The Devil in Disguise: Hybrid News-Commercials and First Amendment Protection for Broadcast Journalists

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BROADCAST JOURNALISTS

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I. INTRODUCTION

Broadcast journalists and advertisers endure an uneasy alliance. Because of increasing use of newscast content as an advertising vehicle, this difficult relationship may soon present constitutional problems for news organizations.

Advertising pays the bills, but good journalism requires independence from undue influence by sponsors. Edward R. Murrow, the CBS news pioneer, once infuriated his corporate superiors by declaring that if “news is to be regarded as a commodity, only acceptable when saleable, then I don’t care what you call it—I say it isn’t news.”

This article will examine a modern manifestation of the news-commercial conflict, sneaking sponsors’ messages into purported news stories. Such shadowy advertisements are, in the words of Consumer Union’s executive director Rhoda H. Karpatkin, “just commercials pretending to be news.”

Turning impartial reporters into commercial endorsers obviously violates journalistic ethics. Osborn Elliott, a former dean of Columbia

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3. The American Society of Newspaper Editors’ (“ASNE”) Code of Ethics urges member journalists to gather and report information to the public accurately, honestly and impartially. Furthermore, members are to strive to conduct themselves in a manner that protects them from conflicts of interest. BRUCE M. SWAIN, REPORTERS’ ETHICS 111 (1978). These aspirational goals are not always respected, hence the problems discussed in this article.
University's journalism school declared: "Number one, they shouldn't do it. Number two, [if they do] it should be revealed that this is the arrangement... That's a fine line across which one shouldn't pass." Former CBS News president Fred Friendly explained his network's concern: "[I]f certain subjects are scheduled because they are sponsored, it follows, conversely, that certain other programs might not be broadcast because they are unsponsor able."

Furthermore, as this article will demonstrate, mixing advertisements and news may jeopardize the First Amendment protections of news broadcasters, since commercial speech enjoys a lower level of constitutional protection than does noncommercial speech. This may be true even when the commercial speech has or purports to have a noncommercial dimension. Consequently, broadcast journalists may thus be more vulnerable to defamation lawsuits. They may violate federal communications laws requiring sponsor identification and federal trade regulations prohibiting deceptive advertising. Journalists may invite regulation, fines, or even prior

4. Joanne Lipman, TV Series on Personal Finance Stirs Debate Over Separation of News and Advertising, WALL ST. J., Feb. 10, 1988, at A23. Dean Osborn Elliott was referring to "Planning Your Financial Future," a six-part series airing on cable television's Financial News Network ("FNN"), which has since been absorbed by CNBC. The series featured FNN anchors and other journalists, but it was actually a paid commercial for The New England, an insurance and financial services company. The New England invested $365,000 in the production. Id.

5. FRED W. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL 207 (1967). Friendly's fear is as well-founded today as it was twenty-five years ago. One network even hesitated to expand coverage of the Persian Gulf war, despite enormous public interest, because sponsors were skittish about associating their products with war coverage. Bill Carter, Few Sponsors for TV War News, N.Y. TIMES, Feb. 7, 1991, at D1. Some newspapers are dropping entire categories of news for which few advertisers can be found, such as science. Fred Jerome, Bad News for Science News, N.Y. TIMES, Sept. 26, 1992, at A21. Even more troubling is the tendency of some broadcasters and publishers to avoid news material that may offend advertisers, such as consumer protection reports and price comparisons. American Society of Journalists & Authors Newsletter, Oct. 1992. As television revenues weakened, advertisers became more insistent on favorable coverage and stations became more susceptible to advertiser threats. Stephen Waldman, Consumer News Blues, NEWSWEEK, May 20, 1991, at 48. See generally G. Pascal Zachary, Many Journalists See A Growing Reluctance to Criticize Advertisers, WALL ST. J., Feb. 6, 1992, at A1.

6. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'"); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 64 (1983) ("[O]ur decisions have recognized the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.") (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).
restraints on material they pass off as news, without the constitutional protections upon which they have come to rely.

Part II of this article presents a short history of commercial influence on newscasts. Part III will examine the differing levels of First Amendment protection for independent news coverage and for commercial speech. Part IV discusses the current application of commercial speech rules. Part V presents an example of the troublesome news-commercial hybrid, followed by an examination of resulting problems: less protection against defamation actions, fines, and prior restraints. This part includes a discussion of the commercial speech problems posed by allowing independent journalists to serve as commercial endorsers. Finally, Part VI offers a conclusion as to the current status of the law and the appropriate stance for broadcast journalists on the news-commercial question.

II. THE RISE OF SPONSORED NEWS STORIES

American journalism depends on advertisers. In colonial times, half of all newspapers bore the name “Advertiser” in their titles. In 1989, the fifty leading U.S. advertisers spent approximately $41 billion, much of it on media which deliver news as a sole, primary, or significant product. The cost of broadcast advertising alone was $22 billion. At local television stations, newscasts are the principal source of revenue, although entertainment dominates the program day.

In broadcasting’s early days, sponsors often bought entire programs, including news, and dictated their content. One journalism chronicler

7. Rodney A. Smolla, Legacy: A Conversation With James Madison, A.B.A. J., Aug. 1991, at 51. Professor Smolla notes that during colonial times, there was no established legal distinction between political and commercial speech. Id.
9. Id. The $22 billion figure was up from $18 billion only two years before. House Committee on Small Business, Subcommittee on Exports, Tourism, and Special Problems, May 2, 1989, available in WESTLAW, FTC File (testimony of William MacLeod, director of Federal Trade Commission Bureau of Consumer Protection). Even as the recession cut into advertising, total broadcast revenues rose by more than one billion dollars in 1989. THE WORLD ALMANAC AND BOOK OF FACTS 319 (1992).
said that before 1930, "radio news was almost totally corrupt." For example, in the 1930's, NBC radio allowed its evening news roundup to be produced at the sponsor's headquarters, under the direction of the sponsor's public relations department. Therefore, if an advertiser did not like what was said on the newscast, the journalist responsible could lose not only his sponsorship, but his job. Robert Lemon, a veteran NBC News executive, described the news as "whorishly done."

