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DID BOSE SPEAK TOO SOFTLY?: PRODUCT CRITIQUES AND THE FIRST AMENDMENT

Vincent Brannigan* and Bruce Ensor**

INTRODUCTION

Product critiques, evaluations of vendors' products and services by consumer organizations, are a major force in the area of consumer protection. Only rarely have they been the subject of appellate review.\(^1\) In recent years, however, two important issues have arisen concerning product critiques. These are the appropriate liability standards for product disparagement after *New York Times Co. v. Sullivan*,\(^2\) and the use of product critiques as advertising by the subjects of the critiques.\(^3\)

In *Bose Corp. v. Consumers Union of United States, Inc.*,\(^4\) a product disparagement case,\(^5\) the Supreme Court extended broad

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5. See infra text accompanying notes 18-41.
first amendment protection to statements made by the defendant, Consumers Union, Inc., concerning speaker systems manufactured by the corporate plaintiff, Bose. The procedural protection afforded by the first amendment was broadened to include comprehensive appellate review of the issue of "actual malice." In Consumers Union of United States, Inc. v. General Signal Corp., an attempt by Consumers Union to limit the use of product critiques in advertising was rejected by the Court of Appeals for the Second Circuit. The court found that the advertising constituted fair use of the critique under the copyright law. The unifying theme in both cases is the expanded protection given commercial speech under the first amendment. This Article suggests that under the logic of the Supreme Court's decisions in this area, product critiques are entitled to the highest level of first amendment protection.

I. PRODUCT CRITIQUES: DISPARAGEMENT

Many consumer organizations engage in the criticism of various vendors' products or services. In cases of negative criticism, the vendor may threaten or begin litigation on the grounds of product disparagement. Product disparagement is a tort action in which the plaintiff must prove that a false statement concerning the nature or

6. 466 U.S. at 513.
7. Id. at 514.
8. 724 F.2d 1044 (2d Cir. 1983).
9. Id. at 1052.
10. Id. at 1050.
11. See Bose, 466 U.S. at 512-13; General Signal, 724 F.2d at 1051.
12. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding that attorney could not be disciplined for soliciting legal business through printed advertisements containing truthful and nondeceptive information and advice regarding legal rights of potential clients); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (holding federal law making it a crime to send unsolicited advertisements for contraceptives through the mail unconstitutional, since the restriction of the free flow of truthful commercial information violates the first amendment's guarantee of free speech); In re R.M.J., 455 U.S. 191 (1982) (holding that a state supreme court rule that prohibited an attorney from mailing office opening announcements to persons other than lawyers, clients, former clients, personal friends, and relatives violated the first amendment); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (holding that commercial speech proposing a lawful transaction could be regulated to achieve a substantial government interest in obtaining clear state policy decisions, with Justice Stevens arguing, in concurrence, that the definition of commercial speech used by the Court is too narrow, since commercial expression on issues relating to production and consumption of electrical energy is also a political issue); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748 (1976) (granting limited first amendment protection to commercial speech); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (distinguishing between public and private figures).
quality of its product was made by the defendant.\textsuperscript{13} Product disparagement is somewhat analogous to defamation, but the two actions differ in several respects. Defamation includes the general areas of libel and slander.\textsuperscript{14} Corporations can be defamed,\textsuperscript{15} with corporate defamation relating to the character of the corporation and its "prestige and standing in the business in which it is engaged."\textsuperscript{16} Product disparagement, on the other hand, relates to false or misleading criticism of a specific product.\textsuperscript{17} The damages which can be awarded in a product disparagement action are considerable, since the plaintiff can recover punitive as well as actual damages resulting from the disparagement.\textsuperscript{18}

The first product disparagement case in the recent line of Supreme Court decisions balancing private rights against the first amendment is \textit{Bose Corp. v. Consumers Union of United States, Inc.}\textsuperscript{19}

In a May 1970 issue of \textit{Consumer Reports}, Consumers Union's (CU) widely circulated magazine, the defendant made the following statements concerning the Bose loudspeaker system:

[I]ndividual instruments heard through the \textit{Bose} system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.\textsuperscript{20}

In response to these statements, Bose Corporation instituted a product disparagement action against CU. Bose claimed three distinct


\textsuperscript{14} See generally W. Prosser & W. Keeton, \textit{The Law of Torts} § 111, at 771 (5th ed. 1984), which states that "[d]efamation is made up of the twin torts of libel and slander—the one being, in general, written while the other in general is oral . . . . In either form, defamation is an invasion of the interest in reputation and good name." \textit{Id.} at 771.


\textsuperscript{16} W. Prosser & W. Keeton, \textit{supra} note 14 § 111, at 779.

\textsuperscript{17} Note, \textit{Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation}, 75 \textit{COLUM. L. REV.} 963 (1975).

\textsuperscript{18} W. Prosser & W. Keeton, \textit{supra} note 14 § 128, at 976.

\textsuperscript{19} 466 U.S. 485 (1984).

falsehoods about instruments heard through the Bose system: (1) that their size seemed grossly enlarged; (2) that they seemed to move; and (3) that their movement was "about the room." 21

After an extensive trial at the district court level, Bose prevailed. 22 The district court applied the two-tiered *New York Times Co. v. Sullivan* 23 test to find CU liable. 24 The court first determined that Bose was a "public figure," thus triggering the "actual malice" standard. 25 Bose did not contest this finding, although the determination was crucial. If Bose had been found to be a private person, no actual malice would have been required. 26 Because Bose did not dispute its public figure status, no discussion of that issue was required by the higher courts.

Instead, the district court concentrated on the difficult issue of actual malice. The court, sitting as a fact-finder without a jury, listened to extensive testimony from the engineers who conducted the testing of the Bose speakers 27 and found that the chief engineer had not accurately reported what he had heard. 28 Thus, the court reasoned, the article was false, and both the engineer and CU knew it to be false. 29 According to the trial court, this finding was sufficient to establish liability. 30

CU appealed, and the court of appeals reversed. 31 The court held that it could conduct an independent review of both facts and law to determine whether the district court had made an error. 32 In its review, the appellate court focused on CU's good faith and editorial review process. 33 The First Circuit was clearly concerned that courts could stifle criticism by insisting on literal truth in what is an inexact science, or that the fear of liability could lead to self-

21. *Id.* at 1260 n.20.
22. *Id.* at 1277.
24. 508 F. Supp. at 1271.
25. *Id.* at 1274.
26. *Id.* at 1271 ("Under *Gertz* only a plaintiff who is a public official or public figure is required to prove that disparaging statements were made with actual malice.").
27. *Id.* at 1254-57.
28. *Id.* at 1277.
29. *Id.*
30. *Id.*
31. *Bose*, 692 F.2d 189 (1st Cir. 1982).
32. *Id.* at 195.
33. *Id.* at 196-97. The court noted that the journalistic standards for articles such as the one in question are not high: "Although we would refrain from describing CU's loudspeaker article as exemplifying the very highest order of responsible journalism, CU does not have to meet such high standards to prevail." *Id.* at 196.
The Supreme Court affirmed the court of appeals on all key points. The Court held that appellate judges applying the *Times v. Sullivan* standard must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. It also held that application of the *Times v. Sullivan* actual malice standard to this product disparagement action involving a public figure was acceptable. Applying this standard, the Supreme Court found that the author's testimony at trial concerning the *Consumer Reports* article did not constitute clear and convincing evidence of actual malice, that is, that CU had not published the article "with knowledge that it contained a false statement, or with reckless disregard of the truth." Finally, the Court decided that the statement made by CU fell well within the "robust debate" permitted by the first amendment, and as a matter of law could not have been made with the actual malice required by *Times v. Sullivan*:

The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court . . . to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." . . . [T]he difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment.

The most important conclusion of the *Bose* Court was that appellate courts must apply close scrutiny to questions of actual malice in order to ensure that first amendment values are not bypassed. In

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35. Id. at 514.

36. Id. at 513.

37. Id.


39. 466 U.S. at 513 (citation omitted) (quoting *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979)).

40. Id. at 514.
the past, such concern for first amendment values has been extended to political speech; Bose stands for the proposition that some product critiques deserve first amendment protection equivalent to that afforded political speech.

Traditionally, for first amendment analysis, speech has been divided into two areas: political speech and commercial speech. The doctrine of commercial speech deals with the first amendment rights of speakers in the economic marketplace, as opposed to those engaged in political debate. Commercial speech historically has been broadly regulated by the government, whereas political speech has been controlled, not through government regulation, but in the courts, through libel litigation. The potential for such litigation in the product disparagement area poses a grave danger for consumer organizations. As Bose illustrates, expensive libel litigation can be brought over relatively innocuous language. Since there is virtually no limitation on the potential damages in such suits, libel actions may pose a greater threat to such organizations than would direct government regulation. The result of this threat, the suppression of robust debate in the economic marketplace, is in conflict with the policies implicit in Times v. Sullivan and its progeny, and the general deregulation of commercial speech.

A. Interaction of Libel and Commercial Speech

Over the past twenty years, there has been a revolution in libel law. The leading Supreme Court opinion regarding first amendment

41. Id. at 515 (Rehnquist, J., dissenting).
44. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.").
46. See RESTATEMENT OF TORTS § 569 comment c (1938). Actual harm need not result from a defamatory statement in order for a plaintiff to recover. The publication of the statement is itself an injury and provides sufficient grounds for recovery of at least nominal damages. In addition, a plaintiff can recover compensatory or punitive damages, depending on the circumstances involved. Id.
libel law is *New York Times Co. v. Sullivan*. In *Times v. Sullivan*, the Court set two critical standards. The first was a distinction between public officials and private persons. Under *Times v. Sullivan*, public officials are expected to bear a certain level of harsh, even inaccurate, criticism in order to vindicate the right of the public to robust and open debate. Second, the Court defined the level of criticism to be tolerated by using a standard of actual malice. Under this standard, if the plaintiff is a public official, he or she must prove not only that the injurious statement is defamatory and false, but also the author knew that it was false, or acted with reckless disregard of the truth.

Following *Times v. Sullivan*, several cases attempted to refine the concepts of "public figure" and "actual malice" and courts debated the applicability of those standards. *Bose* arose in the context of this debate, despite the fact that it was a product disparagement, rather than a libel, case.

Product disparagement differs from libel in that it normally arises in the context of commercial speech, while libel usually arises in the context of political speech. In 1976, ordinary commercial speech was granted partial first amendment protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* *Bose* is the first product disparagement case to be decided by the Supreme Court after *Virginia Pharmacy's* extension of partial first amendment protection to commercial speech.

