

mass audiences to advertisers.⁸³ Most (but not all) of their programming is offered to the public solely as an incident of their efforts to sell advertising time. Any intellectually defensible theory of broadcasters' First Amendment rights must reflect this reality.⁸⁴

The "infomercial" provides a telling proof of this phenomenon. Most broadcasters are quite willing to preempt their regular programming in order to air 30 and 60 minute commercials -- programs that consist entirely of staged testimonials for wrinkle creams, exercise machines, and similar products. That broadcasters are willing to preempt their regular programming for such fare says something quite significant about the value broadcasters place on their regular programming, and their motivations for showing it. Even the networks, if offered sufficiently high rents, will preempt prime time programming for televangelists, rich millionaires who wish to be President, and presumably for a particularly well-funded manufacturer with a new

⁸³ Most editorial decisions are driven by market demand for particular programming and a desire to maximize advertising revenue by selling advertising time associated with programming that enjoys large mass audiences. See Noll, Peck & McGowan, Economic Aspects of Television Regulation 8-12 (1973); see also Comments of the Center for Media Education, et al., MM Docket No. 93-48, at 6-9 (Oct. 16, 1995); C. Sunstein, Democracy, supra note __, at 17-18.

⁸⁴ In fairness, I should note that Dean Krattenmaker and Professor Powe have acknowledged the potential applicability of the commercial speech doctrine to television broadcast programming, but have not explored the idea. See Krattenmaker & Powe, Regulating Broadcast Programming, supra note __, at 317 n.69.

product to sell.⁸⁵ Broadcasters, unlike the print media, cannot plausibly hold themselves out to be full participants in the marketplace of ideas, at least insofar as "full participation" posits something more than a desire to complete a commercial transaction.⁸⁶

Of course, notable exceptions exist to this model of the broadcaster as the relentless rent seeker. Network, and to a lesser extent local, news programming, certain educational and investigative programming, and similar shows all require the broadcaster as program producer to make political, philosophical, and artistic decisions.⁸⁷ Many of these decisions are made free

⁸⁵ One could imagine the Coca-Cola corporation buying a thirty minute slot of prime time to introduce "new New Coke."

⁸⁶ Of course, not all print media outlets are created equal. Numerous periodicals consist of nothing but commercial speech: Harmon Homes Guides, Thrifty Nickel tabloids, and Weekly Auto Traders consist completely of advertisements. The fact that they are "newspapers" or "magazines" does not transform their content. Academic writers tend to use newspapers like the New York Times and the Washington Post as examples of the "the press." The reality of the marketplace is that newspapers and magazines exist along a broad continuum, and some of them exist largely, if not completely, to facilitate commercial speech. Moreover, to the extent that the "responsible" or "mainstream" press rest editorial decisions on purely commercial grounds, their claims of First Amendment protection for such materials should be analyzed under the rubric of commercial speech -- just like those of commercial broadcasters. See, e.g., Kasindorf, "What Makes Steve Run?," Fortune, February 5, 1996, at 58, 67-69 (arguing that Forbes magazine permits its commercial objectives to control its editorial policies); Marks & Barone, "Unfriendly Fire on the Rising Star," U.S. News & World Report, January 29, 1996, p. 36.

⁸⁷ But see Entman, supra note ___, at 79 ("[r]ecent research suggests reasons to fear for reporters' and even publishers' autonomy, with advertising revenues stagnating or shrinking and news organizations being forced to become more responsive to advertiser complaints"); Sunstein, "Half-Truths," supra note ___, at 35 (noting the power of advertisers over

and clear of any specific commercial objective.⁸⁸ Thus, there are then instances in which a broadcaster is not indifferent about the content of his programming; in such instances, broadcasters should enjoy the same speech rights as print journalists, cablecasters, and other media outlets.⁸⁹

The difficulty, of course, is identifying those instances in which a broadcaster is acting out of a non-commercial motivation.⁹⁰ Broadcasters cannot seriously assert that all of

programming content).

⁸⁸ The CBS Evening News does not select its stories based on Nielsen ratings suggesting that certain stories will sell more advertising time. Instead, the producers and directors of the news select and air stories that they believe merit placement on the national agenda. Broadcaster journalists take quite seriously this "agenda setting" function, and its operation is usually independent of concerns regarding ratings. See Bennett, News: The Politics of Illusion (1988); see also Sunstein, Democracy, supra note ___, at 62. Thus, in producing their evening news shows, networks are doing significantly more than bundling and selling an audience. However, advertisers historically have exercised control even over the presentation of news programming. See D. Brinkley, David Brinkley: A Memoir 66-67 (describing RJ Reynolds' control over the NBC nightly news in the 1950s). More recently, both the ABC and CBS news departments have responded to pressure from tobacco companies. See Gunther, "A Big Chill: Critics Say Networks Are Afraid to Investigate the Tobacco Industry," The Chicago Tribune, November 30, 1995, § 1, p. 15; Glaberson, "'60 Minutes Case Part of a Trend of Corporate Pressure, Some Analysts Say," The New York Times, November 17, 1995, at § B, p. 14, col. 1; see also Bennett, supra; Bagdikian, Media Monopoly (1990).