With the passage of the Communications Act of 1934, advertisements were required to be identified as such. All matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person ... Although the purpose of that statute was to prevent audience deception, many news programs still danced to an advertiser's tune. Reuven Frank, a former NBC News president, revealed that an early television newscast, NBC's Camel News Caravan, was prohibited by its tobacco company sponsor from showing "No Smoking" signs, live camels (considered too ugly to represent the company) or anyone smoking a cigar. An exception was made for one famous cigar smoker, Winston Churchill, but not for comedian Groucho Marx.

Eventually, national prosperity, broadcast expansion, and greater public reliance on radio and television news increased electronic journalism's independence and influence. The combination of regulation and changing times encouraged responsible broadcasters to insulate their news

13. Id.
14. Id.
17. Id.
20. Id.
departments from commercial pressure.\textsuperscript{22} Advertisers could sponsor programs, but they could not influence content or impose their slant on the news.\textsuperscript{23} Today, most serious journalists consider the separation of news from advertising as basic a rule as the separation of church and state.\textsuperscript{24}

Recently, however, regulation has eased. While federal law still requires sponsor identification, a Federal Communications Commission regulation states that merely mentioning the name of the advertiser or its product is generally sufficient.\textsuperscript{25}

Furthermore, the economics of broadcasting have changed drastically. News budgets have been reduced, and news independence has suffered as pressure from advertisers and sales departments has increased.\textsuperscript{26} Observ-

\textsuperscript{22} See \textsc{Friendly, supra} note 5, at 206-07.

\textsuperscript{23} \textit{Id.} This article is concerned only with news-commercial broadcast at the behest of a sponsor. Not considered here are the more subtle pressures of the commercial environment which sought to keep news and public affairs as conforming and uncontroversial as the rest of television. \textit{See generally} \textsc{Alexander Kendrick, Prime Time: The Life of Edward R. Murrow} (1969). Nor does this paper deal with overt advertiser demands or vetoes in entertainment programming. For example, the syndicators of a planned program on new books will not permit criticism of the books, because advertisers will pay to have their titles included. Meg Cox, \textsc{TV Stations See Literary Future: Shows on Books}, \textsc{Wall St. J.}, July 7, 1993, at B1. Advertisers refused to buy time on a program dealing with the suicide of a gay teenager, effectively blocking the program. Bill Carter, \textsc{NBC Defends Move On “Quantum Leap,”} \textsc{N.Y. Times}, Oct. 1, 1991, at C18.

\textsuperscript{24} Thomas Toch, \textit{Homeroom Sweepstakes}, \textsc{U.S. News \& World Report}, Nov. 9, 1992, at 86.

\textsuperscript{25} Section 317 of the Communications Act now includes the following, after the original text:

\textit{Provided, [t]hat ‘service or valuable consideration’ shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.}


\textit{In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, \textit{when it is clear that the mention of the name of the product constitutes a sponsorship identification}, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.}


ers are consequently alarmed that television news "is taking on the trappings of public relations puffery and huckstering for advertisers."27 The sales director at a New Hampshire station complains of the pressure to keep editorial integrity in the news because of increasing client identification with certain news features.28

For example, a hospital might agree to purchase commercial time on a television newscast if the station airs a "news segment" on health care adjacent to the hospital's commercial.29 Thus, the hospital receives not only a regular commercial, but a "lead-in" credit30 to the news segment and a so-called news report which focuses audience attention on health matters. In some cases, the hospital might even provide the videotape and specify the persons to be interviewed. Once that news segment has a sponsor, it is likely to remain part of the newscast even if producers or editors consider other material more important.31

Many journalists fear that this practice gives advertisers new and improper selection and treatment of news stories. One leading commentator on the business ethics of broadcasting stated the problem clearly: "A journalistic organization that allows these two elements [news and advertising] to blur undermines public confidence in everything else it does and stands for. The principle is so fundamental and the appropriate policy

WMUR-TV, Manchester, N.H. and the Bank of New Hampshire have teamed up to produce a series of 30-second consumer-tip spots featuring WMUR-TV anchor Karen Appel. In the spots, Appel provides basic information for viewers on personal and small-business finances. The ads are paid for and sponsored by the bank, but they do not pitch the bank's services.

Id.

It is only fair to note that the print media also suffers from the mingling of news and advertising. See Randall Rothenburg, Messages from Sponsors Become Harder to Detect, N.Y. TIMES, Nov. 19, 1989, at D5.

29. Hospitals like to purchase hybrid commercials because their needs and the needs of broadcasters are complementary. News producers need to fill time with "dateless" material, that is, features which can be prepared in advance and aired anytime. Health stories are ideal for this purpose. Broadcast research indicates that health and medical stories are of interest to audiences. Hospitals, like other businesses, are highly competitive, using advertising to reach potential patients. Any exposure that adds credibility to the hospital's message is especially helpful, hence the desire for a news "tie-in."