Under current doctrines, both political speech and commercial speech have first amendment protection. However, there are dra-

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49. *Id.* at 270.
50. *Id.* at 279-80.
51. *Id.* at 280.
52. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 134-36 (1979) (petitioner not a public figure, thus actual malice standard did not apply); Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (respondent not a public figure, as she did not assume any role of special prominence or thrust herself into the forefront of a public controversy); Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974) (Court held that a person is not a public figure simply because he is involved in a public controversy); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-63 (1967) (where *Times v. Sullivan* standard was interpreted to include public figures).
54. *See, e.g.*, regarding political speech, New York Times Co. v. United States, 403 U.S. 713 (1971) (where the Court refused to enjoin the *New York Times* from publishing the Pentagon Papers); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (where the Court discussed the first amendment right of the public to access to social, political, esthetic and moral ideas); *Times v. Sullivan*, 376 U.S. 254 (1964) (where the Court held that publication
matic differences between the two which are critical in the area of product critiques. The primary limitation on commercial speech, which does not apply to political speech, is a requirement of truth.55

A false statement in an advertisement, for example, is clearly subject to government restraint.56 Is a false statement in a product critique equally unprotected under the Constitution? Or do product critiques have a special status under the first amendment? Does it make a difference whether a competitor or a third party is criticizing the product? Does it make a difference if the critic is a member of the media? If there is to be one rule for the advertiser and another for the critic, how is this to be justified?

The doctrine of commercial speech defines speech which is potentially subject to regulation because of its content.57 In one sense, the law of libel has nothing to do with commercial speech, since no speech has been controlled in a libel case. However, the application of the first amendment is intended to prevent the self-restraint which would result from the fear or threat of a libel action.58 If a type of speech can be restrained by the government because of its content, there is no special reason to protect it because of fear of libel. Since commercial speech defines the limits of the government’s ability to control speech directly, it provides an important dividing line between the areas where robust debate is the goal of the law, and where other values, such as an honest marketplace, take precedence.

The development of the doctrine of commercial speech gives a rationale for special protection of consumer critiques in the marketplace. This Article compares the Times v. Sullivan-Bose line of defamation cases with the Virginia Pharmacy concept of the role of commercial speech in the first amendment. The purpose is to create a logical structure for defining the role of product critiques under the first amendment. The logic of the position is then examined by anal-

of political advertisement is clearly protected as political speech irrespective of the fact that the newspaper was paid to carry the political advertisement).

Regarding commercial speech, see Bates v. State Bar, 433 U.S. 350 (1977) (advertisement of prices for routine legal services held to be constitutionally protected); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (advertisement of contraceptives held to be protected by first amendment); Virginia Pharmacy, 425 U.S. 748 (advertisement of prescription drug prices by pharmacists came under first amendment protection).

56. Id.
ysis of the use of product critiques for advertising purposes by the subjects of the critique.

B. Commercial Speech and the First Amendment

Historically, commercial speech was not protected under the first amendment. Therefore commercial speech could be regulated by the government without affecting the first amendment rights of the speaker or the audience. In Virginia Pharmacy, however, the Court extended first amendment protection to some types of commercial speech, citing the strong interests of consumers and society as a whole in the free flow of accurate commercial information:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

In later cases, the Court, recognizing the critical role of commercial speech in the marketplace of ideas, has continued to define the rights and limits of commercial speech under the first amendment. In Central Hudson Gas & Electric Corp. v. Public Service Commission, the Court held that, in theory, some commercial speech proposing a lawful transaction could be regulated to serve clear cut state policies, for example, energy conservation. The Court proposed a four step test:

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

59. See Valentine v. Chrestensen, 316 U.S. 52 (1942) (ordinance forbidding street distribution of commercial handbills held constitutional).
60. 425 U.S. at 765 (footnotes omitted).
61. For example, in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557 (1980), the Court noted that “[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” Id. at 561-62.
not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries are [positive], 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.63

Justice Stevens found the Court’s definition of commercial speech as “speech proposing a commercial transaction”64 to be too narrow, in that such a definition unduly restricts speech which is protected by the first amendment. In his opinion,

[n]either a labor leader’s exhortation to strike, nor an economist’s dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospects of pecuniary reward.

. . . .

This case involves a . . . regulation that . . . curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders.65

In Bolger v. Youngs Drug Products Corp.,66 however, the Supreme Court cited Central Hudson, stating that: “We have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”67

In Zauderer v. Office of Disciplinary Counsel,68 the Supreme Court held that a truthful, nondeceptive advertisement soliciting clients for an Ohio lawyer could not be restricted, despite the possibility that some such advertising might be misleading.69 Most important, in Central Hudson, Bolger, and Zauderer, the Court gave the involved speech first amendment protection despite its status as com-

63. Id. at 566.
64. Id. at 580 (Stevens, J., concurring).
65. Id. at 579-81 (Stevens, J., concurring).
69. See id. at 641-42.
mercial speech.

The Court in Zauderer rejected the suggestion that states could discourage litigation by suppressing information concerning contingent fees:

That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.70

The only recent Supreme Court case in which truthful commercial speech was suppressed was the decision in Posadas de Puerto Rico Associates v. Tourism Co.71 In Posadas, the Court upheld a regulation, directed toward residents of Puerto Rico, that prohibited truthful commercial advertising for a casino. The Court purported to follow the Central Hudson guidelines.72 The Posadas case was unusual in that the Puerto Rican government was allowed to suppress speech directed toward its own residents, while encouraging the same speech when directed to nonresidents and tourists. The case thus falls outside the mainstream of commercial speech decisions.

In Posadas, both the majority and the dissent overstated their cases. Justice Rehnquist, writing for the Court, stated in dicta that only speech concerning activity that is itself constitutionally protected is protected under the first amendment’s commercial speech doctrine.73 He distinguished Carey v. Population Services International74 and Bigelow v. Virginia:75

In Carey and Bigelow, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling,

70. Id. at 643.
71. 106 S. Ct. 2968 (1986).
72. Id. at 2976.
73. Id. at 2978–79.
75. 421 U.S. 809 (1975).
and Carey and Bigelow are hence inapposite. 76

The suggestion, without support, that the power to ban an activity automatically includes the "lesser" power to ban speech about that activity is clearly inconsistent with the Court's holding in Zauderer that advertisement of attorney contingent fees is constitutionally protected. Contingent fees by attorneys in tort actions are clearly a matter for ordinary police power regulation by the state, and state legislatures clearly possess the power to outlaw such billing practices on public policy grounds. However, under Zauderer, the state legislatures' power to regulate or prohibit contingent fees by attorneys in tort actions did not create the power to suppress truthful commercial speech concerning such practices. Similarly, virtually all commercial speech cases involve products or activities subject to prohibition by the states.77

The dissent also overstated the role of the first amendment by effectively eliminating the Central Hudson four-factor test.78 Clearly, if it is permissible for the state to prohibit and discourage gambling by its own citizens, a restraint on truthful advertising is an effective and inexpensive means of accomplishing that goal.

It is most likely that Posadas simply decides a very limited area of commercial speech as it relates to casino gambling, an industry that historically has been pervasively regulated and ordinarily prohibited. The Court recognized that casino gambling is banned by the vast majority of states.79 Such a pervasively regulated commercial enterprise may be subject to broad prohibitions extending as far as truthful advertising. The application of Posadas to cases involving

76. 106 S. Ct. at 2979, Justice Rehnquist went on to state:
[[It is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the Legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Id. (emphasis in original).


78. 106 S. Ct. at 2980-86 (Brennan, J., dissenting).

79. Id. at 2977.
ordinary commercial speech is thus likely to be limited.\textsuperscript{80}

\section*{C. Critiques After Bose: Dun & Bradstreet}

In \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}\textsuperscript{81} a libel case arising in the commercial context, the Supreme Court's plurality opinion relied on the \textit{Virginia Pharmacy} line of cases in determining whether special first amendment protection should be accorded a libel defendant who negligently prepared a credit report. Citing \textit{Virginia Pharmacy}, the Court noted that the "speech" in \textit{Dun & Bradstreet} was, like advertising, "motivated by a desire for profit," and was "hardy and unlikely to be deterred by incidental state regulation."\textsuperscript{82} The Court concluded that the reporting in \textit{Dun & Bradstreet} was more "objectively verifiable than speech deserving of greater protection."\textsuperscript{83}

In reaching its decision, the plurality in \textit{Dun & Bradstreet} used an old idea—a "matter of public or general interest"\textsuperscript{84}—in a new context. This idea was examined in \textit{Rosenbloom v. Metromedia, Inc.},\textsuperscript{85} where the concept of public or general interest was used to decide whether the \textit{Times v. Sullivan} standard of actual malice ap-

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\textsuperscript{80} The concept that pervasive regulation of an industry limits constitutional protection is perhaps best illustrated by the fourth amendment cases involving certain businesses. While the Court has repeatedly upheld fourth amendment protection of both homes and businesses against warrantless search and seizure, there has been a series of exceptions created for industries that are "pervasively regulated." For example, in \textit{Donovan v. Dewey}, 452 U.S. 594 (1981), the Court stated:

[\textit{I}t is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment. Thus in \textit{United States v. Biswell}, this Court upheld the warrantless search provisions of the \textit{Gun Control Act of 1968} despite the fact that 
\textit{[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry.} . . . Of course, the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary. But if the length of regulation were the only criterion, absurd results would occur.}

\textit{Id.} at 606 (citation omitted). See also \textit{United States v. Biswell}, 406 U.S. 311 (1972); \textit{Colonnade Catering Corp. v. United States}, 397 U.S. 72 (1970). Given the limited protection of heavily regulated businesses under the fourth amendment, comparable regulation under the first amendment is not surprising. One of the most interesting extensions of this doctrine might be to allow regulation of cigarette advertising for the purpose of reducing tobacco consumption.

\textsuperscript{81} \textit{472 U.S. 749} (1985).

\textsuperscript{82} \textit{Id.} at 762.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 755.

\textsuperscript{85} \textit{403 U.S. 29} (1971).
\end{flushright}
plied. In *Dun & Bradstreet*, however, false statements on matters not of "public concern" were held to give rise to presumed and punitive damages.

The opinion also cited *Central Hudson* for a definition of what constitutes a public question, implicitly using the same definition as that of commercial speech: "These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience."

The best interpretation of *Dun & Bradstreet* is that it establishes a three-tier system of liability. If the defendant is a public figure, the *Times v. Sullivan* rule of actual malice applies. If the issue is a matter of public concern, the *Gertz v. Robert Welch, Inc.* rule of no-liability-without-fault, and limitation to proved damages, applies. If it is not a matter of public concern, the *Dun & Bradstreet* rule allowing punitive and presumed damages applies.

