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# Why Copyright Law Should Not Protect Advertising

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PART of growing up American is to be an unwitting collector of advertising jingles. Most collections today include a jingle of the Dr. Pepper Company which asks the musical question, "Wouldn't you rather be a Pepper, too?" The popularity of the "Be a Pepper" jingle was noticed by Bozell & Jacobs, Inc., the advertising agency for Sambo's Restaurants. Bozell & Jacobs, as part of an advertising campaign designed to convince older persons to eat at Sambo's, prepared a television commercial in which a number of senior citizens were shown dancing to up-tempo music. The commercial closed with the tagline, "Don't you want to be a Senior, too?" The Dr. Pepper Company was not amused by the attempted spoof, and brought suit[1] alleging that the Sambo's commercial amounted to infringement of its own copyrighted commercial.[2] The U.S. District Court for the Northern District of Texas agreed, entered a permanent injunction against further showing of the Sambo's commercial, and ordered a trial to determine the damages sustained by Dr. Pepper.[3]

Over a half century ago, in another copyright infringement case involving commercial matter, a dissenting judge wanted to dismiss the suit as a "trivial pother" and "an advertising row of no impor-

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[1] Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202 (N.D. Tex. 1981).

[2] The Copyright Act of 1976 gives a copyright holder the right to the exclusive use of the copyrighted work. 17 U.S.C. § 106 (Supp. V 1981). If a copyright holder's rights are violated, a copyright infringement action may be brought to recover actual damages, statutory damages when actual damages are not proved, and attorney's fees. 17 U.S.C. §§ 504, 505 (Supp. V 1981).

[3] 517 F. Supp. at 1209.

tance."[4] To some people, such a characterization of the dispute between Dr. Pepper and Sambo's may seem inappropriate in view of the $100 million Dr. Pepper spent on its "Be a Pepper" advertising campaign.[5] Certainly Dr. Pepper didn't view the matter as a "trivial pother."[6]

Increasingly, advertisers have resorted to the copyright laws to protect their large investments. This Article explores the question of whether advertising is an appropriate subject matter for copyright protection.

It is the thesis of this Article that copyright protection for commercial advertisements does not further any important societal interest and, in fact, such protection amounts to government subsidization of a business that costs consumers millions of dollars. In a time when our federal courts are overburdened, affording advertisers the use of the courts to litigate copyright claims is wasteful. Additionally, copyright protection for commercial advertising is partially responsible for advertising strategies that appeal primarily to our emotions and very little to our reason.

## I

## TREATMENT OF ADVERTISING UNDER THE COPYRIGHT LAWS

### *A. Judicial Treatment*

In 1891, the Supreme Court of the United States first considered whether commercial matter could be copyrighted in *Higgins v. Keuffel*.[7] The *Higgins* Court interpreted the copyright clause[8] of the Constitution to preclude Congress from protecting writings that have "no possible influence upon science or useful arts."[9] The Court found an ink bottle label unrelated to the promotion of

[4] Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83, 95, 97 (1st Cir. 1922) (Hough, J., dissenting).

[5] 517 F. Supp. at 1204. The $100 million spent on this advertising campaign constitutes a substantial sum for a corporation whose gross sales in 1980 were $330 million.

[6] The president of Dr. Pepper made the decision to sue Sambo's after he and several other company executives reviewed a tape of the commercial created for Sambo's. Interview with Mannett Dodge, former counsel for Dr. Pepper Co. (June 7, 1982).

[7] 140 U.S. 428 (1891).

[8] U.S. CONST. art. I, § 8, cl. 8. The copyright clause provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

[9] 140 U.S. at 431.

either science or the useful arts, and denied copyright protection. Justice Field, writing for a unanimous Court, stated: "To be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."[10]

*Higgins* could be read to deny copyright protection for the bottle label either because it was an advertisement or label, and advertisements or labels were not seen as influencing the "useful arts," or because the label in question, "waterproof drawing ink," was so lacking in originality that it was not a "writing" within the meaning of the copyright clause. The Court probably found both reasons compelling.

The Court's refusal in *Higgins* to find advertising copyrightable upheld the position taken by most lower courts that had decided the issue.[11] *J.L. Mott Iron Works v. Clow*,[12] for example, was an action brought against a manufacturer who had directly copied cuts and prints from a catalogue published and copyrighted by the plaintiff, a plumbing manufacturer. The Seventh Circuit Court of Appeals concluded that the copyright clause was not designed to be "a protection to traders in the particular manner in which they might shout their wares."[13] According to the court:

> The object of [the copyright clause] was to promote the dissemination of learning, by inducing intellectual labor in works which would promote the general knowledge in science and useful arts . . . . It sought to stimulate original investigation, whether in literature, science, or art, for the betterment of the people, that they might be instructed and improved with respect to those subjects. Undoubtedly a large discretion is lodged in the Congress with respect to the subjects which could properly be included within the constitutional provision; but that discretion is not unlimited. It is bounded and circumscribed by the lines of the general object sought to be accomplished . . . . So far as the decisions of the Supreme Court have gone, we think they hold to the proposition that mere advertisements, whether by letter press or by picture, are not within the protection of the copyright law.[14]

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[10] *Id.*

[11] *See, e.g.*, Lamb v. Grand Rapids School Furniture Co., 39 F. 474 (W.D. Mich. 1889); Ehret v. Pierce, 10 F. 553 (E.D.N.Y. 1880); Collender v. Griffith, 6 F. Cas. 104 (C.C.S.D.N.Y. 1873) (No. 3000).

[12] 82 F. 316 (7th Cir. 1897).

[13] *Id.* at 319.

[14] *Id.* at 318.

In 1903, in the case of *Bleistein v. Donaldson Lithographing Co.*,[15] the Supreme Court rejected the broad and most natural reading of *Higgins*—that commercial matter is not entitled to copyright protection. In *Bleistein*, the Court held that a picture used in an advertisement is copyrightable.[16] Justice Holmes's opinion suggests that only the second rationale of *Higgins*, absence of sufficient originality, would place commercial matter outside of Congress's power to protect through copyright.[17] Justices Harlan and McKenna, dissenting, impliedly adopted the broader reading of *Higgins*.[18]

Although *Bleistein* signified a shift in policy in favor of copyright protection for advertisements, it is important to note what the decision did not say. *Bleistein* protected a circus poster portraying a ballet, a group of men and women on bicycles, and a group of persons whitened to represent statues. The picture contained in the advertisement was found to be worthy of protection because it had sufficient artistic merit as a picture.[19] The fact that the picture happened to be in an advertisement did not deprive the picture of the protection it otherwise would have under copyright law.[20] The implication of *Bleistein*, therefore, is that an advertisement may be protected only to the extent that its individual elements—illustrations, copy, graphics, and lay-out—are protected. However, subsequent courts considering the applicability of copyright laws to commercial advertising have read *Bleistein* to stand for the broad proposition that advertising is copyrightable unless it is a label or descriptive phrase so lacking in originality that it cannot be considered a "writing."[21] Since *Bleistein*, the Supreme Court has never squarely addressed this question.[22]

Lower courts have extended copyright protection to a variety of

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[15] 188 U.S. 239 (1903).