30. A "lead-in" is an announcement such as "Tonight's health report is brought to you by ABC Hospital." A similar brief announcement after the program is called a "lead-out," as in, "Tonight's money report was brought to you by XYZ Bank."

so obvious that there should be no need for comment. But need there
is."32

The appropriate policy forbids mixing news and advertising. While
that may seem clear to a news ethicist, it may appear murky to a judge who
must separate the highly-protected news material from the less-protected
commercial material. Recently, the United States Supreme Court articulated
this point in *Cincinnati v. Discovery Network, Inc.*33 where a city govern-
ment attempted to limit the number of newsracks used by commercial
advertising publications, while imposing no such controls on the racks of
traditional newspapers.34 Such a case "illustrates the difficulty of drawing
bright lines that will clearly cabin commercial speech in a distinct
category," Justice Stevens wrote for the Court.35 Clearly, much of the
material in ordinary news media is commercial speech and some material
in promotional media is not "core" commercial speech.36

Does this mean that commercial and non-commercial elements of
speech, once mixed, are inextricably intertwined?37 Recent developments
indicate that they are not.

III. SPEECH PROTECTIONS

A. Freedom of the Press

It is hardly necessary here to restate the importance of a free press
or its special position in our hierarchy of constitutional values. A few
points will provide adequate foundation for the discussion to follow. The
First Amendment provides that "Congress shall make no law . . . abridging
the freedom of speech or of the press."38 The protection is applied to the
states through the Fourteenth Amendment.39 Courts have consistently

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See also Mitchell, supra note 31.
33. 113 S. Ct. 1505 (1993).
34. Id. at 1509.
35. Id. at 1511.
36. Id. at 1513.
38. U.S. CONST. amend. I.
39. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or
property, without due process of law"). By 1925, the Supreme Court assumed that the due
process clause of the Fourteenth Amendment protected fundamental rights and "liberties" such
as freedom of speech and of the press from impairment by the states. *Gitlow v. New York*, 268
adhered to the principle "that debate on public issues should be uninhibited, robust, and wide-open" and that a free press serves that end. A series of press cases established the "actual malice" standard to provide breathing room for discussion of public officials and public figures. Furthermore, the Court concluded that public figure plaintiffs may not use the tort of intentional infliction of emotional distress to circumvent the "actual malice" standard for libel. In Miami Herald Co. v. Tornillo, the Court emphatically declared that the choice of material in a newspaper should be determined by the publication's own editors, not by public officials. "It has yet to be demonstrated," Chief Justice Burger wrote for the Court, "how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

Paradoxically, at the time of Tornillo, the Court had recently upheld restrictions on newspaper content. In Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, a newspaper was barred from printing an employment advertisement listing jobs as "male" or "female" because such gender distinction was contrary to equal opportunity employment laws. The Court was careful to limit that holding, stressing that it authorized no restriction on content or layout, on stories or commentary originated by the newspaper, its columnists, or contributors. The advertisements were not originated by the news organization; they were "classic examples of commercial speech." The Court did not hesitate to examine the newspaper's components to decide which were journalistic, as opposed to commercial, in nature.

Pittsburgh Press dealt only with newspapers, but its holding clearly applies to broadcasters as well. The Supreme Court recently restated the

U.S. 652, 666 (1925). This was the first indication by the Court that First Amendment guarantees were "incorporated" in the Fourteenth Amendment. GERALD GUNTHIER, CONSTITUTIONAL LAW 1004 n.2 (11th ed. 1985).

41. Id. at 279-80 (discussing public officials: "actual malice" defined as knowledge that the defamatory speech was false or reckless disregard of whether it was false); see Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967) (discussing public figures).
44. Id. at 258.
45. Id.
47. Id. at 378-79.
48. Id. at 391.
49. Id. at 385.
established rule that broadcasting may be more closely regulated than other forms of communication.50

B. Limits on Commercial Speech

From 1942 until the mid-1970′s, commercial speech appeared to have no First Amendment protection. The matter was governed by Valentine v. Chrestensen,51 wherein the Court upheld a ban on the distribution of handbills and other advertising on public streets.52 The First Amendment would forbid banning all communications by handbill, but no such restraints applied “as respects purely commercial advertising.”53 The distinction was further established by the holding that door-to-door solicitation of magazine subscriptions could be prohibited,54 but door-to-door publicizing of a religious meeting could not, because it involved no commercial element.55 The historic holding of New York Times v. Sullivan, expanding press latitude in libel cases, was not derived from a news story, but from an advertisement.56 The advertisement was protected


51. 316 U.S. 52 (1942).
52. Id. at 53-54.
53. Id. at 54.
56. New York Times v. Sullivan, 376 U.S. 254, 256-59 (1964). The advertisement at issue was placed by several persons and groups to protest actions taken against civil rights demonstrators in the South. The defamation plaintiff was a police commissioner of Montgomery, Alabama, who claimed that he was libeled because certain actions were falsely attributed to the police. Id. at 258.
because it dealt with a matter of substantial public concern, as opposed to commercial interests.\textsuperscript{57}

In 1975, the Court began to embrace some protection of commercial speech. Finding that an advertisement for legal abortion clinics contained matter of public interest, not just a proposal of a commercial transaction, the Court struck down a ban on such advertisements.\textsuperscript{58} That left unsettled the fate of speech which merely proposed a commercial transaction.

The following term, in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.},\textsuperscript{59} the Court found that purely commercial speech does not lack all First Amendment protection.\textsuperscript{60} The speech involved was a list of prescription drug prices.\textsuperscript{61} Writing for the Court, Justice Blackmun noted that even an entirely commercial message may be of public interest.\textsuperscript{62} Since a pharmacist could cast himself as a commentator on drug prices and detail several competing prices to prove his point, the Court reasoned that it makes little difference whether he does so in a commentary or an advertisement.\textsuperscript{63}

The Court stressed that commercial speech could still be regulated.\textsuperscript{64} Appropriate restrictions on the time, place, and manner of commercial speech remained permissible.\textsuperscript{65} Government could deal effectively with false, deceptive, or misleading speech.\textsuperscript{66} Advertisement of illegal transactions could still be forbidden, as in \textit{Pittsburgh Press}.\textsuperscript{67} The Court

\textsuperscript{57} \textit{Id.} at 266. The determination of "public concern" has plagued the Court since the \textit{New York Times} decision. Rosenbloom \textit{v. Metromedia, Inc.}, 403 U.S. 29, 43 (1971) (plurality opinion) (applies \textit{New York Times} standard to discussions of matters of public or general concern, without regard to plaintiff's public or private status); Gertz \textit{v. Robert Welch, Inc.}, 418 U.S. 323 (1974) (returning emphasis to status of plaintiff, forbidding defamation liability without fault and requiring actual malice for punitive damages in private plaintiff cases). The concept of "speech of public concern" has returned recently to the Court's discussion of First Amendment protection. Philadelphia Newspapers, \textit{Inc. v. Hepps}, 475 U.S. 767, 777 (1986).