The problem with this three-tier system is that it could lead to potentially devastating consequences for consumers and consumer organizations if a false statement should appear in a product critique. If the subject of a critique could convince the court that he is not a public figure, under either *Gertz* or *Dun & Bradstreet*, the defendant would be unprotected, despite the language in *Bose*

86. *Id.* at 44.
87. 472 U.S. at 760-61.
88. *Id.* at 762 (citing *Central Hudson*). In a footnote to the text, though, the opinion denied that all credit reports constituted private matters:

The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

*Id.* at 762 n.8.
89. *Id.* at 755.
91. 472 U.S. at 756-57.
92. *Id.* at 760-61.
93. See *Gertz*, 418 U.S. at 351-52. In *Gertz*, the Court defines a public figure in two ways. First, an individual may attain such "pervasive" fame and recognition that he or she becomes a public figure in all respects. Second, an individual can "voluntarily inject . . . himself or be drawn into a particular public controversy and thereby become . . . a public figure for a limited range of issues." *Id.* at 351.
PRODUCT CRITIQUES

describing the “breathing space” implicit in the first amendment. Under *Dun & Bradstreet*, a consumer organization could easily be held liable for punitive damages for simple negligence.

Both *Bose* and *Dun & Bradstreet* connect libel law to developments in commercial speech; however, the connection is poorly made. Both cases arise in a commercial setting, but neither gives any guidance as to the relative importance of free and open debate in the commercial area, as opposed to liability for errors. Two different approaches to the problem are possible. On the one hand, greater license to print commercial speech could be accompanied by more extensive liability for libel, because of the need to promote responsible speech. On the other hand, expansion of the right to print commercial speech could be accompanied by a reduction in libel exposure, on the grounds that the threat of libel would tend to substitute self-censorship for government censorship. Unfortunately, *Dun & Bradstreet* gives no guidance as to which approach the Supreme Court will ultimately adopt. The confusion arises primarily because there is no definition of what constitutes a matter of public concern, and no relation of that term to the concept of public figure. The most important issue is the relative importance of truth or robust debate. Most first amendment analysis balances these competing attributes in determining the level of legal control.

D. Truth and the First Amendment

In *Times v. Sullivan*, the Court minimized the importance of literal truth, noting the inevitability of factual errors in free debate. Imposing liability for erroneous factual assertions could, in the Court’s view, lead to self-censorship and a weakening of first amendment protection. The Court was concerned that an insistence on literal truth could discourage people from participating in the robust debate characteristic of American public life. The Court balanced the need for robust first amendment debate with the need to protect private parties. If the debate is one of sufficient public interest, a strict requirement of literal truth can be suspended to protect the

95. 376 U.S. at 279. Cf. *Gertz*, 418 U.S. at 340, where the Court noted that “there is no constitutional value in false statements of fact.” However, the Court conceded that a certain amount of abuse is inevitable in the pursuit of free speech.
96. 376 U.S. at 270.
97. *Id.*
robustness of the debate. In *Gertz*, however, the plaintiff was a private person who had a right to be protected against false defamatory statements; the press bore the risk that a statement made in good faith might be incorrect. Truth is therefore a relative value, with its significance depending on the role of the speaker and the victim.

For example, in the area of commercial speech, the Court has always insisted on literal truth. In his concurring opinion in *Virginia Pharmacy*, Justice Stewart differentiated between the press and the advertiser:

In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them.  

This distinction allows for the continuance of programs, such as those administered by the Federal Trade Commission, which control false advertising.

The Court also insisted on truthful commercial speech in *Central Hudson*. In that case, the Court conceded the government’s right to control forms of communication “more likely to deceive the public than inform it.”

In commercial speech, the insistence on literal truth creates an atmosphere in which the effective exchange of ideas can occur. In political debate, on the other hand, an insistence on truth can stifle the debate. The important question regarding product critiques is: Are they more akin to commercial speech, or to political debate? The answer to this question is of crucial significance to critics. If the *Times v. Sullivan* standard applies to product critiques, the plaintiff must prove that the false statement was made with actual malice, that is, with knowledge that it was false, or with reckless disregard for the truth. If the standard is conventional libel law, punitive damages may be available for mere negligence under *Dun & Bradstreet*.

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98. *Id.* at 271.
99. 418 U.S. at 348.
100. 425 U.S. at 777 (Stewart, J., concurring).
101. 447 U.S. at 563.
102. 376 U.S. at 279-80.
103. 472 U.S. at 760-61.
II. PRODUCT CRITIQUES: POLITICAL SPEECH?

The relative importance of truth or robust debate is reflected in the classification of product critiques as either commercial or political speech. In *Central Hudson*, the Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."104 Product critiques can easily fall within that definition. Product critiques can be an effective tool for consumer protection, but they can also be an effective form of advertising. From the producer's point of view, it is conceptually difficult to separate a product critique from a statement designed to sell a product. A favorable critique performs the same function as advertising. If unfavorable, the critique is equivalent to advertising for a competitor. Product critiques are made by many people, including competitors, interested parties, and disinterested parties. A false statement by a competitor concerning a product is the natural target of a government ban on false advertising.105

In *Dun & Bradstreet*, the credit report was held not to involve matters of public interest.108 The credit report, which involved a commentary by a third-party reviewer, is indistinguishable from a product critique.107 The Court affirmed both presumed and punitive damages without a showing of actual malice because the defamatory statements did not involve matters of public concern.108

In *Bose*, CU was not attempting to market or sell a product; its business is to sell product critiques.109 The article purported to be an unbiased professional critique of loudspeaker systems readily available to the public.110 A false statement in the product critique has the same capacity to mislead the public as does a false statement in an advertisement or a credit report. If the statements in the *Consumer Reports* article had been made by a competitor, rather than by *Consumer Reports*, there would be no question that the speech was com-

104. 447 U.S. at 561.
105. See supra text accompanying notes 56-58.
106. 472 U.S. at 761-62.
107. A credit report is a marketable product and is sold to anyone who desires such information; the credit report focuses on the credit rating of a particular person or entity in terms of credit-worthiness and, therefore, serves the same descriptive and operational purposes as a product critique. Credit ratings are intended to advise third parties as to the desirability of entering into a transaction with the described person or entity. The rating of bonds by various rating organizations might be the best example.
108. 472 U.S. at 763.
109. 692 F.2d at 191.
110. Id.
commercial speech, and subject to regulation. Many different types of organizations engage in product critiques. Some are commercial; others are competitors. What of critiques by Underwriters Laboratories? Motor Trend Magazine? Good Housekeeping? Local organizations of consumers? How should the balance be struck between truth and robust debate?

It is the role of the first amendment to protect speech related to political action. Since we have, in our free economy, made the political decision to rely on the private sector to provide most goods and services, criticism of those providers is a component not of commercial speech, but, arguably, of political speech. Product critiques, whether biased or unbiased, correct or incorrect, are an exposition of ideas and opinions concerning consumer choice in the marketplace. The value of speech in the marketplace has been recognized by its protection under the Virginia Pharmacy line of cases. As in Times v. Sullivan, the most important issue is whether the law of libel intimidates useful voices in the marketplace by insisting on literal truth. It is difficult to imagine a more direct threat to underfunded consumer participants than a specter of libel suits to be defended on the merits. Even if consumers could prove an absence of negligence, the cost of defending such suits would deter all but the hardiest of critics.

Under this reasoning, such statements should be protected by the full force of the first amendment. The criticism of products is precisely the type of robust debate that Times v. Sullivan tried to protect. Just as citizens should be free to criticize politicians who promote dangerous or wasteful policies with maximum freedom, so should consumers and consumer organizations be able to criticize producers. This means that the standard of actual malice, not literal truth, is appropriate. The problem is that under current law this standard applies only to critiques of certain vendors—those whom a court is willing to classify as public figures.

111. See Central Hudson, 447 U.S. at 563.
112. See Virginia Pharmacy, 425 U.S. at 763-64. See also infra text accompanying note 266.
113. 376 U.S. at 279.
114. See generally Times v. Sullivan, 376 U.S. at 270. Cf. Bose, 466 U.S. at 513. The Court was reluctant to overtly apply the Times v. Sullivan rule to product disparagement. The Court did, however, use the rule to decide Bose.
116. See, e.g., Golden Bear Distributing Systems v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983) (court held Golden Bear to be a private party); Steaks Unlimited, Inc. v.
A. Public Figures

Public figure status is the key to deciding whether the actual malice rule applies. In Bose, the Supreme Court did not examine the issue of whether Bose was a public figure. Instead, the Court accepted the lower court’s finding that Bose was a public figure, and Bose did not object to that characterization. Bose had submitted its radical speaker design to stereo critics and others in the hope that favorable reviews would stimulate sales. The design itself sparked considerable technical debate. This probably would have been enough to make Bose a public figure, even under the most restrictive analysis.

What, though, is the status of a vendor who does not advertise, does not invite criticism, and whose name is hardly a household word? The issue is of vital importance, since a vendor who is not a public figure could win a defamation action based on a mere negligent false statement in a product critique.

The major Supreme Court decision concerning the issue of public figure status is Hutchinson v. Proxmire. In Hutchinson, the Supreme Court dealt with a senator’s criticism of a scientist's research. Senator Proxmire presented a “Golden Fleece” award, which carried the implication that public funds were being expended on pointless and wasteful research, to Dr. Hutchinson’s study of jaw-grinding in monkeys. The Court found that the scientist was a limited purpose public figure, and rejected the suggestion that the

Deaner, 623 F.2d 264 (3d Cir. 1980) (court held Steaks Unlimited to be a public figure).


118. 466 U.S. at 492.

119. The Court in Bose noted that the petitioner actively solicited reviews in a variety of publications. Id. at 488 n.1.

120. See cases cited supra note 117.

121. See supra text accompanying note 103.


123. Id. at 115. In a speech printed in the Congressional Record, Senator Proxmire said:

Dr. Hutchinson’s studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of The American taxpayer.

It is time for the Federal Government to get out of this “monkey business.” In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer.

Id. at 116.

124. Id. at 134-35.
scientist was a limited purpose public figure for the purpose of comment on his receipt of federal funds for research purposes. The Court noted that the scientist was addressing a small, presumably expert, group of readers: "His published writings reach a relatively small category of professionals concerned with research in human behavior."