[16] *Id.* at 251.

[17] *Id.* at 251-52.

[18] *Id.* at 253 (Harlan, J., dissenting).

[19] *Id.* at 251.

[20] *Id.*

[21] *See, e.g.*, Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298 (9th Cir. 1965); Day-Brite Lighting, Inc. v. Sta-Brite Fluorescent Mfg. Co., 308 F.2d 377 (5th Cir. 1962); Modern Aids, Inc. v. R.H. Macy & Co., 264 F.2d 93 (2d Cir. 1959); Ansehl v. Puritan Pharmaceutical Co., 1 F.2d 131 (8th Cir. 1932); Campbell v. Wireback, 269 F. 372 (4th Cir. 1920).

[22] In L.A. Westerman Co. v. Dispatch Printing Co., 249 U.S. 100 (1919), however, the Court necessarily assumed that advertising was copyrightable in a suit involving copyrighted pictures of women's styles for newspaper advertisements.

advertising materials, from advertising catalogues[23] to bottle labels[24] to run-of-the-mill advertising copy.[25] The trend toward finding advertising matter containing even a modicum of originality protectable under copyright legislation has been so clear and consistent that it is fair to say that the federal courts unequivocally view commercial advertising to be within the power of Congress to protect under the copyright clause.[26]

### *B. Legislative Treatment*

Despite strong arguments to the contrary,[27] the judiciary has interpreted the Constitution to permit Congress to extend copyright protection to advertising. There is some question, however, whether or not Congress has chosen to exercise its power. No-

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[23] *See* J.H. White Mfg. Co. v. Shapiro, 227 F. 957 (S.D.N.Y. 1915).

[24] *See* ABLI, Inc. v. Standard Brands Paint Co., 323 F. Supp. 1400 (C.D. Cal. 1970).

[25] *See* Ansehl v. Puritan Pharmaceutical Co., 1 F.2d 131 (8th Cir. 1932).

[26] *See* Borden, *Copyright of Advertising*, 35 KY. L.J. 205 (1947); Derenberg, *Commercial Prints and Labels*, 49 YALE L.J. 1212 (1940); Comment, *Copyrights—The Protection of Advertising*, 5 VILL. L. REV. 615 (1960); Comment, *The Extent of Copyright Protection for Advertising*, 16 NOTRE DAME LAW. 298 (1941).

[27] In addition to the arguments developed in the preceding section, another argument can be made on the basis of the plain language of the copyright clause (quoted *supra* note 8), the exclusive source of congressional power to enact copyright legislation. The Supreme Court has said that "the clause is both a grant of power and a limitation." Graham v. John Deere Co., 383 U.S. 1, 5 (1965). Although in *Graham* the Supreme Court considered the scope of congressional power to enact patent legislation, the Court's reasoning applies to the copyright power as well. The Court wrote: "Innovation, advancement, and things which add to the sum of useful knowledge are requisites of a patent system which by constitutional command must 'promote the Progress of . . . Useful Arts.' This is the standard expressed in the Constitution and it may not be ignored." *Id.* at 6. Analogizing to the power to enact copyright legislation, it is clear that the Constitution requires copyright legislation to "promote the Progress of Science." In colonial usage, "science" referred to the works of authors, and "useful arts" to the works of inventors. *See* P. GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 1 (2d ed. 1981). Considering the conception of "science" available to the framers of the Constitution, it seems implausible to argue that Congress was given the power to protect the format and layout of an advertisement for a laundry detergent. The legislative history of the copyright clause provides no support either way. The committee meetings that considered the clause were conducted in secret, and the final form of the clause was adopted without debate. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 579-81 (1966) (1st ed. 1893).

An additional argument that advertising is outside of the subject matter intended to be protectible under the copyright clause is that the framers' limited the power to the "writings" of "authors." It requires a forced interpretation of this language to cover not only the prose, but also the type and layout of a beer advertisement prepared by a Madison Avenue firm.

where in the Copyright Act of 1976,[28] nor in any other piece of copyright legislation,[29] has Congress explicitly stated its intention to afford copyright protection to commercial advertising.

The initial approach of Congress to define the proper objects of copyright protection was enumeration. Objects not enumerated were not protected. The Copyright Act of 1870,[30] the first law that gave rise to a copyright infringement action involving advertising, made copyright protection available for books, maps, charts, prints, cuts, and engravings.[31] Advertising was not listed. This omission convinced the first American court to consider the question that Congress had not intended to protect advertising.[32]

In 1874, Congress passed the "Print and Label Law"[33] that extended copyright protection to objects not covered by the 1870 Act. Again, however, Congress failed to specifically enumerate advertising as a proper object of copyright protection. Engravings, cuts, and prints, all of which might be copyrighted, were expressly limited to "pictorial illustrations or works connected with the fine arts."[34] "Prints or labels designed to be used for other articles of manufacture" were not included under the copyright law.[35]

In 1909, Congress abandoned its efforts to enumerate the objects of copyright protection, choosing instead to make protection available to "all the writings of the author,"[36] and to allow the courts to determine what "all the writings" might include. Rather than interpret "all the writings of an author" to be co-extensive with the "writings" of "Authors" in article I, section 8,[37] the courts

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[28] 17 U.S.C. §§ 101-810 (Supp. V 1981).

[29] Act of March 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976); Act of March 3, 1891, ch. 565, 26 Stat. 1106; Act of June 18, 1874, ch. 301, 18 Stat. 78; Act of July 8, 1870, ch. 230, 16 Stat. 198; Act of Feb. 18, 1867, ch. 43, 14 Stat. 395; Act of March 3, 1865, ch. 126, 13 Stat. 540; Act of Feb. 18, 1861, ch. 37, 12 Stat. 130; Act of Aug. 18, 1856, ch. 169, 11 Stat. 138; Act of June 30, 1834, ch. 157, 4 Stat. 728; Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of Feb. 15, 1819, ch. 19, 3 Stat. 481; Act of April 29, 1802, ch. 36, 2 Stat. 171; Act of May 31, 1790, ch. 15, 1 Stat. 124 (unless indicated otherwise all of the above acts were repealed by 1909).

[30] Act of July 8, 1870, ch. 230, 16 Stat. 198 (repealed by 1909).

[31] *Id.* § 100, 16 Stat. at 214.

[32] *See* Collender v. Griffith, 6 F. Cas. 104 (C.C.S.D.N.Y. 1873) (No. 3000).

[33] Act of June 18, 1874, ch. 301, 18 Stat. 78 (repealed by 1909).