\textsuperscript{59} 425 U.S. 748 (1976).

\textsuperscript{60} \textit{Id.} at 762.

\textsuperscript{61} \textit{Id.} at 749-50.

\textsuperscript{62} \textit{Id.} at 764.

\textsuperscript{63} \textit{Id.} at 764-65.

\textsuperscript{64} \textit{Virginia Pharmacy}, 425 U.S. at 770-73.

\textsuperscript{65} \textit{Id.} at 771 (citing Buckley \textit{v. Valeo}, 424 U.S. 1 (1976); Erznoznik \textit{v. City of Jacksonville}, 422 U.S. 205, 209 (1975); Cantwell \textit{v. Connecticut}, 310 U.S. 296, 304-08 (1940)).


\textsuperscript{67} \textit{Id.} at 772.
also noted that it need not consider the special problems of the electronic broadcast media.68

Significantly, the Court appeared to recognize sharp distinctions between commercial speech and news reporting.69 "Commercial speech" is more verifiable than other forms, Justice Blackmun wrote, because the advertiser knows more about his product or service than anyone else and can easily verify his own claims.70 Because of that "hardness" of commercial speech, inaccurate statements need not be tolerated for fear of silencing a speaker.71 At this point, the Court might almost have anticipated the modern news-commercial hybrid when it suggested that the special qualities of commercial speech "may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints."72

Indeed, Virginia Pharmacy emphasized not the right of the commercial speaker, but the importance of accurate commercial information to individuals and society.73 As commentators have noted, the decision's primary focus was not on the advertiser's right to speak, but on the interests of consumers and the public in a free flow of information to assure informed decision-making.74

C. Commercial Speech Defined

There is general agreement on a "core notion" of what constitutes commercial speech: that which does no more than propose a commercial

68. Id. at 773 (citing Capitol Broadcasting, 333 F. Supp. at 582).
70. Id.
71. Id. (emphasis added). See also Bates v. State Bar, 433 U.S. 350, 384 (1977) (The Court suggested that even protected commercial speech might require "some limited supplementation, by way of warning or disclaimer.").
72. Id. (emphasis added). See also Bates v. State Bar, 433 U.S. 350, 384 (1977) (The Court suggested that even protected commercial speech might require "some limited supplementation, by way of warning or disclaimer.").
73. Virginia Pharmacy, 425 U.S. at 763. "T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Id. "It is a matter of public interest that [consumer purchasing] decisions, in the aggregate, be intelligent and well informed." Id. at 765.
However, in *Board of Trustees v. Fox*,76 Justice Scalia's majority opinion omitted the phrase "no more than" and said that whether the speech "propose[s] a commercial transaction . . . is the test for identifying commercial speech . . . ."77 The Court thereby underscored earlier declarations that speech may be commercial even though it contains some noncommercial elements.78 "[W]e have made clear," the Court stated, "that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."79

There is also a firm notion of what is not commercial speech. Not every advertisement is commercial.80 As noted earlier, the civil rights advertisement at issue in *New York Times v. Sullivan* was noncommercial.81 In addition, a mere reference to a specific product does not by itself make the message commercial.82 Finally, a speaker's economic motivation will not alone turn his material into commercial speech.83 However, the Court has found that a combination of all those factors—advertisement, mention of a product (or presumably of a service), and economic motivation—provides strong support for a conclusion that the message is commercial speech.84

But can commercial and noncommercial speech be "inextricably intertwined," as the Court had suggested in *Riley v. National Federation of

75. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). But see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), in which Justice Powell's majority opinion defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." Id. at 561. Only a page later, the opinion described commercial speech as "proposing a commercial transaction." Id. at 562. Justice Stevens found the first definition too broad, noting that even Shakespeare may have been motivated by money, and the second unclear, in that it might extend to a mere mention of a product or service within an otherwise noncommercial discussion. Id. at 580 (Stevens, J., dissenting).

77. Id. at 473-74.
78. Id. at 474-75 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983)).
79. Id. at 475 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983)).
80. Bolger, 463 U.S. at 66.
82. Bolger, 463 U.S. at 66 (citing Associated Students for Univ. of California at Riverside v. Attorney General, 368 F. Supp. 11, 24 (C.D. Cal. 1973)).
83. Id. at 67 (citing Bigelow v. Virginia, 421 U.S. 809, 818 (1974); Ginzburg v. United States, 383 U.S. 463, 474 (1966); Thomhill v. Alabama, 310 U.S. 88 (1940)).
84. Id.
the Blind, Inc., thus rendering the entire message noncommercial? They can indeed be intertwined, Justice Scalia declared, but not inextricably, unless the state had ordered them combined. In Riley, the state required charitable organization fundraisers to disclose in their solicitations of how much money collected actually went to the charity. Justice Scalia has found that absent such a government command, nothing requires the inclusion of noncommercial speech within a commercial message. Combining the two would no more convert a sales pitch into protected speech "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech."