⁸⁹ See Letter from Chairman Mark S. Fowler to Senator Bob Packwood (March 14, 1981), reprinted in Freedom of Expression Act of 1983: Hearings on S. 1917 Before the Senate Committee on Commerce, Science & Transp., 98th Cong., 2d Sess. 240 (1984); but cf. Safchik, "Will Local Newscasts Take the High Road or the Low Road? Or Both?," The Quill, September 1989, 41 ("For better or worse . . . I think we are going to see a move toward [local] news broadcasts that are fashioned in direct response to marketing opportunities and audience interest.").

⁹⁰ See infra text and accompanying notes ___ to ___.

their editorial decisions are non-commercial in nature, and, with respect to children's television programming, it is relatively clear that broadcasters are principally engaged in commercial speech activity.⁹¹

B. Broadcasters' Speech Activities Should Often Be Deemed "Commercial" Speech

As the preceding discussion suggests, even if one adopts a unitary theory of the First Amendment -- tossing Red Lion and its progeny onto the dust heap of constitutional history -- the First Amendment analysis is not necessarily as easy as some have suggested.⁹² In arguing for a market-based approach to the selection of television programming, Dean Krattenmaker and Professor Powe acknowledge that audiences -- or the absence of them -- largely drive broadcasters' programming decisions.⁹³ That is to say that a broadcaster's paramount objective is the creation and maintenance of an audience possessed of certain demographic characteristics.⁹⁴

⁹¹ See infra text and accompanying notes ___ to ___; see generally N. Minow, supra note ___, at 10-11, 40-41; J. Twitchell, Carnival Culture 246-47 (1992).

⁹² See Krattenmaker & Powe, Regulating Broadcast Programming, supra note ___, at 202, 229-36, 323-24; Krattenmaker & Powe, "Converging First Amendment Principles," supra note ___, at 1726-33.

⁹³ See Krattenmaker & Power, "Converging First Amendment Principles," supra note ___, at 1728-30; see also Smolla, supra note ___, at 6-28.

⁹⁴ See B. Shanks, The Cool Fire: How to Make It in Television 98 (1976) (quoting an industry executive who reported that commercial television broadcasters' paramount criterion in selecting programming should be "attract[ing] mass audiences" in a fashion that would make the audience "receive, recall, and respond to the commercial messages").

In most instances (and certainly in their selection of children's television programming⁹⁵) broadcasters are largely indifferent to the content of their programming, so long the programming generates and sustains sufficient advertiser support.⁹⁶ Although the Supreme Court has relied consistently on the scarcity rationale to justify imposing special burdens on the speech rights of broadcasters, the commercial speech doctrine provides a more analytically sound basis for justifying government regulation of broadcasters.⁹⁷

⁹⁵ Not only do broadcasters select children's programming based on the rents that they can obtain by broadcasting a particular show, but in addition those producing the programming often create the shows for the express purpose of promoting various products, notably including children's toys. See Charren, "Children's Advertising: Whose Hand Rocks the Cradle?," 56 U. Cin. L. Rev. 1251, 1252-55 (1988); see also N. Minow, supra note ____, at 45-46, 52-57.

⁹⁶ See generally Price, "The Market for Loyalties: Electronic Media and the Global Competition for Allegiance," 104 Yale L.J. 667, 694-95 (1994).

⁹⁷ Of course, the same or similar burdens could be imposed on other media, including the press, provided that the regulations related to commercial speech activities. Historically, both judges and academics have maintained an idealized vision of the press, perhaps because most of the major press cases coming before the federal courts have involved core speech activities. See Near v. Minnesota, 283 U.S. 697 (1931) (involving newspaper reporting about police corruption and gangsterism); New York Times v. United States, 403 U.S. 713 (1971) (involving publication of the "Pentagon Papers," which addressed United States military policy in Vietnam); Grosjean v. American Press Co., 297 U.S. 233 (1936) (involving a punitive tax assessed against larger newspapers in Louisiana, which were generally unsupportive of Governor Huey Long); Bridges v. California, 314 U.S. 252 (1941) (involving newspaper editorials about pending trials); Pennekamp v. Florida, 328 U.S. 221 (1946) (involving newspaper editorials and cartoons critical of a local judge); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (involving the right of newspaper personnel to attend criminal trials); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (involving a right of reply statute triggered by

However, in order to shift away from the scarcity model to a commercial speech regime, two obstacles would have to be overcome. First, a sufficiently precise definition of "commercial" speech is needed to ensure that broadcasters' non-commercial (*i.e.*, political, social, philosophic, and aesthetic) speech activities are not underprotected -- we should not throw out the baby with the bathwater. Second, we must be comfortable with the decision to assimilate much of what broadcasters do into the "commercial" speech category.