[34] *Id.* § 3, 18 Stat. at 79.

[35] *Id.*

[36] Act of March 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976). "[T]he works for which copyright may be secured under this Act shall include all the writings of an author." *Id.*

[37] The House committee report for the 1909 Act stated: "It was suggested that the

have interpreted the statutory language to be narrower than the constitutional language.[38]

Regardless of whether the courts could justify their construction of the 1909 Act—that copyright protection afforded by that statute was less extensive than that permitted by the Constitution—such an interpretation of the Copyright Act of 1976 would appear proper. The Copyright Act of 1976 made copyright protection available to "original works of authorship."[39] The House committee report on the 1976 Act stated the committee's hope that the wording would encourage courts to continue to recognize that Congress has not chosen to exercise fully its power under the copyright clause.[40] What might have fallen between the statutory "original works of authorship" and the outer limits of congressional power under the copyright clause was not addressed in the legislative history of the 1976 Act. Congress was concerned more with simply preserving the possibility of future expansion of copyright protection rather than with identifying objects presently excluded from copyright protection but within the ambit of the constitutional power.[41]

Nothing in the legislative history of either the 1909 or 1976 Copyright Acts indicates whether Congress expressly intended to provide copyright protection for advertising[42] except for a 1939 amendment to the 1909 Act.[43] That amendment, which provided that prints and labels were to be registered in the Copyright Office rather than the Patent Office, made reference to "prints . . . published in connection with the sale or advertisement of articles of

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word 'works' should be substituted for the word 'writings,' in view of the broad construction given by the courts to the word 'writings,' but it was thought better to use the word 'writings' which is the word used in the Constitution." H.R. REP. NO. 2222, 60th Cong., 2d Sess. 10 (1909). Professor Nimmer observes that this language would seem to justify the conclusion that copyright protection under the 1909 Act was coextensive with congressional authority under the Constitution. M. NIMMER, NIMMER ON COPYRIGHT, § 2.03[A], 2-24 n.5 (2d ed. 1978).

[38] *See, e.g.*, Goldstein v. California, 412 U.S. 546 (1973); Mazer v. Stein, 347 U.S. 201, 210 (1954); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).

[39] 17 U.S.C. § 102 (Supp. V 1981).

[40] H. R. REP. NO. 94-1476, 94th Cong., 2d Sess. 51 (1976). "In using the phrase 'original works of authorship,' rather than 'all the writings of the author' now in section 4 of the [1909] statute, the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field . . . ." *Id.*

[41] M. NIMMER, *supra* note 37, § 52.03[A].

[42] *Id.* § 2.08[G][4].

[43] Act of July 31, 1939, ch. 396, 53 Stat. 1142 (repealed 1976).

merchandise."[44] Professor Nimmer views this language as a congressional endorsement of *Bleistein* and of subsequent court decisions extending copyright protection to advertisements.[45] It is difficult to disagree with this view. A 1940 opinion of the Attorney General concluded that the prints referred to in the amendment included one-page ads in periodicals.[46] The Copyright Office has also adopted this view.[47] A Copyright Office circular states that the term "prints" includes "works which contain copyrightable pictorial matter, text, or both, and which are published as advertising or as labels for goods."[48] Congress and those government officials responsible for administering the copyright laws apparently have decided that advertising is protected by copyright law to the same extent as other matter. Like the courts, they have done this without considering the relative merits of this choice.

## II

## EFFECTS OF REMOVING COPYRIGHT PROTECTION FOR ADVERTISING

Some infringement actions involving commercial matter would not be affected by the removal of copyright protection for advertising. Primarily, these are the cases in which the copyrighted material is being used by an advertiser, but where the original use was not for advertising purposes. For example, a suit by United Artists alleging that a live cougar in Ford's automobile commercials is an infringement of its Pink Panther character could still be maintained.[49] So too could Heloise Bowles sue Shaklee's for using reprints of her copyrighted "Hints from Heloise" column in its advertising.[50] Copyright protection in this type of case serves to promote the arts, at least "the arts" if defined broadly, and it is within the power of Congress to protect works such as those involved in these cases.

The infringement cases that would not be possible if copyright protection were removed for commercial matter encompass a wide variety of alleged infringements. The fact situation

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[44] *Id.* § 3, 53 Stat. at 1142.

[45] M. NIMMER, *supra* note 37, § 2.08[G][4], 2-119 n.257.

[46] 39 Op. Att'y Gen. 498 (1940).

[47] 37 C.F.R. § 202.10 (1982).

[48] Copyright Office, Circular No. 46 (Feb. 1962).

[49] *See* United Artists Corp. v. Ford Motor Co., 483 F. Supp. 89 (S.D.N.Y. 1980).

[50] *See* National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 (W.D. Tex. 1980).

presented at the beginning of this Article,[51] a suit by Dr. Pepper alleging that Sambo's has violated its exclusive right to the use of its "Be a Pepper" commercial, would not constitute a violation of the copyright laws if the change were effected. Other recently litigated situations that would no longer be actionable under the copyright laws would include the alleged copying of whole advertising campaigns,[52] labels,[53] catalogs,[54] brochures,[55] and product instructions.[56]

To assess the impact of removing copyright protection for commercial matter, it is necessary to determine the likelihood that other companies will be encouraged to adopt the sort of advertising tactics used by defendants in copyright infringement actions between advertisers. How many other companies in America, big or small, might desire to use a variation of Dr. Pepper's catchy "Be a Pepper" jingle in their own radio or television ads—and would, if not for the threat of a copyright infringement suit? No one knows. It is, however, reasonable to assume that there are some.[57] To the extent that additional use of the jingle is encouraged, the period during which the jingle will benefit Dr. Pepper is shortened (that, anyway, was Dr. Pepper's contention in its lawsuit[58]). In advertising, distinctiveness is closely associated with

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[51] *See supra* text accompanying notes 1-2.

[52] *See* Dealer Advertising Dev., Inc. v. Barbara Allen Fin. Advertising, COPYRIGHT L. REP. (CCH) ¶ 25,219 (W.D. Mich. Nov. 21, 1979).

[53] *See, e.g.*, Power Lawn Mower Parts v. Lawn Mower Parts, COPYRIGHT L. REP. (CCH) ¶ 25,316 (W.D.N.Y. Aug. 24, 1981); Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc., COPYRIGHT L. REP. (CCH) ¶ 25,160 (N.D. Ga. Apr. 14, 1980).

[54] *See, e.g.*, Power Lawn Mower Parts v. Lawn Mower Parts, COPYRIGHT L. REP. (CCH) ¶ 25,316 (W.D.N.Y. Aug. 24, 1981); Habersham Plantation Corp. v. Country Concepts, COPYRIGHT L. REP. (CCH) ¶ 25,150 (N.D. Ga. Apr. 14, 1980).