It is important to note that courts will consider the commercial-noncommercial distinction before the First Amendment questions arise. The type of speech involved affects the way in which interests are balanced. For example, false or misleading commercial speech will have no First Amendment value at all. On the other hand, under the rule of New York Times v. Sullivan and its progeny, noncommercial false assertions of fact involving public figures will be protected if they are free of actual malice. Analysis of the appropriate protection cannot begin without determining the nature of the speech.

86. Fox, 492 U.S. at 474.
87. Riley, 487 U.S. at 784.
88. Fox, 492 U.S. at 474.
89. Id. at 474-75.
90. Id. at 473. Justice Scalia, writing for the majority, stated "the first question we confront is whether the principal type of expression at issue is commercial speech." Id.
94. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (noncommercial speech: "Under the First Amendment there is no such thing as a false idea." However, false statements of fact have "no constitutional value.")
IV. Regulation of Commercial Speech

Four years after the *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* Court left open the question of how commercial speech could be regulated, the Court set out a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*

There, the state attempted to ban a utility company's advertising to promote the use of electricity. The ban was ordered in late 1973, when there was great national interest in promoting energy conservation, and extended in 1977. To test the validity of the ban, the Court accepted the premise that the disputed speech was commercial, since the state regulation applied only to advertising intended to stimulate the purchase of utility services.

With that determination made, the Court outlined an analysis to judge the regulation of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The last factor proved problematic. Justice Powell meant that if the governmental interest could be served as well by a more limited restriction, the excessive regulation would not be permissible. This appeared to be a "least restrictive means" test; indeed, Justice Scalia acknowledged this even as he struck it down in *Board of Trustees v. Fox.* "Necessary" should not be interpreted too narrowly; the regulation must merely be narrowly tailored to achieve the desired objective, Justice Scalia wrote.

96. Id. at 558-60.
97. Id.
98. Id. at 559.
100. Id. at 564.
101. *Fox,* 492 U.S. 469, 476 (1989) ("There are undoubtedly formulations in some of our cases that support [the least restrictive means interpretation]—for example, the statement in *Central Hudson* itself that 'if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.'") (citation omitted).
102. Id. at 476-77.
"What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." 103

The analysis of commercial speech regulation now follows a four-step Central Hudson/Fox test:

1) If the speech is false and misleading, it has no protection and may be regulated;
2) If the speech is not false and misleading, the court will ask whether the asserted governmental interest in regulation is substantial;
3) If the interest is substantial, the court will ask whether the regulation directly advances the interest asserted; and
4) If so, the court will determine whether the regulation is tailored narrowly enough to achieve a reasonable fit with the asserted interest. 104

V. COMMERCIAL NEWS

A. A Likely "Story"

Given the high level of constitutional protection for news, the lower level for commercial speech, and the regulation standards described above, consider the following hypothetical hybrid news-commercial item from a television newscast aired by Local Broadcaster, Inc. pursuant to its agreement with an advertiser.

As the commercial break ends, a hospital company logo appears on screen. An announcer's voice says, "Tonight's medical report is brought to you by the Healthy Hospital, the leader in serving our community's medical needs."

The news anchor then appears on screen, perhaps with a background graphic featuring a caduceus and the words "Your Health." The anchor reads, "In tonight's report on your health, we look into the continuing development of lung transplant techniques in our city. Here is Rick

103. Id. at 480 (citations omitted).
104. See Central Hudson, 447 U.S. at 566; Fox, 492 U.S. at 480.
105. A representation of a staff with two entwined snakes and two wings at the top, often used as a symbol to represent the medical industry. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 195 (9th ed. 1990).
Reporter." Rick Reporter is a regular member of the news staff, seen often on health and other stories and promoted as a member of the news team.

The taped report begins with interior shots of an operating room. A print graphic at the bottom of the screen identifies the location as Healthy Hospital, Downtown. Rick Reporter begins his narration with a brief history of organ transplant surgery. Then he states, "In our city, Healthy Hospital maintains the only fully licensed lung transplant facility."

The tape then shows a physician (identified by the traditional white smock, a stethoscope around her neck, and a printed identification at the bottom of the screen) who says, "Of course, another hospital here has attempted to develop a lung transplant team, and we applaud their effort. But they're not licensed to perform this surgery. Patients should carefully investigate whether any experimental technique has been approved by our state."

Rick Reporter then adds a few comments and signs off. The anchor says, "Thank you, Rick. In just a moment, tonight's weather forecast." This is followed by a clearly identifiable commercial message, promoting Healthy Hospital's new childbirth center and urging expectant parents to call for information.

A few days later, Hale & Hearty Medical Center sues Healthy Hospital, the physician, and Local Broadcaster for defamation. Hale & Hearty is the only other hospital in town known to have attempted a lung transplant program. Contrary to the doctor's assertion, it is in fact licensed to perform the experimental surgery. Hale & Hearty claims that the "news report" was a false assertion of fact which tended to lower it in the estimation of the community and to deter persons from dealing with it.

The situation catches the attention of the State Medical Review Board, which has a rule against advertising any medical service or product which is considered experimental. Lung transplants are considered experimental. The State Board moves to enjoin Healthy Hospital and the television station from airing further paid segments on lung transplants.

**B. Defamation**

For the purpose of argument, assume that the statement in the "newscast" item is defamatory, and that the hospitals and their transplant specialists are well-known in the medical field, frequently seeking and
receiving publicity. Assume further that if the item was noncommercial, it would be protected by the “actual malice” standard of *New York Times* v. *Sullivan*; that is, a public figure’s libel action would fail unless the item was broadcast with knowledge of falsity or reckless disregard of whether it was false or not. Finally, assume that actual malice could not be proven in the case of a neutral, unsponsored report, resulting in judgment for Healthy Hospital and Local Broadcaster.

But as noted earlier, courts will not even consider these matters until they have ascertained the nature of the speech. If the speech is noncommercial, it will have full First Amendment protection. If it is commercial, less protection will be accorded.