1. *Defining "commercial" speech.* Although the Supreme Court has a well-developed jurisprudence that governs the analysis of governmental burdens imposed on "commercial" speech,⁹⁸ it never has defined precisely what constitutes "commercial" speech, nor has it provided a set of analytical tools one can use to separate accurately and efficiently "commercial" from "non-commercial" speech. In fact, the Supreme Court has suggested that the distinction rests on nothing more

a staff editorial). However, these cases -- and others like them -- involve only the gathering and reporting of "hard" news; this is but a single aspect of newspaper publishing. Other related publishing activities, such as printing advertisements and "puff" pieces promoting advertisers' businesses have not received much, if any, First Amendment scrutiny. If there is to be a unitary First Amendment applicable to all media, the courts must be prepared to analyze critically the commercial or non-commercial character of various publishing activities, regardless of whether the activity is undertaken by a newspaper, a magazine, or a television station. *See* Powe, *supra* note ___, at 197-215, 248-56; Krattenmaker & Powe, *Regulating Broadcast Programming*, *supra* note ___, at 203-36, C. Sunstein, *Democracy*, *supra* note ___, at 108.

⁹⁸ *See* *Central Hudson Power & Gas Co. v. PSC*, 447 U.S. 557, 564-66 (setting forth a four part test to determine the validity of governmental restrictions on commercial speech).

than the application of "common sense."⁹⁹ However, this generalization does not decide concrete cases. As Judge Alex Kozinski has observed, "[t]he distinction between commercial and non-commercial speech is extraordinarily difficult to make in any satisfactory way."¹⁰⁰

Plainly, speech that solicits customers or touts particular products is "commercial," insofar as both its primary purpose and primary effect is to facilitate an economic transaction.¹⁰¹ Of course, Charles Dickens wrote his novels in order to make a living -- but he did not write "A Christmas Carol" as an advertisement for poultry retailers.¹⁰² Likewise, Andy Warhol's "Campbell's Soup Cans" are works of art, notwithstanding their "commercial" subject matter; accordingly, they should and do enjoy full First Amendment protection.

⁹⁹ See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 771 n.24 (1976); cf. Tribe, American Constitutional Law, § 12-15, at 894-96 (2d ed. 1988) ("the Court's blithe admonition that the difference between commercial and non-commercial speech is determined by 'commonsense' has not provided reliable guidance for the resolution of individual cases").

¹⁰⁰ Kozinski & Banner, "Who's Afraid of Commercial Speech?," 76 Va. L. Rev. 627, 641 (1990); see also Epstein, "Property, Speech, and the Politics of Distrust," 59 U. Chi. L. Rev. 41, 60 (1992); see also Schauer, "Commercial Speech and the Architecture of the First Amendment," 56 U. Cin. L. Rev. 1181, 1184-85 (1988).

¹⁰¹ See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

¹⁰² Upon waking up, chastened by the visits of the ghosts of Christmas past, present, and future, Mr. Scrooge instructs a neighborhood boy to buy the "prize goose" from a local shop and deliver it to Bob Cratchett's home.

Between the easy cases of direct solicitations and works of art or literature lies a universe of speech that falls within a gray area. Suppose that Philip Morris purchases advertising space in the New York Times and runs the following copy: Philip Morris supports freedom -- you should too." To make the case a bit harder, we can posit that the text of the First Amendment appears in bold letters underneath the slogan. It is possible to make good arguments for classifying the speech as both commercial and non-commercial.¹⁰³ Central Hudson and its progeny provide little help in deciding how to analyze the hypothetical advertisement.

The Supreme Court has volunteered that "commercial speech" is speech that "does no more than propose a commercial transaction."¹⁰⁴ Yet this distinction does not withstand close scrutiny for reasons artfully articulated by Judge Kozinski.¹⁰⁵ Similarly, other proposed distinctions between "commercial" and "non-commercial" speech prove ephemeral. Profit motive fails, for "much expression is engaged in for profit but nevertheless receives full first amendment protection."¹⁰⁶ Nor can the

¹⁰³ See Kozinski & Banner, supra note ___, at 645-46.

¹⁰⁴ Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

¹⁰⁵ See Kozinski & Banner, "Who's Afraid of Commercial Speech?," 76 Va. L. Rev. 627, 639-40 (noting that many commercials do quite a bit more than merely propose a commercial transaction, but are not thought be non-commercial speech as a consequence).

¹⁰⁶ Kozinski & Banner, supra note ___, at 637.

universe of "commercial" speech be limited to speech disseminated through the use of money, speech that solicits money, or speech on a commercial subject.¹⁰⁷

To say that any speech by a company constitutes commercial speech plainly would be inconsistent with relevant Supreme Court precedents. Corporate entities can and do engage in non-commercial speech.¹⁰⁸ A test that hinges on a speaker's subjective motivation for engaging in speech activity would create almost insurmountable difficulties regarding its application.¹⁰⁹ Those engaged in commercial speech that includes an arguably non-commercial speech element could be expected to claim routinely that the speech merited full First Amendment protection.

Indeed, one need look no farther than Valentine v. Chrestensen,¹¹⁰ the seminal case in the field of the commercial

¹⁰⁷ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, ___ (1976); see also Kozinski & Banner, supra note ___, at 638-39.

