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NOT Playing at a Theater Near You: Deceptive Movie Trailers and the First Amendment

Dr. Joel Timmer*

Abstract: On December 20, 2022, in what appears to be a first, a court determined that a studio may face legal liability for deceptive advertising for including an actress and a scene in a trailer promoting a movie, when neither was in the actual movie. Some have suggested that such an action might be barred by the First Amendment, based on the Supreme Court's suggestion in the 1983 case *Bolger v. Youngs Drug Products Corp.*, that advertising for fully protected speech products, such as movies, may be entitled to the same level of protection as the products themselves, instead of the lower level of protection accorded to commercial speech. The Supreme Court has never made clear the limits of the applicability of this observation. Examining the cases cited by the Court to support this statement, as well as Supreme Court commercial speech cases involving protected speech since that time, this article concludes that the application of this observation should be limited to commercial speech involving religious and charitable solicitation. The Court has not given any indication that this observation should be extended to cases involving commercial speech for entertainment products. Thus, movie studios may face liability for deceptive movie trailers.

I. Introduction

Imagine seeing a trailer for a movie featuring one of your favorite actors. Based on this, you excitedly decide to rent and watch the movie. As you finish the movie, you are disappointed to realize that your favorite actor did not appear in the film at all. This is similar to what happened to two

* Professor, Department of Film, Television and Digital Media, Texas Christian University.

individuals who rented the movie *Yesterday* after viewing a trailer for the film that featured the actress Ana De Armas.[1] De Armas, however, does not actually appear in the film. These two individuals decided to take action, filing a class action lawsuit seeking $5 million in damages against Universal, the film's distributor, for false advertising, among other things.

On December 20, 2022, the U.S. District Court for the Central District of California ruled against Universal's motion to dismiss the case, allowing the case to proceed. This appears to be the first time a court has held that studios may be held liable for movie trailers that deceptively represent the promoted movie's content to audiences.[2] As both the court and the parties to the case acknowledge, this case implicates the First Amendment.[3]

Movies are creative, expressive works that are fully protected by the First Amendment.[4] Advertising, or commercial speech, which can include trailers, generally receives a lesser level of First Amendment protection.[5] The Supreme Court, however, has indicated that advertisements for products consisting of fully protected speech may also be entitled to full First Amendment protection.[6] The issues involved here, then, are whether movie trailers are entitled to full First Amendment protection due to the fact that they advertise products entitled to that level of protection. Or, do trailers constitute commercial speech, meaning they are entitled to a lesser degree of protection?

This article examines these issues. In Part II, the article reviews the court's 2022 opinion in *Woulfe v. Universal*, including details about the film *Yesterday* and the trailer for it. Part III examines what commercial speech is and how speech is determined to be commercial. It also examines the reasons why commercial speech is provided with less than full First Amendment protection. Part IV goes on to consider a suggestion by the Supreme Court

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[1] YESTERDAY (Universal Pictures 2019).

[2] Defendant's Supplemental Brief Regarding Application of the First Amendment to Plaintiffs' Second Amended Complaint (Oct. 10, 2022), at 6, Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR (C.D. Cal Dec. 20, 2022) [hereinafter Def.'s Suppl. Br. (Oct. 10, 2022)]. "Plaintiffs have not cited, and Universal has not found, a single case holding that a motion picture trailer constitutes an implied affirmative representation that every actor, song, or scene in a trailer will appear in the final movie. Plaintiffs' theory is . . . unprecedented."

[3] *See* Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *28–32 (C.D. Cal Dec. 20, 2022) [hereinafter Woulfe Court Order].

[4] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1951).

[5] *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561–62 (1980).

[6] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 n.14 (1983).

in *Bolger v. Youngs Drug Products*, that commercial speech which advertises products that are fully protected by the First Amendment might likewise be entitled to full First Amendment protection.[7] While the Court has never explained the limits of the applicability of this statement, this article considers whether advertising for movies should be entitled to full First Amendment protection, as movies themselves are entitled to full protection.

Examining relevant Supreme Court precedents, this article concludes that the Court has limited the applicability of this suggestion to cases involving government restrictions on commercial speech involving religious and charitable solicitation. In these cases, the Court has determined that the speech at issue is fully protected, because solicitation of funds to support the causes in these cases is so "inextricably intertwined" with the commercial speech the government is trying to regulate, to make it impractical to apply different standards to different components of the same speech.[8] Limiting the Court's statement that commercial speech involving protected First Amendment activities may be entitled to full protection to cases of religious and charitable solicitation means that advertising for movies should not categorically receive that same level of protection. In Part V, this article then returns to *Woulfe v. Universal*, to examine how the First Amendment issues were addressed in that case. Finally, Part VI of the article concludes with some observations on the implications of the *Woulfe* court's decision.

II. *WOULFE V. UNIVERSAL*: THE CASE OVER THE *YESTERDAY* TRAILER

In *Woulfe v. Universal City Studios*,[9] plaintiffs Conor Woulfe and Peter Michael Rosza brought a class action complaint against Universal Pictures over the 2019 film *Yesterday* and the advertising campaign intended to promote that film, alleging that the advertising was false, deceptive, and misleading.[10] At the heart of the plaintiffs' complaint was a trailer for the film which each plaintiff viewed prior to paying $3.99 to rent and view the film on Amazon.com. According to plaintiffs, that trailer "promoted Ana De Armas as an actress that would appear in the film," which persuaded the plaintiffs to rent the film.[11] After watching the film, however, the plaintiffs

[7] *Id.*

[8] *See infra* notes 104–141 and accompanying text.

[9] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089 (C.D. Cal Dec. 20, 2022).

[10] *See* Plaintiff's Second Amended Class Action Complaint (June 7,2022), at 1, Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR (C.D. CA Dec. 20, 2022) [hereinafter Pls. 2d Am. Compl.].

[11] *See id.* at 2–3.

discovered that De Armas does not in fact appear in the film.[12] Because the trailer led the plaintiffs to believe that De Armas would appear in the film, they alleged that Universal's marketing of the film was false, deceptive, and misleading. The pair is seeking $5 million in the class action lawsuit.[13]

Plaintiffs described the film *Yesterday* as being about "failed musician Jack Malik who hits his head during a blackout only to wake up to discover that the world's knowledge of The Beatles has been erased. Taking advantage of this opportunity, the protagonist Malik, played by actor Hamesh Patel, adopts The Beatles' songs as his own, quickly becoming world famous."[14] De Armas was a cast member in the film, and did shoot scenes for the film which were ultimately not included in the final film. De Armas played the character Roxanne, a well-known actress who meets the protagonist Malik when they both appear on a late-night talk show.