[55] *See, e.g.*, O'Neill Devs. v. Galen Kilburn, Inc., 524 F. Supp. 710 (N.D. Ga. 1981).

[56] *See, e.g.*, Jovan, Inc. v. A.R. Winarick, Inc., COPYRIGHT L. REP. (CCH) ¶ 25,098 (N.D. Ill. Mar. 9, 1978).

[57] Sambo's Restaurants was not the only company to attempt to capitalize on the popularity of Dr. Pepper's commercials. An advertisement for a Dr. Schmee soft drink featuring a dancing soft drink can and a man dressed like Dr. Pepper (in both respects similar to the Dr. Pepper commercial) resulted in correspondence between the two companies and an eventual decision to withdraw the ad. Interview with Mannett Dodge, *supra* note 6.

[58] *See* Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202, 1208 (N.D. Tex. 1981). The court noted that the Dr. Pepper Co. "has built up a tremendous amount of business goodwill which reposes in this advertising campaign . . . . [T]he campaign is such a success that it is now projected that it will endure for ten years . . . . Distractions from the uniqueness and originality of the 'Be a Pepper' commer-

effectiveness. If an advertisement does not command attention through its jingles or imagery or copy, it will not work. Advertisements that substantially copy other advertisements reduce the value of the original because of overexposure to the target market. If allowed to continue, copying by Sambo's of the "Be a Pepper" jingle could discourage future expenditures by the Dr. Pepper Company to develop similar jingles.

In general, the expected effect of eliminating copyright protection for advertising would be to reduce expenditures for the development and production of advertising of the sort most likely to be the victim of copying. Company executives will hesitate to spend large sums for an advertisement if a competitor is likely, through copying part or all of the commercial, to benefit through increased sales at a fraction of the cost. On the other hand, removal of copyright protection would not reduce expenditures for advertising that competitors lack reason to copy.

The advertising most tempting to would-be copiers is likely to have certain characteristics. It is costly to create; the greater the cost of the advertising, the more is to be saved by copying. It is successful; competitors have no reason to copy advertising which is not perceived to be effective. It appeals more to emotions than to reason; little is to be gained from copying specific product information that, in most cases, will not be an accurate description of the competing product and thus might result in a violation of Federal Trade Commission rules.[59]

The advertising medium most likely to be affected is television. Unlike newspaper advertisements, most television ads presently are copyrighted[60] for the following reasons: the sums invested in television commercials are much greater, television advertisements have a longer duration, and the image-oriented nature of television commercials make them a more likely target for copying. On the other hand, a grocery store's advertisement in a local

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cials would logically shorten the life of the campaign which would be a loss of the business goodwill of Plaintiff." *Id.*

[59] 16 C.F.R. §§ 228-503 (1982).

[60] The growth of television has corresponded with the growing tendency to copyright advertisements. In 1960, most advertisements were not copyrighted. Two explanations have been offered: (1) most advertisements in 1960 had limited life expectancies, and (2) it was uncertain in the industry at that time whether imitation was a commercial harm or a beneficial form of flattery. Comment, *Copyrights—The Protection of Advertising*, 5 VILL. L. REV. 615, 636 (1960).

paper listing its prices for steaks, milk, and artichokes is in no danger of being copied by a competitor.

Advertisements for products such as soft drinks will continue to appeal primarily to emotions; there simply is not much that can be said about the product qualities of a Pepsi or a Coke. But without the copyright laws to protect the very substantial investments in advertising which soft drink manufacturers traditionally have made, company executives would be encouraged to consider new marketing strategies. Manufacturers might choose to counter copying by constantly changing their advertisements to maintain product identification, or by spending less on advertising and engaging instead in price competition. Both strategies probably would be employed.[61]

For products as diverse as televisions and soap—products that have qualities that can be discussed and that are relevant to the consumer—the style of advertising might undergo a more substantial change if copyright protection were removed. Rather than, as now, appealing to emotions, advertising for these products might be directed more toward relevant product distinctions such as durability and effectiveness.

## III

## Economic Arguments for Eliminating Copyright Protection for Advertising

To determine sound public policy it is necessary to consider the relative economic and social value to the consumer of informational advertising and of image-oriented advertising. The elimination of copyright protection for advertising will encourage informational advertising at the expense of image-oriented advertising. This result would benefit consumers because informational advertising encourages both increased price competition and rational consumer choices based on product quality. Alternatively, image-oriented advertising fosters the opposite result.

According to proponents of advertising, advertisements are essentially informational.[62] Their utility was suggested by commen-

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[61] Interview with Mannett Dodge, *supra* note 6.

[62] *See, e.g.*, J. Ferguson, Advertising and Competition: Theory, Measurement, Fact 5-8 (1974); J. Lambin, Advertising, Competition and Market Conduct in Oligopoly Over Time 164 (1976); Brozen, *Entry Barriers: Advertising and Product Differentiation*, in Industrial Concentration: The New Learning 115 (H. Goldschmidt, M. Mann & F. Weston eds. 1974); Coase, *Advertising and Free*

tator Stuart Britt when he said, "Doing business without advertising is like winking at a girl in the dark: You know what you are doing but nobody else does."[63] By increasing consumer knowledge of goods, informational advertising increases the potential elasticity of demand for those goods.[64] An elastic demand curve indicates that consumers will respond decisively to a price change in any single good based on a rational comparison with like goods. If one recognizes that two brands of tires are of similar quality, he will purchase the least expensive make. Even if the goods were of different quality, a consumer rationally might opt for the inferior one because of a compensating price difference. Consumers make more prudent choices as information about the alternatives becomes more accessable. Proponents argue that advertising is the catalyst to this dynamic. "Elasticity of demand is a function of *known* alternatives, not the number of brands in existence. Therefore it is not the existence of close substitutes that is important, but the probability that the consumer will find them."[65] Advertising increases that probability. In this classic view, increased product information exerts a downward pressure upon prices and provides an incentive to product innovation and improvement.[66]

Critics of advertising denounce it as manipulative. They contend it is endemic of an industrial movement that threatens the vitality of consumer sovereignty upon which our economic system is based.[67] Increasingly, the producer, rather than the consumer,

*Speech*, 6 J. LEGAL STUD. 1, 12 (1977); Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); Telser, *Advertising and Competition*, 72 J. POL. ECON. 537 (1964).

[63] N.Y. Herald Tribune, Oct. 30, 1956, § 2, at 9, col. 2.

[64] A working definition of "elasticity of demand" and its related concepts is necessary to understand the economic evaluation of advertising. Elasticity measures consumer price sensitivity to an individual product. If a product reflects a highly elastic, or flat, demand curve, then small price changes will cause a decisive change in the amount of that good purchased. As a product's demand curve becomes inelastic, price becomes less prominent as a purchasing factor. Conversely stated, if a good exhibits an inelastic demand curve, the purchaser increasingly entertains nonprice considerations. Cross-elasticity measures the change in the number of goods sold caused by the price change of a competing good. These concepts are used to identify the level of competition in any particular market for a single good. An industry that exhibits an inelastic demand curve or one with low cross-elasticity is not considered a competitive one. *See* C. MCCONNELL, ECONOMICS: PRINCIPLES, PROBLEMS AND POLICIES 464-69 (6th ed. 1975).