¹⁰⁸ See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

¹⁰⁹ If a bank touting an "affinity" card affiliated with a particular organization (i.e., the NAACP Legal Defense Fund) ran an advertisement touting the fact that it would rebate 1% of all charges to that group, would the advertisement constitute "commercial speech"? Certainly, the bank's motivation in running the advertisement includes a desire to issue more LDF affinity cards. At the same time, however, the bank could reasonably claim that it wanted to publicize its support of the particular organization -- a task that has a significant non-commercial element.

¹¹⁰ 316 U.S. 52 (1942).

speech doctrine, for an example of a case raising such facts. Mr. Chrestensen wished to publicize the fact that he maintained a submarine that interested persons could tour for a nominal fee.¹¹¹ When New York City police informed Chrestensen that he could not distribute leaflets touting the submarine because they were purely "commercial," he modified the leaflets to include an attack on the city's prohibition on commercial leafletting on one side of the leaflets.¹¹²

The Supreme Court treated Mr. Chrestensen's leaflets as commercial speech, notwithstanding the non-commercial element: "We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented."¹¹³ The Court explained that:

[i]t is enough for the present purposes that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.¹¹⁴

Even if Mr. Chrestensen's behavior was sufficiently transparent to make the case an easy one, other, harder cases will remain.

It therefore should come as no surprise that some have given up trying to articulate a principled distinction between

¹¹¹ Id. at 53-54.

¹¹² Id.

¹¹³ Id. at 55.

¹¹⁴ Id.

commercial and noncommercial speech. For example, Judge Kozinski concludes that the difficulties associated with defining "commercial" speech make the category at best arbitrary and at worst meaningless; he advocates its complete abolition.¹¹⁵ His argument has a good deal of persuasive force; at a theoretical level, it is rather difficult to rebut.¹¹⁶ However, he has ignored a rather basic empirical fact: the federal courts successfully have deployed the commercial speech doctrine for over twenty years, notwithstanding its definitional shortcomings. Along the same lines, Judge Kozinski's argument also disregards the current Supreme Court's consistent and enthusiastic application of the commercial speech doctrine.¹¹⁷

As these observations suggest, I have a great deal of sympathy for Judge Kozinski's position. In the best of all possible worlds, all speech would receive full and robust First Amendment protection, regardless of the intent or purpose of the speech. This is not because all speech is inherently equal,¹¹⁸

¹¹⁵ Kozinski & Banner, supra note __, at 651-53.; cf. Farber, Commercial Speech and First Amendment Theory, 74 Nw. U.L. Rev. 372, 386-90 (1979).

¹¹⁶ Cf. Schauer, supra note __, at 1183-93; Collins & Skover, "Commerce and Communication," 71 Tex. L. Rev. 697 (1993).

¹¹⁷ See Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993); Fane v. Edenfield; Board of Trustees v. Fox, 492 U.S. 469 (1989).

¹¹⁸ Alexander Meiklejohn and Owen Fiss have posited -- correctly in my view -- that speech that tends to further self-governance lies at the core of the First Amendment. See A. Meiklejohn, Free Speech and Its Relation to Self-Government 22-27 (1948); Fiss, "Silence on the Streetcorner," 26 Suffolk U.L. Rev. 1, 19-20 (1992).

but rather because government simply cannot be trusted to identify and protect various forms of social and political speech from a project of censorship or control.¹¹⁹ Accordingly, Judge Kozinski's approach would best protect core speech activities from government encroachment, by avoiding completely the definitional difficulties -- and concomitant discretion -- associated with labelling particular speech "non-commercial" or "commercial."¹²⁰

However, we do not live in Candide's "best of all possible worlds," and our jurisprudence must reflect this basic reality. Regardless of the ultimate merits of the commercial speech doctrine, it will be with us for some time to come. It is therefore necessary for those of us who support a vigorous and freewheeling marketplace of (political) ideas to make the best of a bad situation. Given the current state of the law, we simply cannot avoid the vexing question of what constitutes "commercial speech" or, perhaps more aptly, what doesn't constitute commercial speech?¹²¹

I submit that it is impossible to maintain a viable theory of "commercial" speech without substantial reliance on an intent-based test for determining whether such speech is "commercial" or

¹¹⁹ The recurrent battle over prohibiting flag-burning provides a salient example of this phenomenon.

¹²⁰ But cf. C. Sunstein, Democracy, supra note ____, at 149-50.

¹²¹ One might say that, like Justice Potter Stewart's famous quip about obscenity, we will "know [commercial speech] when we see it." See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

"non-commercial." Andy Warhol's soup cans provide an instructive illustration: we know that Andy Warhol's soup cans are "art" rather than "commercial speech" because Mr. Warhol could have cared less whether the works sold or promoted the sale of so much as a single can of soup. A reasonable person would conclude that Warhol's motivations were non-commercial. By like reasoning, a glossy advertisement in Time magazine informing us that Campbell's soup is "Mmmm. Mmmm. Good!" constitutes "commercial" speech precisely because we know that Campbell's intends its advertisement to promote or facilitate an economic transaction -- even if Norman Rockwell illustrates it. Of necessity, the application of an intent-based test also must rely rather heavily on the particular context of the speech activity to determine its commercial or non-commercial character.