The scene at issue depicted De Armas' talk show appearance, during which, the show's host "first suggests that Malik write a song about Roxanne," then tells Malik to simply write a song about "something."[15] Malik's response is to play the Beatles' song "Something," which he does while sitting next to Roxanne, gazing at her.[16] Roxanne appears charmed by the song, and there is a romantic connection between Roxanne and Malik which leads to the two embracing.[17] Meanwhile, Malik's longtime, hometown friend Ellie, the film's female lead "played by the relative unknown actress Lily James," watches this at home and "is visibly upset that she might lose Malik to Roxanne.[18] Dialogue in the trailer also suggests that Ellie is concerned that Malik is distracted by his newfound fame and glamor of actress Roxanne."[19]

The scene featuring De Armas was cut from the final version of the film, resulting in De Armas not being in the version of the film released to the public.[20] Nor was the well-known Beatles' song "Something" included in the final film.[21] Both, however, were included in the trailer released to

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[12] *See id.* at 2–3.

[13] *See* Agence France-Presse, *Movie fans can sue over misleading trailer, US judge rules*, THE GUARDIAN (Dec. 23, 2022, 23.07 EST), https://www.theguardian.com/film/2022/dec/24/movie-fans-can-sue-over-misleading-trailer-us-judge-rules [https://perma.cc/K546-L6HZ].

[14] Pls. 2d Am. Compl., *supra* note 10, at 13.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 13–14.

[20] *Id.* at 15.

[21] *Id.* at 15–16.

promote the film.[22] *Yesterday* director Danny Boyle called De Armas' portrayal of Roxanne in the original film cut "brilliant" and "radiant."[23] Boyle also called the scene one of his favorites from the original cut of the film, and that Malik playing the song "Something" in response to the talk show's request that he write and play "something" on the spot was a delightful joke.[24] Ana De Armas' character Roxanne was intended to be a third point in a love triangle, coming between the romance between Malik and Ellie.[25] As for why the scene was cut, screenwriter Richard Curtis explained the audience was invested in the relationship between Ellie and Malik, and did not like the fact that Malik's "eyes even strayed."[26] While the scene was among the director's and one of the screenwriters' favorites in the film, it was cut for the sake of the story.[27]

According to the plaintiffs, De Armas represented the most recognizable actor among the film's cast, and her appearance in the trailer was a key factor in their decisions to rent the film.[28] De Armas has appeared in such high-profile films as *Blade Runner 2049*, *War Dogs*, and as the female lead in the James Bond film *No Time to Die*.[29] Additionally, she was nominated for a Golden Globe for Best Actress in a Comedy or Musical for her performance in the film *Knives Out*.[30] Otherwise, plaintiffs allege, the two stars of the film, Hamesh Patel and Lily James were largely unknown prior to the film's release, with *Yesterday* being Patel's first film credit.[31]

The plaintiffs argued that "because none of the *Yesterday* film leads were famous, [Universal] could not rely on their fame to promote the movie to entice viewership."[32] On the other hand, De Armas is a well-known movie star, who "is a viewership draw by herself."[33] Plaintiffs allege that Universal included De Armas' scenes in the trailer "to maximize ticket and movie sales and rentals," and that including the scene featuring De Armas,

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[22] *Id.* at 15.
[23] *Id.* at 14.
[24] *Id*.
[25] Mike Reyes, *Yesterday Cut An Entire Character From The Film That Would Have Changed The Plot*, Cinema Blend (June 26, 2019), https://www.cinemablend.com/news/2475654/yesterday-cut-an-entire-character-from-the-film-that-would-have-changed-the-plot [https://perma.cc/VM34-D8FU].
[26] *Id.*
[27] *Id.*
[28] Pls. 2d Am. Compl., *supra* note 10, at 15, 54.
[29] *Id.* at 12.
[30] *Id.*
[31] *Id*. at 14.
[32] *Id*.
[33] *Id*. at 15.

which "was described by director Boyle as fantastic" was also included "to entice viewership and thereby boost movie sales and rentals."[34] Plaintiffs alleged that Universal "knew and indeed intended that consumers would rely on the content of the *Yesterday* movie trailers when making decisions whether to pay for purchasing or viewing the film," believing that "consumers would be enticed by [De Armas'] appearance and scenes to pay for the movie."[35] In addition, plaintiffs alleged that Universal "used Ana De Armas and the omitted scene elements to make the movie *Yesterday* appear more appealing than it actually was."[36]

According to District Judge Stephen V. Wilson's opinion deciding the case, "at the center of this case is the question of whether Universal made some actionable misrepresentation of the movie by including the scene in the trailer that ultimately did not appear in the movie."[37] Although plaintiffs alleged that Universal's actions violated a number of different laws, Judge Wilson noted that a commonality shared by many of those laws is that they applied the "reasonable consumer standard."[38] This standard requires plaintiffs to show that "the alleged misrepresentation is 'likely to deceive' the consumer."[39] This requires "more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner."[40] Instead, it must be "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[41] Judge Wilson found that plaintiffs had met their burden to plausibly allege that reasonable consumers could be misled by the trailer to believe that De Armas and the scene featuring her would be in the movie.[42] The court found this to be the case even though the trailer did not affirmatively state that De Armas would appear in the movie, as the court found that "[e]ven an implied assertion may be sufficient to deceive a reasonable consumer."[43] Here, the court observed that the representation that plaintiffs alleged Universal made by featuring De Armas in the trailer, while "not express," could still

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[34] *Id.*

[35] *Id.* at 19.

[36] *Id.* at 27.

[37] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *9–10 (C.D. Cal Dec. 20, 2022).

[38] *Id.* at *10 (citation omitted).

[39] *Id.* (quoting Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003)).

[40] *Id.* (quoting *Lavie*, 105 Cal. App. 4th at 508).

[41] *Id.* (quoting *Lavie*, 105 Cal. App. 4th at 508).

[42] *Id.* at *11 (citing *Lavie*, 105 Cal. App. 4th at 508).

[43] *Id.* (citations omitted).

"be viewed as 'a specific measurable claim, capable of being proved false . . . or of being reasonably interpreted as a statement of objective fact.'"[44]

The Court had taken judicial notice of the fact that "some trailers include scenes that do not appear in the final movie,"[45] which Universal argued contributed to making the plaintiffs' interpretation of the trailer "implausible."[46] While the court called this a "close question," the court found that plaintiffs had made sufficient allegations to support their claim. First, they alleged that "'[m]ovie trailers are understood by movie viewers and consumers to convey what actors will appear in the advertised film.'"[47] In addition, plaintiffs alleged that De Armas is a "famous" actress who has starred in several films and who has a large social media following.[48] Plaintiffs had also pointed to statements by other viewers of the trailer stating that they had expected to see De Armas in the film.[49]

Further, despite De Armas only appearing in the trailer for 15 seconds, the court found it "plausible that a consumer could interpret De Armas' appearance as more than de minimas [sic.]. In the scene that De Armas appears in, she is sung to by the main character, is the only person in view for several seconds, and embraces the main character."[50] Furthermore, the trailer shows Ellie, the main love interest, becoming visibly upset as she watches this. The court noted that Universal has recognized that this scene conveyed "a key part of the overall story arc in the trailer: [the protagonist's] meteoric rise to fame and how it undoes the life he knew."[51] The implication of all this for the court was that "De Armas could be viewed as more than a fleeting background extra, and as a character that viewers would expect to see in the movie."[52]

Universal posited "a host of 'what if' scenarios" contending that if the court allowed the plaintiffs suit to proceed, that "Plaintiffs could assert that they were led to believe that De Armas would appear for a certain amount of time, occupy a specific role, or receive a speaking role."[53] The thrust of

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[44] *Id.* at *12 (quoting Vitt v. Apple Computer Inc., 469 Fed.Appx. 605, 607 (9th Cir. 2012)).