[65] J. FERGUSON, *supra* note 62, at 5.

[66] *See* Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 311-18 (1970); *see also* Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974).

[67] J. GALBRAITH, THE NEW INDUSTRIAL STATE 6 (2d ed. 1972).

is viewed as determining what is to be purchased. In this way, the promotional attempt overwhelms the productive endeavor—or, "there is a danger when the better mousetrap is better at catching people than at catching mice."[68] Much of today's advertising, rather than appealing to reason, is attended by "elaborate science and art designed to suppress market influences and make prices and amounts sold subject to the largest measure of control."[69]

Opponents of advertising also argue that apart from any adverse structural effect it may impose, advertising, especially image-oriented advertising in concentrated markets, is simply of little or no value.[70] Oligopoly illustrates this point. It is accepted that when an industry is highly concentrated, firms eschew price competition. They recognize the interdependence between market members and pursue a policy of relative price rigidity. This practice allows a small number of firms to realize the advantages of price and input stability in their efforts to maximize profits.[71] Competition in some form, however, continues to exist. The entrepreneur, being the competitive animal he is, strives to win with nonprice strategies that rely heavily on advertising.[72] But what is gained by the repeated attempts of firms to out-advertise each other? Escalating promotion costs entail higher costs to the consumer. Competition along these lines, unlike price wars or technological races, yields no benefit.[73]

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[68] Charles Eames, *quoted in Man in the Trap*, TIME, May 3, 1963, at 75.

[69] J. GALBRAITH, *supra* note 67, at 66, 67. Today, consumer wants are grounded less in physical needs and more in a complex array of psychological attitudes. *Id.* at 201-02. While strictly physical needs readily lend themselves to the appeal of reason, nonphysical aspirations are more susceptible to emotional appeal. *Id.*

[70] F. CALLAHAN, A SOCIO-ECONOMIC ANALYSIS OF ADVERTISING 4, 5 (1972).

[71] *See* C. MCCONNELL, ECONOMICS: PRINCIPLES, PROBLEMS AND POLICIES 522-41 (4th ed. 1969). This collusive behavior is sanctioned even by the antitrust laws under a policy that refuses to consider such "conscious parallelism" as per se violation of antitrust laws. *See* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

[72] *See* F. CALLAHAN, *supra* note 70, at 175; J. GALBRAITH, *supra* note 67, at 180-81.

[73] An additional deleterious effect of advertising is that it reduces the general level of consumer savings. This reduction occurs because advertising increases aggregate consumption. *See* J. LAMBIN, *supra* note 62, at 137-38, 164-65.

Other critics point to the colossal depletion of available investment capital caused by advertising. *See, e.g.*, Smith, *The Rape of Small Business: Advertising and the Conglomerates*, 11 ANTITRUST L. & ECON. REV. 27, 35-38 (1979). When combined with the allegedly monopolistic effects of advertising, the drain on investment capital is estimated to total about $180 billion per year. *Id.* at 38. The effect of the depletion in investment capital is anticompetitive because smaller organizations are denied the credit they need at rates favorable enough to allow them to grow and compete with the larger corporations. This loss of capital can be ill-afforded. The short supply of

Critics also contend that advertising has an anticompetitive impact because it promotes product choice based on nonprice features—product features that may exist only in the imaginations of the Madison Avenue advertisers who devise the ads.[74] The ability of a toothpaste to attract sexy blondes, the ability of a beer to turn a wimp into a real man, and the ability of an automobile to gain its buyer peer respect and approval are examples of these nonprice features. When consumers view competing products as essentially similar, then the major focus of the competition is on price. Alternatively, when consumers value nonprice attributes of a product, then competition is diverted, at least partially, to the desired feature. Differentiating products from competing brands by advertising nonprice features thus results in higher prices for these products.[75]

From an economist's perspective, the social utility of this type of product differentiation is really the crux of the advertising debate. When economists speak of product differentiation in the pejorative sense they are referring to distinctions unrelated to the product's relative economic worth.[76] If an item can be distinguished artificially from others so that it exhibits an inelastic demand curve, then the consumer pays a higher price but receives no real benefit. If the competitive focus were on quality interests, however, such as product longevity or efficiency, then the effect would be positive. Producers would struggle to incorporate into their products the features that make them more valuable. Consumers would then attempt to obtain the best value possible by comparing both price and quality.

Economists explain that product differentiation not based on product qualities creates brand loyalties that inhibit competition.[77] Established firms can advertise in order to distinguish their

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savings in this nation has spurred high interest rates and consequently crippled certain industries and small businesses. Taylor, *Hard Times on Main Street*, TIME, Oct. 26, 1981, at 60, 60-61.

[74] *See* J. BAIN, BARRIERS TO NEW COMPETITION 114 (1956). The practice of promoting product choice based on nonprice features strengthens consumer preferences for established brands and thereby creates a barrier to new entrants to the market. Comanor & Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J. ECON. LITERATURE 453, 457 (1979), supports the finding that advertising promotes brand preference despite a lack of evidence of true product distinctions.

[75] *See* C. MCCONNELL, *supra* note 71, at 509-10.

[76] *Id.* at 514.

[77] Theoretically, past advertising makes the consumer more receptive to a product. Continued advertising maintains and may expand that acceptance. Brand loyalty enables the established manufacturer to charge higher prices than the competitors with-

brands from those of competitors and thereby attain the advantage of consumer goodwill. Once established, acquired goodwill is a barrier to any firm that seeks to enter a particular market. This barrier comprises four main deterrents. First, the potential entrant suffers from an absolute cost disadvantage. To compete with established firms, a new firm must incur prohibitive selling costs or price its product dangerously low.[78] Both alternatives serve to make entry into the market less attractive. Second, the newcomer is handicapped in his use of advertising to overcome the existing goodwill leverage because large advertising outlays have greater impact than do smaller ones, and the holder of brand loyalty is better able to finance extensive advertising campaigns.[79] The established producer, usually the large advertiser, enjoys increasing returns from his advertising expenditures because his costs are spread among more units sold.[80] Because of buyer allegiance, established brands are sold in greater quantities; those sales in turn finance the guarantee of future allegiance through yet more advertising.[81] Third, entrants can begin to reap the benefit of promotion only at certain threshold[82] levels. Modest advertising attempts may be ineffective in cultivating sales; the nature of advertising dictates a relatively hefty investment before any sales stimulation occurs. Even a newcomer who out-advertises a firm with consumer goodwill may not reap the full benefit of those expenditures.[83] Finally, initial advertising outlays differ from other capital requirements. Physical assets, even of a bankrupt com-

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out threat of price retaliation by new producers. Much of the economic literature consists of statistical evaluation of this premise with considerable difference of opinion over the capacity of advertising to alter demand elasticities. *See* Comanor & Wilson, *supra* note 74.

