquired by the person on

---

celebrities. See *Namath v. Sports Illustrated*, 48 A.D.2d 487, 490, 371 N.Y.S.2d 10, 13 (1975) (Kupferman & Murphy, JJ., dissenting).

<sup>103</sup> In *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), the magazine, in an advertisement, had made an exaggerated claim of exclusivity with respect to an interview the entertainer had given. The court said:

*Forum* was not content with honest exploitation of the fact that it possessed some pictures of Cher and an interview that she had given a writer. *Forum* falsely proclaimed to the readers of its advertising copy that Cher "tells *Forum*" things that she "would never tell *Us*." In view of the fact that Cher had intended to "tell" the rival magazine, *Us*, the very words in the interview, and had not "told" *Forum* anything, the advertising copy was patently false. This kind of mendacity is not protected by the First Amendment . . . .

*Id.* at 639.

Although the *Sports Illustrated* advertisement is not patently false, it does not provide its audience with an accurate description of the magazine's contents. Hence, there is little first amendment interest in protecting this speech. *Friedman v. Rogers*, 440 U.S. 1 (1979).

<sup>104</sup> *Namath*, 80 Misc. 2d at 532, 363 N.Y.S.2d at 277-78.

<sup>105</sup> See *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 258-59 (1st Cir. 1962); cf. *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 984 (S.D.N.Y. 1981) (recognizing loss of publicity value because unauthorized publication of nude photographs was in "low quality and very explicit pornographic magazine").

<sup>106</sup> That is not to say that a person does not experience emotional distress when something belonging to her is taken without permission and without compensation by another.

the basis of achievement, which he has exploited, and to which a sense of possession attaches.

This interest is arguably weaker than the interest the Supreme Court recognized in *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>107</sup> which involved an appropriation of part of the economic value of a performer's act.<sup>108</sup> The appropriation of Namath's advertising value does not affect his economic interest in his "act," namely, playing football. Nevertheless, Namath's income from advertisements is a derivative form of compensation for his playing football. Certainly, Namath's football prowess was the basis for his potential income from advertisements. Moreover, for some persons — fashion models — income from advertising appearances is not a derivative form of income. Namath's interest in receiving income from this source should not be any less protected than another's just because his usefulness to an advertiser derives from his being an athletic celebrity rather than merely from having an attractive face or figure. Thus, whether Namath's advertising income is viewed as income from his principal occupation — playing football — or from a separate occupation — appearing in advertisements — the government's interest in protecting Namath's potential advertising income remains substantial.

In sum, the first amendment interest in speech that does not inform the potential subscriber of the nature and quality of the product is low or nonexistent; the government has a substantial interest in protecting both the direct and indirect forms of compensation for individual endeavors. Hence, upon the application of the first three prongs of the commercial speech analysis, *Sports Illustrated* does not have a privilege under the commercial speech doctrine.

The fourth prong of the commercial speech doctrine asks whether the governmental regulation — here, permitting recovery for the unauthorized use of name or likeness — is too extensive. The key question is whether giving Namath a right to recovery will have a chilling effect on protected speech. In this respect, *Namath* differs significantly from *Humiston*. In *Humiston*, the advertisement for the current or upcoming newsreel is close to being a news bulletin itself. To distinguish the advertisement from constitutionally protected news would lead to such vexing questions as: Is a headline an advertisement of the story below? Is a statement by a newscaster to stay tuned for a story about a named person an advertisement?

In *Namath*, however, the advertising speech does not closely resem-

---

<sup>107</sup> 433 U.S. 562 (1977).

<sup>108</sup> *Id.* at 575.

ble highly protected speech. To the extent that courts offer advertisers an incentive to be more accurate about the claims they make for their products, they are properly applying the commercial speech doctrine.<sup>109</sup> Nor is there any need to give publishers preferential treatment, such as was granted by *Humiston*, when they are advertising the general nature and quality of the publication, since the publisher is under none of the limitations that may justify negligence or overstatement in the context of putting out the next issue, or derivatively, advertising that issue. Hence, denying a privilege to *Sports Illustrated* in the *Namath* situation would not be too extensive a regulation of commercial speech.

## 2. A Greater First Amendment Privilege for Advertisements of Products Themselves Protected by the First Amendment?

In *Bolger v. Youngs Drug Products Corp.*,<sup>110</sup> Justice Marshall, writing for the Court, suggested in a footnote that if the activity advertised is also protected by the first amendment, speech that would otherwise be commercial speech may be more highly protected.<sup>111</sup> The cases he cited do not strongly support that position. In *Murdock v. Pennsylvania*,<sup>112</sup> for example, the constitutional protection granted door-to-door solicitation for the purchase of religious books was based on the solicitation itself being a "form of religious activity."<sup>113</sup> In contrast, in *Breard v. Alexandria*,<sup>114</sup> the Court held that the first amendment protection afforded the product (magazines) did not insulate door-to-door solicitation for subscriptions from an ordinance generally prohibiting door-to-door solicitation except by invitation or consent of the occupant. The *Breard* Court acknowledged that the first amendment was implicated because of the nature of the product being sold — distinguishing this litigant from "solicitors for gadgets or brushes,"<sup>115</sup> — but held that the commercial feature distinguished this case from the proselytizer cases.<sup>116</sup> Thus solicitors for magazines could be prohibited from door-to-door canvassing just as solicitors for gadgets or brushes.

Arguably, the distinction between brushes and books recognized in

---

<sup>109</sup> See *Friedman*, 440 U.S. at 16.

<sup>110</sup> 463 U.S. 60 (1983).

<sup>111</sup> *Id.* at 67 n.14.

<sup>112</sup> 319 U.S. 105 (1943).

<sup>113</sup> *Id.* at 109.

<sup>114</sup> 341 U.S. 622 (1951).

<sup>115</sup> *Id.* at 641.

<sup>116</sup> *Id.* at 642-43. The case the Court discussed is *Martin v. Struthers*, 319 U.S. 141 (1943), which involved the free distribution of an invitation to religious services.

*Breard* under the old commercial speech doctrine, which provided no first amendment protection for commercial speech, should be carried over to the new regime. The *Breard* Court suggests that speech about brushes and speech about books belong to different orders. Although the magazine salesman in *Breard* was convicted, at least the Court recognized his standing to assert a first amendment privilege. Under the new order, even the gadget salesman has standing to assert a first amendment privilege; arguably, then, the magazine salesman should now be entitled to something more — namely, to full first amendment protection rather than the limited protection afforded by the commercial speech doctrine. This argument does not withstand analysis.

Speech about books and magazines is protected speech, but so is speech about other kinds of products. However, when a would-be seller makes the speech in the process of selling the product, the selling seems to color the magazine or encyclopedia seller's speech as much as the brush seller's. A colporteur's visit to one's front door may be, for her at least, a form of religious activity; for the encyclopedia seller, it is not. Hence, commercial speech about first amendment products is not entitled to greater protection than commercial speech about other products. If the trier of fact finds that the advertisement does not accurately represent the relation of the name-or-likeness plaintiff to the product advertised, then the advertiser should not be accorded a first amendment privilege.

As stated earlier,<sup>117</sup> this analysis, which would deny a first amendment privilege to *Sports Illustrated* in the *Namath* case and, more generally, would deny a special privilege to advertisers of first amendment products, does not preclude a state from providing the advertiser with more extensive protection under a doctrine such as "incidental advertising." It does, however, demonstrate that the common law "incidental advertising" doctrine exceeds the protection afforded by the constitutional commercial speech doctrine. To the extent that a court deciding *Namath* today believed the first amendment mandated application of the incidental advertising doctrine, it would be mistaken.

---

<sup>117</sup> See *supra* text accompanying notes 89-91.

D. *Advertisements for Products Not Themselves Protected by the First Amendment*

1. Advertising an Employment Relationship

In *Caesar v. Chemical Bank*,<sup>118</sup> plaintiffs complained of the use of their photographs by their employer, the Chemical Bank, to advertise the employer's electronic customer services department at a trade show. The plaintiffs were all employees of that department. The court granted the plaintiffs summary judgment because the defendant bank conceded that it had used plaintiffs' photographs for advertising and trade purposes without obtaining their written consent. The court did not discuss the commercial speech doctrine.

In applying the commercial speech analysis to this case, as to any name-or-likeness case arising from a commercial advertisement, we start with the recognition that there is no analytical problem with respect to the third prong of the test; speech is the evil complained of. It remains then to balance the value of the speech (first prong) against the value of the interest in name or likeness (second prong) with the proviso that should the balance favor the protection of name or likeness over speech the means of protection must not be more extensive than is necessary (fourth prong).

a. *First Prong: The Value of the Speech*

In *Caesar*, the advertised activity was lawful,<sup>119</sup> and the advertisement truthful. Neville Caesar and the other persons whose names and photographs were included actually worked in the electronic customer service department. Nevertheless, the statement raises a problem of informativeness. Does the presentation of the names and photographs convey a significant amount of relevant information to the audience of the advertisement? Compare the facts of *Caesar* with Expensive Resort's advertising that Resort tennis lessons are given by the well-known professional tennis player Billie Ace. Billie Ace's contract with the resort makes no provision for the use of her name or likeness in advertisements for the resort. Nevertheless, the resort should be entitled under the commercial speech doctrine to advertise its facilities. Moreover, the advertisement can be specific. A pharmacist, for example, is not limited to advertising that she sells prescription drugs at reasonable

---

<sup>118</sup> 118 Misc.2d 118, 460 N.Y.S.2d 235 (Sup. Ct. 1983).

<sup>119</sup> The leading case on advertisements for unlawful activities is *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (gender based job discrimination).

prices; she may identify the products and the prices.<sup>120</sup> Similarly, the resort may specify the facilities and services it offers. A significant part of its services is the opportunity to take tennis lessons from Billie Ace. Anything less than naming Billie Ace would be an inadequate identification of the particular service the resort offers.