[45] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *12 (C.D. Cal Dec. 20, 2022).

[46] *Id.*

[47] *Id.* at *13 (citations omitted).

[48] *Id.* (citations omitted).

[49] *Id.* (citations omitted). While the court found this to be "weak evidence," it nevertheless contributed to the plausibility of the plaintiffs' claim. *Id.*

[50] *Id.* (citations omitted).

[51] *Id.* (alteration in original) (citations omitted).

[52] *Id.*

[53] *Id.* at *14.

Universal's argument here was that "permitting Plaintiffs to move forward with this theory 'would open the floodgates to claims like these, where answers depend on purely subjective judgements.'"[54] The court, however, was unpersuaded by this, noting that these types of claims would be limited by the reasonable consumer test, which "'requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'"[55] Here, the court specified that its "holding is limited to representations as to whether an actress or scene is in the movie, and nothing else."[56]

One final argument advanced by Universal was that applying consumer protection laws to the *Yesterday* trailer would violate the First Amendment.[57] This argument was significant enough for the court to order supplemental briefings on the First Amendment issues implicated by the case.[58] In the end, a significant portion of the district court's opinion deals with First Amendment issues, which will be discussed later in this article.[59] The treatment of commercial speech for entertainment products is complicated by the fact that "the Supreme Court has yet to rule definitively on whether advertisements and promotions for . . . protected speech should be accorded the same degree of First Amendment protection as the products themselves, or whether this type of advertising should instead be treated as ordinary commercial speech, the regulation of which is subject to a lower standard of judicial review."[60] In other words, the issue is "whether the First Amendment fully protects entertainment advertising, or if entertainment advertising is instead considered commercial speech, subject to greater government regulation as well as charges of deceptive advertising."[61]

III. Commercial Speech and the First Amendment

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[62] the U.S. Supreme Court described commercial speech as "expression

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[54] *Id.* (citation omitted).
[55] *Id.* (quoting Kasky v. Nike, Inc. 27 Cal.4th 939, 951 (2002)).
[56] *Id.*
[57] *Id.* at *28.
[58] *Id.*
[59] *Id.* at *28–32.
[60] Tara Kole, *Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent with the First Amendment?*, 9 UCLA Ent. L. Rev. 315, 319 (2002).
[61] *Id.* at 326.
[62] 447 U.S. 557 (1980).

related solely to the economic interests of the speaker and its audience."[63] Commercial speech has also been described by the Court as "speech which does no more than propose a commercial transaction."[64] According to the *Central Hudson* Court, commercial speech "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."[65] The Court elaborated on the valuable function of commercial speech in a subsequent case:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. 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.[66]

As a result of *Central Hudson*, commercial speech is protected by the First Amendment.[67] However, the Court has observed that commercial speech varies from other types of speech in significant ways, such that "a different degree of [First Amendment] protection is necessary [for commercial speech] to insure that the flow of truthful and legitimate commercial information is unimpaired."[68] As a result, the Court has determined that commercial speech receives a lesser degree of protection than fully protected speech.[69]

The Court in *Central Hudson* pointed to two features of commercial speech that allow for greater government regulation of it than noncommercial speech. First, advertisers "have extensive knowledge of both the market and their products," making them "well situated to evaluate the accuracy of

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[63] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 561 (1980) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 363–-364 (1977); Friedman v. Rogers, 440 U.S. 1, 11 (1979)).

[64] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66 (1983) (citing *Virginia Pharmacy Bd.*, 425 U.S. at 761–62) (quotations omitted)).

[65] *Cent. Hudson*, 447 U.S. at 561–62.

[66] *Virginia Pharmacy Bd.*, 425 U.S. at 765.

[67] *Cent. Hudson*, 447 U.S. at 561 (citing *Virginia Pharmacy Bd.*, 425 U.S. at 761–62).

[68] *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24 (1976) (citation and quotations omitted).

[69] *Cent. Hudson*, 447 U.S. at 562–63 (citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456–457 (1978)).

their messages. . . ."[70] Because of this, the truth of commercial speech "may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."[71] Second, because commercial speech promotes the speaker's own "economic self-interest," it is "a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'"[72] Because businesses rely on advertising to help make a profit, it "may be more durable than other kinds" of speech and be unlikely to be "chilled by proper regulation and forgone entirely."[73] Thus, "the greater objectivity and hardiness of commercial speech . . . may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."[74]

In a concurring opinion in *Rubin v. Coors Brewing Co.*, Justice Stevens offered another justification for allowing greater government regulation of commercial speech: "namely, commercial speech's potential to mislead."[75] For Justice Stevens, commercial speech could be treated differently under the First Amendment to help "avoid[ ] deception and protect[ ] the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker."[76] He explained:

> Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech. Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy. Moreover, the consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. Finally, because commercial speech often occurs in the place of sale, consumers may respond to the

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[70] *Cent. Hudson*, 447 U.S. at 564 n.6 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977)).

[71] *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24.

[72] *Cent. Hudson*, 447 U.S. at 564 n.6 (citing *Bates*, 433 U.S. at 381).

[73] *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24.

[74] *Id.*

[75] Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1994) (Stevens, J., concurring) (citing *Virginia Pharmacy Bd.*, 425 U.S. at 771–772; *Bates*, 433 U.S. at 383–84; Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 81–83 (1983) (Stevens, J., concurring in judgment)).

[76] *Rubin*, 514 U.S. at 492–93 (Stevens, J., concurring).