In fact, it seems probable that determinations regarding the commercial or non-commercial nature of speech can rest on a "common-sense" basis only if the speaker's motivation is transparent to all. However, the application of "common sense" to mixed-motive cases will not lead to predictable outcomes. In such instances, the federal courts must apply a kind of "reasonable person" standard to divine the probable motivation of the speaker, based on the particular context in which the speech activity occurred.¹²²

¹²² See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983); Valentine v. Chrestensen, 316 U.S. 52, 53-54 (1942); see also Note, "A Critical Analysis of Commercial Speech," 78 Cal. L. Rev. 359, 383-90 (1990).

As noted above, Mr. Chrestensen had claimed that his revised leaflet constituted something more than merely commercial speech; the court rejected this claim based on its perception that the non-commercial element of Chrestensen's speech was simply a fig leaf designed to avoid the proscription against commercial leafletting.¹²³ The Court disposed of the case based on a reasonable assumption regarding Mr. Chrestensen's "intent and purpose" in engaging in the facially non-commercial speech.¹²⁴

Thus, the Chrestensen Court relied on an objective evaluation of Chrestensen's intent in engaging in the speech activity to classify the activity.¹²⁵ A review of the other relevant commercial speech cases demonstrates that an objective evaluation of the intent of the speaker is almost always dispositive in determining the commercial or non-commercial nature of particular speech.¹²⁶

¹²³ Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942).

¹²⁴ Id. at 55.

¹²⁵ Judge Kozinski claims that the Supreme Court has explicitly ruled out intention as a test for commercial speech. See Kozinski & Banner, supra note ___, at 639-40. In support of this proposition, he cites a single case, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-64 (1976). The cited pages do not contain an explicit rejection of an intent-based standard, nor is there any such prohibition in any of the other commercial speech cases. Judge Kozinski simply appears to be incorrect on this point.

¹²⁶ Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Hoffman Estates v. The Flipside, 455 U.S. 489 (1982); Board of Trustees v. Fox, 492 U.S. 469, 475 (1989). Elsewhere, I have argued that the First Amendment should be applied in a context-specific fashion to afford certain speakers with greater access to public property for use in speech activities. See Krotoszynski, "Celebrating Selma: The Importance of Context in Public Forum Analysis," 104 Yale L.J. 1411, 1425-32 (1995). In

Explicit adoption of an intent-based standard will not make hard cases, such as the Philip Morris hypothetical, substantially easier to resolve. However, it would expand the universe of commercial speech to encompass materials traditionally thought to fall outside the category.¹²⁷

The Supreme Court should acknowledge that intent plays a crucial part of determining the "commercial" nature of speech. Correspondingly, the universe of "non-commercial" speech should encompass all speech that a reasonable person would conclude has

many respects, my position on the question of commercial speech is of a piece with this earlier work. The weaker First Amendment protection afforded commercial speech should apply in all instances where the motivation for the speech is commercial, rather than non-commercial. The reason for this is relatively simple: a commercial speaker is less interested in meaningful participation in the marketplace of ideas than in concluding a commercial transaction. Compare Kozinski & Banner, supra note ___, at 648-53 with Meiklejohn, Free Speech and Its Relation to Self-Government 22-27 (1948); Meiklejohn, "The First Amendment is Absolute," 1961 Sup. Ct. Rev. 245, 257.

¹²⁷ For example, record labels produce music videos to promote the sale of albums. These videos are often elaborate, film-length creations, involving substantial artistic effort. However, if intent governs the classification of speech, they arguably constitute a form of commercial speech. Cf. Kozinski & Banner, supra note ___, at 641. Music videos differ in this respect from most feature-length movies. Although the distinction may at first seem difficult to grasp, it is a meaningful one. A music video stands to an album the same way that a movie "trailer" or "teaser" stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are arguably "double" commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the music videos that they believe will generate the highest advertising revenue, i.e., the video cable channels have a commercial intent in selecting the titles that they broadcast. The video channels' unwillingness to broadcast controversial materials -- materials likely to spook boycott-wary advertisers -- provide additional evidence of the essentially commercial nature of the undertaking.

as its primary purpose something other than facilitating or encouraging a commercial transaction.

The problem of "mixed motive" cases would be resolved by reference to the probable principal objective of the speaker. Thus, Mr. Chrestensen's protest of the prohibition against public leafletting appears to be secondary to his primary objective of publicizing the submarine.¹²⁸ Had Mr. Chrestensen initially produced a leaflet attacking the city government's attempt to squelch commercial speech, his case would have stronger appeal.

Any doubts regarding whether this is a proper approach to "mixed-motive" cases are largely resolved by reference to two commercial speech cases, both involving "mixed" commercial and non-commercial speech.¹²⁹

Hoffman Estates v. The Flipside¹³⁰ involved a challenge to a local ordinance that made it "unlawful for any person 'to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs."¹³¹ The marketing restrictions included display rules that prohibited the placement of certain items near or proximate to "literature encouraging the illegal use of cannabis or illegal drugs."¹³²

¹²⁸ Valentine v. Chrestensen, 316 U.S. 52, 53-54 (1942).