This decision would seem to support the suggestion that some scientists are public figures and some are not. Few would argue, for example, that the Nobel Prize-winning scientists who pioneered the polio vaccines are not public figures. How can the line be drawn? The opinion in Hutchinson is difficult to interpret, since the Court gave no guidance as to which scientists might be public figures. Because scientific research is a highly personal activity, criticism of a scientist's work as pointless and wasteful is almost identical to a claim of personal fraudulent activity. It may be appropriate to hold critics to a high standard of proof when they accuse a person of defrauding the government by name.

In contrast, product critiques are normally related to products, not persons. Critiques are normally in rem rather than in personam and carry few of the moral overtones of a libel action. This may be one of the significant differences between libel and product disparagement. It is possible that a vendor is a public figure for purposes of product disparagement, but not for purposes of ordinary libel. One approach might be to consider the product critique not from the producer's point of view, but from the consumer's. The definition of a public figure simply bears no relationship to a consumer's purchase or use of a product. To a consumer, all vendors stand in the same relationship vis-a-vis the consumer, no matter what their size, ownership, or scope of operation.

Suppose there were three apartment complexes in a city, all

125. Id.
126. Id. at 135.
127. See infra text accompanying notes 132-36. See also Fetzer, The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish, 68 IOWA L. REV. 35, 77 (1982) (discussing Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980), where court held that plaintiff was a public figure for purposes of the "controversy surrounding its sales").

For the purposes of this Article, the term "public figure" will be equivalent to the term "limited purpose public figure," with the limited purpose being that of product critiques.
128. All vendors who place products in the stream of commerce occupy the same position vis-a-vis the consumer. They are all competitors competing for a limited amount of disposable income. There is no body of law which distinguishes vendors' responsibilities to consumers based on the public perception of the size of the operation.
constructed and operated in exactly the same way, one by the city, one by a national firm which advertises extensively, and one by a private developer. Consumer organizations wish to criticize the conditions in the three apartments. The city public housing director is clearly a public figure. Is there any rational basis for treating the other vendors differently? As far as the consumer is concerned, all are engaged in the same activity. Logic would indicate that all should be subject to the same rules on libel. In all three cases, the public is invited to use the product. In all three cases, the consumer has the same interest in robust debate in the marketplace.

The same could be said for the vendor of any product. Is there any basis for concluding that some restaurants are public figures, and others are private persons, when it comes to restaurant reviews? Should some defense contractors be public figures and others not? Or are they all equally vulnerable to criticism? Placing a product in the marketplace is a public act.129 Criticizing products serves the same purpose of robust public debate as does any political argument. As the Court in Virginia Pharmacy suggested, to many people it is even more important: “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”130

The most logical conclusion is that vendors who place products on the market are public figures for the purpose of product critiques and would fall under the Gertz definition of public figures as including those who “engage the public’s attention in an attempt to influence . . . outcome.”131 Advertisers clearly engage the public’s attention and attempt to influence them to buy their products. Nothing about the Supreme Court’s ruling in Gertz requires that the public issue be overtly political; therefore, it is consistent with Bose and Dun & Bradstreet.

129. The “public” nature of commerce has been analyzed in numerous cases. For example, congressional power under the commerce clause for interstate commerce was extended in Wickard v. Filburn, 317 U.S. 111 (1942), where the Supreme Court held that a quota could be imposed on a farmer’s production of wheat, even though the wheat was to be consumed on his own farm or sold locally. The Court reasoned that the total supply of an agricultural commodity greatly affects both prices and the supply and demand for wheat in interstate commerce. See also Katzenbach v. McClung, 379 U.S. 294 (1964), which held that the purchase of meat from a supplier who received it from out of state sources was sufficient justification for the application by Congress, under the commerce power, of Title II of the Civil Rights Act of 1964.
130. 425 U.S. at 763.
131. 418 U.S. at 352.
In *Dairy Stores, Inc. v. Sentinel Publishing Corp.*, a seller of spring water brought a product disparagement action against the publisher of a derogatory article about the spring water. The New Jersey Superior Court noted that a consumer's need for information about goods and services was a first amendment interest comparable to the interest in being informed about political and social issues. Corresponding to the consumer's right to know is the media's right to convey such information. In the opinion of the court in *Dairy Stores*, a business exposes its products or services to public scrutiny in much the same way as does a public official or public figure. The court reasoned that a business' entry into the marketplace for the purpose of making a profit is an activity which "'invites attention and comment.'"

The alternative is to develop a system where some corporations are public figures and others are not. The problem with this approach can be seen in *Golden Bear Distributing Systems v. Chase Revel, Inc.*

In *Golden Bear*, the "products" being sold were franchises for various soft drink machines. A magazine oriented toward buyers of these franchises published an article that could be considered negligently defamatory. The article confused the names of several corporations, all called Golden Bear. The court considered Golden Bear to be a private party as a matter of law: "Here Golden Bear of Texas did not 'thrust itself' into a public controversy by merely advertising its services. Were we to agree with Entrepreneur's hypothesis, the mere fact of advertising would render all businesses public figures."

Thus, in *Golden Bear*, a consumer-oriented magazine was held liable for defamation because it did not adequately differentiate between two corporations engaged in the same line of business who had

133. Id. at 214, 465 A.2d at 959.
134. Id.
135. Id. at 215, 465 A.2d at 960. The *Dairy Stores* court reiterated the idea from *Gertz* that a distinction must be made between public and private individuals because, in general, "'public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them,'" (quoting *Gertz*, 418 U.S. at 344-45).
136. Id. (quoting *Gertz*, 418 U.S. at 345).
137. 708 F.2d 944 (5th Cir. 1983).
138. Id. at 947.
139. Id.
140. Id. at 952. *See also* Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1980) (corporations as a class are not public figures for first amendment purposes).
adopted similar names. The article was literally true, but the court held the magazine's implication of bad conduct by one corporation to another of similar name to be defamatory. Most important, the court imposed on the defendant magazine the burden of proving that the statements were true, rather than imposing on the plaintiff corporation the burden of proving that the statements were false.

In Hallmark Builders, Inc. v. Gaylord Broadcasting Co., a homebuilder sued a television station for defamation regarding statements about homes the plaintiff had built. The court declared the builder to be a private person, and held the television station to a standard of proving the truth of the broadcast. This does not seem to comport with the focus on free and robust debate in Times v. Sullivan, nor with the acceptance in Virginia Pharmacy of commercial speech as a key first amendment concern. A better rule is that all vendors are public figures with regard to the products they offer for sale. At the very least, since Bose stands for the proposition that a finding of actual malice must be carefully examined by the appellate court, a finding that a defendant is not a public figure should be equally closely examined, since it is the threshold question which determines whether the actual malice standard applies.

B. Actual Malice

Once a defendant is shown to be a public figure, the actual malice rule applies. One of the most interesting issues in actual malice is the question of respondeat superior. Generally, an employer is liable for the torts of an employee who acts within the scope of his employment. Should a publication be required to have actual malice or is it sufficient that the individual writing the story has actual malice? For example, suppose an employee writes and publishes a critique that he knows to be false. Should the plaintiff be able to impute the malice of the reporter to the publication?

141. 708 F.2d at 948.
142. Id. at 949.
143. Id. at 952.
144. 733 F.2d 1461 (11th Cir. 1984).
145. Id. at 1463.
146. Id. at 1464.
147. Bose, 466 U.S. at 498-511.
149. See Bose, 466 U.S. at 490.
150. See W. Prosser & W. Keeton, supra note 14 § 70, at 502. See also Bose, 466 U.S. at 494.
The court of appeals in *Bose* concentrated on the actual malice of CU as publisher, rather than that of the engineer, and found that "CU’s editorial procedures reveal no evidence of actual malice." Since no malice was found on the part of CU, the district court’s finding of liability was reversed. The Supreme Court did not reach the issue of imputed malice, since it determined that the engineer lacked actual malice.

Perhaps the Court’s comments in *Gertz* shed light on the issue. In that case, the Court held that there could be no liability without fault for defamation. The Court required negligence at least, even in the case of a private figure. *Dun & Bradstreet* did not change that rule, and on its facts there was probably corporate negligence. In the case of a public figure, negligence is not enough; the *Times v. Sullivan* rule requires willfulness. Yet respondeat superior is essentially a doctrine of strict responsibility for the failings of a subordinate. How does this standard mesh with the prohibition of strict liability under *Gertz*?

Since product critiques normally involve extensive subjective analysis, a possible rule under *Bose* would be that there is no imputation of malice from the reporter to the publication, absent some act by the publication at least amounting to negligence in handling the story, or the willful refusal to publish a correction, retraction, or an explanation of its procedures.

C. Opinion v. Fact

Whether or not the plaintiff is a public figure, there is more first amendment protection of opinions, as opposed to facts. Under *Gertz*, opinions, or at least ideas, receive absolute first amendment protection; if critiques constitute opinion, there is little need to

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151. 692 F.2d at 197.
152. 466 U.S. at 513.
153. 418 U.S. at 347. The Court held that the states could define "the standard of liability for a publisher or broadcaster"; however, liability could not be imposed without fault. *Id.*
154. *See id.* at 347 n.10. The *Gertz* Court warned that strict liability should not be enforced, even when a private individual is involved.
156. 376 U.S. at 279-80.
159. *Id.* ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").
worry about other issues.

In *Bose*, however, the Court accepted the defamatory comments as statements of fact, not opinion, albeit with some doubts. Since both the appellate court and the Supreme Court could have avoided constitutional questions by classifying the allegedly defamatory remarks as statements of opinion, such remarks probably represent the borderline between statements of fact and opinion. Since the consequence of labeling a comment as a statement of fact rather than opinion can be devastating, the subject deserves more analysis than both courts gave it in *Bose*.

In libel cases connected with political discourse, intemperate language has often been protected as opinion. In *Liberty Lobby, Inc. v. Anderson*, for example, the court considered statements charging the plaintiff with “virulent [sic] anti-Semitism . . . , incessant Red-baiting to smokescreen fascist propaganda [sic] . . . , [and] the use of lies and half-truths” to be statements of opinion. The court set the standard for what constitutes an opinion as situations in which “[t]here are no objective criteria by which the truth or falsity of these statements can be evaluated.” Oddly, the court determined that the jury could find defamatory such statements as:

Carto “conducts his business by way of conference calls from a public telephone,” which arguably suggests criminality; [and a] . . . [c]laim that in 1968 a Carto front organization “used a direct mail blitz to support G. Gordon Liddy’s Congressional campaign in New York” (since Liddy was later convicted of [a] felony in connection with political activities, the allegation could be considered defamatory).

The idea that the inference to be drawn from these statements of “fact” is so clearly a matter of equally unprovable speculation did not trouble the court at all.