> falsehood before there is time for more speech and considered reflection to minimize the risks of being misled.[77]

Thus, "[a]lthough some false and misleading statements are entitled to First Amendment protection in the political realm, the special character of commercial expression justifies restrictions on misleading speech that would not be tolerated elsewhere."[78] As Justice Stewart explained:

> 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. The advertiser's access to the truth about his product and its price substantially eliminates any danger that government regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction "some falsehood in order to protect speech that matters."[79]

The *Central Hudson* court observed that the reason for granting commercial speech First Amendment protection "is based on the informational function of advertising."[80] Accordingly restricting or prohibiting inaccurate commercial speech does not raise First Amendment issues,[81] meaning "the government can "regulate commercial speech to ensure that it is not false, deceptive, or misleading[.]"[82] However, where commercial speech "is neither misleading nor related to unlawful activity," it is protected by the First Amendment.[83] The *Central Hudson* court then laid out a four-part test for determining if government regulation of commercial speech is constitutional. First, the commercial speech at issue "must concern lawful activity and not be misleading." Second, the government interest to be served by the

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[77] *Id.* at 496 (1994) (Stevens, J., concurring) (citing Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 457–458 (1978) (distinguishing in-person attorney solicitation of clients from written solicitation)).

[78] *Rubin*, 514 U.S. at 495 (Stevens, J., concurring) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[79] *Virginia Pharmacy Bd.*, 425 U.S. at 777–778 (Stewart, J., concurring) (quoting *Gertz*, 418 U.S. at 341).

[80] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 563 (1980) (citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

[81] *Cent. Hudson*, 447 U.S. at 563.

[82] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (citing *Virginia Pharmacy Bd.*, 425 U.S. at 771–72).

[83] *Cent. Hudson*, 447 U.S. at 564.

regulation must be substantial. Third, the government regulation must directly advance that governmental interest. Fourth, the regulation must be no "more extensive than is necessary to serve that interest."[84] This is known as the *Central Hudson* test for the constitutionality of government restrictions on commercial speech.

How exactly is speech determined to be commercial? In a subsequent case, *Bolger v. Youngs Drug Products Corp.*,[85] the Supreme Court laid out some factors to help determine when speech could be classified as commercial.[86] At issue in *Bolger* was a federal law which "prohibit[ed] the mailing of unsolicited advertisements for contraceptives."[87] Youngs Drug Products, which made and sold contraceptives, challenged the law as it was seeking to mail unsolicited pamphlets to the public including information about its products, as well as about the availability and desirability of contraceptives in general.[88]

In determining the validity of the government restriction at issue, the Court first considered whether Youngs' mailings constituted commercial speech. In doing so, it observed that just because the pamphlets were "conceded to be advertisements clearly does not compel the conclusion that they are commercial speech."[89] Similarly, the pamphlets' "reference to a specific product does not by itself render the pamphlets commercial speech."[90] Lastly, "the fact that Youngs has an economic motivation for mailing the pamphlets" was "insufficient by itself" to conclude they constituted commercial speech.[91] However, the combination of all three of these characteris-

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[84] *Id.* at 566.

[85] 463 U.S. 60 (1983).

[86] *Id.* at 66.

[87] *Id.* at 61.

[88] *Id.* at 62.

[89] *Id.* at 66 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265–266 (1964)).

[90] *Bolger*, 463 U.S. at 66 (citing Associated Students for Univ. of Cal. at Riverside v. Attorney General, 368 F.Supp. 11, 24 (C.D. Cal. 1973)).

[91] *Bolger*, 463 U.S. at 67 (citing Bigelow v. Virginia, 421 U.S. 809, 818 (1975); Ginzburg v. United States, 383 U.S. 463, 474 (1966); Thornhill v. Alabama, 310 U.S. 88 (1940)). "The third Bolger factor . . . asks whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had *any* economic motivation." Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1116 (9th Cir. 2021) (citing Procter & Gamble Co. v. Amway, 242 F.3d 539, 552–53 (5th Cir. 2001) ("The question whether an economic motive existed is more than a question whether there was an economic incentive for the speaker to make the speech; the Bolger test also requires that the speaker acted substantially out of economic motivation.") (emphasis in original)). In addition, "economic motivation is not limited simply to the expectation of a direct commercial transaction with consumers. . . .

tics provided strong support for concluding that they were "properly characterized as commercial speech."[92] The Court came to this conclusion about Youngs' pamphlets despite "the fact that they contain discussions of important public issues such as venereal disease and family planning."[93] The Court made it clear that advertising which includes information that "'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."[94]

However, the *Bolger* court did state in a footnote that "a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment," so that the advertisement would be entitled to the same level of First Amendment protection as noncommercial speech.[95] That could mean movie advertising is entitled to full First Amendment protection as artistic expression (which includes movies) is clearly protected by the First Amendment. As one court has observed:

> First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books. . . . Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.[96]

Similarly, in an oft-cited passage, the Supreme Court recognized in the 1951 case of *Burstyn v. Wilson* that movies communicated ideas and were deserving of full First Amendment protection:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all political expression. The importance of motion pictures as an organ of public opinion

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Importantly, the type of economic motivation is not the focus; rather, the crux is on whether the speaker had an adequate economic motivation so that the economic benefit was the primary purpose for speaking." *Ariix*, 985 F.3d at 1117.

[92] *Bolger*, 463 U.S. at 67.

[93] *Id.* at 67–68.

[94] *Id.* at 68 (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 563, n. 5 (1980).

[95] *Bolger*, 463 U.S. at 67 n.14 (1983) (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943) (advertisement for religious book cannot be regulated as commercial speech); Jamison v. Texas, 318 U.S. 413 (1943)).

[96] McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 999 (Cal. Ct. App. 1988) (internal quotations and citations omitted).

> is not lessened by the fact that they are designed to entertain as well as to inform.[97]

Does the *Bolger* court's observation about advertising for fully protected First Amendment activities maybe being entitled to full First Amendment protection as well apply to trailers and other film advertising? The Supreme Court has never explicitly elaborated on the meaning and applicability of this observation, and the Court has never directly addressed the question of whether advertising for movies and other fully protected entertainment is entitled to full First Amendment protection. Lower courts that have considered the issue have ruled both ways: some have ruled that commercial speech should be fully protected in these circumstances,[98] while other have ruled that it should not.[99] That question is considered in the next section of this article, primarily by examining the cases cited in the *Bolger* footnote to support the Court's assertion, as well as Supreme Court cases since that time which have dealt with commercial speech restrictions involving protected First Amendment activities. Discussed first is a Ninth Circuit case which also considered the cases cited in the *Bolger* footnote.[100]

IV. The Meaning of the *Bolger* Footnote about Full Protection for Commercial Speech

The Ninth Circuit Court of Appeals considered the question of the appropriate level of First Amendment protection for advertising of protected entertainment products in *Charles v. City of Los Angeles*.[101] At issue in that case was a billboard proposed to be publicly displayed by Wayne Charles and Fort Self Storage (Appellants) advertising the television program "E! News," which depicted the show's logo and pictures of the show's hosts,

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[97] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[98] *See, e.g.*, Lacoff v. Buena Vista Publ'g, Inc., 705 N.Y.S.2d 183, 186–187 (N.Y. Sup. Ct. 2000); Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (1995); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860 (1979); Page v. Something Weird Video, 960 F. Supp. 1438 (C.D. Cal. 1996); Cher v. Forum Int'l, Ltd., 692 F.2d 634 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983).