*Caesar* differs from this hypothetical situation in that the thirty-eight persons whose names and photographs were used do not perform a service with the rare skill that Billie Ace has. The electronic customer services department could be adequately described by stating that it is staffed by thirty-eight highly qualified, well trained, dedicated individuals who provide specifically described services. On the other hand, the bank's advertisement may have been an attempt to counter the image of a faceless, impersonal bureaucracy, an image that was perhaps reinforced by the use of electronic customer services. Actually picturing and naming the individual employees was probably a more effective way of personalizing the bank than stating that "our highly qualified, well trained, dedicated personnel will give you the personal service you deserve." Thus, although the actual naming and picturing of the individuals was not necessary to an adequate identification of the service being offered, that basic message (that customers dealing with the electronic services department will be served by people) may have been communicated more forcefully, and perhaps was adequately communicated only through names and pictures.

On the significance of commercial speech's informativeness in determining the constitutional protection it receives, *Friedman v. Rogers*<sup>121</sup> provides some elucidation. In *Friedman*, plaintiffs made a first amendment challenge to a statutory prohibition of the practice of optometry under a trade name. The Court upheld the statute, deciding that a trade name was commercial speech but that it was significantly different from the commercial speech at issue in previous cases.<sup>122</sup> The Court stated that unlike advertisements of products and prices, a trade name is not self-explanatory. It has no "intrinsic meaning" but "acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality."<sup>123</sup> The Court noted that because the commercial speech doctrine permits the explicit advertisement of the information "unstated [by] and ambig-

---

<sup>120</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976).

<sup>121</sup> 440 U.S. 1 (1979).

<sup>122</sup> *Id.* at 11-12.

<sup>123</sup> *Id.* at 12.

uous[ly] associated with a trade name," the statutory prohibition may serve to increase the information available to the public.<sup>124</sup>

Similarly, it can be argued that the names and photographs of Neville Caesar and his colleagues have no intrinsic meaning to the potential consumer of electronic banking services. They do not help the potential consumer make an informed decision about whether to use the advertised service. Since the commercial speech doctrine does protect the statement of information about the nature of the services, the burden of compensating the individuals whose names and likenesses were appropriated will provide an incentive for the bank to provide the public with more informative advertisements.

The statement "Neville Caesar is an employee in Chemical Bank's electronic customer services department" does have intrinsic meaning when compared to a trade name such as "TSO;"<sup>125</sup> nevertheless, the name and photograph of an employee do not usually — the exception being the Billie Ace situation — provide much information to a potential customer. Hence, assigning a value to the speech in *Caesar* is rather difficult. The information provided by the names and photographs does not seem as relevant to rational decisionmaking as "I will sell you X drug at Y price."<sup>126</sup> Although the Chemical Bank advertisement is neither deceptive nor intrinsically empty (like "TSO"), it does not inform the audience of the advertisement of much other than that they will be served by "real people." That information may not, however, be negligible; it may be precisely the piece of information most important to the potential customer. Thus, although a lower value may be placed on the information in the Chemical Bank advertisement than that in the price advertising at issue in *Virginia Board of Pharmacy*, courts should be wary of deciding that names and photographs are informationless.

*b. Second Prong: The Value of the Publicity Claimant's Interest*

The second prong of the commercial speech test assesses the government's interest in providing plaintiffs with a cause of action. The information provided about the *Caesar* plaintiffs is not highly offensive to a

---

<sup>124</sup> *Id.* at 16.

<sup>125</sup> TSO is an acronym for "Texas State Optical," a trade name used by the optometrists in *Friedman, id.* at 8.

<sup>126</sup> The Supreme Court has, on occasion, illustrated commercial speech with this statement. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976), *cited with approval in Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977).

reasonable person and is of legitimate concern to the public. It is not offensive to have one's occupation revealed when the occupation is perfectly respectable; this is especially true when the occupation involves contact with the public.<sup>127</sup> Caesar's dignitary interest would be much stronger if the bank had provided short biographical sketches, stating, for example, that Caesar was the son of immigrants and had put himself through school. Entering an employment relationship does not entail an expectation that the employer will publicize that kind of information, but it is not surprising that an employer would publicly state that someone was its employee.

Moreover, Chemical Bank clearly did not appropriate from Caesar a pecuniary value analogous to a celebrity's name or face recognition.<sup>128</sup> The bank apparently did not use Caesar's attractive appearance to draw attention to the advertisement.<sup>129</sup> Nor did it use Caesar to advertise a product, such as a newspaper, which had used him as part of a story, but with which he was otherwise unassociated.<sup>130</sup> He had chosen to work for Chemical Bank. Thus the government has only a small interest in providing Caesar with name-or-likeness rights.

*c. Balancing the Interests.*

Conceding that the speech interest is not strong in the *Caesar* situation, the advertiser should, nevertheless, be granted a first amendment privilege under the commercial speech doctrine. When the plaintiff is an employee and the advertisement merely truthfully informs the public that the plaintiff is the advertiser's employee and performs the service for which customers are being solicited, the speech should be protected

---

<sup>127</sup> Cf. RESTATEMENT (SECOND) OF TORTS § 652C comment d (1977).

*Incidental use of name or likeness.* The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation.

<sup>128</sup> Cf. *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

<sup>129</sup> Cf. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

<sup>130</sup> Cf. *Namath*, 80 Misc. 2d at 531, 363 N.Y.S.2d at 276 (Sup. Ct.); *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 223 N.Y.S.2d 737, *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962).

by the commercial speech doctrine. The advertiser describes the product it is offering the public; the plaintiff is part of that product and, indeed, has voluntarily become part of that product.<sup>181</sup>

As noted above, when the plaintiff is a noncelebrity like Neville Caesar, the countervailing interest in an unexploited (and probably unexploitable) publicity value is weak. Even when the plaintiff is a celebrity and has an exploitable, and perhaps exploited, publicity value, the employer should be privileged to advertise the fact that the service or product it offers is performed or made by a celebrity. In part, this is because the information that Billie Ace gives tennis lessons at Expensive Resort is more meaningful to potential customers than that Neville Caesar is a staff member in the electronic customer service department. Although many unknowns may, in fact, be better tennis instructors than Billie Ace, potential customers may have a real interest in taking tennis lessons from a star like Billie Ace regardless of her pedagogical ability. Hence, the first amendment interest is greater in the celebrity situation because the mere use of a name or likeness is more informative. In addition, when the plaintiff is a celebrity, she should reasonably expect that the employer will call attention to that fact. Presumably, she is paid a premium because she is a celebrity and will make her employer more attractive to its customers. Having employed a celebrity, the employer should be entitled to inform its potential customers of the service or product it has to offer.

Hence, the application of the first two prongs of the Supreme Court's commercial speech analysis to advertisements in which the advertiser informs the public that the plaintiff performs a service or makes a product in the employ of the advertiser results in the conclusion that such advertisements are privileged speech. It is unnecessary to continue the analysis to the fourth prong, which is only relevant if a court denies a privilege after the earlier stages of the analysis.

---

<sup>181</sup> For a recent variation of this kind of advertisement, see the four-page advertisement by IBM of the 20-year history of one of its employees with the firm, emphasizing the firm's commitment to retraining. *NEW YORKER*, May 27, 1985, at 62-65. Even if this employee's photograph and work history with the firm were used without permission, that use should be privileged because they simply set forth facts that are neither highly offensive nor acquired by the advertiser during a confidential relationship. See also an advertisement by Morgan Bank that contains the name and likeness of one of its employees in describing the services that the bank offers through this and other employees. *NEW YORKER*, May 6, 1985, at 120. With respect to confidentiality, see *infra* text accompanying notes 135-38.

## 2. Advertising Relationships Other Than Employment

In the employment relationship, the publicity claimant has chosen to become part of the advertiser's product. In the situations now to be considered, the publicity claimant's relationship to the advertiser's product is not as close. Nevertheless, the best rule appears to be that the advertiser should be entitled to include the publicity claimant in a truthful description of its product without permission unless (1) the claimant and the advertiser have a confidential relationship; (2) the advertiser has agreed, explicitly or implicitly, to limit the use of the claimant in the description of its product; or (3) the advertiser has placed the claimant in a false light.

Consider the following advertising copy: "When Billie Ace won the American Championship, she used a Wacko Racket. Wacko Rackets — the Choice of Champions." Assume that Wacko Rackets did not have an arrangement with Billie Ace whereby the company paid her to use its rackets.<sup>132</sup> All the advertiser is doing is stating a fact, which fact is of some, perhaps slight, general interest. Trivialists might be interested in knowing such details as the maker of the racket of a particular tennis player at a particular period in her career.<sup>133</sup> But apart from general interest, it is a significant fact about the product that it was praised, or, even better, used by experts. This fact is of interest to a person deciding which manufacturer's product to purchase. The fact is all the more significant if the expert chose to use the product without a pecuniary incentive from the manufacturer.<sup>134</sup>

---

<sup>132</sup> Cf. *Dzurenko v. Jordache, Inc.*, 59 N.Y.2d 788, 451 N.E.2d 477, 464 N.Y.S.2d 730 (1983) (breach of statutory right of privacy for use of photograph not within scope of model's consent); *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 440 N.E.2d 1317, 454 N.Y.S.2d 971 (1982) (breach of statutory right of privacy for use of television commercial after expiration of period consented to by actor).

<sup>133</sup> Cf. *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (no liability for unauthorized republication in magazine of movie still showing actress with bare breast — "the fact that the plaintiff, a woman who has occupied the fantasies of many moviegoers over the years, chose to perform unclad in one of her films is a matter of great interest to many people" and, therefore, privileged as newsworthy).