¹²⁹ See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 496-97 (1982).

¹³⁰ 455 U.S. 489 (1982).

¹³¹ Id. at 492.

¹³² Id. at 496.

The Flipside, a store catering to the local counterculture, claimed (among other things) that the ordinance infringed its First Amendment rights by using the presence of certain literature as a test for determining whether the store was marketing other items for an illicit use.¹³³

The Court squarely rejected the Flipside's claim, holding that the ordinance did not infringe "the noncommercial speech of Flipside or other parties."¹³⁴ The ordinance merely "regulate[d] the commercial marketing of items that the labels reveal may be used for an illicit purpose."¹³⁵ Thus, the government was free to regulate speech activities involved in facilitating commercial transactions, even if it marginally burdened the Flipside's ostensibly non-commercial speech.

In Bolger v. Youngs Drug Products Corporation,¹³⁶ the Court faced a challenge to a federal statute that prohibited "the mailing of unsolicited advertisements for contraceptives."¹³⁷ Youngs Drug directly marketed its prophylactic devices to the general public; the company's efforts included mailings consisting of advertisements for condoms and informational

¹³³ Id. at 495-96.

¹³⁴ Id. at 496.

¹³⁵ Id.

¹³⁶ 463 U.S. 60 (1983).

¹³⁷ Id. at 61; see also 39 U.S.C. § 3001(e)(2) (1982).

pamphlets providing health-based reasons for buying and using condoms.¹³⁸

The Court faced the task of classifying Youngs Drug's informational pamphlets; was the speech activity at issue wholly commercial or commercial in part and non-commercial in part? At least one of the pamphlets at issue, "Plain Talk About Venereal Disease," did not contain any references to Youngs Drug's products.¹³⁹

The Supreme Court began its analysis of the pamphlets by noting that their "proper classification as commercial or non-commercial speech . . . presents a close[] question."¹⁴⁰ The fact that Youngs Drug distributed the pamphlets with other promotional materials (i.e., the advertising flyers) led the Court to question the non-commercial nature of the pamphlets. However, neither the fact that the pamphlets were meant to promote Youngs' products nor Youngs' economic motivation for mailing the pamphlets compelled the conclusion that the pamphlets constituted "commercial" rather than "non-commercial" speech.¹⁴¹

The Bolger Court concluded that "[t]he mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease

¹³⁸ Bolger, 463 U.S. at 62-63, 66. The mailings included two pamphlets: "Condoms and Human Sexuality" and "Plain Talk About Venereal Disease." Id. at 66 n.13.

¹³⁹ Bolger, 463 U.S. at 66 n.13.

¹⁴⁰ Id.

¹⁴¹ Id. at 66-67.

and family planning."¹⁴² The juxtaposition of facially "non-commercial" pamphlets with more direct promotional materials ultimately led the Supreme Court to declare the entirety of Youngs Drug's mailings to constitute "commercial speech."¹⁴³ This result obtained even though the same pamphlets, in a different context, would enjoy full First Amendment protection.¹⁴⁴

Bolger strongly suggests the commercial or non-commercial nature of speech will depend in large part on the context in which the ostensibly non-commercial speech occurs. If the speech occurs in the context of plainly commercial speech, the Court appears to be willing to assimilate the arguably non-commercial speech into the "commercial" category.

Perhaps the best explanation for the Court's reasoning in Bolger is that the intent of the speaker -- or more precisely the Court's determination of the speaker's probable intent -- prefigures to a non-trivial extent the "commercial" or "non-commercial" nature of particular speech.¹⁴⁵ The intrinsic nature of the materials did not control the Court's speech

¹⁴² Id. at 67-68.

¹⁴³ Id. at 66-68.

¹⁴⁴ See generally Griswold v. Connecticut, 381 U.S. 479 (1965).

¹⁴⁵ Another significant factor in the outcome of commercial speech cases is the Supreme Court's assessment of the informational value of the commercial speech to the public. See Lowenstein, "Too Much Puff: Persuasion, Paternalism, and Commercial Speech," 56 U. Cin. L. Rev. 1205, 1228-30 (1988); see also Bigelow v. Virginia, 421 U.S. 809 (1975).

analysis; virtually any kind of material could be "commercial" speech in the right context.¹⁴⁶

However, courts must take care not to underprotect non-commercial speech activity. Explicit use of an objective-intent test would not necessarily mean that all mixed-motive speech should be classified as "commercial." The government should not be permitted to establish a general presumption mixed-motive speech is commercial in nature.

Toward this end, the federal courts should establish a clear presumption that, if speech may reasonably be characterized as either commercial or non-commercial, the speaker intends the speech to be deemed non-commercial. The burden always should rest on the government to establish in hard cases that, in a given context, particular speech is "commercial" rather than "non-commercial." Furthermore, the government should have to do so by something more than a mere preponderance of the evidence (i.e., by "clear and convincing" evidence).