[99] *See, e.g.*, Serova v. Sony Music Entertainment, 13 Cal. 5th 859, 515 P.3d 1 (2022); Keimer v. Buena Vista Books, Inc., 75 Cal.App.4th 1220 (1999) (holding that the identical advertisements as those in Lacoff constituted commercial speech); Charles v. City of Los Angeles, 697 F.3d 1146, 1153 (9th Cir. 2012); Rezec v. Sony Pictures Ent., Inc., 116 Cal.App.4th 135 (Cal. Ct. App. 2004).

[100] Those cases are Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Jamison v. Texas, 318 U.S. 413 (1943).

[101] Charles v. City of Los Angeles, 697 F.3d 1146, 1151 (9th Cir. 2012).

Ryan Seacrest and Giuliana Rancic.[102] The City of Los Angeles classified the sign as commercial, which subjected it to far more extensive regulation than if it had been classified as noncommercial.[103] Appellants challenged this determination, arguing that signs displaying content for entertainment products should be treated as noncommercial speech.[104] The issue for the Ninth Circuit Court of Appeals in this case was thus, "whether truthful advertisements for expressive works protected by the First Amendment are inherently noncommercial in nature."[105] The court observed that commercial speech had more limited protection, and was subject to greater government regulation than noncommercial speech.[106] The court further observed that "in many areas 'the boundary between commercial and noncommercial speech has yet to be clearly delineated.'"[107]

Applying the *Bolger* factors discussed above, the Court first determined that the sign at issue did in fact constitute commercial speech.[108] Appellants then argued that advertisements for entertainment products "*always* go beyond a bare proposal for a commercial transaction because they also 'promote the ideas, expression, and content contained in the works and thus they are too entitled to full First Amendment protection.'"[109] To support this position, Appellants pointed to the *Bolger* Court's statement that advertising for protected First Amendment activities may also be entitled to that same level of protection.[110] The court, after examining the cases cited by the Bolger court to support its observation, *Murdock v. Pennsylvania*[111] and *Jamison v. Texas*,[112] concluded that Appellant's interpretation of that statement was incorrect.[113] The court observed that the cited cases concerned religious speech, and explained that in both cases, "the Court overturned the convictions of Jehovah's Witnesses who had been prosecuted for religious speech that solicited donations, sometimes in exchange for religious texts. While

[102] *Id.* at 1150.
[103] *Id.* at 1149.
[104] *Id.* at 1150.
[105] *Id.* at 1151.
[106] *Id.* (quoting and citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623, (1995) (internal quotation marks and alterations omitted)).
[107] *Charles*, 697 F.3d at 1151 (citing Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001)).
[108] *Charles*, 697 F.3d at 1151–52 (quotations omitted).
[109] *Id.* at 1152 (quotations omitted) (emphasis in original).
[110] *Id.* at 1152 (quoting and citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 n.14 (1983)).
[111] 319 U.S. 105 (1943).
[112] 318 U.S. 413 (1943).
[113] *Charles*, 697 F.3d at 1152–53.

the religious speech at issue in both cases bore some of the hallmarks of commercial speech, it was also unquestionably part of a protected religious activity."[114]

At issue in *Murdock v. Pennsylvania* was a Jeannette, Pennsylvania city ordinance that required those engaging in solicitation in the city to obtain a license from the city and pay fees to the city.[115] The law was challenged by Jehovah's Witnesses, who had gone door to door in the city "distributing literature and soliciting people to 'purchase' certain religious books and pamphlets."[116] As part of these activities, the Jehovah's Witnesses also played a record espousing their religious views.[117] The Jehovah's Witnesses were arrested for engaging in these activities without first obtaining a license.[118] The *Murdock* court observed:

> The hand distribution of religious tracts is an age-old form of missionary evangelism — as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.[119]

The *Murdock* court went on to observe that despite the fact that religious literature was "sold" by the Jehovah's Witnesses it "does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."[120] This led the Court to the conclusion that the Jehovah's Witnesses were engaged in a religious venture, rather than a commercial one.[121] To support this conclusion, the *Murdock*

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[114] *Id.* at 1152.
[115] 319 U.S. 105, 106 (1943).
[116] *Id.* at 106–-07.
[117] *Id.* at 107.
[118] *Id.*
[119] *Id.* at 108–09.
[120] *Id.* at 111.
[121] *Id.*

court also pointed to a decision by the Iowa Supreme Court that described the same "selling activities" by members of Jehovah's Witnesses as being " 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.' "[122] The Court found that conclusion applicable to the case at hand.[123]

The Ninth Circuit in *Charles* also looked to the Supreme Court's holding in *Jamison v. Texas*,[124] observing that in that case, "the Court drew a similar distinction between purely commercial handbills and handbills that were distributed as part of one's religious pursuits[.]"[125] In that case, Jamison, also a member of Jehovah's Witnesses, was charged with violating a Dallas, Texas ordinance that prohibited the distribution of handbills on city streets.[126] The contents of the handbill included an invitation to attend a gathering in a city park to hear a public address by a leader of Jehovah's Witnesses on the topic of "Peace, Can It Last."[127] The handbill also contained a description of "two books which explained the Jehovah's Witnesses' interpretation of the Bible and set out their religious views," which were offered for a 25-cent contribution.[128]

The city argued that the handbill's containing the offer of the books for sale made the city's prohibition on the distribution of handbills permissible. The Court disagreed.[129] The Court acknowledged that the government "can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended."[130] However, the government "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."[131]

After its examination of these two cases, the Ninth Circuit in Charles explained that:

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[122] *Murdock*, 319 U.S. at 112 (citing State v. Mead, 230 Iowa 1217, 300 N. W. 523, 524 (1941)).
[123] *Id.*
[124] 318 U.S. 413 (1943).
[125] Charles v. City of L.A., 697 F.3d 1146, 1153 (9th Cir. 2012).
[126] *Jamison*, 318 U.S. at, 413.
[127] *Id.* at 414.
[128] *Id.* at 414–15.
[129] *Id.* at 416.
[130] *Id.* at 417 (1943) (citing Valentine v. Chrestensen, 316 U.S. 52, 55 (1942)).
[131] *Jamison*, 318 U.S. at 417.