<sup>134</sup> Cf. *Rossi v. F.W. Woolworth Co.*, 56 A.D.2d 566, 392 N.Y.S.2d 9 (1977) (no liability for photograph of plaintiff shopping in one of defendant's stores published in defendant's annual report); *Rand v. Hearst Corp.*, 31 A.D.2d 406, 298 N.Y.S.2d 405 (1969), *aff'd*, 26 N.Y.2d 806, 309 N.Y.S.2d 348 (1970) (no liability for use of famous author's name on book cover to puff another's book; her name appears in a quotation from a review of other's book); *LaForge v. Fairchild Publications, Inc.*, 23 A.D.2d 636, 257 N.Y.S.2d 127 (1965) (no liability for pictorial story containing photographs taken at race track of boys and men wearing sports jacket of particular material). *Contra*

This Billie Ace hypothetical is distinguishable from *Doe v. Roe*,<sup>135</sup> in which a psychiatrist reported verbatim the plaintiff-patient's thoughts, feelings, and fantasies. Although the psychiatrist used a pseudonym rather than plaintiff's name, plaintiff was identifiable to those who read the psychiatrist's book.<sup>136</sup> That case is distinguishable from the Billie Ace hypothetical in two ways. First, the psychiatric information revealed is generally recognized as private whereas one's choice of a tennis racket is not. Second, a patient-therapist relationship is generally viewed as confidential whereas a user-manufacturer relationship is not. Thus a plastic surgeon who advertised his skill by providing the names and likenesses of his clientele would not have a first amendment privilege.<sup>137</sup> It would also be impermissible to make a true statement about plaintiff's relation to a product if the presentation would be an invasion of privacy quite apart from the advertising context, for example, a photograph showing a nude Billie Ace drinking an ABC Cola in the locker room after a match.<sup>138</sup>

The general rule would also not apply to situations in which the name-or-likeness plaintiff entered into the relationship with the adver-

---

*Reilly v. Rapperswill Corp.*, 50 A.D.2d 342, 377 N.Y.S.2d 488 (1975) (pre-*Virginia Board of Pharmacy* case enjoining incorporation in manufacturer's film demonstrating product's usefulness of a videotape containing favorable consumers' report on the product). In *Reilly*, the Appellate Division recognized the favorable treatment given publishers, *see supra* text accompanying notes 86-88, but refused to extend it to other advertisers. It noted that the use of consumers' reports in subsequent advertisements would tarnish reporters' reputations and have a chilling effect on reporting. 50 A.D.2d at 346, 377 N.Y.S.2d at 492. Assuming the consumers' report is not distorted in the advertisement, such judicial fears are symptomatic of first amendment valetudinarianism. If the consumers' report is presented as such in the advertisement so that it does not appear that the reporter is a paid pitchman, there is no basis for complaint. An accurate quotation and attribution of another's statement does not tarnish her reputation. That is not to say that the reporter's reputation may not be tarnished by her having made the statement. Nor is it persuasive that a disinterested reporter will be unwilling to make a truthful favorable statement for fear that the person praised will repeat the statement. Book and film reviewers are regularly quoted in advertisements for those products. In any event, being quoted by a person who benefits from the reporter's statement is the price that reporters pay for living in a society that encourages the free flow of information. The Appellate Division failed to recognize what the United States Supreme Court subsequently did — that commercial speech is part of the protected flow of information.

<sup>135</sup> 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977).

<sup>136</sup> *Id.* at 675, 679.

<sup>137</sup> *See* *Griffin v. Medical Soc'y*, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (Sup. Ct. 1939) (photographs showing plaintiff before and after operation to correct a "saddle nose").

<sup>138</sup> *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

tiser on the condition, express or implied, that the advertiser use limitedly or not use at all the fact of the claimant's relationship to its product. If, for example, pursuant to a contract, Wacko Rackets had paid Billie Ace to use Wacko Rackets, then Wacko would not be entitled after the expiration of the contract to run the advertisement set forth above unless its contract with Billie Ace specifically gave it that right. Such a use would implicitly claim that Billie Ace chose to use a Wacko Racket without being paid to do so. That claim places Billie Ace in a false light.

Nor does the general rule apply in noncontractual situations in which the advertiser places the plaintiff in a false light. Even in the absence of an agreement, it would place Billie Ace in a false light to show her using a Wacko Racket if the reason she was using it, for example, was that her own Rocket Racket had been misplaced and she was merely using a racket ready at hand until her own equipment was found or could permanently be replaced. In both the contractual and noncontractual situation, the advertiser is, in effect, making a false representation about its product, and thus it is not entitled to first amendment protection.<sup>139</sup>

Consider another advertisement, which presents a more incidental relationship between the plaintiff and the product: "Dine at the Outdoor Cafe — the People Watching's Great." Above these words is a photograph taken from one of the tables of the cafe that shows a clearly identifiable celebrity walking on the sidewalk beside the cafe.<sup>140</sup> This

---

<sup>139</sup> Cf. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (unauthorized use of plaintiff's distinctive racing car in advertisement for cigarettes); *Dzurenko v. Jordache, Inc.*, 59 N.Y.2d 788, 451 N.E.2d 477, 464 N.Y.S.2d 730 (1983); *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 440 N.E.2d 1317, 454 N.Y.S.2d 971 (1982); *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 73 N.Y.S.2d 426 (1947), *aff'd*, 273 A.D. 947, 78 N.Y.S.2d 224 (1948) (unauthorized use of plaintiff's surname and coat of arms on wine bottles).

<sup>140</sup> This hypothetical is similar to *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 223 N.Y.S.2d 737, *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962), discussed *supra* note 102, in that the celebrity is used in a representative capacity and her individuality is not emphasized.

In other cases, courts have permitted advertisers to use the names and likenesses of well-known persons when the advertisement truthfully asserts a real connection between the advertiser and the well-known person even though that person did not voluntarily enter into the relationship with the advertiser. In *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969), the advertiser made unauthorized use of the plaintiff's name, photograph, and signature in a promotion for one of its meat products. Cepeda had previously contracted with a sporting goods manufacturer to use his name, likeness, and signature in connection with the sale of baseball equipment. The sporting goods firm and the meat producer then entered into an agreement whereby the former pro-

situation differs from that addressed above in that it does not involve or refer to a transaction between the name-or-likeness claimant and the cafe owner. Nevertheless, even in this situation, the advertiser's use of the claimant should be privileged. A person walking on the street does not have an expectation of privacy.<sup>141</sup> Her photograph may be taken and it may be publicized. The photograph substantiates the advertiser's claim of one of the virtues of the product, its atmosphere.

Finally, consider an advertisement that connects plaintiff and product as follows: "Buy an ABC personal computer. It's the best in its field, the Billie Ace of personal computers." Here the advertiser is stating an opinion about the quality of its product and not providing the audience with information about it. Since the commercial speech doctrine is

---

vided the latter with Cepeda baseballs which were used to promote the sale of its meat products. The promotion required the purchaser of the meat to send in a label with one dollar for a Cepeda baseball. The court, emphasizing that the advertiser "did not in any fashion attempt to indicate that plaintiff used or endorsed its meat products," *id.* at 1208, affirmed summary judgment for Swift.

In the analogous area of trade names, the Second Circuit permitted an advertiser to use the names "Dior" and "Christian Dior" to promote the sale of garments copied from original Diors despite the fact that those names were registered as trademarks by others. The court stated: "The interest of the consumer here in competitive prices of garments using Dior designs without deception as to origin, is at least as great as the interest of plaintiffs in monopolizing the name." *Societe Comptoir de L'Industrie Cottonniere Etablissements Boussac v. Alexander's Dep't Store*, 299 F.2d 33, 37 (2d Cir. 1962).

For a recent advertisement similar to that involved in *Cepeda*, see *NEW YORKER*, May 13, 1985, at 28-29. This is an advertisement of the Ford Motor Co. for its FILA Thunderbird. The text reads in part: "Inspired by the world-famous sportswear known for its quality and style, the FILA Thunderbird was created expressly for active lifestyles." The advertisement includes a photograph of the well-known tennis player Bjorn Borg wearing FILA clothing. Assuming Ford had FILA's permission to adopt the FILA logo and characteristic markings, *Cepeda* suggests that Ford could use the photograph of Borg without his permission. The Borg situation differs from *Cepeda*, however, in that a "Cepeda baseball" was specifically being offered rather than a Wilson Sporting Goods' baseball of the kind Cepeda uses. On the other hand, Borg is not named so that he is arguably being used in a representative capacity, showing the FILA clothing actually being worn. In this respect the situation is similar to the *Booth* case discussed *supra* note 102. Although Borg would present a close case, a court should rule in favor of Ford both because of the *Booth* point just made, and because the photograph of Borg, although prominent, does not dominate the advertisement. Nor can it be reasonably inferred that Borg himself uses or endorses the automobile being advertised.

<sup>141</sup> See *Arrington v. New York Times*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982) (no liability for unauthorized photograph of black man in business suit as the most prominent illustration of magazine article entitled *The Black Middle Class: Making It*), *cert. denied*, 459 U.S. 1146 (1983).

based on the rights of consumers to make informed decisions and advertisers to inform them, an advertiser's opinion about the quality of its product is not the kind of statement that the doctrine is aimed at protecting. Although it may be too strong to say that advertisers' opinions about their products are without constitutional protection, the constitutional value of the speech is low. At the same time, Billie Ace's interest in not having her name diluted and in not being sold by another<sup>142</sup> is more greatly involved in this advertisement, which *identifies* her, albeit metaphorically, with the product than in an advertisement that states that she used certain tennis equipment at a certain time in her career. She herself chose to be associated with the tennis equipment; she did not associate herself with ABC Computers. The commercial speech doctrine would not protect ABC's use of Billie Ace's name or likeness in this manner.<sup>143</sup>

In general, then, under the commercial speech doctrine an advertiser should be able to use a person's name or likeness without consent as part of a truthful statement about a legitimate product. The cases in which the privilege should not be upheld are (1) when the advertiser made a false claim about the connection between the plaintiff and the product, as in *Namath v. Sports Illustrated*<sup>144</sup> or, even more clearly, *Cher v. Forum International, Ltd.*;<sup>145</sup> (2) when a truthful statement violated either a confidential relationship or an agreement between the parties; or (3) when the advertiser's statement is an opinion about the quality of its product.