2. *Broadcasters are often engaged in commercial speech.* Under an intent-based test for commercial speech, much

¹⁴⁶ A booklet on how to stage an effective flag burning could be "commercial" speech if sent as part of a campaign to sell American flags for such a purpose, even though the same pamphlet, if distributed incident to a protest rally, would constitute "non-commercial" speech. It is the context in which the speech occurs, rather than the content of the speech, that is outcome determinative. See Krotoszynski, "Celebrating Selma," supra note __, at 1425-36; but cf. Note, supra note __, at 400-05 (arguing that the commercial speech doctrine's scope should be significantly narrowed).

of what broadcasters air would constitute "commercial" speech.¹⁴⁷ Large chunks of the broadcasting schedule exist solely to generate audiences that the broadcaster hopes to sell to advertisers. In many respects, the programming that appears in between the commercials is incidental to the commercials themselves.¹⁴⁸ It does not require much creativity to argue for the extension of the Bolger principle to reach broadcasting; the only salient difference is the use of the airwaves rather than the mails to deliver the advertiser's message.

¹⁴⁷ See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 495-97 (1982).

¹⁴⁸ Indeed, in the early days of television, the line between programming and sponsorship sometimes blurred. see N. Minow, supra note ____, at 91 & 91 n.64. David Brinkley writes of newscasts sponsored by RJ Reynolds in which the sponsor required that the anchorman smoke and/or maintain a lit cigarette throughout the entire program. D. Brinkley, David Brinkley: A Memoir 66-67 (1995) (describing the nicotine-laced aesthetics of the "Camel Caravan of News" on NBC). Likewise, Mary Tyler Moore tells of serving as "Happy Hotpoint," the Hotpoint Appliances' Elf. M. Moore, After All 61-65 (1995). Her character interacted with Harriet of "Ozzie & Harriet" during commercial breaks in the show. Id. Finally, the very term "soap opera" is derived from the early sponsors of these shows on radio -- manufacturers of soaps and other cleaning products -- that hoped to hawk their wares to housewives transfixed to their programming. See M. Cantor & S. Pigree, The Soap Opera 36-37 (1983).

Some obvious vestiges of the early practices remain. For example, Willard Scott and Spencer Christian, weathercasters for the NBC "Today Show" and ABC's "Good Morning America" respectively, both give direct product endorsements of their sponsors' products part and parcel with their meteorological prognostications. It would be quite naive to think that less direct forms of advertiser control do not also exist. See Bagdikian, Media Monopoly (1990); see also Johnson, "Ad Naseum: 'Friends' Crosses the Ethical Line With a Shameless Tie-In," The Chicago Tribune, January 26, 1996, at § 2, p.3.

Broadcasters' behavior makes plain that most of their programming is only secondary to commercial advertisements. For example, if an advertiser is willing to pay a sufficient premium, the broadcaster will permit the advertiser to preempt his programming entirely in favor of an "infomercial."¹⁴⁹ Broadcasters also countenance direct commercial product promotion in the context of their "core" programming.¹⁵⁰ In sum, broadcasters' indifference to the content of their "speech" is a strong indicator of the "commercial" nature of much of their speech activity.

With respect to the selection of particular kinds of children's television shows, a network or local broadcaster is largely indifferent as to whether it should air "Magic Smurfs" or "Rainbow Bright." If a choice between the shows must be made, the decision will probably turn on which show is likely to generate higher ratings, or generate a predictable audience of a particular demographic cast (i.e., young girls rather than young boys), rather than on some artistic, philosophic, or political ground.¹⁵¹

¹⁴⁹ Some advertisers also have produced programming that they wish to have broadcast like any other syndicated show. See Ross, "Blurring the Line," Inside Marketing, May 11, 1994, at 28; Edelson, "That's Sell-o-Tainment," Women's Wear Daily, April 26, 1994, at 16.

¹⁵⁰ See Johnson, supra note ____, (describing a Coca-Cola marketing tie-in with the popular show "Friends").

¹⁵¹ See N. Minow, supra note ____, at 10-11, 19-21; J. Twitchell, Carnival Culture 246-47 (1992). Indeed, toymakers produce and financially subsidize the distribution of many of the most popular children television shows. See N. Minow, supra note ____, at 52-57; Charren, supra note ____, at 1252-55. Media mogul

Indeed, at the risk of being overbold, it is virtually certain that the network or local station will not make a decision based on the political, philosophical, or artistic message each show conveys. The decision is fundamentally an economic one, more akin to a grocer deciding to stock green leaf or Romaine lettuce than to establishing a political party's platform.

For example, in formal comments submitted to the Commission, Capital Cities/ABC touted a new children's television show the network was developing called "CRO" as an indication of its strong support for educational children's programming.¹⁵² "CRO"

Rupert Murdoch once condemned commercial broadcasters' participation in distributing these materials in no uncertain terms:

There's nothing wrong with advertising to a child audience, but to make your programming that way I think is really a prostitution of the broadcasters' function. If you did that in a newspaper, you'd be run out of town.