> In both decisions, the Court drew a sharp contrast between the actions of ordinary, commercial booksellers and the activities of Jehovah's Witnesses, who distribute literature as part of a religious mandate of evangelism. In neither case did the Court imply that ordinary advertisements for books were themselves noncommercial; indeed, the cases suggest the opposite conclusion.[132]

The *Charles* court concluded that "[f]airly read in combination with the decisions it cites, footnote 14 in *Bolger* provides no support for Appellants' position" that entertainment advertising should be entitled to the same full First Amendment protection as the entertainment products themselves.[133]

The Supreme Court has never explicitly explained or elaborated on the meaning of its statement in footnote 14 of *Bolger*. Since the time of that decision, however, there have been instances in which the Court has found what would otherwise be considered commercial speech to be fully protected. In these cases, the court relied on the fact that the speech-concerned activities themselves were fully protected by the First Amendment. Significantly for the present question, those cases have been limited to government attempts to regulate charitable solicitation, and it has justified the application of full First Amendment protection to charitable solicitation by the fact that the commercial speech and fully protected speech in those cases were so "inextricably intertwined," that it would be impractical to try to separate the different types of speech from each other to apply different First Amendment standards to them. Those cases are examined next.

Inextricable intertwinement was found by the Court in *Village of Schaumburg v. Citizens for a Better Environment*.[134] At issue in that case was validity "of a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for 'charitable purposes,' those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses."[135] Challenging the regulation was *Citizens for a Better Environment* (CBE), a non-profit organization with "the purpose of promoting 'the protection of the environment.'"[136] To help achieve its purpose, CBE employed canvassers who went door-to-door "to distribute literature on environmental topics and answer questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; [and] receive grievances and complaints of an environmental nature regarding

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[132] Charles v. City of L.A., 697 F.3d 1146, 1153 (9th Cir. 2012).
[133] *Id.*
[134] 444 U.S. 620 (1980).
[135] *Id.* at 622.
[136] *Id.* at 624.

which CBE may afford assistance in the evaluation and redress of these grievances and complaints."[137]

The Court discussed prior cases involving government restrictions on the charitable solicitation of funds,[138] which led the Court to the following conclusion:

> Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.[139]

To the *Schaumburg* Court, it was "clear" that "charitable solicitations in residential neighborhoods are within the protections of the First Amendment."[140] Treating the speech addressed by the regulation as fully protected,[141] the Court found the regulations to be "constitutionally overbroad."[142]

The Court came to a similar conclusion in another case involving government restrictions on charitable solicitation, *Riley v. Federation of the Blind of North Carolina*.[143] At issue in that case was a law that, *inter alia*, limited the fees professional fundraisers could earn for soliciting charitable donations.[144] The Court observed that prior precedents had established that fundraising was fully protected by the First Amendment.[145] The state argued that even so, the challenged portion of its law "regulates only commercial speech because it relates only to the professional fundraiser's profit from the solicited contribution."[146] The state argued that because of this, the Court

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[137] *Id.* at 625.
[138] *Id.* at 628–32.
[139] *Id.* at 632.
[140] *Id.* at 633.
[141] *Id at* 637. (citing Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)).
[142] *Schaumburg*, 444 U.S. at 620.
[143] 487 U.S. 781 (1988).
[144] *Id.* at 794.
[145] *Id.* at 787–89.
[146] *Id.* at 795.

should apply its "more deferential commercial speech principles" to the law at issue.[147]

The *Riley* court's conclusion analysis on this point is similar to that in the *Murdock* and *Jamison* cases involving religious solicitation just discussed. The *Riley* court observed that "'solicitation is characteristically intertwined with informative and perhaps persuasive speech[.]"[148] The Court likewise observed that, "where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself."[149] The Court went on to find the fully protected and commercial speech elements here to be "inextricably intertwined," leading it to treat the entire speech as fully protected.[150] The justification for this was that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression."[151]

What the Court seems to be saying is that the purpose of the religious or charitable solicitation is greater than simply raising money. In the act of seeking financial support for their causes, these speakers are also spreading the word about those causes in the hopes of persuading others to them. Even when the speakers are unsuccessful at raising money, they might still be successful in gaining support for their causes through the impact and persuasiveness of their speech. As the Court has observed, "charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment[.]"[152]

Nowhere in Supreme Court opinions is there any indication that there should be a categorical rule that advertising or commercial speech for activities protected by the First Amendment should be automatically entitled to the same full First Amendment protection as the underlying activities. The Court in *Bolger* only said that there *may* be such situations.[153] As has been

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[147] *Id.*

[148] *Id.* at 796 (1988) (quoting and citing *Schaumburg*, 444 U.S. at 632).

[149] *Riley*, 487 U.S. at 798 (1988) (citing Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 963 (1984); *Schaumburg*, 444 U.S. at 635).

[150] *Riley*, 487 U.S. at 796

[151] *Id.*

[152] Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 961 (1984).

[153] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 n.14 (1983) (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943) (advertisement for religious book cannot be regulated as commercial speech); Jamison v. Texas, 318 U.S. 413 (1943)).

discussed, the only situations where the Court has actually come to this conclusion have involved cases of religious or charitable solicitation. The Court has never come to this conclusion in a case involving advertising of entertainment products, such as movies, despite their being protected by the First Amendment.

At least one court has recognized a significant problem with a rule that entertainment advertising should categorically receive full First Amendment protection. In *Rezec v. Sony Pictures Entertainment*, Sony was accused, *inter alia*, of false advertising for creating a fake film reviewer and attributing laudatory reviews about Sony films to the fake reviewer in the advertising for those films.[154] Sony argued that "because the films themselves are noncommercial speech, so are the advertisements."[155] The court rejected this argument, observing that "[u]nder Sony's absolutist approach, every film advertisement, no matter how false, would be outside the scope of consumer protection laws."[156]

Instead, commercial speech for protected entertainment products should only receive full protection when inextricable intertwinement exists. In fact, it seems that the principle described in the *Bolger* footnote has evolved into the "inextricable intertwinement" test. As the Ninth Circuit observed, "In neither [*Murdock* or *Jamison*] did the Court imply that ordinary advertisements for books were themselves noncommercial; indeed, the cases suggest the opposite conclusion."[157] While the speech involving religious solicitation in those cases included commercial elements, the Court did not separate out those elements, but rather considered the entire speech—including both the noncommercial and commercial elements—to be fully protected.[158] While the Court did not use the term "inextricable intertwinement" in these early cases, that seems to be the concept on which the Court based its decisions.

However, the Supreme Court (and seemingly lower courts for that matter) has not provided explicit tests or factors to help determine when commercial and fully protected speech are inextricably intertwined. The Court has stated that inextricable intertwinement is present when courts "cannot parcel out the speech, applying one test to one phrase and another test to another phrase," as this would "be both artificial and impractical."[159] Alternatively, "the two components of speech can be easily separated, [meaning]

[154] 116 Cal.App.4th 135 (Cal. Ct. App. 2004).
[155] *Riley*, 487 U.S. at 142.
[156] *Id.*
[157] Charles v. City of Los Angeles, 697 F.3d 1146, 1153 (9th Cir. 2012).
[158] *Jamison*, 318 U.S. at 416-17; Murdock, 319 U.S. at 108-13.
[159] *Riley*, 487 U.S. at 796.

they are not 'inextricably intertwined.'"[160] A more descriptive, but not any more helpful formulation of the test that has been offered by the courts is that "[i]f '[n]o law of man or of nature makes it impossible' to present the noncommercial aspects of the speech without the commercial aspects, then the noncommercial speech is not inextricably intertwined with the commercial speech."[161] Thus, courts will simply examine the speech at issue to determine whether or not the commercial and noncommercial elements are inextricably intertwined.