[78] *See* Comanor & Wilson, *Advertising Market Structure and Performance*, 49 REV. ECON. & STATISTICS 423, 425 (1967).

[79] *See* Kaldor, *The Economic Aspects of Advertising*, 18 REV. ECON. STUD. 1, 13 (1949-50).

> [T]he shift of the demand curve resulting from advertising cannot be assumed to be strictly proportionate to the amount spent on advertising—the "pulling power" of the larger expenditure must overshadow that of smaller ones with the consequence a) that the larger firms are bound to gain at the expense of the smaller ones; b) if at the start, firms are more or less of equal size, those that forge ahead are bound to increase their lead, as the additional sales enable them to increase their outlay still further.

*Id.*

[80] *See* Comanor & Wilson, *supra* note 74, at 468.

[81] *Id.* at 468-69.

[82] *Id.* at 470.

[83] W. COMANOR & T. WILSON, ADVERTISING AND MARKET POWER 48-49 (1974).

pany, may be sold, but once dollars are spent on advertising, there may be recoupment only upon success. If the enterprise fails, no one will purchase the advertising and that investment is lost.

An advertising campaign that irrationally convinces consumers that an established brand is preferable to other brands will magnify the cost and risk involved in entering a market and thereby insulates the established firm from competition.[84] Image-oriented advertising thus inhibits competition by fabricating consumer brand loyalty in favor of established products, and by deterring entry by firms who must overcome excessive start-up costs in order to compete.[85]

Copyright protection for commercial advertisements encourages image-oriented advertising and thereby decreases competition.[86] In *Kontes Glass Co. v. Lab Glass, Inc.*,[87] for instance, the plaintiff claimed that the defendant copied part of its catalogue, and that the defendant's "actions permitted it to arrive in competition with Kontes earlier than it would have done."[88] But is not that precisely what is desired—hearty, timely competition? The copyrightability of cake box wrapper drawings was the subject of *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*[89] Among pastry manufacturers, however, the competition should be to produce pastry more efficiently. Patent laws reward this type of innovation and production.[90] Applying copyright law to reward a cleverly designed wrapper encourages skills that are, in the cake business, economic surplusage.

It is misleading to characterize all advertising as either informa-

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[84] *Id.*

[85] Brand loyalty also gives its recipients a competitive advantage over existing firms of marginal strength. Consequently, small firms are disposed to merge with other producers to finance the expensive promotional attempt. This route is chosen instead of an avenue which stresses efficient production reflected in lower prices, and therefore evokes the ire of economists who view this as an unjustified step toward concentration. For a rebuttal to the charge that advertising inhibits competition, see generally W. COMANOR & T. WILSON, *supra* note 83; J. FERGUSON, *supra* note 62; J. LAMBIN, *supra* note 62.

[86] Comanor and Wilson urge that attention to advertising's anticompetitive effects be turned to policy action that might restrict advertising's ability to inhibit competition without limiting the information offered to consumers. They caution, however, that mere market imperfection does not justify intervention "unless the specific measures proposed can be demonstrated as superior to the operation of an unfettered market." Comanor & Wilson, *supra* note 74, at 473.

[87] 373 F.2d 319 (2d Cir. 1967).

[88] *Id.* at 320.

[89] 266 F.2d 541 (2d Cir. 1959).

[90] 35 U.S.C. §§ 111, 112 (1976).

tional or manipulative. The line between manipulative image-oriented ads and informational ads is not a clear one. In fact, it is more accurate to view advertising within a spectrum ranging from the purely objective ad to the purely nonobjective. Some advertisements employ facts to inform while others use images to ply consumers; most are a composite of the two techniques. Therefore it is possible, indeed likely, that both desirable and deleterious economic effects accompany any single advertisement.

What then is the final word on the arguments offered by both the opponents and defenders of advertising? The answer is that each argument has a certain validity when properly addressed. Rational appeals to buy familiarize the consumer with his options and are thereby conducive to a competitive environment. Informational advertising is good. But when advertisers intrude upon the prerogative of consumer choice the door is opened to wasteful and anticompetitive tendencies. To the degree that advertising thwarts consumer rationality, it is bad.[91]

Thomas Nagle, in response to proposals to reduce advertising, points out that less advertising would cause consumers to rely

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[91] Samuel Smith's study of the role of national advertising as an anticompetitive strategy in the food industry illustrates why image-oriented advertising is economically undesirable. *See* Smith, *supra* note 73. This strategy, according to Smith, utilizes "huge advertising programs" to drive out competing smaller firms. *Id.* at 27. The device has worked. From 1947 to 1972, a 50% reduction in the number of food manufacturing firms has occurred. *Id.* at 30. Of the 23,000 remaining firms, the 200 largest own 81.1% of all industry assets and, interestingly enough, account for 100% of all television and 85% of total industry advertising. *Id.* at 31. In the same period, the industry has also undergone considerable conglomeration. *Id.* at 33. Smith does not contend that advertising solely is responsible for these changes. Technological strides naturally have stepped up the scalar economies of the industry, but the use of advertising has been instrumental in the strong course of concentration. *Id.* at 31.

Smith details this phenomenon by tracing Proctor and Gamble's (P&G) foray into the coffee market. P&G entered the coffee business in 1963 by acquiring Folger & Company, a regional coffee manufacturer. *Id.* at 28. At that time there were 261 coffee producers in the country; today there are 40. *Id.* The reason for the mass extinction was the struggle between P&G and General Foods for market supremacy. Again and again, P&G would combine extremely low pricing and saturation advertising in a particular area to cripple or destroy the local producer. In 1979, experts predicted that P&G and General Foods would dominate the market with 70% of sales. *Id.* at 28-29.

In the food industry the average amount of advertising may double after the acquisition of a smaller company by a marketing conglomerate. *Id.* at 35. According to Smith, this concentration is not because of superior innovation or efficiency of the dominant firms. These firms simply wait for the smaller firms to innovate, then buy them or run them out of business. *Id.* at 37.

more on old product reputations.[92] This would increase the cost of establishing a new reputation as consumers would be forced to discover them through sampling or other means. Nagle concludes that what is needed to enhance competition is more information in the market.[93] Advertising then, as a device for disseminating product information, should be increased. Nagle's view is consistent with the removal of copyright protection for advertising: by deterring expensive, image-oriented advertising, the removal of copyright protection will make more dollars available for informational advertising.