Similarly, in *Buckley v. Littel*, a statement describing the plaintiff as a “fellow traveler” of “fascists” was protected opinion, but the court considered an equally vague statement to be one of fact: “Like Westbrook Pegler, who lied day after day in his column

160. 466 U.S. at 513.
161. 746 F.2d 1563 (D.C. Cir. 1984), vacated and remanded on other grounds, 106 S.Ct. 2505 (1986).
162. Id. at 1573.
163. Id. at 1572.
164. Id. at 1578.
about Quentin Reynolds and goaded him to a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do. The court treated this as a provable statement of fact that Buckley was a libeller.

One of the most dramatic recent cases in the area of fact versus opinion is Ollman v. Evans. In Ollman, a Marxist professor was nominated to be chairman of the Department of Government and Politics at the University of Maryland. In an OP/ED column, the defendants, nationally syndicated columnists, quoted an unnamed political scientist as saying, "Ollman has no status within the profession, but is a pure and simple activist."

The determination of whether this was an actionable statement of fact or protected opinion took seventy pages in the Federal Reporter, and resulted in a six-five decision in which no one view commanded a majority. Five judges found for the court that the statement was protected opinion. Four judges, including two who supported the opinion for the court, found that the statement, if taken alone, would be a statement of fact. In his concurrence, Judge Bork wrote:

The dissents . . . suggest that an assertion about one's general reputation is an assertion of fact. If common usage were the test, and if we looked at the sentence standing alone, the dissent's characterization would certainly be correct . . . . If placing the bare assertion in question into one of two compartments labelled "opinion" and "fact" were the only issue we were allowed to consider, I would join the dissent.

Judge Bork went on to describe the "startling inflation of damage awards" and suggested that such damage awards would impose

166. Id. at 895.
167. Id. at 896.
169. Id. at 973.
170. Id. at 971.
171. Id.
172. Id. at 994 (Bork, J., concurring). Judge Bork went on to defend fashioning rules of libel to protect first amendment values broadly:

Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?

Id. at 996.
self-censorship on the press.\textsuperscript{173} He also suggested that the critical point for decision is not the fact-opinion dichotomy, but rather protection of the values implicit in the first amendment:

[I]n Supreme Court decisions and the decisions of other courts there is no mechanistic rule that requires us to employ hard categories of "opinion" and "fact"—defined by the semantic nature of the individual assertion—in deciding a libel case that touches upon first amendment values.\textsuperscript{174}

Bork noted that the same factors that caused Professor Ollman to be deemed a public figure should lead the courts to protect speech concerning him:

Ollman may not be required to accept the same degree of buffeting that a candidate for a major office must, but when he chose to become a spokesman for Marxism to be implemented politically, . . . when Professor Ollman chose that path he became a figure in whom the public might legitimately be interested . . . . In a word . . . Ollman entered a first amendment arena and had to accept the rough treatment that arena affords.\textsuperscript{175}

The five dissenters wrote four opinions, three of which concurred that the statement was one of fact, and a "classic and coolly crafted libel."\textsuperscript{176}

In the area of product critiques, a special problem of fact or opinion can arise when a person with special expertise or knowledge of a particular situation makes a statement. If, for example, an oncologist says "this substance causes cancer," ordinary people may have no way of knowing if this statement is one of fact or opinion.\textsuperscript{177}

\textsuperscript{173} Id. at 996. \\
\textsuperscript{174} Id. at 1001. \\
\textsuperscript{175} Id. at 1004. \\
\textsuperscript{176} Id. at 1036 (Scalia, J., dissenting). \\
\textsuperscript{177} The contrast is best illustrated by the case of Reserve Mining v. EPA, 514 F.2d 492 (8th Cir. 1975). The appellate court in that case quoted heavily from the testimony of a witness who appeared both as a scientist and as a physician:

\begin{quote}
After some degree of exposure to the literature and to the testimony given in this trial I would say that the scientific evidence that I have seen is not complete in terms of allowing me to draw a conclusion one way or another concerning the problem of a public health hazard in the water in Lake Superior.
\end{quote}

\begin{quote}
Q. [The court]. Would you define the difference between what you say is scientific proof and medical proof . . . ? A. Well, science requires a level of proof which is pretty high. That is, we do not accept as truth things that seem to be casually associated, a cause casually associated with an effect. We have erected certain statistical barriers which force us to come to conclusions based on probability . . . .
\end{quote}

\begin{quote}
Now, when I turn, however, to the medical side of things, Your Honor, I am
The court of appeals in *Bose* discussed this issue in dicta:

Although CU's argument that the statement is an opinion is plausible, the seeming scientific nature of the article—indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests—would support the position that the statements are factual.\(^{279}\)

Resolution of this area will require further litigation, but the "scientific nature" test suggested by the court of appeals in *Bose* probably gives too little weight to the range of fact and opinion in product testing.

One possible approach would be to consider all consumer criticism to be in the nature of opinion, on grounds of public policy. The difficulty with this approach is that the Supreme Court has held that there is no constitutional merit in false statements of fact.\(^ {279}\) The law allows recovery if a defamatory statement is made falsely and maliciously and is truly a statement of fact.\(^ {180}\)

A second approach might be to borrow from the "puffing" defense enjoyed by vendors when they are describing their own wares.\(^ {181}\) These "vague commendations of quality" have not been held to create any warranty, presumably on the grounds that no consumer reasonably believes anything a vendor says.\(^ {182}\) Utilizing this concept would immunize any statement that did not purport to be a fact, and would immunize projections of future facts such as the frequency of repair of a car or the anticipated level of consumer satisfaction.

A third approach would be to make the description of a statement as one of fact or opinion depend on whether or not the plaintiff is a public figure, as proposed by Judge Bork in *Olman*.\(^ {183}\) It may be possible to create a different definition of a fact for a public person, as opposed to a private person. It is possible that a statement of fact concerning a private person could be considered an opinion faced with the fact that I am convinced that asbestos fibers can cause cancer. \ldots

\(^{278}\) Id. at 518-19.
\(^{178}\) 692 F.2d at 194.
\(^{179}\) *See supra* note 95 and accompanying text.
\(^{182}\) Id.
\(^{183}\) 750 F.2d at 994 (Bork, J., concurring).
when directed at a public person.\textsuperscript{184} For example, if we say that a private person is a crook, that might be considered a statement of fact, defamatory if false. If we say the President of the United States is a crook, that would be classified as opinion. Making the definition of a fact or opinion depend on the existence of public figure status would tend to insulate robust debate on public issues, while protecting private persons. As noted above, however, it requires a consistent definition of who is a public figure for product critiques.

D. Media Defendants

The Court in \textit{Bose} addressed only a few of the issues involved in product critique cases. Among the most important issues left unresolved is the implication for critics who are not members of the media. In prior cases, statements given the widest range of protection under the first amendment were those made by the media.\textsuperscript{185} Some courts and commentators have suggested that there is a special "media defense."\textsuperscript{186} The concept that there is special standing for members of the media arises from the need to protect the first amendment rights of those who engage in political debate, but who are essentially commercial entities, such as the \textit{New York Times}.\textsuperscript{187} In \textit{Bose}, CU was found to be a "media" defendant by the Court.\textsuperscript{188}

A defense based on the defendant's status as a member of the media, however, may cause consumers more harm than good. Many consumer organizations and operations would not qualify as members of the media. Also, there is a question as to whether members of the media lose protection if their speech is simply related to their own economic interests.

In \textit{Dun & Bradstreet}, a majority of the Court indicated that it rejects the special provision of a media defense in libel cases.\textsuperscript{189} The four dissenters argued:

\begin{itemize}
\item \textsuperscript{184} See \textit{Ollman}, 750 F.2d at 975 n.10 (distinction between fact and opinion should depend on whether person is public or private figure).
\item \textsuperscript{185} See, e.g., \textit{Ollman}, 750 F.2d at 970; \textit{Times v. Sullivan}, 376 U.S. 254.
\item \textsuperscript{187} See generally \textit{Times v. Sullivan}, 376 U.S. 254.
\item \textsuperscript{188} 466 U.S. at 492 n.8.
\item \textsuperscript{189} 472 U.S. at 781-84.
\end{itemize}
Respondent urged . . . [restriction of] the applicability of Gertz to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ." 190

Justice White, although concurring in the decision, agreed with the dissenters on this point:

Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and non-media defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. 191

Since Justice Powell did not mention the media rule in his opinion for the court, the most appropriate conclusion is that it is not currently viable.

E. Competitor v. Noncompetitor Critics

Based on the above analysis, vendors in a free enterprise economy, whatever their size, product, or method of doing business, would be public figures protected from product critiques only by a standard of actual malice. 192 This proposal does not mean that competitors would enjoy the same protection. Clearly, a misrepresentation concerning a competitor's product is precisely the type of conduct a court would allow to be regulated. 193 It may be possible to fashion one rule for vendors and another rule for critics such as CU. A rule for critics has been made before, though in different circum-

190. Id. at 781 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978)).
191. Id. at 773.
193. See, e.g., Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941) (court upheld FTC cease and desist order against manufacturer of stainless steel cooking utensils, based upon unfair commercial representation of aluminum cookware).

In addition, the court in Dairy Stores noted that:

A different conclusion might be reached in a case in which a competitor rather than a newspaper was the publisher of a false statement about a business or its product. Such a statement probably would be characterized as "commercial speech, that is expression related solely to the economic interests of the speaker and its audience . . . which is entitled to a "lesser protection . . . than . . . other constitutionally guaranteed expression."