Having considered the First Amendment issues and standards involved in the advertising of movies generally, the article now returns to the *Yesterday* trailer lawsuit to examine Judge Wilson's ruling on the First Amendment issues implicated in that case.

V. Judge Wilson's Ruling on the First Amendment Issues in the *Yesterday* Case

Defending itself against allegations of deceptive advertising in *Woulfe v. Universal*, Universal argued that its trailer for *Yesterday* did not constitute commercial speech because the trailer went beyond simply proposing a commercial transaction by promoting the movie's availability.[162] Universal argued that it was significant that the trailer did not contain "price and quantity information, which is within the core notion of commercial speech."[163] The *Yesterday* trailer, Universal argued, including the segment featuring Ana De Armas, is an "artistic, expressive work in its own right" that "uses images, music, and dialogue to convey in just three minutes the story arc and themes of the feature film to which it relates."[164] As a result, Universal argued, the trailer "'bears all the hallmarks of noncommercial

[160] Hunt v. City of Los Angeles, 638 F.3d 703, 715 (9th Cir. 2010).

[161] Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1119 (9th Cir. 2021) (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 474-75, (1989) (finding that the home economics elements of Tupperware sales presentations were not inextricably intertwined with the sales pitches done in campus dormitories)).

[162] Def.'s Reply in Supp. of Def.'s Suppl. Br. Regarding Application of the First Amendment to Pls.' 2d Am. Compl. (Oct. 20, 2022), at 1, Woulfe v. Universal City Studios LLC, No 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *14 (C.D. Cal Dec. 20, 2022) (citing Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 906 (9th Cir. 2002) (quoting Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001) [hereinafter Def.'s Oct. 20 Reply]).

[163] Def.'s Oct. 20 Reply, *supra* note 1, at 1 (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (quotations omitted)).

[164] Def.'s Oct. 20 Reply, *supra* note 1, at 1.

speech'"[165] The court disagreed that this resulted in the trailer's being non-commercial: "If that were the case, almost any commercial for a product that chooses to entice consumers by telling a story would be considered a non-commercial work."[166] Acknowledging that there was some creativity in the trailer, the court concluded that "this creativity does not outweigh the commercial nature of [the] trailer. At its core, a trailer is an advertisement designed to sell a movie by providing consumers with a preview of the movie."[167]

The court then applied the *Bolger* factors to determine that the trailer is commercial speech. First, the plaintiffs had plausibly alleged that the trailer is an advertisement, as it was "used to advertise the movie and solicit purchases and rentals of the movie[.]"[168] The trailer also referred to a specific product: the movie *Yesterday*.[169] Finally, the plaintiffs had sufficiently alleged that "Universal had 'an adequate economic motivation so that the economic benefit was the primary purpose for speaking,'"[170] namely enticing consumers to pay to view or purchase the film.[171]

Universal argued that the plaintiffs could not show that the primary reason the particular scene featuring De Armas was included in the trailer "was for economic, as opposed to artistic, reasons."[172] The court's response to this was that "Universal's frame of reference is too narrow. The commercial speech in question is not the specific segment in question, but the trailer *as a whole*. Viewed in this light, it is a reasonable inference that the trailer as a whole was made for the primary purpose of selling tickets, copies, and rentals of the movie."[173] As a result, the court concluded that "[p]laintiffs have plausibly pled that the trailer is commercial speech."[174]

However, this did "not end the Court's inquiry," as the court noted that "[c]ommercial speech can lose its commercial character when it is 'in-

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[165] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *19 (C.D. Cal Dec. 20, 2022) (citation omitted).

[166] *Id.*

[167] *Id.*

[168] *Id.* (citations omitted).

[169] *Id.* at 19.

[170] *Id.* at 20 (citing Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1117 (9th Cir. 2021)).

[171] *Id.* at 230 (citation omitted).

[172] *Id.* (citation omitted).

[173] *Id.* (citing Charles v. City of Los Angeles, 697 F.3d 1146, 1151 (9th Cir. 2012) (emphasis in original)).

[174] *Id.* (citing Incarcerated Ent., LLC v. Warner Bros. Pictures, 261 F. Supp. 3d 1220, 1228 (M.D. Fla. 2017); *Charles*, 697 F.3d at 1151 (9th Cir. 2012)).

extricably intertwined' with fully protected speech."[175] However, if it is not impossible to separate the noncommercial elements of the speech from the commercial elements, then there is no inextricable intertwinement.[176] The court observed that "the 'inextricably intertwined' test operates as a narrow exception to the general principle that speech meeting the *Bolger* factors will be treated as commercial speech."[177]

One argument advanced by Universal to support a finding of inextricable intertwinement was the "expressive elements" in the scene featuring De Armas "are interwoven with the rest of the expressive story the trailer tells and are not 'easily separable' without undermining the continuity of the story that the rest of the trailer tells."[178] The court rejected this argument, again explaining that for purposes of this analysis, the court's focus was on the trailer as a whole, rather than the individual scenes that comprised the trailer. Because the trailer as a whole constituted commercial speech, so did the individual scenes within it, leading the court to find that "the fact that the [scene featuring De Armas] (commercial speech) is inextricably intertwined with the rest of the trailer (commercial speech) does not result in the conclusion that commercial speech and non-commercial speech are inextricably intertwined."[179]

Universal also argued the trailer "is entwined with protected speech" because it "reflects the content of the movie, which is 'plainly entitled to full First Amendment protection.'"[180] The court was not persuaded that the trailer's using scenes from the movie meant that there was inextricable intertwinement here. The court observed that "[w]hile the scenes from the movie would be non-commercial expressive speech when used as part of the movie, when these scenes are used in the context of the trailer, they become commercial speech."[181] The court thus distinguished scenes in the movie itself from the same scenes appearing in a trailer for the film. According to the court, those scenes would be fully protected in the movie, but receive less protection when appearing in the trailer. To the court, the trailer could be

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[175] *Id.* (citing *Ariix*, 985 F.3d at 1119).

[176] *Id.* (citing *Ariix*, 985 F.3d at 1119) (internal quotation omitted)).

[177] *Id.* (citing Dex Media W., Inc. v City of Seattle, 696 F.3d 952, 958 (9th Cir. 2012)).

[178] Def.'s Oct. 20 Reply, *supra* note 1, at 2 (citing *Ariix*, 985 F.3d at 1119).

[179] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *31 (C.D. Cal Dec. 20, 2022).