"The Thinking Man's Media Baron," Broadcasting, April 13, 1987, at 68, 70. Mr. Murdoch's supposition regarding such arrangements in the national print media appears to hold true, if the scandal surrounding Forbes' editorial policies is any indication of contemporary journalistic ethics. See Kasindorf, supra note ____, at 67-69; Kurtz, "Forbes Feels the Wrath of Fortune," The Washington Post, January 16, 1996, at § E, p.1.

¹⁵² See Comments of Capital Cities/ABC, MM Docket No. 93-48, at 10 & 10 n.10 (May 7, 1993); Reply Comments of Capital Cities/ABC, MM Docket No. 93-48, at __ (June 7, 1993); see also Comments of Children's Television Workshop, MM Docket No. 93-48, at iii, 3-4 (May 7, 1993). "CRO" was a joint project of ABC and the Children's Television Workshop. Comments of CTW, at 3.

In fairness to ABC, it bears noting that NBC also used its formal comments to tout a new educational show, "Name Your Adventure," that did not survive a single season. See Comments of National Broadcasting Co., Inc., MM Docket No. 94-48, at 13-15 (May 7, 1993); Reply Comments of National Broadcasting Company, Inc., MM Docket No. 93-48, at 8 (June 7, 1993).

would feature serious educational messages about "tools, machines, and scientific principles."¹⁵³ After one season, ABC cancelled "CRO" and replaced it with a cartoon version of the movie "Dumb and Dumber."¹⁵⁴ ABC cannot argue seriously that its decision to cancel "CRO" and replace it with "Dumb and Dumber" reflected any social, aesthetic, moral, or philosophical point of view; it reflected a desire to increase revenues from the sale of commercial spots in the half hour at issue, nothing more and nothing less.

Furthermore, the behavior of advertisers provides further confirmation of this model. Advertisers generally demand a guarantee that, in exchange for their advertising dollars, the station will actually deliver an audience that largely, if not completely, lives up to the station's projections. Hence, stations commonly offer free advertising time as "make goods" for "underdelivery" of a specific kind of audience.¹⁵⁵ When the

¹⁵³ Comments of ABC, at 10 & 10 n.10; see also Comments of CBS Inc., MM Docket No. 93-48, at 10-11 (May 7, 1993) (describing "CRO" and touting it as an example of the commercial networks' commitment to educational children's programming).

¹⁵⁴ See Address by Chairman Reed E. Hundt to the Kidsnet Meeting, at 2 (August 22, 1995). Evidently, ABC must have counted on the Commission maintaining a very short institutional memory. Indeed, all four major networks touted "CRO" as strong evidence of the commercial networks' commitment to compliance with the Children's Television Act of 1990, 47 U.S.C. §§ 303a, 303b.

¹⁵⁵ See Walley, "Networks Fed Up," Advertising Age, May 7, 1990, at 66; see also Moss, "Hasbro Buys Out Turner 'Toon-In' Time," Multichannel News, November 23, 1992, at 49 ("Advertisers are expecting to get make goods from networks because of the underdelivery of several children's shows."); Gay, "NBC Ratings Belly-Flop Forces Make-Goods," Advertising Age, September 26, 1988, at 3 (describing process of using make-goods to satisfy

actual ratings fail to meet the station's projections, the advertiser is entitled to some form of compensation.

The transaction, at bottom, is really little different from a grocer selling a customer lettuce, cabbages, and other forms of produce.¹⁵⁶ Just as a grocer tries to maintain a produce stock that is appealing to most of his regular customers, so too a broadcaster attempts to maintain a line up of programming that will generate the kinds of audiences that his regular advertisers desire. A grocer is largely indifferent to the items he sells, so long as his store generates a sufficient volume of sales to generate an acceptable level of income. Likewise, television broadcasters are often largely indifferent to the programming that they broadcast, provided advertisers are willing to purchase spots.¹⁵⁷

advertiser's audience expectations).

¹⁵⁶ See Fiss, "Free Speech and Social Structure," 71 Iowa L. Rev. 1405, 1413 ("From the perspective of a free and open debate, the choice between Love Boat and Fantasy Island is trivial."); see also Fiss, supra note __, at 788 ("For a businessman, the costs of production and the revenue likely to be generated are highly pertinent factors in determining what shows to run and when.").

¹⁵⁷ The recent controversy over "trash" talk shows illustrates this point quite nicely. Talk shows are very inexpensive to produce, and therefore are less expensive to buy from syndicators. These shows also generate good ratings on a consistent basis. The result: advertisers purchase spots on talk shows discussing the habits of sexaholics who choose celibacy -- and those who love them. However, after a number of public interest groups decried the content of these shows, advertisers responded by withdrawing their financial support. See Mifflin, "Talk Show Critics Urge Boycott of Programs By Advertisers," The New York Times, December 8, 1995, at § A, p. 17; Saunders, "Advertisers Are Backing Off From Sleazy TV Shows," The Chicago Tribune, December 4, 1995, § 2, p. 4. The result of the advertisers' decision: "[s]ome of the current talkers could