191 N.J. Super. at 216 n.4, 465 A.2d at 960 n.4.
stances, in the related cases of Perma-Maid Co. v. FTC\textsuperscript{194} and Scientific Manufacturing Co. v. FTC.\textsuperscript{195} In Scientific Manufacturing, an author had marketed a book which contained his opinion that aluminum pots caused cancer.\textsuperscript{196} In Perma-Maid, a corporation selling stainless steel utensils made the same claims about aluminum.\textsuperscript{197} The Federal Trade Commission (FTC) brought actions against both parties. The FTC prevailed against the manufacturer in Perma-Maid on a claim of false advertising,\textsuperscript{198} but lost against the author in Scientific Manufacturing on first amendment grounds.\textsuperscript{199} While these cases predate Valentine v. Chrestensen,\textsuperscript{200} in which the Court determined that commercial speech was not entitled to first amendment protection, they strongly suggest that a noncompetitor critic is entitled to greater protection under the first amendment than a competitor would be.\textsuperscript{201}

In Lowe v. SEC,\textsuperscript{202} the Supreme Court discussed the exception for “bona fide newspapers” in the Investment Advisors Act. The SEC position was that an investment newsletter, which provided critiques of various investments, was not a newspaper but was commercial speech, and could be regulated under the first amendment.\textsuperscript{203} Avoiding the constitutional question, the Court held that the newsletter involved was a bona fide newspaper under the Act.\textsuperscript{204} The Court interpreted the Act as being sensitive to the first amendment.\textsuperscript{205} The newsletter’s investment critiques were, therefore, unregulated political speech.\textsuperscript{206} The Court analogized the situation to

\begin{enumerate}
\item 194. 121 F.2d 282 (6th Cir. 1941).
\item 195. 124 F.2d 640 (3d Cir. 1941).
\item 196. Id. at 641.
\item 197. 121 F.2d at 283.
\item 198. Id. at 285.
\item 199. 124 F.2d at 644-45.
\item 200. 316 U.S. 52 (1942). Valentine was the original case in which the Court determined that commercial speech was not entitled to first amendment protection. It began the era of restriction of commercial speech which was ended in Virginia Pharmacy, 425 U.S. 748 (1976).
\item 201. See Scientific Mfg., 124 F.2d at 644. The court stated that “the present petitioners not being engaged or materially interested in the cooking utensil trade, the Commission was without power to enjoin their sale and distribution of the pamphlets . . . concerning the use of aluminum cooking utensils.”
\item 203. Id. at 183-89.
\item 204. Id. at 210-11.
\item 205. Id. at 204.
\item 206. The Court noted that: “To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications.” Id. at 210.
\end{enumerate}
Bose, stating in a footnote:

Moreover, because we have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment, . . . it is difficult to see why the expression of an opinion about a marketable security should not also be protected.\footnote{Id. at 120 n.58 (citation omitted).}

\section*{F. Use of Product Critiques by Advertisers: General Signal}

The development of commercial speech and its importance in the marketplace is best illustrated by the use of third party product critiques in advertisements, despite the wishes of the person making the product critique. In \cite{1983}, the Court of Appeals for the Second Circuit would not enjoin the defendants from broadcasting two commercials for Regina vacuum cleaners that quoted ratings published in the plaintiff's magazine, \textit{Consumer Reports}, despite Consumers Union's noncommercialization policy.\footnote{724 F.2d 1044 (2d Cir.1983), \textit{cert. denied,} 469 U.S. 823 (1984).} The case is the first of its kind to be decided against Consumers Union (CU) and presents important issues dealing with the first amendment, its interplay with the fair use defense in copyright law,\footnote{Id. at 1046.} and the requirement of truthfulness under the Lanham Act.\footnote{Id. at 1048-49.}

The legal issues involved in this case focus on two separate conflicts under the first amendment. The first conflict is the right of the holder of a copyright to the fruits of his labor, versus the rights of a user of copyrighted material.\footnote{Id. at 1052.} The second conflict involves the Lanham Act, which is designed to prevent false and misleading inducements from corrupting the basic structure of commercial information in the marketplace.\footnote{Id. at 1048.} The court of appeals relied heavily on its own precedent in \cite{Harper & Row Publishers v. Nation Enterprises} when it decided \textit{General Signal}. Subsequently, \textit{Harper & Row} was reversed by the Supreme Court, so the current status of the law in this area is in doubt.

CU published a report in its July 1983 issue of \textit{Consumer Re-
ports, rating various lightweight vacuum cleaners. The Regina powerteam vacuum cleaner received a check-rated rating, awarded when a product is deemed by CU to be of superior quality and price in relation to non-check-rated models. CU also broadcast the results of the test over the CBS radio network and distributed the results to between three hundred and four hundred newspapers.

The Regina Company (Regina), a division of General Signal Corporation, decided to run an advertising campaign for Regina vacuum cleaners using CU's evaluation of its product, and they prepared three thirty-second television advertisements. The first advertisement did not mention CU’s evaluation in Consumer Reports and was not challenged in the actual litigation.

The second advertisement stated that the Regina Powerteam vacuum cleaner “[was] the only lightweight that Consumer Reports says, Quote, was an adequate substitute for a full-sized vacuum.” Accompanying the announcer’s words, for the entire time CU was quoted, was a statement superimposed on the screen, which read: “Consumer Reports is not affiliated with Regina and does not endorse products.” The advertisement was broadcast on all three major networks, starting September 27, 1983.

The third advertisement included several quotations from Consumer Reports that were displayed on the screen and read by the voice-over announcer. As in the second commercial, each time CU was mentioned, a disclaimer appeared stating that CU is not affiliated with Regina and does not endorse products. The disclaimer appeared in the third advertisement for a period of 14 seconds out of the total 29.5 seconds. The third commercial was never actually broadcast.

CU’s noncommercialization policy is printed each month in its magazine, Consumer Reports:

Consumers Union accepts no advertising or product samples and is not beholden in any way to any commercial interest. Its Rat-

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215. General Signal, 724 F.2d at 1046.
216. Id.
217. Id. at 1047.
218. Id.
219. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Id.
ings and product reports are solely for the use of readers of Consumer Reports. Neither the Ratings nor the reports may be used in advertising or for any commercial purpose. CU will take all steps open to it to prevent such uses of its material, its name, or the name of Consumer Reports.225

Regina Company gave notice to CU that it planned to broadcast the Powerteam commercials using the CU material.226 On September 30, 1983, CU demanded that Regina cease and desist from airing these commercials. Regina responded to CU’s demand but was told that CU had already commenced an action for injunctive relief. CU demanded temporary and permanent injunctions, compensatory damages of $5 million, and punitive damages of not less than $5 million, alleging violations of the Copyright Act, the Lanham Act, and New York State law.227

On October 3, 1983, the district court granted a temporary restraining order prohibiting Regina from using the advertisements.228 Regina, in response to CU’s motion, changed the disclaimer to state that “Consumer Reports is not affiliated with Regina and does not endorse Regina products or any other products.”229 The voice-over in the second commercial was also changed to include the word “unquote” at the end of the quotation from Consumer Reports.230 The district court issued a preliminary injunction prohibiting the broadcast of the Regina Powerteam advertisements that used the ratings from Consumer Reports.231 The district court addressed only the copyright issues, and denied Regina’s claims under the first amendment and the fair use defense, and determined that the elements of copyright infringement had been established.232

Regina appealed, arguing that the commercials were a fair use of copyrighted material and that ratings are facts that are not protected by the copyright laws.233 Regina also asserted that the Lanham Act and state law did not provide a basis as a matter of law to enjoin truthful and accurate reporting of CU’s test results of its

225. Id. at 1046.
226. Id. at 1047.
227. Id.
228. Id. at 1047-48.
229. Id. at 1048.
230. Id.
231. Id.
232. Id.
233. Id.
products. Additionally, Regina claimed consumers and the public interest would be adversely affected, and Regina would suffer irreparable injury, if the injunction were allowed to remain in effect.

The appellate court reversed the issuance of the preliminary injunction, holding that CU did not establish a likelihood of success on the merits of the case based on copyright law, the Lanham Act, and New York State law. The court held that Regina's use of CU's ratings constituted fair use, an exception to copyright infringement. The appellate court relied on Harper & Row, which approved a fair use defense in a case involving the unpublished works of President Ford's memoirs, but this case was later reversed by the Supreme Court. The precise status of the fair use defense is thus unclear.

The court also held that CU did not demonstrate that the advertisements would create a likelihood of confusion under the Lanham Act due to the adequacy of the disclaimer contained in the commercial messages. Further, the court found that the legislature of the State of New York did not intend a New York statute prohibiting unauthorized use of the name of a nonprofit corporation to apply to a nonprofit corporation whose business was the evaluation of products and the wide dissemination of those results, since the purpose of the statute was to protect the privacy of the nonprofit corporation.

CU petitioned for an en banc hearing by the entire Court of Appeals for the Second Circuit. The request was denied, but the dissent noted the congressional determination that the copyright laws should be subordinate to the first amendment. The dissent argued that the en banc hearing should have been permitted because the "use of 'commercial free speech' to justify a fair use defense to copyright infringement stands either the copyright law or the First Amendment on its head." The dissent further claimed that the

234. Id.
235. Id. at 1051, 1053, 1055.
236. Id. at 1051.
239. 724 F.2d at 1053.
240. Id. at 1054.
241. 730 F.2d 47 (2d Cir. 1984).
242. Id. at 50 (Oakes, J., dissenting).
243. Id.
opinion holds that commercial use "is more entitled to the fair use defense than a use that is not. At the very least the panel opinion reads the presumption against the fairness of commercial use out of the statute. Doing so in the name of the First Amendment . . . cheapens that Amendment's coin." 244

III. COPYRIGHT LAWS AND PRODUCT CRITIQUES

Article I, section 8, of the Constitution provides that: "The Congress shall have Power . . . to 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." 245 The law of copyright grants a limited monopoly over the exclusive work of the author for a limited period as a reward for the creative ability of its creator. 246 Such a monopoly is also deemed to be of high social value to the general public. 247 The limited monopoly also ensures that the public will be allowed access after exclusive control of the work has expired. 248

The monopoly is not absolute. The Copyright Act does permit some use of copyrighted material without the owner's consent. 249 Numerous decisions established a doctrine of "fair use" of copyrighted material. 250 These decisions are codified in the Copyright Act:

[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of

244. Id. (emphasis in original).
247. Id.
248. Id.
250. Id.
the copyrighted work.251

The various types of usage which can be considered fair use include, but are not limited to, criticism, comment, news reporting, scholarship, and teaching.252 These examples are not a complete list of accepted uses, but are meant to exemplify those uses considered fair. The uses do not share any common characteristic. Some are commercially oriented; others are not. Some uses by their very nature require copying the expression; others do not. The courts decide each case based on its own merits and facts, helping the doctrine to evolve over time.253

The purpose of the fair use defense is to ensure that social values protected by other legal and statutory protections and the first amendment are not eliminated by use of the copyright law.254 The Copyright Act does not go as far as the constitutional provision might permit. Since the copyright provision and the first amendment are both in the Constitution, it is possible that Congress could have prevented any use of copyrighted material. It is clear that Congress has not done so. The Copyright Act was designed to give the courts the power to permit some uses of copyrighted material without consent of the copyright holder.255 Courts recognize that a balancing test exists with the fair use doctrine.256 The copyright issue presented in General Signal is whether the advertisements fall within the section 107 fair use exception.257 If so, Regina's use of the information is permitted despite the copyright protection under the Copyright Act. Answering the question of fair use requires examination of the four section 107 factors — purpose and character of the use, nature of the copyrighted work, quantity of the work taken, and effect on demand for the product.