Certain effects of advertising are beyond economic analysis. Advertising, when it helps shape the values, aspirations, and culture of a society, produces costs and benefits that defy analysis in conventional economic terms. Because these impacts are not easily quantifiable, there is a tendency to ignore or undervalue them in a policy analysis.[94] Yet even the most hard-headed economist would admit that an effect is no less real or significant because it is difficult to identify or quantify.

Questions about the social impact of advertising abound; answers are rare. Does advertising do no more than exploit human needs, cravings, and fears—or does it magnify and reinforce them as well?[95] Does advertising confuse and obscure human values by attributing qualities such as integrity, spirit, and pride to beer, automobiles, and laundry detergent? Does the failure of advertising to remind us of spiritual values make it a corrosive, contributing to the obsolescense of nonmaterialistic values?[96] Does advertising contribute to the elimination of distinctions between cultural levels and spheres?[97] Has advertising become a tool for

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[92] *See* Nagle, *Do Advertising-Profitability Studies Really Show that Advertising Creates a Barrier to Entry?*, 24 J. L. & ECON. 333, 342-43 (1981).

[93] *Id.* at 344.

[94] *See* Tribe, *Ways of Not Thinking About Plastic Trees*, in WHEN VALUES CONFLICT 61, 63-66 (L. Tribe, C. Schelling & J. Voss eds. 1976).

[95] *See, e.g.*, Miller, *Getting Dirty*, NEW REPUBLIC, June 2, 1982, at 25. Miller sees the "inanities" of a commercial's script as "subtle and meticulous" needles activitating our psychological pressure points. *Id.* at 26.

[96] *See, e.g.*, G. BUZZI, ADVERTISING: ITS CULTURAL AND POLITICAL EFFECTS 138 (1968) (discusses the question).

[97] *See, e.g.*, J. ELLUL, THE TECHNOLOGICAL SOCIETY (1964). Ellul argues:

> The goal of advertising is to persuade the masses to buy. It is necessary to base advertising on general psychological laws. . . . The inevitable consequence is the creation of mass man. As advertising of the most varied products is concentrated, a new type of human being, precise and generalized, emerges.

corporations wishing to pursue goals more expansive than simple profit maximization?[98] These questions demand wider attention and closer scrutiny than has been given them.

## IV
## A Proposal to Implement the Elimination of Copyright Protection for Advertising

Presently, the public subsidizes advertisers to the extent that advertisers are able to use the courts to bring copyright infringement actions. Eliminating copyright protection for advertising would end this subsidization. Additionally, ending copyright protection for advertising would encourage informational advertising at the expense of image-oriented advertising. This result would increase price competition and promote rational consumer choices based on product quality.

Two institutions have the power to eliminate copyright protection for advertising: the courts and the Congress. Despite the difficulties in finding a constitutional basis for extending copyright protection to advertising,[99] there is little hope that the courts will abandon their current deferential attitude toward Congress's exercise of power under the copyright clause. If change is to come, it most likely will come in the form of legislation. Copyright protection for advertising could be eliminated by a simple amendment to the 1976 Copyright Act.

Section 102 of the 1976 Copyright Act provides:

> § 102. Subject matter of copyright: In general
> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;

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*Id.* at 407.

[98] *See* J. Galbraith, *supra* note 67. Galbraith contends that the industrial system has grown in economic strength to the point where it now actually controls market activity. He sees individual desires as having become subordinated to corporate goals. "Advertising by making goods important makes the industrial system important." *Id.* at 210.

[99] *See supra* note 27 and accompanying text.

> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[100]

Congress could eliminate copyright protection for advertising simply by adding a subsection (c):

> (c) In no case does copyright protection for an original work of authorship extend to any work used primarily to advertise a service or product.

The general intention embodied in proposed subsection (c) should be clear; the application of subsection (c) to specific situations may not always be clear.

The provision would apply only to advertisements. Copyright protection would remain available for many other works informing consumers about services and products. Only when the work is prepared primarily to persuade consumers to buy a particular good or service does it fall within the exclusion of subsection (c). For example, a story in *Consumer Reports* comparing various named brands of washing machines, even where the author encourages readers to select a particular brand, would not be covered by subsection (c). Nor would subsection (c) apply to a newspaper reviewer's complementary article about the fare at a local French restaurant. Also, where an author merely expresses an opinion about the desirability of purchasing a service or product, and where he has no personal interest in the sale of these services or products, subsection (c) would not apply. Rather, subsection (c) is meant to exclude copyright protection for those works prepared at the direction of those who stand to gain, usually in a direct financial sense,[101] by the increased sales of a service or product.

Removing advertising from the works protected under § 102 would have, unless appropriate provisions were made, the effect of

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[100] 17 U.S.C. § 102 (Supp. V 1981).

[101] The policy arguments for extending copyright protection to the advertisements of not-for-profit organizations (e.g., advertisements for bake sales, membership drives, and tickets for organization-sponsored events) are stronger than for other advertisements. Many of the dangers of profit-motivated advertising, such as concentration of market power, do not exist in the case of not-for-profit organization advertising.

allowing the individual states to protect advertising as intellectual property under state law. The validity of state copyright protection was recognized by the Supreme Court as early as 1834.[102] Unlike the judicial decisions interpreting the commerce clause,[103] no court decision has ever determined that the copyright clause precludes states from affording copyright protection.[104] Although § 301 of the Copyright Act of 1976 preempts state protection for subject matter that comes under the definition of copyrightable matter specified in § 102, § 301(b) permits states to extend protection to matter not within the subject matter of copyright specified by § 102.[105] The addition of proposed § 102(c), without more, would allow the states to provide the equivalent of copyright protection for advertising under state law, and thereby to undermine the goals of § 102(c). The following is a proposed preemption provision:

> No person is entitled to any legal or equitable rights under the common law or statutes of any state that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, for any work used primarily to advertise a service or product.

This provision would leave the rights of advertisers unaffected if their claims contain elements that are different from those involved in a copyright infringement action.

A company certainly would not be powerless to combat the practices of a competitor who seeks to confuse consumers into believing the products of the two companies are the same. Protection for trademarks, service marks, and words, names, or symbols that identify or distinguish a company's goods or services exists under the Trademark Act of 1946 (Lanham Act).[106] A company also has rights against a competitor who falsely describes or

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[102] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[103] *See, e.g.*, Sporhase v. Nebraska, 102 S. Ct. 3456 (1982); Hughes v. Oklahoma, 441 U.S. 322 (1979).

[104] Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 206 (1978).

[105] Section 301(b) provides:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 . . . .