The hybrid news item cannot be classified easily as a mere proposal to engage in a commercial transaction. Rather, it resembles the contraceptive advertisements at issue before the Supreme Court in *Bolger v. Youngs Drug Products Corp.* Those ads included socially useful information on the subjects of birth control and venereal disease prevention. The *Bolger* court suggested a three-part test, briefly noted in Part III.C. above, to categorize the speech as commercial or noncommercial. If the speech is an advertisement, contains a reference to a specific product, and the speaker has an economic motivation, then the speech is probably commercial. An affirmative answer to any single question does not render the speech commercial, but a combination of all three provides strong support for a commercial characterization.

One part of Healthy Hospital’s newscast segment, the typical, easily identifiable “pitch” extolling the hospital’s services, is obviously commer-

108. See *supra* note 89 and accompanying text.
110. *Id.* at 62, 71.
111. *Id.* at 66-68.
112. *Id.*
113. *Id.* at 67.
cial. The so-called news item presents a more sensitive question, but the Bolger analysis supports a conclusion that the "report" is also commercial speech. Certainly it is an advertisement. The Hospital's contract with the station called for a health story, as well as a regular, easily identifiable commercial. It contains a reference to a specific service, lung transplant operations. Finally, the hospital clearly has economic motivation in purchasing the airtime as a vehicle to create goodwill and increased patronage.

The hospital may argue that it purchased the time and specified the subject matter, but it exercised no control over the content. If the station indeed maintained control of the script, interviews, editing, and other essential elements, the hospital's position may be plausible. However, it defies logic to claim that a story sponsored by Healthy Hospital would receive utterly independent treatment. The station would be unlikely to produce an exposé of Healthy Hospital shortcomings or a list of its competitors' superior services. By the same token, if the hospital did control or significantly influence the item's content, it seems clear that the "report" would be considered simply one part of an elaborate commercial segment.

Consider again the Supreme Court's declaration in Pittsburgh Press, that speech which originated with the news organization would enjoy full protection. A sales contract to cover certain material suggests that the item originated with the advertiser, not the journalists. Even without written proof, the First Amendment will not prevent an inquiry into the question of motivation: was it journalistic or commercial? In Herbert v. Lando, the Supreme Court held that plaintiffs suing a news medium for defamation could inquire into the defendant's editorial process. That case involved a plainly noncommercial news report; the same conclusion would be even easier to reach where commercial speech was at issue.

Recall that attempts to link a product or service to a topical issue will not qualify commercial speech for heightened protection. As the Court wrote in Central Hudson Gas & Electric Corp. v. Public Service Commis-

114. Such a "spot ad" is typical of those that need no specific announcement: "This is a commercial paid for by (name of sponsor)." The commercial nature of the conventional advertising message is perfectly obvious. T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 289-90 (1986).
115. See Cox, supra note 23.
116. See supra text accompanying note 48.
118. Id. at 175.
sion, corporations are entitled to full protection for "their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions." Thus, even if Healthy Hospital's commercial was part of a news discussion of medical issues, it would not qualify for heightened protection.

Although the Supreme Court has confronted more than a dozen commercial speech cases since 1977, none have involved defamatory commercial speech. However, the Court of Appeals for the Third Circuit faced the problem in *United States Healthcare, Inc. v. Blue Cross.* The case arose from a comparative advertising war between two health insurance providers. The defendant company contended that it was entitled to heightened First Amendment protection because its defamatory advertisement dealt with important issues of health care quality and cost. The Third Circuit rejected that argument: "[W]hile we agree that the quality, availability, and cost of health care are among the most important and debated issues of our time, these particular advertisements for specific health care products do not escape the commercial speech category."

If the court's reference to advertisement for specific health care products hints at some greater protection for hybrid news stories which avoid plugging a particular product or service, it must be remembered that the decision rested largely on *Central Hudson,* which warned against blurring the Supreme Court's line between commercial and noncommercial speech. The Third Circuit found that advertisers are prevented "from

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121. Ewald, *supra* note 74, at 429. As Professor Ewald notes, about half the Court's commercial speech cases involved state regulation of advertising by lawyers.
122. The Court has faced defamation questions in a commercial context, but this is not the same as defamatory commercial speech. In *Bose Corp. v. Consumers Union of U.S., Inc.*, an audio equipment manufacturer claimed to have been defamed by a review of its product in *Consumer Reports* magazine. The speech at issue, the review, was clearly not commercial speech. 466 U.S. 485 (1984).
124. *Id.* at 917-20.
125. *Id.* at 927.
126. *Id.* at 937.
127. *Id.* at 936 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 n.5 (1980)).
immunizing, in effect, otherwise defamatory speech—behind the actual malice standard afforded to core speech by the First Amendment—simply by reference to an issue of public concern.”

The Third Circuit announced another reason for refusing to apply the New York Times actual malice standard to commercial defamation. The defendant in Healthcare, Inc. argued that the other provider, by its own advertisements, had become a limited purpose public figure. In Gertz v. Robert Welch, Inc., the Supreme Court defined limited purpose public figures as those who “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” But once again, the Third Circuit returned to the initial issue: the nature of the speech. Although some of the advertisements touched on matters of public concern, the court found, their central thrust was commercial. Therefore, the advertiser must be considered to have acted primarily to generate revenue, not to influence the resolution of issues. The court held that to find otherwise would allow corporate advertisers permanent insulation behind the actual malice standard.