### III. CLAIMS ARISING FROM THE RHETORICAL MATTER

In the cases discussed above, the key consideration is the truthfulness of the commercial speech: Does the advertiser truthfully assert that plaintiff is a part of a realistic description of the product itself?<sup>146</sup> In

---

<sup>142</sup> See *supra* text accompanying notes 28-31.

<sup>143</sup> For a recent advertisement that impermissibly appropriates a celebrity's name in this respect, see *NEW YORKER*, June 24, 1985, at 41. This advertisement is for a shoe that the company has named *DIANA*. The advertisement concludes: "This is truly the most elegant shoe you can wear anywhere and feel like a princess: *DIANA*." This opinion, which coyly but unmistakably identifies the product with Princess Diana of Great Britain, should not be privileged.

<sup>144</sup> 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

<sup>145</sup> 692 F.2d 634 (9th Cir. 1982).

<sup>146</sup> By "realistic" I exclude metaphorical descriptions such as, "Even in the most difficult driving conditions, this car handles the road as easily as Billie Ace handles a deep backhand."

the cases discussed below, the advertiser is not (explicitly, at least) connecting the plaintiff to the product in a way that is true or false. Instead, the connection between plaintiff and product is more or less remote: plaintiff may be part of the background information concerning the product, or merely metaphorically connected with the product, or (even more remote) an attention-getter with no real or metaphorical connection to the product.<sup>147</sup>

The question that this section addresses, then, is what are the relative rights of an advertiser and the person whose name or likeness has been used when the advertiser cannot justify the use as part of a truthful realistic description of the advertised product? Perhaps paradoxically, the advertiser may be entitled to greater protection. The Supreme Court has said that an advertiser need not set itself up as a social commentator to enjoy first amendment protection for its commercial proposals.<sup>148</sup> What if the advertiser does? Does it receive enhanced first amendment protection at least for the social commentary part of the advertisement? And, of course, advertisements need not be limited to social commentary; they can provide news, other information of general or public interest, or entertainment. What should be their first amendment status in the context of a commercial advertisement?

---

<sup>147</sup> Degrees of remoteness can be illustrated as follows:

(1) In an advertisement for fireproof safes, the advertiser reproduces a newspaper story about a destructive fire. Plaintiff is mentioned in the story. Although a story about fires is a part of an extended realistic description of the product, it is background information rather than a description of the product itself. Plaintiff is not connected to the safe even to the extent that the passing celebrity was connected to the Outdoor Cafe in the hypothetical advertisement previously discussed. *See infra* text accompanying notes 177-88.

(2) In an advertisement for a small computer company, a still from an old movie is used showing plaintiff as David approaching Goliath. The advertising copy says, "Smaller . . . but better. ABC Computers . . . we're younger, quicker and smarter than the big boys." Here the connection is merely metaphorical. *See supra* text accompanying notes 141-43.

(3) In an advertisement for razor blades, the advertiser provides a photograph and a short three-sentence paragraph of sports history about Billie Ace. Here there is not even a metaphorical connection between the product and the plaintiff. The sports history merely calls attention to the advertisement and, so the advertiser hopes, to the product. *See infra* text accompanying notes 190-92.

<sup>148</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976).

A. *Similarities and Differences in Advertising and Nonadvertising News and Entertainment*

It may be assumed that in the normal commercial advertisement, a substantial purpose of speech such as social commentary or news is rhetorical. Its purpose is to call attention to the advertisement and the product and to enhance their attractiveness. But while the presentation of news or entertainment in an advertisement may have an ulterior purpose, the viewer or listener may be informed or entertained whether or not she is moved to purchase the product. Thus, from the audience's point of view, the rhetorical matter may be an end in itself even though it is principally of instrumental value to the advertiser.<sup>149</sup>

Thus, a first amendment problem arises. Although contained in an advertisement, the rhetorical matter may be entitled to the greater first amendment protection given entertainment and newsworthy information.<sup>150</sup> On the other hand, it is possible that because this speech appears within an advertisement it will receive less protection than it would if it were independent. In other words, the limited constitutional protection afforded "commercial speech" may apply to everything contained in a certain form — the commercial advertisement — or it may apply only to a particular part of the content of this form — namely, the commercial proposal.<sup>151</sup>

This problem may be illustrated by focusing on entertainment in the context of a commercial advertisement ("advertising entertainment"). Entertainers are often financially motivated. Their financial motivation does not, however, diminish their constitutional protection.<sup>152</sup> Is it relevant, then, whether the entertainer seeks remuneration directly, through the price of admission, or indirectly, through a subsequent purchase of the product offered in conjunction with the entertainment? And assuming there are relevant differences in the two forms of remuneration, how should a television variety show be characterized? The entertainer is paid by the broadcaster, which is paid by the advertiser while the audience watches free. The audience "pays" for the entertainment only to the extent that some of its members purchase products advertised on the show in response to those advertisements.

There do seem to be relevant differences between advertising entertainment and nonadvertising entertainment (even when the enter-

---

<sup>149</sup> See M. REDISH, *supra* note 41, at 50.

<sup>150</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977).

<sup>151</sup> See *supra* text accompanying notes 18-34.

<sup>152</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

tainer is financially motivated). First, advertising associates the subject with an advertised product while nonadvertising does not. Second, advertising bears the greater possibility of sham entertainment. In the case of the television variety show, these two differences are not as likely to exist. A mimic impersonating a celebrity on a variety show is not likely to cause the celebrity to be associated with even a regular sponsor of the show. Further, the mimic is governed by her need to be entertaining rather than by a need to awaken or induce a desire for a product. It remains to be determined whether these differences justify different degrees of legal protection and, if so, how different the degrees of protection can be. Specifically, can there be a blanket denial of constitutional protection for the use of names or likenesses in advertising entertainment?

The Supreme Court has not decided whether all the speech contained in a commercial advertisement — including social commentary, news, and entertainment — should be treated as “commercial speech.” In its most definitive pronouncement to date, *Bolger v. Youngs Drug Products Co.*,<sup>153</sup> the Court did state that all the speech in a commercial advertisement is “commercial speech.”<sup>154</sup> However, because the speech interest triumphed, this statement was dictum. Moreover, in its analysis the Court gave great weight to the content of the speech itself without discounting for the commercial advertising context,<sup>155</sup> so that the *Youngs Drug Products* approach suggests (statements in the opinion to the contrary notwithstanding) that speech in a commercial advertisement will be accorded the protection it would receive absent the commercial advertising context.

The remainder of this section will explore the question: Given the differences between advertising and such nonadvertising speech as social commentary, news, and entertainment, what differences (if any) in first amendment protection are justified?

### *B. Bases for Lesser or No First Amendment Protection for Advertising News and Entertainment*

#### 1. Sham News and Entertainment in Commercial Advertisements

Like nonadvertising entertainment, advertising entertainment (*qua* entertainment) may be unsuccessful. Surely the constitutional protection afforded entertainment should not depend on whether a joke, for

---

<sup>153</sup> 463 U.S. 60 (1983).

<sup>154</sup> *Id.* at 66-68.

<sup>155</sup> *Id.* at 74-75.

example, activates a laugh meter. However, the speaker outside the confines of a commercial advertisement is disciplined by the market for her speech. The entertainer who fails to entertain will lose her audience. The newspaper or newscast that fails to provide news (whatever that is) will lose its readers or audience. The advertiser is not subject to that kind of discipline. Its "jokes" may be dull and its "news" uninformative, but the advertiser will not suffer for it so long as the "entertainment" or "news" succeeds in catching attention and enabling the advertiser to make its pitch.

The greater likelihood of sham "entertainment" and "news" in advertisements does not justify an overinclusive rule that would deny first amendment protection for all advertising news and entertainment. The Supreme Court's *Youngs Drug Products* analysis is consonant with this conclusion.<sup>156</sup> Hence a blanket rule, such as "Commercial advertisements are never privileged against name or likeness claims except when the claimant's name or likeness is part of a truthful description of the product," is out of line with *Youngs Drug Products* and the high value given speech whatever the motivation of the speaker. The value of the speech, and not the speaker, is the issue. An obviously overinclusive rule will not govern this issue consistently with first amendment jurisprudence.

By rejecting an overinclusive rule, the courts would be called upon to distinguish, for example, real jokes (which would include those that are not funny) from sham jokes and real news from sham news. Courts have generally deferred to the judgment of newspaper editors on the question of whether some piece of information is newsworthy,<sup>157</sup> and, with respect to entertainment, the courts have had difficulty drawing the line between parody and copying.<sup>158</sup> Thus the courts have not developed a technique for distinguishing protected from unprotected news and entertainment, nor even a well-settled line of cases. Of course,

---

<sup>156</sup> There the Court, after having determined that the speech was commercial speech, nevertheless proceeded to give it great weight. 463 U.S. at 74-75. See *supra* text accompanying notes 153-55. See *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2280 (1985) (rejecting use of overinclusive "prophylactic restraints").

<sup>157</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218, 2231 (1985) ("As Judge Meskill wisely noted, '[c]ourts should be chary of deciding what is and what is not news.'"); *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (newsworthiness determined by community interest); Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963).

<sup>158</sup> Goetsch, *Parody as Free Speech — The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39, 39-40 (1980).

some advertising news or entertainment have nonadvertising counterparts.<sup>159</sup> These communications should not be hindered by the sham news and entertainment hurdle. Advertisers who depart from nonadvertising prototypes of news and entertainment risk the greater likelihood of the court's finding that what purports to be news or entertainment is not. However, given the material that passes constitutional muster as news, for example,<sup>160</sup> it may be that the theoretical category of sham news or entertainment is practically empty.<sup>161</sup>

## 2. Unjust Enrichment

Even if the rhetorical matter is not a sham, the advertiser is arguably unjustly enriched by using plaintiff's charisma. However, the first amendment permits other speakers to do precisely that — enrich themselves through the public's interest in the person who is the subject of their speech. For example, many books, tabloids, and magazines are sold not on the basis of the writer's insights and felicity of expression but simply on the basis of the public's interest in the subjects.<sup>162</sup> The publishers thus enrich themselves by attracting public interest to their products and perhaps reducing the market for the celebrity's own writing. The advertiser in the rhetorical matter (assuming it is not a sham) is doing the same. Enriching oneself by speaking about another (per-

---

<sup>159</sup> See, e.g., *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971), discussed *infra* text accompanying notes 205-15.