A. Purpose and Character of the Use

This factor examines the use to which the copyrighted material is put. The communication by Regina cannot be said to be one of "criticism" or "comment," in that the advertisements extol the vir-

251. Id.
252. Id.
254. Id. at 555-60.
255. Id. at 549; see also Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 432-33 (1984).
257. 724 F.2d at 1048.
The advertisements may or may not constitute news of a newsworthy event, for example, ratings of an unbiased evaluator in the lightweight vacuum cleaner industry. Fair use does not require that the user of the copyrighted material (Regina) be in the news business, but rather that the subject of the report be newsworthy. "The issue is not what constitutes "news," but whether a claim of news reporting is a valid fair use defense to an infringement of copyrightable expression." 259 The Supreme Court has stated that "the news element — the information respecting current events contained in the literary production — is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day." 260

Certainly a news report that CU had rated a product unacceptable would be protected as fair use if published in the New York Times. The crucial question is whether the advertisements constitute a news report of a product's rating even though it is broadcast as an advertisement.

What distinguishes this case from most newsworthiness cases is that CU, as the copyright holder, actually created the newsworthy event in addition to publishing it. As a practical matter, the CU publication is the event which is news, rather than the evaluation, or creation of that news. Since the taking of the heart of a publication is normally considered a violation of the Copyright Act, 261 such a use would tend to be unfair.

The second prong of this element is commercialization. 262 In Sony Corp. v. Universal Studios, Inc., 263 the Supreme Court stated that use of copyrighted material solely for commercial purposes is presumptively unfair. 264 Perhaps this principle is better stated by saying that noncommercial use is presumptively fair, since the holding in Sony was that the noncommercial use in that case was fair use under the Copyright Act. 265 The court in General Signal held that

258. Id. at 1047 n.2.
264. Id. at 451.
265. Id. at 456.
while the purpose of the use was clearly commercial, the advertisements also conveyed useful information to consumers, and that useful information is protected under the commercial speech doctrine of the first amendment as recognized in Virginia Pharmacy.\textsuperscript{266}

In General Signal, the court claimed that such a use would only increase the exposure of CU's ratings to the public at large, thus bestowing a “significant public interest” and that “[s]ince the purpose is to report factual information . . . it is more conducive to the concept of fair use.”\textsuperscript{267} Advertising is subject to a large degree of control, even though protected by the first amendment.\textsuperscript{268} While the boundaries of control of advertising have not been fully explored, restrictions which protect an orderly marketplace have been upheld.\textsuperscript{269} Despite the appellate opinion, the purpose and character of the use would tend to support a finding that the use by Regina was not fair use. The primary argument is that the heart of the copyrighted work was appropriated simply to promote a product.

\textbf{B. Nature of the Copyrighted Work}

The second factor to be considered under the fair use doctrine is the nature of the copyrighted work.\textsuperscript{270} Characterization of the ratings by CU as fact, opinion, news, or research data could be essential in determining whether copying CU’s expression constitutes fair use. The Copyright Act does not protect the underlying idea, but only the expression of that idea.\textsuperscript{271} The problem occurs when the expression is the idea. The court in General Signal stated that implicit in Harper & Row was an acknowledgement that, “where accurate reporting requires use of verbatim quotations, fair use will be liberally applied.”\textsuperscript{272}

The suggestion is that the “idea” is the actual rating of the vacuum cleaner, while the expression is the copyrighted story. Permitting CU to control use of the actual rating would be akin to allowing them to control the flow of news. The idea-expression dichotomy embodies the competing interests between copyright protection and the first amendment.\textsuperscript{273} The Supreme Court has held that it is an axiom

\begin{itemize}
  \item \textsuperscript{266} 724 F.2d at 1049.
  \item \textsuperscript{267} \textit{Id.}
  \item \textsuperscript{268} See, e.g., Central Hudson, 447 U.S. at 560-61.
  \item \textsuperscript{269} \textit{Id.} at 561-66.
  \item \textsuperscript{270} 17 U.S.C. § 107 (1982).
  \item \textsuperscript{271} 17 U.S.C. § 102(b) (1982).
  \item \textsuperscript{272} 724 F.2d at 1050.
  \item \textsuperscript{273} Harper & Row, 471 U.S. at 556-57.
\end{itemize}
of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself. 274

The Ninth Circuit, in Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 275 observed:

"[T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the 'expression' of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his work in that it renders his 'ideas' per se unprotectable, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue." 276

In Harper & Row, a copyright infringement action was brought arising out of unauthorized publication of quotations from President Ford's unpublished memoirs, in an attempt to "scoop" the news story. 277 The published account used numerous direct quotes from a pirated copy of the manuscript to add verisimilitude to the story. 278 The court of appeals approved a fair use defense based on the fact that the content was factual and contained subjects of important public significance. 279 The Supreme Court reversed, holding that the unauthorized publication of verbatim quotes from the "heart" of unpublished material effectively supplanted the copyright holder's right of first publication, and thus did not constitute a fair use within the meaning of section 107 of the Copyright Act. 280

The Supreme Court in Harper & Row was clearly willing to give great deference to the financial incentives built into the copyright scheme, even at the cost of keeping facts of clear public interest concealed. Harper & Row can be distinguished from General

274. Mazer v. Stein, 347 U.S. 201, 217-18 (1954). The Ninth Circuit has elaborated on this, stating that "this principle attempts to reconcile two competing social interests: rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter." Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977).
275. 562 F.2d 1157 (9th Cir. 1977).
276. Id. at 1170 (quoting Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180, 1192-93 (1970)).
277. 471 U.S. at 542.
278. Id. at 542-43, 567.
279. Id. at 542.
280. Id. at 542, 548-49, 564-66.
Signal in that President Ford’s memoirs had yet to be published, while the information from CU had been disseminated in both the print and broadcast media. This distinction may have been crucial to the court’s rejection of CU’s request for an injunction, since the commercial value of the particular measure that rated lightweight vacuum cleaners was not affected at the newsstand. Since the interest so vigorously protected by Harper & Row was the right of first publication and its attendant financial benefits, Harper & Row is of limited value in analyzing General Signal.

If CU were in the commercial business of rating products, then it could establish any terms desired prior to accepting a product for rating, including limitations on how its rating was to be used. Terms would be a simple issue of contract law. CU, by choosing a non-profit, noncommercialization policy for its business, is unable to control the way its copyrighted publication is used. The copyright law confers a limited monopoly. For example, the holder of the copyright cannot prevent a purchaser from buying multiple copies of the favorable publication and giving them away in stores. Acceptance of the benefits of the copyright law also means acceptance of its burdens, including the burden that the underlying idea disclosed in a copyrighted work is unprotected.

C. Quantity of the Work Taken

The third factor in determining whether the fair use doctrine is applicable is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The concept is that brief excerpts of a play or novel can be copied without violating the copyright of the work as a whole. Works that are naturally broken down into smaller pieces present additional problems. In General Signal, it is unclear whether the “whole” is the entire issue of the magazine, the ratings of all lightweight vacuum cleaners, or simply

281. Id. at 549.
282. General Signal, 724 F.2d at 1047.
283. Id. at 1051.
286. See supra text accompanying note 271.
288. Compare General Signal, 724 F.2d at 1050 (use of one phrase and/or 29 words out of 2100 words considered insubstantial use) with Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977) (broadcast of a human cannonball’s entire act poses a substantial threat to the economic value of that performance).
those sections devoted to Regina vacuum cleaners. This element illustrates the weakness of using the copyright law to protect CU. It was not the expression that CU was trying to protect, but rather the fact of the rating. As the court stated, “In truth, CU is not really objecting to Regina’s copying CU’s expression. The statement of policy in its magazine and its position in its brief before us is that any mention of CU in commercial advertising will diminish its effectiveness as an unbiased evaluator of products.”

This factor is of little assistance in determining whether Regina’s use was fair, since, again, it is the underlying use of CU’s rating that was the target of CU’s lawsuit.

D. Effect on Demand for the Product

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” This factor has been deemed to be the most important, and was the heart of CU’s case. The district court accepted CU’s argument that commercial use of the article could be “the demise of Consumers Union since such commercial use could lead the public to view Consumers Union as [an] unfair tester of products.”

The court of appeals determined that the district court erred in its conclusion, since the fourth factor is aimed at a copier who is attempting to usurp the demand for the original work, for example, the specific issue of Consumer Reports. Since CU had already published the results of its testing on the lightweight vacuum cleaner products, and the advertising of the test results occurred after publication of the magazine, it was difficult for CU to establish harm. Because CU is sold at newsstands and by subscription, it may be impossible to show that the issue involved suffered any reduction in sales. The court of appeals distinguished the case where the copyright owner and the copier are competitors in the market for the copyrighted material. CU and Regina are not competitors. The court of appeals found that CU did not allege in its complaint harm to any work currently copyrighted, but rather, alleged harm to fu-

289. 724 F.2d at 1050 (emphasis in original).
291. See General Signal, 724 F.2d at 1050.
292. id.
293. id.
294. id. at 1050-51.
ture issues of Consumer Reports.\textsuperscript{295} The court of appeals recognized that the only damages being asserted under the copyright claim were to CU's future publications: "The only alleged injury which CU truly presses is that Regina's use may lead to public perception of endorsement. Truthful excerpting of CU's ratings cannot hurt CU unless the public perceives that CU sponsored the use."\textsuperscript{296} The copyright law protects only individual cases of expression, not a way of doing business.\textsuperscript{297}

Even if the Copyright Act could be read as covering future issues along the same theme, it is questionable whether widespread advertising of CU's test results and unbiased reporting in Consumer Reports by manufacturers/retailers would usurp publication demand. It could be suggested that the widespread adoption of CU's ratings would lead to greater influence over the marketplace, not less. Underwriters Laboratories, another nonprofit testing group, dominates the field of electrical and fire safety product testing, despite an approach to publication which is the exact opposite of CU's. In Europe, testing labels from consumer organizations are found on many products.

On the other hand, it is possible that widespread advertising of test results may usurp the demand for CU's publication, since those who advertise will generally be those with the most favorable ratings, making it unnecessary for subscribers to purchase the magazine. While this may be somewhat speculative, the General Signal decision presumes that the effect of Regina's use upon the potential market for the copyrighted work is de minimis, as consumers are able to order back issues of the magazine.\textsuperscript{298} Widespread advertising for a particular product that receives a favorable rating by CU, however, eliminates the need for the consumer to order any such back issues.\textsuperscript{299} At best, the opinion may take too narrow a view of the market demand issues.