With respect to the prior hypothetical, an unsponsored news story would have been classified as noncommercial speech and would have enjoyed the protection of the actual malice standard. Assuming that the physician’s statement was made without knowledge of falsity or reckless disregard of whether it was false or not, and assuming that the station acted in similar good faith, judgment would be given for the defendants, Healthy

129. Id. at 937-38.
131. Id. at 345.
133. Id. This further distinguishes the case from Bose, since the noncommercial nature of Consumer Reports’ speech allowed it to invoke the actual malice standard.
134. Id. See also Vegod Corp. v. American Broadcasting Co., Inc., 25 Cal. 3d 763, 770 (1979) (“Criticism of commercial conduct does not deserve the special protection of the actual malice test.”). But see Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 488 n.1 (1984). In Bose, a manufacturer of audio equipment sued the publisher of Consumer Reports magazine for product disparagement in a review of a Bose speaker system. Bose was classified as a public figure, thus triggering the actual malice standard, because it “actively solicited reviews in numerous publications thereby inviting critical evaluation and comment on the unique qualities of the system.” Id. (quoting Bose Corp. v. Consumers Union, 508 F. Supp. 1249, 1273 (D. Mass. 1981)). In overturning the district court decision, neither the court of appeals nor the United States Supreme Court passed on the public figure question. Bose, 466 U.S. at 492 n.8. Furthermore, the speech at issue was not commercial, as it was in Healthcare, Inc. See supra note 122.
Hospital and Local Broadcaster. However, the Third Circuit analysis in *Healthcare, Inc.* indicates that no such protections are afforded to commercial speech, even if it touches on areas of public concern. A defamatory statement would therefore be subject to liability under substantive state law.

C. Prior Restraint

It is well established that some government restrictions on commercial speech are permissible. The permissibility is crucial for news-commercial hybrids. For example, the government cannot ban news reports about a state lottery, but it can prevent a broadcast station from airing commercial speech about the same subject.

The Federal Trade Commission Act declares that "unfair or deceptive acts or practices in or affecting commerce are declared unlawful." States may have statutes which restrict certain forms of commercial speech in areas subject to their regulation. For example, South Carolina forbids chiropractic facilities from using the term "hospital."


141. *Id.*
Such rules will be upheld if they pass the four-step *Central Hudson* test discussed in Part IV.

In our hypothetical hybrid, the State Medical Review Board wishes to enjoin Healthy Hospital and Local Broadcaster from airing further paid segments on experimental lung transplants. As always, the analysis must begin with a determination of whether or not the speech is commercial. If it is noncommercial, it is likely to be entitled to full First Amendment protection. If it is commercial, however, the *Central Hudson* examination begins.

To regulate truthful, non-misleading commercial speech, the government must have a substantial interest. Controlling the cost and quality of health care is clearly a substantial interest and a traditional area of government authority.

Next, the regulation must directly advance the interest asserted. Preventing the advertising of experimental surgeries would advance the state interest of controlling health care costs by discouraging public demand for services not currently deemed safe and effective. The state’s interest in regulating a commercial transaction gives the state an interest in speech about that transaction. Recall, however, that government could not regulate a noncommercial discussion of experimental surgery.

Finally, under the *Board of Trustees v. Fox* modification of *Central Hudson*, the regulation must be narrowly tailored to achieve the desired objective. There is little doubt that state regulation of commercial speech will provide the necessary “reasonable fit” with control of health care. Indeed, the Supreme Court held, in *Posadas de Puerto Rico Associates v. Tourism Co.*, that where government has the power to ban an activity altogether, it may ban commercial speech which promotes the activity.

Other regulatory agencies may take a special interest in simulated news on certain subjects. For example, the Food and Drug Administration ("FDA") is investigating video news releases (promotional materials

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145. Id.
146. It is beyond the scope of this article to debate the wisdom of shaping public behavior by suppressing commercial speech. For a recent argument against this approach, see United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) (Stevens, J., dissenting).
149. 478 U.S. 328 (1986).
150. Id. at 346-47.
prepared to look like news stories) distributed by pharmaceutical companies. The FDA considers this advertising approach insidious, because viewers do not recognize it as promotion. In other words, it looks like news, but it's not. Because of this concern, the FDA has been requiring drug companies to submit copies of their video releases for approval.

Similarly, state agencies charged with regulation of certain sensitive activities, such as health care, have little difficulty enforcing restrictions on commercial communication. As previously noted, the South Carolina chiropractic facility restriction was upheld under a Fox analysis.

Nor should the presence of a newscast complicate the analysis. To justify added constitutional protection, the newscast must be bona fide, not merely a program to insulate advertising. The Federal Trade Commission ("FTC") has successfully blocked such commercial speech by establishing that it is inherently false, misleading, and deceptive. For example, the FTC has filed complaints against the marketers of a so-called "cash flow system" for presenting commercials that resembled independent programs. The Commission ordered another sponsor to pay $200,000 for various advertising violations, including the use of programs that were

152. Id.
153. Id.
154. Id. The FDA's right to require prior approval of the message was virtually undisputed.
156. Defining a "bona fide" news publication or newscast is not a welcome task for courts, but at least one has attempted to do so, and its definition was later embraced by the Supreme Court. In Securities & Exchange Comm'n v. Wall Street Transcript Corp., the Second Circuit suggested that a bona fide publication is one which does not deviate from the customary newspaper practices to such an extent that there is a likelihood of deceiving the audience as to its noncommercial nature. 422 F.2d 1371, 1377 (2d Cir. 1970), cert. denied, 398 U.S. 958 (1970). In a later case involving a financial newsletter, the Supreme Court stressed the importance of independence in establishing publications' bona fide character. There should be "no suggestion that they contained any false or misleading information, or that they were designed to tout any security in which petitioners had an interest" Lowe v. Securities & Exchange Comm'n, 472 U.S. 181, 209 (1985) (emphasis added). "Bona fide" means genuine, the Court wrote, not "masquerading in the clothing of newspapers [or magazines]." Id. at 208-209.
157. Federal Trade Commission action to date has concentrated on "infomercials" or program length commercials, which typically run thirty to sixty minutes. See MacLeod testimony, supra note 9. The FTC has not yet considered the question of hybrid commercials in newscasts.
“misrepresented to be objective news or documentary programs, rather than paid ads . . .”159