<sup>160</sup> *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (publication of family's name and photographs of interior of their former home where they had been held hostage by escaped convicts used as part of story on opening of play that was loosely based on this event); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980) (nude photograph of actress).

<sup>161</sup> But not completely empty. If, for example, Rochester Folding Box Company had added to the likeness of Ms. Roberson the information that she was the mother of two children and played the piano very well, the value of that information alone is so slight as not to entitle the advertiser to a privilege it would not otherwise have. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902); see *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978) (addition of legend "In Memory" to poster photograph of Elvis Presley published after his death did not make poster privileged as celebrating a newsworthy event), *cert. denied*, 440 U.S. 908 (1979).

<sup>162</sup> For example: "When Geraldine Ferraro got the Democratic vice-presidential nomination last month in San Francisco, it seems that publishers were thinking of how quickly they could do a book on her. Now, three paperback houses have announced books about the candidate." *Three "Instant" Books on Ferraro to be Published in Paperback*, PUBLISHERS WEEKLY, Aug. 24, 1984, at 65.

The publisher of one of the three books asserted: "This will not be a crash, fluff book — the subject matter deserves more respect." *Id.*

haps at the expense of the other) does not, without more, provide a basis for holding an advertiser liable to a person whose name or likeness the advertiser has used in the rhetorical matter of an advertisement.

### 3. Undesired Association

Undesired association of the plaintiff and the advertised product is the key difference between advertising and nonadvertising news or entertainment. As noted at the outset of this Article, such association may either affront the plaintiff's dignity or dilute the financial value of her name or likeness.<sup>163</sup> However, the mere possibility of such injuries should not cause the advertiser to lose its first amendment privilege.<sup>164</sup> Indeed, even when some affront or dilution is actually shown, the advertiser should not necessarily lose the privilege. Instead, the court's analysis should determine whether in the particular case the dignitary or financial injury outweighs the value to the public of the advertiser's news or entertainment. That determination can be guided by the tests set forth below.

#### *C. An Adaptation of the Commercial Speech Analysis to Claims Arising from the Rhetorical Matter of a Commercial Advertisement*

In name-or-likeness cases involving the rhetorical matter, I propose a four-step test adapted from the commercial speech test. The first prong of the commercial speech analysis — the value of the speech — becomes the first two steps of the adapted test. At the first step, the court determines whether the speech would be protected absent the commercial advertising context. At this stage the court might determine that statements would not be privileged on a number of bases: for example, defamation or false light,<sup>165</sup> invasion of privacy,<sup>166</sup> copyright infringe-

---

<sup>163</sup> See *supra* text accompanying notes 18-34.

<sup>164</sup> Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (recovery in libel cannot be based on presumed damages).

<sup>165</sup> *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936) (cigarette advertisement containing optical illusion that placed plaintiff in ridiculous light); *Onassis v. Christian Dior*, 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984) (Jacqueline Onassis in advertising photograph with other celebrities representing themselves); *Tolley v. J.S. Fry & Sons*, [1930] 1 K.B. 467 (1931) (caricature of prominent amateur golfer with a packet of defendant-advertiser's chocolate protruding from his pocket).

<sup>166</sup> For example, before and after photographs of at least certain kinds of plastic surgery. Cf. *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939) (article containing x-ray photograph of woman's pelvis showing six inch surgical clamp lodged therein); *Griffin v. Medical Soc'y of State of N.Y.*, 7 Misc. 2d 549, 11 N.Y.S.2d

ment,<sup>167</sup> or passing off.<sup>168</sup> If the speech would otherwise be protected, the court would proceed to the second step and determine whether in its advertising context the speech made an explicit or implicit misrepresentation that plaintiff uses or endorses the product. For example, in a photograph of Billie Ace hitting a low backhand as part of an advertisement for tennis equipment, it would probably be reasonable to infer that Billie Ace used or endorsed such equipment. If the speech is false, it is without first amendment protection.<sup>169</sup>

If the speech does not make a false representation regarding the relation of plaintiff and product, the court would go on to the third step and determine the plaintiff's interest. At this stage, it is not enough to say vaguely that a person's financial and dignitary interest in controlling the use of her name or likeness is substantial. Instead, the court must determine whether plaintiff suffers additional costs in the particular case by the association of her name or likeness in otherwise protected speech with the advertiser or the product. Various considerations come into play:

(1) Duration of the association of plaintiff and product. Distinguish, for example, a single item of advertising news published on one day from an advertiser's "adoption" of a particular person, as IBM, for example, appears to have adopted the likeness of Chaplin's little tramp.<sup>170</sup>

(2) Closeness of association between plaintiff and product. Distinguish a used car advertisement with a mimic impersonating former president Richard Nixon selling a used car from an advertisement for another product involving the same sketch. Although it could not be reasonably inferred that Nixon himself was endorsing the used car dealership (thus the advertisement would pass the second step), there is a closer association between Nixon and the product in this case than in

---

109 (Sup. Ct. 1939) (article titled "The Saddle Nose," showing before and after photographs of plaintiff).

<sup>167</sup> For example, a cartoon character or a song. See *NEW YORKER*, June 10, 1985, back cover (father's day advertisement containing Daddy Warbucks from *Little Orphan Annie*). Advertisers occasionally incorporate popular songs in their advertisements. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (advertisement incorporated song *These Boots Are Made for Walkin'*).

<sup>168</sup> *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *Sim v. H.J. Heinz & Co.* [1959] 1 W.L.R. 313 (C.A. 1958).

<sup>169</sup> *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2275 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

<sup>170</sup> See *Celebrities' Ghosts Are Hanging over Advertisers*, *BUS. WK.*, June 3, 1985, at 108 (noting IBM's "hugely successful Charlie Chaplin — 'Little Tramp' campaign").

the other, and thus his interest in being free from unchosen associations is more substantially involved in this case.<sup>171</sup>

The nature and quality of the product should not be a consideration. The existing rules provide sufficient protection without involving the courts in a region of miasma and mirage. For example, should the speech rights of the advertiser of meat products be valued less than those of the advertiser of fire extinguishers? Probably more people object to the eating of meat than to having fire extinguishers in buildings. Perhaps it can still be said that the ordinary person does not object to eating meat. What about smoking and drinking? Should tobacco and liquor advertisers not be able to use individuals' names and likenesses even if the rhetorical matter is newsworthy?

Existing standards already prohibit close association with offensive products. First, advertisements for unlawful products do not receive first amendment protection.<sup>172</sup> Second, the advertiser may not imply that the person whose name or likeness appears in the advertisement uses or endorses the product.<sup>173</sup> Within those limits the court should focus simply on the degree of association with the product rather than also attempting to discount the value of the advertiser's speech on the basis of the value of the product.

The fourth step of the test involves a weighing of the value of the speech against the plaintiff's dignitary and dilution losses. In order to find for plaintiff, the court must determine that plaintiff's injury was substantial. The court may not discount the value of the advertiser's speech merely because it is contained in an advertisement.<sup>174</sup> The speech is already discounted by being part of an advertisement; in a nonadvertising context,<sup>175</sup> the plaintiff's dignitary and dilution losses

---

<sup>171</sup> Compare *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959) (plaintiff's name used in story about fire as part of advertisement for fireproof safe) with *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971) (still from movie showing plaintiff's character asking if another character had tried the product advertised). See *infra* text accompanying notes 187-92 & 212-14.

<sup>172</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

<sup>173</sup> See *supra* text accompanying note 168-69.

<sup>174</sup> In performing a commercial speech balancing test, the Supreme Court did not minimize the importance of the speech because it occurred in a commercial advertisement. *Youngs Drug Prods. Corp.*, 463 U.S. at 64-68.

<sup>175</sup> See, e.g., *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10 (S.D. Ohio 1983) (photograph of plaintiff boys with policewoman used as part of article that featured nude photographs of policewoman); *Colyer v. Richard K. Fox Publishing Co.*, 162 A.D. 297, 146 N.Y.S. 999 (1914) (high diver pictured in diving costume on page with women vaudeville entertainers in publication that court describes as "carr[ying] a very

would not be taken into account at all, and the court would not perform a balancing test. Courts should not overvalue these losses in the advertising context by both performing a balancing test and devaluing the speech in the course of the balancing.<sup>176</sup>

#### IV. APPLICATIONS OF THE MODIFIED COMMERCIAL SPEECH ANALYSIS

##### A. News in Commercial Advertisements

###### 1. *Flores v. Mosler Safe Co.*<sup>177</sup>

*Flores v. Mosler Safe Co.* illustrates the application of the test set forth above. *Flores* was decided by the New York Court of Appeals before the expansion of first amendment protection brought about by *New York Times v. Sullivan*<sup>178</sup> and the commercial speech doctrine. The lawsuit arose from the reproduction on an advertising circular of a photograph and forty-seven-line news story from *The New York Times* about a devastating fire. The advertiser's apparent purpose was to make the risk of fire vivid to potential customers of its fireproof safes. The news report mentioned plaintiff three times, giving his address and occupation.<sup>179</sup> Plaintiff was not someone whose name would attract attention to the advertisement or product; neither the news report itself nor its use in the advertisement suggested that plaintiff endorsed the product.<sup>180</sup> The court upheld plaintiff's name-or-likeness claim.

The "rather spectacular and eye-catching picture of a burning building"<sup>181</sup> was included to attract attention to the advertisement. In addition, the news report provided potential customers with background information relevant to the decision whether to purchase a fireproof safe. As Judge Van Voorhis maintained in dissent, the advertiser should not be restricted to general warnings about the hazards of fire: "People

---

considerable amount of reading matter that scarcely appeals to a refined mind, and likewise a great number of advertisements of quack nostrums and trivial things").