\textbf{E. Fair Use and Product Critiques}

The use of copyright law by CU to prevent re-publication of its

\begin{itemize}
\item \textsuperscript{295} \textit{Id.} at 1051.
\item \textsuperscript{296} \textit{Id.} 1051 n.7 (emphasis in original).
\item \textsuperscript{297} See, e.g., Baker v. Selden, 101 U.S. 99 (1880), where the Court stated that "the copyright of a book on book-keeping cannot secure the exclusive right to make, sell and use account books prepared upon the plan set forth in such book." \textit{Id.} at 104.
\item \textsuperscript{298} 724 F.2d at 1051.
\item \textsuperscript{299} \textit{General Signal}, 730 F.2d at 49 (Oakes, J., dissenting).
\end{itemize}
opinions is virtually unique, since CU, in a sense, is trying to suppress truthful commercial speech to protect its own independence.\textsuperscript{300} This attempted suppression clearly conflicts with the usual interpretations of the Copyright Act.\textsuperscript{301} CU is not attempting to protect its economic well-being, but is attempting to preserve a particular method of doing business. This is not the purpose of the copyright law.\textsuperscript{302}

Copyright laws and the first amendment represent competing interests in a free market economy that values information in a "marketplace of ideas."\textsuperscript{303} The ultimate issue under fair use is whether the public interest in truthful discussion, even in the commercial marketplace, outweighs other concepts which try to restrict truthful advertising to protect other values.\textsuperscript{304} For the most part, the Supreme Court has rejected that position.\textsuperscript{305} The fair use section is essentially the accommodation of copyright to first amendment requirements. Furthermore, any consideration of fair use in the marketplace must take into account \textit{Virginia Pharmacy}, which upheld the strong public interest in the dissemination of truthful and accurate commercial information.\textsuperscript{306}

This strong public interest is seen in \textit{Bolger v. Younsg Drug Products Corp.},\textsuperscript{307} where the Supreme Court examined a federal statute that prohibits the mailing of unsolicited advertisements for contraceptives. The advertisement at issue included not only the particular vendor's products, but informational pamphlets discussing the

\begin{footnotesize}
\begin{itemize}
\item 300. \textit{See supra} text accompanying note 296.
\item 301. \textit{See generally} General Signal, 724 F.2d at 1044-51.
\item 302. \textit{See supra} note 297 and accompanying text.
\item 303. \textit{See Gertz}, 418 U.S. at 339-40. But see Central Hudson, 447 U.S. at 592, where Justice Rehnquist, in his dissent, noted, "[W]hile it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a 'marketplace of ideas'."
\item 304. \textit{See}, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (Court held ordinance forbidding newspapers from carrying sex-designated employment advertising did not violate the first amendment); Miller v. California, 413 U.S. 15 (1973) (obscene advertising material is not protected by the first amendment).
\item 305. In Bolger v. Younsg Drug Prods. Corp., 463 U.S. 60, 69 (1983), the Court reiterated the preferred position of truthful commercial speech, stating that "where . . . a speaker desires to convey truthful information relevant to important social issues . . . we have previously found the First Amendment interests served by such speech paramount." \textit{But see FCC v. Pacifica Found.}, 438 U.S. 726 (1978) (where Court noted that of all forms of communication, broadcasting has the most limited first amendment protection).
\item 306. 425 U.S. at 765.
\item 307. 463 U.S. 60 (1983).
\end{itemize}
\end{footnotesize}
availability of prophylactics in general. The Court found that the mailings constituted commercial speech, notwithstanding the fact that the pamphlets contained discussion of "important public issues" such as venereal disease and family planning. The Court unanimously declared the statute to be unconstitutional, affirming its support for the most robust type of commercial debate, even when the debate is offensive to some listeners, or when it might expose children to what are normally adult topics. The Court stated, "[T]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."  

Given that fair use is designed to accommodate the first amendment interests of a speaker, and given the special role of advertising in our marketplace, CU's desire to be "above the marketplace" cannot survive the changes in the field of advertising law over the past few years. Professionals now advertise in the marketplace just as plumbers and auto dealers do. The economic marketplace is regarded as being as important to citizens' well-being as the political campaign. CU desires to influence the marketplace, while not being part of it. Copyright law simply will not stretch that far. If CU is to find protection, it must be in another quarter.

IV. THE LANHAM ACT

A. Truth in Advertising

In General Signal, CU also asserted claims under section 43(a) of the Lanham Act, which prohibits express and implied false representations made in connection with the sale of goods. Those who misrepresent can be held liable to those damaged by the misrepresentation.

One of the most important limitations on commercial speech is the requirement of truth. While commercial advertising does receive first amendment protection under Virginia Pharmacy and sub-

308. Id. at 62.
309. Id. at 67-68.
310. Id. at 74.
311. See General Signal, 724 F.2d at 1054 n.15.
313. See General Signal, 724 F.2d at 1044-51.
315. 724 F.2d at 1051.
316. Id.
sequent cases, it is clear that misleading advertising does not fall within the ambit of the first amendment. The government is also free to ban commercial communication that is more likely to deceive the public than to inform it.

Section 43(a) of the Lanham Act covers not only those advertisements that are blatantly false, but also those that embrace "in-nuendo, indirect intimations, and ambiguous suggestions." The court in *Vidal Sassoon, Inc. v. Bristol-Myers Co.* held that "where depictions [in advertisements] of consumer test results or methodology are so significantly misleading that the reasonably intelligent consumer would be deceived about the product's inherent quality or characteristics, an action under Sec. 43(a) may lie."

In *Mennen Corp. v. Gillette Corp.*, a district court held that under Section 43(a) of the Lanham Act, the plaintiff only needs to establish that "a non-insubstantial number of consumers would be misled," and that the "capacity to deceive is not tested by reference to the average consumer but rather must be construed to protect the vast multitude which includes the ignorant, the unthinking and the credulous.

The standard for commercial speech under the Lanham Act is, therefore, a high level of truth. Many of the commercial uses of CU's ratings have been false or misleading. There is no question under the Lanham Act that those can be effectively suppressed.

**B. Disclaimer**

In *General Signal*, CU's most important claim was that CU evaluates products in general and does not endorse specific products such as Regina vacuum cleaners, and that the disclaimer by Regina

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319. Id. at 15-16.
322. 661 F.2d 272 (2d Cir. 1981).
323. Id. at 278.
325. Id. at 655.
326. Id.
was not sufficient to dispel the misrepresentation. The court of appeals determined that, under the Lanham Act, the disclaimer used in the advertisements was sufficient to eliminate a likelihood of confusion regarding the source or sponsor. Disclaimers in commercial advertising may be required in order to insure accurate commercial information. In Bates v. State Bar, for example, the Supreme Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional advertising.

In Brooklyn Union Gas Co. v. Public Service Commission, a New York court held that requiring a gas utility, in advertising the price advantage of natural gas, to include a disclaimer that such an advantage might deteriorate as a result of deregulation, did not violate the gas utility's constitutional right of expression. The requirement of a disclaimer was determined to be constitutional even though the advertisement was not deceptive in the absence of the disclaimer and was, therefore, protected by the first amendment under the commercial speech doctrine. The state was held to have a substantial interest in providing complete information to consumers. The court also found that the restriction directly advanced the state's interest in complete information about a regulated industry and was limited and carefully drawn.

In Better Business Bureau v. Medical Directors, Inc., the court held that an advertisement proclaiming a "BBB spy's" conclusion that a weight loss clinic "really work[ed]" was misleading, but held that an injunction forbidding all use of the words "Better Business Bureau" violated the first amendment. The injunction was modified to require a disclaimer that the BBB did not endorse the clinic.

The question in the instant case is whether the disclaimer was sufficient to dispel any hint of misleading the consumer. A "com-

329. 724 F.2d at 1052.
330. Id. at 1053.
332. Id. at 384.
334. Id. at 459-60, 478 N.Y.S.2d at 83.
335. Id. at 459, 478 N.Y.S.2d at 83.
336. Id.
337. Id. at 459-60, 478 N.Y.S.2d at 83.
338. 681 F.2d 397 (5th Cir. 1982).
339. Id. at 398.
340. Id. at 406.
plete" disclaimer, which essentially included a copy of CU's entire noncommercialization policy, would clearly be nondeceptive and truthful.\textsuperscript{341} The question remains whether anything less than a display of the entire noncommercialization policy is truthful advertising. If the disclaimer is determined to be insufficient, and therefore the advertisement is misleading, the advertisement does not fall under the protection of the first amendment.

Like the Copyright Act, the Lanham Act provides only limited protection to the CU position. Under the Lanham Act, truth is the standard,\textsuperscript{342} not protection of CU's independence.

V. Conclusion

The Bose case represents a clear step forward for consumer-oriented criticism of product vendors. In product disparagement actions, vendors who are public figures must show actual malice, and the evidence of actual malice must be examined in detail at the appellate level. Bose left open the question of who is a public figure in this area. Analyzing this issue in light of the social concerns raised in the \textit{Times v. Sullivan} and \textit{Virginia Pharmacy} lines of cases would result in a rule whereby any vendor is a public figure with regard to consumer criticism of his product. At the very minimum, the issue of who is a public figure requires the same level of appellate review as does actual malice.

The deregulation of commercial speech under \textit{Virginia Pharmacy} has opened a new era in first amendment analysis of the marketplace. One of the most interesting effects of the liberalization of commercial speech is on Consumers Union's noncommercialization policy forbidding use of its reviews by commercial parties. This policy was adopted and flourished during the era when commercial speech was highly regulated. The fair use doctrine of the copyright law is sensitive to developments in first amendment analysis. The more protection that is given to advertising under the first amendment, the more the doctrine of fair use will protect the use of truthful, relevant copyrighted information. While Congress could amend the Copyright Act to give greater protection to CU, until that time CU will need to use other means to protect its independence.

The deregulation of commercial speech is a recognition of the central role commercial transactions play in the well-being of each

\textsuperscript{341} See, e.g., \textit{General Signal}, 724 F.2d at 1046.

\textsuperscript{342} 15 U.S.C. § 1125(a) (1982); see also \textit{General Signal}, 724 F.2d at 1052-53.
citizen. Attempts to limit the free flow of information, whether by
government or private parties, should be rejected. While literal truth
can be demanded of commercial parties who have the time, inclina-
tion, and finances to craft their advertising carefully, an insistence
that critics in the marketplace prove that their criticisms contain no
mistakes may allow vendors to control the marketplace and stifle the
debate encouraged by the first amendment.