Although the FTC seldom describes its actions as “banning” speech, its use of consent orders has the same effect. For example, in In re Phillips,160 the Commission obtained an order barring defendants from making any commercial that misrepresents itself as an independent program, as opposed to a paid commercial.161 The commercial in question was presented as a talk show, with the subject “posing” (the FTC’s disapproving word162) as a guest extolling the virtues of his small business start-up system. The order also required any future commercials to carry the following disclaimer: “The program you are watching is a paid advertisement.”163 Such requirements seem entirely consistent with the observation in Virginia Pharmacy that warnings, disclaimers, or changes of form may be required to prevent commercial speech from being deceptive.164 The FTC recently obtained similar orders against disguised commercials for hair restorers of questionable usefulness.165

If broadcasters participate in deception, they must expect regulation or penalties similar to those imposed upon the advertisers themselves. Broadcast licensees may be punished for sponsorship identification violations which might deceive the public.166 Indeed, neither intent to deceive nor actual deception need be present to find a violation.167 A station receives no extra protection because the commercial airs during a news story. Congress intended that the sponsorship announcement requirement be observed “even though the program in question might not be regarded as entirely commercial in content.”168

161. Id. at *30.
162. Id.
163. Id.
164. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976). It should be noted here that merely identifying the item as a commercial with a brief superimposed title (“This is a Commercial” or “Paid Message”) is unlikely to provide sufficient warning. A study of audience reaction recently showed that viewers usually don’t notice such material. David Hazinski, Video News Release Labels Go Unread, ELECTRONIC MEDIA, Nov. 4, 1991, at 20.
167. Id.
These cases and regulatory decisions establish a solid basis for government restriction of hybrid news-commercial speech where the government has a substantial interest in regulating such speech.

D. Endorsements and Testimonials

The FTC's power to prevent deceptive advertising includes controls on the use of endorsements and testimonials.169 An advertising message is considered an endorsement if "consumers are likely to believe [that it] reflects the opinions, beliefs, findings, or experience" of the endorser, not just the sponsor.170 The endorser's statements must be honest; he cannot say he uses a product if he does not.171 On this theory, singer Pat Boone was fined for falsely claiming that his daughters used an acne medication with some success.172

If the endorser purports to be an expert173 on the subject being advertised, he must in fact be an expert.174 For example, an astronaut famous for space exploration is not necessarily an expert on automobile tires.175 If an organization endorses a product or service, the endorsement must reflect the judgment of the group, and must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization.176 If the endorsers claim to be or are considered experts, any endorsement must reflect their independent evaluations.177

How do these rules apply to otherwise legitimate newscasts? Reliability, persuasiveness, sincerity, leadership, charisma and staying power are among the attributes that advertisers seek in endorsers.178 Television stations hope that audiences will perceive the same qualities in

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170. 16 C.F.R. § 255.0(b) (1993).
171. Id. at § 255.1 (a)(b) (1993).
173. An expert is defined as "an individual, group or institution possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals." 16 C.F.R. § 255.0(d) (1993).
177. Id.
newscasters, from local reporters to nationally-recognized anchors. News teams are regularly promoted as experts on virtually anything they cover, working valiantly in pursuit of truth.

But when reporters are coerced into promoting an advertiser's product, they not only compromise their professional principles, but are likely to violate FTC regulations as well. The reporters may not be regular, satisfied users of the product or service. They seldom will have done anything to substantiate the truth of their statements. By abandoning their usual practice as independent reporters, they merely deliver the advertiser's message. Yet their celebrity status is crucial to the sales pitch, for advertisers know that commercial information is retained better when a readily identifiable figure is used. And what better spokesman than a supposedly disinterested journalist, one who is thought to be experienced, trusted, and responsive to the public's need for accurate information? As the FTC has repeatedly noted, the very purpose of advertising with a news program style is to deceive. The presence of a journalist controls the net impression of the advertising message, which is the principal focus of inquiries by the FTC and the courts.

VI. CONCLUSION

The modern practice of disguising commercials within so-called news stories increases a news organization's danger of defamation liability. It may invite prospective plaintiffs and the government to challenge the news-gathering process in ways which set unwelcome precedents for journalists.

No journalist likes to make a case for regulation of speech. Indeed, most journalists favor full First Amendment protection for truthful, nondeceptive commercial speech concerning lawful activities. However, the law requires broadcasters to exercise special care to segregate their newscasts from lesser-protected commercial material.

For journalism organizations wondering how to deal with a news-commercial hybrid, the wisest counsel may be in the old newsroom maxim, "when in doubt, leave it out." What should be left out is the commercial

181. Jones, supra note 178, at 525.
182. See supra notes 179-80.
183. See supra part V.D.
connection, not the real news story. To suggest otherwise would be to allow over-zealous plaintiffs and regulators to restrict free speech protected by the First Amendment.

Journalists and their corporate superiors must strengthen their efforts to discover the news and broadcast it, irrespective of potential sponsors' wishes. In a tough economic climate, it may not be easy to turn down revenue. But the highest traditions of independent journalism may demand it.

Keeping the news content noncommercial is the surest way to protect newscast integrity. The restrictions discussed here, if carefully applied by courts, do not chill serious news coverage; they only chill commercials. To the extent that they chill willingness to pay for serious news coverage, they show not a failure of the First Amendment, but a failure of journalists' nerves. This examination has come full circle: if news is acceptable only when it can be sold, it isn't news. And it may not be protected by the Constitution. 185

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185. See supra note 1 and accompanying text.