<sup>176</sup> The mere association of plaintiff-celebrity with the product has not been enough to cause plaintiff to prevail in a number of cases. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (association of plaintiff to product through use of song plaintiff had popularized); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969) (association of plaintiff's name, photograph, and signature with product).

<sup>177</sup> 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

<sup>178</sup> 376 U.S. 254 (1964).

<sup>179</sup> 7 N.Y.2d at 279, 164 N.E.2d at 854, 196 N.Y.S.2d at 977.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

think in terms of specific situations."<sup>182</sup>

Mosler could have retold the story without mentioning Flores or could even have photocopied the story, having erased all but the first letters of Flores' name, thus retaining the authenticity of the newspaper account. This approach would have cost Mosler virtually nothing; however, just because a readily available alternative exists, a person is not thereby denied first amendment protection for the way in which she chooses to speak.<sup>183</sup> There must be some other, better reason why the speech is denied protection.

*a. First Step — the Rhetorical Matter Considered by Itself*

Judge Van Voorhis maintained that the advertiser's rhetorical matter was entitled to protection because it was newsworthy. He argued that the fire was a public event that remained in the public domain, and, further, that because plaintiff was caught up in this public event, he became a public character just as an actor or a musician becomes a public character in a specific context.<sup>184</sup> Judge Van Voorhis argued that the Mosler advertisement was essentially the same as an ordinary newscast sponsored by an advertiser.<sup>185</sup>

The judge seems to have assumed that an article once newsworthy remains so, but that assumption need not be made for this article to be privileged. Assume that the news value of this story had entirely dissipated; perhaps a poll of news editors indicates that none of them would use the story at the time Mosler used it. The story might still be of general or public interest as concerning a representative fire. Obviously, Mosler is not absurdly warning of a past fire. A reasonable person would understand that the article is meant to illustrate and emphasize a point of general or public interest: that fires do occur and that some spread rapidly before valuable property can be saved. Mosler expects to profit from that public concern, but profit motive does not undermine the value of the speech.

Further, there is nothing highly offensive to a reasonable person in the information provided about Flores — his name, address, occupation, and the fact that he was in the building when it caught fire.<sup>186</sup> Hence, the newspaper article *qua* article should remain privileged even

---

<sup>182</sup> *Id.* at 286, 164 N.E.2d at 858, 196 N.Y.S.2d at 982.

<sup>183</sup> See *Virginia State Bd. of Pharmacy*, 425 U.S. 748, 757 n.15 (1976); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974).

<sup>184</sup> 7 N.Y.2d at 286, 164 N.E.2d at 858, 196 N.Y.S.2d at 982-83.

<sup>185</sup> *Id.* at 287, 164 N.E.2d at 859, 196 N.Y.S.2d at 983.

<sup>186</sup> RESTATEMENT (SECOND) OF TORTS § 652C, comment d (1977).

though it is no longer an item of current news.

*b. Second Step — Misrepresentation Concerning Use or Endorsement*

As stated above,<sup>187</sup> the incorporation of the newspaper article in the advertisement does not suggest that Flores uses or endorses Mosler safes.

*c. Third Step — Costs to the Plaintiff from Being Associated With the Advertiser and the Product*

Flores may have found it distasteful to be used in any advertisement or in an advertisement for safes. However, Mosler did not closely associate its product to Flores. Moreover, Flores does not have a financially valuable name or likeness; thus, Mosler could not dilute their value. In addition, because Flores is not the central focus in the story, the association of Flores and Mosler is not strong. Finally, whatever effect the advertisement had on Flores' name or likeness seems to have been short-lived; there is no indication that Mosler used this advertising circular over a long period of time.

*d. Fourth Step — Balancing*

It seems clear that this is not a case of sham news. Mosler did not reproduce the story only to profit from placing Flores' name before the public. Flores' name presumably had nothing to do with Mosler's use of the story. Moreover, the article is of intrinsic interest, as argued above. The mere fact that Flores found it distasteful to be in any advertisement or in an advertisement for safes is not, without more, sufficient to overcome the right to speak about another person.<sup>188</sup> The additional requirement is the closeness of the connection between the plaintiff and the product. In this case, the article remains privileged against Flores' name-or-likeness claim because its continuing general or public interest outweighs the negligible costs to Flores in being weakly associated with the advertiser and the product. Even if Mosler had been motivated by Flores' name-recognition value (assuming he was a celebrity), the use of the news report would still be justified.

---

<sup>187</sup> See *supra* text accompanying note 186.

<sup>188</sup> See *supra* notes 175-76.

## 2. Some Variations on *Flores v. Mosler Safe Co.*

What if the story had no real connection with the product? The advertisement is for an ice tea mix, and a metaphorical connection is made: "When it gets really hot, that's when people reach for Antarctica Ice Tea." Another advertisement may use the same rhetorical matter and not even make a metaphorical connection between it and the product: "This slice of New York history brought to you by Staff of Life Bread." Regardless of the connection between the rhetorical matter and the product, the story has some intrinsic interest. The fact that Flores was annoyed by remaining in the public eye or being associated with a particular product is not sufficient to outweigh speech of general or public interest. There is no dilution because Flores is not a celebrity; even if he were, the association between Flores and the product is not strong enough to outweigh the speech interest. Thus the court in both *Flores* and these hypothetical variations should grant first amendment protection to the story when it appears in a commercial advertisement. The commercial speech doctrine requires that commercial advertisements not be treated as beyond the pale of first amendment protection. Once this advertisement is considered within the pale, there is not a sufficient basis for giving it less protection than the news story would receive outside the borders of a commercial advertisement.<sup>189</sup>

Still another variation must be considered. In the story complained about in *Flores*, the focus was the fire; Mr. Flores, though mentioned three times, was merely a person caught up in an event. What if the story had been about Flores? Consider a newspaper advertisement that includes a striking photograph of Billie Ace reaching for a low backhand. The caption of the photograph reads: *ABC Cola Sports History*. "Twenty years ago, a young tennis player burst onto the scene. Billie Ace, still a teenager, surprised everyone by reaching the finals at the American Championship. Final victory would have to await another year as the veteran Jane Boram won the unforgettable final match, 7-5, 7-5. Tennis fans then as now were enjoying the great refreshing taste of ABC Cola. REACH FOR A WINNER. ENJOY AN ABC COLA."<sup>190</sup>

---

<sup>189</sup> See *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60 (1983).

<sup>190</sup> For a somewhat similar advertisement, see *NEW YORKER*, June 10, 1985, at 76-77. In this advertisement, a two-page photograph shows a white haired man throwing the hammer against the background of green fields and hills. The text reads: "For twenty-five years Henry Gray won the cheers of the crowd in Scotland's Highland Games. And even now he likes to get out and throw his weight around. In the privacy of his own backyard. The good things in life stay that way." In the right hand corner

The advertisement is run during the American Championship. Under my suggested analysis even this story, the focus of which is clearly on a person, is privileged. This kind of item is a typical feature of the sports pages of newspapers.<sup>191</sup> Clearly, outside an advertising context the story would be privileged against Billie Ace's name-or-likeness action.

We move, then, to the second step of the analysis. The advertisement does not imply that Billie Ace uses or endorses ABC Cola. At the third step, then, the key issue is dilution. There is doubtless some dilution: Billie Ace is associated with a product with which she would presumably not agree to be associated without compensation. However, the association is not very strong, no stronger than it would be in "XYZ Television Sports History, sponsored by ABC Cola." To the extent that ABC Cola's advertisement differs from a similar item run by a broadcaster, Billie Ace's claim would be strengthened. If, for example, ABC Cola ran this advertisement every day during the two weeks of the tournament, it might be behaving differently from a newscaster. Were ABC Cola's "Sports History" to be in effect "Billie Ace's Sports Biography," then regardless of whether each advertisement taken individually might qualify as newsworthy entertainment, taken together, it is clear that ABC has associated itself with an unwilling Billie Ace to a much greater extent than it does by using her in a single advertisement, over a short term, or occasionally.

ABC Cola is remotely implying that it is the "Billie Ace of colas" by showing the highly successful tennis player (a winner) reaching for a backhand and then advising the audience of the advertisement to "reach for a winner. Enjoy an ABC Cola." However, such a connection seems

---

of the advertisement are a number of black and white photographs of Gray at earlier times in his life together with a label of the advertised liquor of similar size.

See also *NEW YORKER*, June 17, 1985, at 12. This advertisement offers a brief history of the All England tennis tournament held at Wimbledon. It includes a photograph of "Champion Suzanne Lenglen presented to Queen Mary at Wimbledon."

<sup>191</sup> The *New York Times*, for example, ran a feature entitled "Today in Baseball" during part of the 1985 baseball season. The feature consisted of brief statements of about five events of baseball history that occurred on that day in past seasons. One typical example of the feature included events that had occurred on October 1st in 1903, 1932, 1950, 1961, and 1970. The 1961 entry was as follows: "1961 — Roger Maris ended a season of personal torment by hitting his 61st home run of the season against Tony Stallard of the Boston Red Sox at Yankee Stadium in the Yankees' 1-0 victory. The homer eclipsed Babe Ruth's 34-year-old single-season record." *N.Y. Times*, Oct. 1, 1985, at A28, col. 3. Some other entries were even shorter. For example, "1968 — Bob Gibson set a World Series record by striking out 17 Detroit Tigers in Game 1." *N.Y. Times*, Oct. 2, 1985, at B10, col. 4.

a far cry from explicitly claiming its product to be the "Billie Ace of colas." Thus, on balance (step four), this advertisement should be privileged.<sup>192</sup>

### B. *Entertainment in Commercial Advertisements*

It is at least arguable that entertainment, assuming it can be distinguished from news or information of general or public interest, is entitled to less protection than those other types of speech. However, it is not necessary here to explore the basis and extent of first amendment protection for entertainment.<sup>193</sup> My purpose is to examine the degree to which the first amendment protection afforded advertising entertainment should differ from the first amendment protection afforded nonadvertising entertainment.