17 U.S.C. § 301(b) (Supp. V 1981).

[106] 15 U.S.C. § 1114 (1976).

designates the origin of his product,[107] or who makes false claims about the quality of his product.[108] Regulations of the Federal Trade Commission proscribing "false and deceptive trade practices" afford more protection.[109] State rights based on common law trademark infringement, and the common law torts of "passing off" and fraudulent misrepresentation complete the panoply of residual protection for companies injured by a competitor's advertising practices.[110]

Proposed § 102(c) would allow an advertiser to copy portions of a competitor's advertising. However, where the copying is so extensive as to justify the conclusion that it was undertaken for the purpose of deceiving consumers into believing that the product of the copier is in fact that of the copied, the copying would be actionable under other statutes or common law. Sambo's restaurants should be able to ask, "Wouldn't you rather be a Senior, too?", but a soft drink manufacturer should be able neither to market a product called "Dr. Piper" nor ask in its advertising, "Wouldn't you rather be Piper, too?"

## V

## WOULD THE REMOVAL OF COPYRIGHT PROTECTION FOR ADVERTISING VIOLATE THE FIRST AMENDMENT?

The first amendment requires only that speech not be abridged[111]—not that it must be rewarded. No affirmative obligation to provide copyright protection is imposed by that amendment.[112] Nonetheless, despite the seemingly unambiguous language of the first amendment, the repeal of copyright protec-

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[107] *Id.* § 1125(a).

[108] *Id. See, e.g.*, U Haul Int'l v. Jartran, 681 F.2d 1159 (9th Cir. 1982).

[109] 16 C.F.R. §§ 228-503 (1982).

[110] According to committee reports, § 301 of the Copyright Act of 1976 was not intended to preempt common law fraudulent misrepresentation and passing off. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 132 (1976).

[111] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[112] Such a duty also is unlikely to exist under the copyright clause of article I, section 8. U.S. CONST. art. I, § 8, cl. 8. The enumerated powers of article I are discretionary, not mandatory. Furthermore, some commentators have suggested that copyright protection actually conflicts with the first amendment. *See, e.g.*, Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. 43 (1971).

tion for all works of authorship would have such a devastating impact on creative output that it may raise a serious constitutional question. Even though the better view appears to be that the first amendment does not compel copyright protection,[113] it is not necessary to reach that conclusion to find that Congress constitutionally could repeal copyright protection for a single category of works, commercial advertisements.

While no longer holding the view that the first amendment is irrelevant to advertising,[114] the Supreme Court repeatedly has recognized that certain characteristics of commercial speech cause it to merit less protection than other forms of speech.[115] As recently as 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[116] the Court stated:

> There is no reason for providing [full] constitutional protection when . . . statements are made only in the context of commercial transactions. . . . This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech.[117]

There are several reasons why commercial advertising is undeserving of full first amendment protection. First, advertising has little to do with the first amendment's primary purpose of protecting political expression.[118] Second, unlike in other forms of

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[113] If the first amendment compels copyright protection, it could be argued that other government action that would promote speech, such as tax exemptions for newspapers, also should be required. The Supreme Court has rejected the view that the first amendment requires special treatment of speech-related businesses. *See, e.g.*, Associated Press v. NLRB, 301 U.S. 103 (1937); Grosjean v. Am. Press Co., 297 U.S. 233 (1936).

[114] For cases holding that commercial speech is outside the scope of first amendment protection, see, e.g., Breard v. Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942). More recent cases recognizing some first amendment protection for advertising include Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[115] *See, e.g.*, Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447, 455-56 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1975); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973).

[116] 447 U.S. 557 (1980).

[117] *Id.* at 563 n.5.

[118] *See, e.g.*, *id.* at 588-99 (Rehnquist, J., dissenting). "Nor do I think those who won our independence . . . would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a 'liberty' not subject to extensive regulation . . . ." *Id.* at 595 (Rehnquist, J., dissenting). Even such a staunch defender of free speech as Justice Black has stated that the protections of the first amendment do not apply to a

speech, falsehoods and fallacies in the context of commercial speech are unlikely to be exposed by subsequent commercial speech.[119] Moreover, advertising is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."[120] In addition, commercial speakers have extensive knowledge of their products and sensibly can be held to a higher standard of accuracy than speakers in other contexts.[121]

The protection that has been extended to advertising under the first amendment is based on the informational function of advertising.[122] The Court has stated that "[t]he government may ban forms of communication more likely to deceive the public than inform it."[123] The repeal of copyright protection, proposed to increase the informational content of advertising, would seem not only permissible under the first amendment, but fully supportive of its goals. Moreover, even if the repeal of copyright protection for advertising could be characterized as a burden on protected speech, then it is surely a burden that a court, applying the appropriate balancing test, would uphold.[124]

## CONCLUSION

Although informational advertising, which identifies the price

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" 'merchant' who goes door to door 'selling pots.' " Breard v. City of Alexandria, 341 U.S. 622, 650 (1951) (Black, J., dissenting). *See also* Justice Rehnquist's dissenting opinion in *Virginia State Bd. of Pharmacy*, 425 U.S. at 787.

> The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy.". . . I had understood this view to relate to public decisionmaking as to political, social and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.

*Id.* (citation omitted).

[119] Justice Rehnquist has observed: "The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim 'caveat emptor.' " *Central Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting).

[120] Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977).

[121] *Id.*

[122] 447 U.S. at 563.

[123] *Id.*

[124] For a description of the four-part analysis used to evaluate the constitutional restrictions on commercial speech, see, e.g., *id.* at 566.

or describes a product's concrete qualities, has a clarifying and generally positive effect, the same cannot be said for image-oriented advertising. Image-oriented advertising, designed to produce in the minds of consumers an association between the product and a desired emotional state, creates an economic waste, impedes productive competition, and proselytizes the unwary to suspect beliefs.

Advertising today is subsidized by the public to the extent that advertisers have access to the courts to enforce copyright law. Federal courts adjudicate such weighty questions as whether a commercial for Carling Brewery's "Highlite" beer in which two men arm wrestle in a tavern is substantially similar to a copyrighted Miller Brewing Company spot in which John Mackey and Matt Snell, two professional football players, do the same thing.[125] Corporate attorneys brief questions such as whether General Mills can reproduce on its cereal boxes the same copyrighted Strawberry Shortcake characters that Nation's Choice Vitamin Company plans to use in its vitamin commercials.[126] Much ado is made over whether Screw Magazine can portray Pillsbury Company's "Poppin' Fresh" character and its "Poppie Fresh" character joining in various sexual activities.[127] These cases typify the socially unproductive investments in noninformational advertising that are encouraged by our copyright laws and subsidized by the public. They are "trivial pothers," "advertising row[s] of no importance."[128] Congress should eliminate copyright protection for advertising.

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[125] *See* Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F. Supp. 429 (W.D.N.Y. 1978).

[126] *See* Nation's Choice Vitamin Co. v. General Mills, 526 F. Supp. 1014 (S.D.N.Y. 1981).

[127] Pillsbury Co. v. Milky Way Prods., Inc., COPYRIGHT L. REP. (CCH) ¶ 25,139 (N.D. Ga. Nov. 30, 1978).

[128] Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83, 95, 97 (1st Cir. 1922) (Hough, J., dissenting).