The legal protection afforded entertainment depends on its type. Entertainment can be divided into performances and nonperformances. A performance is something done to entertain an audience (for example, a human cannonball act); a nonperformance is an event that simply happens to be entertaining (for example, a pedestrian chasing a hat on a windy day over a slippery sidewalk). Both performances and nonperformances can be divided into actions of some sort and nonactions (for example, a photograph of an attractive person).

In general, it may be said that quite apart from an advertising context, legal protection is provided against appropriation of performances, whether by photography<sup>194</sup> or by imitation,<sup>195</sup> and against the use of a photograph of a person when the interest is in the person's face or figure and not in the activity.<sup>196</sup> When the activity rather than the per-

---

<sup>192</sup> Of the two advertisements mentioned *supra* note 190, the court should rule against Lenglen (assuming she were alive and brought a name-or-likeness claim) because her association with the product is slight, especially given the fact that the story is focused on the tennis tournament rather than on her. In the other advertisement, Henry Gray is much more prominently featured and is closely connected with the product in the advertisement, in that Scottish origin and age are emphasized. Moreover, as noted previously, a label is placed among the snapshots of Gray. Since the information provided about him is slight, there is a sufficient basis for deciding in his favor on a name-or-likeness claim. I am assuming for the sake of analysis (and probably contrary to fact) that the advertiser has not acquired the person's permission to portray him.

<sup>193</sup> See Felcher & Rubin, *supra* note 9, at 1598 (slight tendency for lower level of first amendment protection for entertainment when compared with information of public or general interest).

<sup>194</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>195</sup> *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (no first amendment privilege to present imitation Elvis Presley show).

<sup>196</sup> *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (upholding

son is entertaining, the person whose name or likeness it is does not have an action.<sup>197</sup> Some appropriation of even protected entertainment is privileged either because it is newsworthy<sup>198</sup> or because the original entertainment has been transformed into new entertainment.<sup>199</sup>

### 1. Newsworthy Entertainment

As to entertainment that is newsworthy, the Supreme Court has dealt only with the extreme case of the broadcast on a nightly news program of the entire flight of a human cannonball, which had been filmed that day without permission during a performance at a state fair.<sup>200</sup> The Court held that newsworthiness would not justify the appropriation of a performer's entire act, leaving open the question whether anything less is privileged.<sup>201</sup> The essential question is not whether the entire act is shown but rather whether the appropriation puts the person appropriating the entertainment in competition with the entertainer herself.<sup>202</sup> Thus it is highly unlikely that a broadcaster could cover all but one batter in a baseball game and avoid the effect of *Zacchini*.<sup>203</sup>

In an advertising context, consider again the ABC Cola advertisement discussed above that includes a striking photograph of Billie Ace reaching for a low backhand. Like *Zacchini*, Billie Ace is a performer; she has invested her thought and labor in developing her tennis ability. This photograph of her is taken during one of her performances. However, the photograph does not appropriate Billie Ace's entire act, nor does it put the advertiser in competition with Billie Ace with respect to those who would watch her tennis matches in person or on television. Moreover, the information in the advertisement is of general or public interest and is of the kind that regularly appears in the sports sections

---

injunction restraining unauthorized publication of memorial poster of deceased entertainer), *cert. denied*, 440 U.S. 908 (1979); *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (liability for unauthorized photograph of model published as poster).

<sup>197</sup> *Gill v. Hearst Publishing Co.*, 40 Cal.2d 244, 253 P.2d 441, 444 (1953) (en banc) (photograph of a romantic young couple sitting together, the young man with his arm around the woman, is protected by the first amendment).

<sup>198</sup> See *infra* text accompanying notes 200-04.

<sup>199</sup> See *infra* text accompanying notes 205-14.

<sup>200</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>201</sup> *Id.* at 574-76.

<sup>202</sup> *Id.* Cf. *infra* note 208.

<sup>203</sup> Cf. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (enjoining unauthorized broadcast of baseball games).

of newspapers. Thus, the advertisement would be privileged at step one and, as discussed above,<sup>204</sup> would retain the privilege at the later steps as long as ABC used it over a limited period of time.

## 2. Transformed Entertainment

As noted above, defenses other than newsworthiness are also available to the advertiser. The advertiser may have transformed the plaintiff's entertainment into its own entertainment. Consider, in this respect, *Negri v. Schering Corp.*,<sup>205</sup> which involved the use of a still photograph from one of Pola Negri's silent films of the early 1920's in a commercial advertisement for a new drug some forty years later. Schering's advertising agency claimed to have found the photograph in a humor book, *What Happened At the Office*, which consisted of still photographs from old silent films with humorous captions, the humor arising from the words being at once apposite and inapposite.<sup>206</sup> The advertising agency adopted the technique of the book. The trial judge was unimpressed, characterizing the agency's attempt at "eye-catching humor" as exhibiting "a rather odd twist of mind."<sup>207</sup>

### a. Step One Analysis

Like *Zacchini*, *Negri* involves the defendant's use of plaintiff's performance. However, the movie still falls far short of appropriating Negri's entire act. Even going beyond a quantitative interpretation of the entire act to an impact on plaintiff's market, the use of the still could not satisfy those interested in the movies in general or in silent

---

<sup>204</sup> See *supra* text accompanying notes 191-92.

<sup>205</sup> 333 F. Supp. 101 (S.D.N.Y. 1971).

<sup>206</sup> The case's description of the advertisement is as follows:

Two-thirds of the two-page spread is taken up with a large full-length photograph of Miss Negri as she appeared in the silent motion picture "Bella Donna", her first in the United States, and of Conway Tearle, her leading man in that picture. Miss Negri, in costume of the period, is shown standing looking down at Conway Tearle, seated cross-legged, dressed in turban and gown, with a somewhat bewildered-looking female in oriental dress sprawled across his lap. Printed words, in large letters, emerge from Tearle's mouth, addressed to Miss Negri, saying, "She has what they call anti-histamine daze, dear." In response, printed words emerge from Miss Negri's mouth, in similar type, saying, "Has she tried POLARAMINE (capitalized) — dexchloreniramine maleate?"

*Id.* at 103.

<sup>207</sup> *Id.* at 105. Perhaps only physicians would find the recaptioned photograph humorous.

films or in Negri's films, in the way that a broadcast of Zacchini's act arguably satisfies those who would otherwise view it in person. Moreover, the advertiser is itself creating entertainment, of a parasitic kind to be sure, but of a kind that has been recognized as privileged against copyright claims.<sup>208</sup> These factors favor finding the advertiser privileged.<sup>209</sup>

The chief difficulty that the case raises at the first stage of analysis is that of sham entertainment. The judge apparently did not find the advertisement amusing. But, as stated above, the test should not be whether the parody or joke works, but simply whether it is a genuine attempt at humor or parody. This test may not be easily applicable.

---

<sup>208</sup> "A parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

For a parodist to have produced a legal parody, it must be clear that he took an identifiable previously published work and, through the creative use of satiric imitation and invention, metamorphized the work's ideas and expression into a recognizably distinct work. Any disputed work which satisfies this standard, whether or not it arguably contains substantial appropriation or copying under the fair use doctrine, is a legal parody and . . . is entitled to protection as free speech under the first amendment.

Goetsch, *supra* note 158, at 43 (emphasis omitted).

Even under the more restrictive "substantial use" test, the use of the still from the Negri motion picture should be privileged because the quantity of the original appropriated was negligible. *See Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (parody of songs in humor magazine). *Compare* *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub nom. Columbia Broadcasting Sys. v. Loew's Inc.*, 356 U.S. 43 (1958) (liability for television burlesque of movie *Gaslight*) *with* *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) (no liability for television burlesque of movie *From Here to Eternity*).

*See generally* Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979); Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962); Note, *The First Amendment v. Right of Publicity in Theatrical Imitations — A Delicate Balance*, 57 NOTRE DAME LAW. 658 (1982).

<sup>209</sup> *Cf. Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 839 (6th Cir. 1983) (Kennedy, J., dissenting):

Appellee's use of the content "Here's Johnny," in light of its value as a double entendre, written on its product and corporate name, and therefore outside of the context in which it is associated with Johnny Carson, does little to rob Johnny Carson of something which is unique to him or a product of his own efforts.

However, this problem is not unique to advertising entertainment but exists with respect to entertainment generally: how much must defendant contribute so that the original entertainment may be viewed as transformed?<sup>210</sup> Although this approach will not provide ready answers, the question the court should focus on is not whether the entertainment is successful but whether attempted entertainment derives from the original rather than from a transformation of the original.<sup>211</sup>

*b. Step Two Analysis*

This advertisement raises several stage two problems. First, does the advertisement convey the message that Negri has used or endorses the product? The Negri character is, after all, given the speech: "Has she tried Polaramine [the product being advertised]?"<sup>212</sup> This question immediately raises a second issue. In a parody that incorporates a photograph of a play or from a movie in which someone says something favorable about the advertised product, is it the character who is speaking or is it the actor? That problem may be compounded by the audience's inability to determine whether the photograph is, on the one hand, of a play or from a movie, or, on the other, simply of actors at a social function.

In the first instance, imagine that the photograph and its captions are humorous (whether successful or not), with the characters/persons speaking lines that no reasonable person would believe they spoke whether in a drama or at a social gathering. A reasonable person would not believe that the real person, whose likeness (whether seen as a likeness of her or of a character) is "endorsing" the product, is herself

---

<sup>210</sup> See Goetsch, *supra* note 158, at 45-57.

<sup>211</sup> See *supra* note 208. A recent case involving Jacqueline Onassis provides an example of entertainment that derives from an appropriation of the original rather than a transformation of it (or her, since in this case the "original" is Onassis herself). *Onassis v. Christian Dior*, 122 Misc. 2d 603, 472 N.Y.S.2d 254 (App. Ct. 1984) (enjoining use of Jacqueline Onassis look-alike in photograph with other celebrities representing themselves). A reasonable person could believe that Jacqueline Onassis herself posed for the photograph just as did the other celebrities in it, with the obvious exception of De Gaulle. Rather than mimicking or parodying Onassis, the photograph presents her in a false light. The fact that the falsification was part of an advertisement is irrelevant to my analysis. See *Spahn v. Julian Messner*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967) (no first amendment privilege when biography of famous baseball pitcher was "infected with material and substantial falsification" and publisher had knowledge of such falsification or recklessly disregarded truth), *appeal dismissed*, 393 U.S. 1046 (1969); *Lord Byron v. Johnston*, 2 Mer. 29, 35 Eng. Rep. 851 (Ch. 1816) (enjoining circulation of poem falsely attributed to Byron).

<sup>212</sup> 333 F. Supp. at 103, 106.

endorsing the product. To be specific, it is unreasonable to interpret the Schering advertisement as conveying Pola Negri's endorsement of the product. This interpretation is all the more unreasonable in that the advertisement appeared in a professional journal: pharmacists and physicians are not likely to be impressed by an "endorsement" of a drug by a movie actor.

*c. Step Three Analysis*

The advertisement presents another, somewhat bizarre problem and this with respect to dilution. The name of the drug was "Polaramine," which bears an inescapable resemblance to the actor's first name, "Pola." It seems incredible that Schering was attempting to obtain any kind of advantage from giving this drug a name whose first four letters were the name of the actor or even from having the actor "recommend" the product. It seems more likely that at most the connection between "Pola" and "Polaramine" was an inside joke at Schering's advertising agency that was expected to be appreciated by, at best, a minute percentage of those who saw the advertisement. It is possible that the connection may have been entirely coincidental or, perhaps, subconscious. Forty or more years after the height of her career as a silent film star,<sup>213</sup> Pola Negri did not have enough presence in the general culture of the 1960's that an advertiser would advertise a product based on the recognition of her name and likeness.

As a general rule, however, an advertiser should not be entitled to name its product after a celebrity or to play on a resemblance in the names of the product and the celebrity. This association intensifies the issue of name/product association discussed in an earlier section. If one is not privileged to claim that one's product is, for example, the "Billie Ace of colas," then one should not be able to go one step further and call it "Billie-Ace." There is a strong association with Billie Ace and thus a strong tendency to dilute her name, and there is, at the same time, a lack of any strong first amendment justification. The name of the product is at best uninformative<sup>214</sup> and more likely to give the false impression that it is endorsed by the celebrity with the similar name.

*Negri v. Schering Corp.* raises interesting problems both at the first and second stage of the analysis. Schering should be privileged under

---

<sup>213</sup> See L. HALLIWELL, HALLIWELL'S FILMGOER'S COMPANION 484 (7th ed. 1980) (Negri "went to Hollywood in twenties and was popular until sound came in" — circa 1930).

<sup>214</sup> See *Friedman v. Rogers*, 440 U.S. 1 (1979) (commercial speech doctrine grants no first amendment protection to uninformative trade name "TSO").

the first amendment, but its playing on the name "Pola" would give rise to liability if it were reasonable to believe that Pola Negri had any substantial name and face recognition among the audience of the advertisement.<sup>215</sup>

### 3. Unperformed Entertainment

#### a. Plaintiff's Physical Appearance

As stated above, the use of a mere likeness of another's face or figure is generally not privileged unless connected with a text of general or public interest.<sup>216</sup> Hence, it is not surprising that such use in an advertising context should not be privileged. Indeed, this exact situation gave rise to New York's right of privacy statute.<sup>217</sup> In terms of the modified commercial speech test, this use is determined to be unprivileged at step one.

#### b. Events Involving the Plaintiff

Another form of entertainment is actions or events involving plaintiff. When these actions are newsworthy, use of plaintiff's name or likeness in presenting them is clearly privileged.<sup>218</sup> As argued above in connection with *Flores v. Mosler Safe Co.*, they should also be privileged in an advertising context. As noted above, at least one court recognized a privilege to publish another's name or likeness in connection with an

---

<sup>215</sup> Thus, in the Auden poem that is the epigraph of this Article, the humor arises from the conjunction of Milton and Hilton. Although this is clearly not a case of sham entertainment (whether or not it is successful), it does closely associate the person and the product. This close association is not sufficient to entitle Milton (assuming away, of course, the standing problem arising from his being dead for three hundred years) to a recovery against Auden because of the absence of ad hoc balancing in nonadvertising speech. See *supra* text accompanying notes 35-38. Were the poem to be used by Hilton in an advertisement, however, Milton's interest in freedom from undesired association would be taken into account. The association is close (albeit fanciful), unlike the remote association in *Flores*; indeed, the essence of the joke is the association. Hence, the advertisement should not be privileged.

<sup>216</sup> See *supra* text accompanying note 196.

<sup>217</sup> That statute was enacted in response to the court of appeals' denial of a common law right of privacy in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), which arose from the unauthorized use of plaintiff's likeness on an advertising poster.

<sup>218</sup> See, e.g., *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955) (innocent customer shown on television being questioned by police during gambling raid on cigar store); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929) (plaintiff's husband murdered before her eyes).

action or event that was merely entertaining.<sup>219</sup> Should such a privilege be extended to this kind of entertainment in an advertising context? Say an advertisement uses a photograph of plaintiff chasing a hat on a windy day, or jogging, bicycling, or roller-skating through Central Park on a beautiful summer day. Presumably it is the presentation of the activity that is interesting to the audience; nevertheless, the individuals performing the activity are identifiable even though the audience has no interest in them *per se*.

(1) *Step one analysis*

Individuals in general do not have a legally protected interest in their personalities, and a privacy interest has not been recognized unless the presentation is highly offensive to a reasonable person or is not of legitimate concern to the public. Of the hypothetical situations given above, only the chasing of one's hat would present one in a ridiculous way. Such a presentation would not outweigh the interest of a newspaper or newscast in informing the public of the weather on a particular day. But if a television weather announcer used the photograph over an extended period of time simply to illustrate every gusty day during the winter a court might allow an action. The weather announcer has converted the claimant's misfortune into entertainment; an item that was privileged as newsworthy may lose its privileged status when it becomes merely entertaining.

---

<sup>219</sup> Gill v. Hearst Publishing Co., 40 Cal.2d 224, 253 P.2d 441 (1953) (en banc). The California Supreme Court appears to have been uncertain about the first amendment status of entertainment of this sort. In the Gill v. Hearst Publishing Co. opinion that appears in the Pacific Reporter, the majority opinion states: "Apparently the picture has no particular news value but is designed to serve the function of entertainment as a matter of legitimate public interest. However, the constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature . . ." 253 P.2d at 444 (citations omitted). In the official report of the case, the quoted language was omitted. The court did not characterize the photograph as entertainment and did not assert that entertainment features and news reports were entitled to equal first amendment protection. 40 Cal. 2d at 231. This postpublication emendation suggests that the court was satisfied that this particular photograph was protected but was unwilling to make a general pronouncement concerning unperformed entertainment.

In any event, this note points to an uncertainty regarding the use of unperformed entertainment *whether or not* it appears in an advertising context.

*(2) Steps two, three, and four*

Consider the photograph of the man chasing his hat being used now not to inform of particular weather conditions but to attract attention to an advertisement for, say, flights to the Caribbean, to show winter at its worst, and perhaps to suggest that those who do not get away are foolish, hapless creatures. Nothing in the advertisement suggests that plaintiff uses or endorses the product. There is nothing highly offensive to being associated with flights to the Caribbean. And if the subject of the photograph lacks name and face recognition, there is no dilution. Hence, unless the photograph is unprotected on the basis of stage one analysis, its use in the advertisement should be privileged.

## CONCLUSION

The modern commercial speech doctrine brought commercial advertising within the pale of first amendment protection, thereby further unsettling the already uncertain law governing the use of names and likenesses in commercial advertising. This Article has attempted to integrate the rights of privacy and publicity, on the one hand, and the right of free speech, on the other, and thus clarify this thorny area of tort law.

The Article divided name-or-likeness claims into those arising from descriptions of the product and those arising from the rhetorical matter. The former claims more directly implicate the commercial speech doctrine in that they concern the commercial proposal itself, which is at the core of the doctrine. In my opinion, the Supreme Court should confine — as it has in practice though not in theory — content restrictions on commercial speech to those that are aimed at preventing or awarding compensation for false, deceptive, or misleading advertising. When the advertiser truthfully asserts a factual connection between the plaintiff and the product, that use of plaintiff's name or likeness should be protected. The only true exceptions to this rule are when the information is confidential or would be an invasion of privacy quite apart from an advertising context. Other "exceptions" are actually examples of false, deceptive, or misleading advertising, as when Billie Ace is shown using a racket that the advertiser paid her to use. Further, an advertiser has no first amendment protection from a name-or-likeness claim for mere opinions, such as "this product is the best, the Billie Ace of its kind." Since such speech is about a product but is not truthful, it is not entitled to protection under the commercial speech doctrine.

Name-or-likeness claims arising from the rhetorical matter are not at the core of the commercial speech doctrine and require a somewhat

different analysis. The key questions are: (1) Would this speech be privileged absent its commercial advertising context? (2) Does the advertisement misrepresent plaintiff's connection to the product? (3) How closely does it associate plaintiff and product? (4) Are the affront to plaintiff's dignity and the dilution of her financial interest in her name and likeness substantial? (5) Do they outweigh the value of the speech?

Truthfulness is not a dispositive factor in this situation because the advertiser does not assert a factual connection between plaintiff and the product or state an opinion connecting plaintiff and the product. The two are merely associated. Courts must balance the speech interest against the right to control associations of one's name and likeness. It is necessarily a less definite test than that dealing with name-or-likeness claims arising from the commercial proposal, depending on the facts of a particular case. However, by analyzing the decisional process and by cautioning against the overvaluation of plaintiff's interest out of an unarticulated hostility to commercial advertising inconsistent with first amendment theory, I hope to have provided guidelines that will adequately constrain courts' judgment in these cases.