[180] Def.'s Oct. 20 Reply, *supra* note 1, at 2 (citing Forsyth v. Motion Picture Ass'n of Am., Inc., No. 16-cv-00935-RS, 2016 WL 6650059, at *3 (N.D. Cal. Nov. 10, 2016)).

[181] *Woulfe*, 2022 WL 18216089, at *20 (citing Zauderer v. Off. of Disciplinary Couns. Of Supreme Ct. of Ohio, 471 U.S. 626, 637 fn.7 (1985)).

easily separated from the movie, meaning the two are not inextricably intertwined, despite the fact that the trailer contained much of the same content as the movie.

To support the conclusion that speech that is fully protected in one context may lose that protection when it appears in a commercial context, the court cited the Supreme Court's holding in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[182] In that case, the Court observed that a lawyer's advertising contained "statements regarding the legal rights of persons injured by the Dalkon Shield [contraceptive device] that, in another context, would be fully protected speech." Despite this fact, the advertisement was still considered to be commercial speech.[183]

Universal then argued that applying consumer protection laws to the trailer would violate the First Amendment.[184] The court, however, found the First Amendment to be inapplicable here, "because Plaintiffs have sufficiently alleged that the trailer is false, commercial speech."[185] The court observed that "while commercial speech is generally subject to intermediate scrutiny, the Constitution affords no protection to false or misleading commercial speech."[186] As the Supreme Court stated in *Zauderer*, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading[.]"[187]

In sum, using the *Bolger* factors, the court found that the *Yesterday* trailer constituted commercial speech, which is subject to less heightened First Amendment scrutiny than is applicable to fully protected speech, such as the movie itself.[188] Further, the trailer and the movie were determined not to be inextricably intertwined, even though much of the same content was found in both. This was due to the fact that the trailer existed independently of the movie, so the two could be separated, with different First Amendment standards applied to each.[189] Finally, because the trailer was plausibly alleged to be deceptive, this removed the trailer from even the more limited

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[182] *Id.* (citing *Zauderer*, 471 U.S. at 637 fn.7 ("Appellant's advertising contains statements regarding the legal rights of persons injured by the Dalkon Shield that, in another context, would be fully protected speech. That this is so does not alter the status of the advertisements as commercial speech.")).

[183] *Zauderer*, 471 U.S. at 638.

[184] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *18 (C.D. Cal Dec. 20, 2022).

[185] *Id.*

[186] *Id.* (citing First Resort, Inc. v. Herrera, 860 F3d 1263, 1271 (9th Cir. 2017)).

[187] *Zauderer*, 471 U.S. at 6387 fn.7 (citing Friedman v. Rogers, 440 U.S. 1 (1979)).

[188] *Woulfe*, 2022 WL 18216089, at *19–20.

[189] *Id.* at *20.

First Amendment protections provided to commercial speech.[190] However, this ruling did not mean that Universal was liable for deceptive advertising here; it only meant that the plaintiffs could proceed with their lawsuit.[191] The question of whether Universal is liable here is yet to be determined.

VI. Implications of the Ruling

Judge Wilson's holding correctly applied First Amendment principles to the case. Courts have come to different conclusions on the issue of whether commercial speech for products protected by the First Amendment should also be granted full First Amendment protection,[192] as suggested by the Court in *Bolger*.[193] However, the foregoing examination of relevant Supreme Court cases demonstrates that the Court has not in fact created a categorical rule on these issues. Instead, that principle has been limited by the Court to cases involving religious and charitable solicitation.[194] The Court has never specifically suggested that it should apply to cases involving advertising of artistic expression or entertainment. Thus, Judge Wilson was correct to allow this case to proceed.[195]

In *Woulfe*, Universal argued that if Judge Wilson allowed the case to proceed, it could open the floodgates to all sorts of complaints by consumers who believed that movie trailers did not accurately represent the films they promoted. Universal argued that if it were held liable here, "a trailer would be stripped of full First Amendment protection and subject to burdensome litigation anytime a viewer claimed to be disappointed with whether and how much of any person or scene they saw in the trailer was in the final film, whether the movie fit into the kind of genre they claimed to expect; or any of an unlimited number of disappointments a viewer could claim."[196] Universal argued that a holding for the plaintiffs in this case would "open the floodgates to claims [whose] answers depend purely on subjective judgments about what representations a trailer purportedly makes, or how or

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[190] *Id.* at *19.

[191] *Id.* at *21.

[192] *See supra*, notes 98–99 and accompanying text.

[193] *Bolger*, 463 U.S. at 67–68 n.14 (1983).

[194] *See supra*, notes 101–7 and accompanying text.

[195] "The case will now proceed to discovery and a motion for class certification." Gene Maddaus, *Ana de Armas Fans' Lawsuit Puts Studios at Risk Over Deceptive Trailers*, Variety (Dec. 21, 2022 2:13pm PT), https://variety.com/2022/film/news/ana-de-armas-yesterday-false-advertising-1235467419/ [https://perma.cc/P22P-HZEL]. Lawyers are scheduled to "convene again for the case on" April 3, 2023. *See* France-Presse, *supra* note 13.

[196] Def.'s Suppl. Br. (Oct. 10, 2022)], *supra* note 2, at 6–7.

when it makes them."[197] The court was "not convinced" by this argument, pointing out that such lawsuits would be limited by the "reasonable consumer test[,] which 'requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'"[198]

As the *Woulfe* court observed, deceptive advertising laws provide elements to help limit liability in situations like those posited by Universal. Federal laws against deceptive advertising are enforced by the Federal Trade Commission (FTC or Commission). The Federal Trade Commission Act (FTCA) prohibits unfair and deceptive trade practices that affect commerce.[199] The law gives the FTC the authority to investigate and take action against deceptive trade acts and practices.[200] However, "private plaintiffs cannot sue under the FTCA – they must allege a violation under a similar state law."[201] Notably, every state has laws against deceptive trade practices under which consumers may file suit.[202] In fact, in *Woulfe*, the plaintiffs alleged the *Yesterday* trailer violated both California's and Maryland's laws against deceptive trade practices.[203]

Furthermore, many states have adopted the Federal Trade Commission's rules on deceptive advertising as their own laws, which are referred to as "Little FTC Acts."[204] These state laws "often expand on the FTCA and

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[197] Def.'s Req. for Notice of Mots. (May 5, 2022), at 15, Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *9 (C.D. Cal Dec. 20, 2022)).

[198] *Woulfe*, 2022 WL 18216089, at *14 (citing Kasky v. Nike, Inc., 27 Cal. 4th 939, 951 (Cal. 2002)).

[199] 15 U.S.C. § 45(a) (2023).

[200] 15 U.S.C. § 45(a)(2) & (b) (2023); *see also* Federal Trade Commission, FTC Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/YDK8-TFPA].

[201] Elad Botwin, *Deception Unknown: A Hard Look at Deceptive Trade Practices in the Video Game Industry*, 32 Loy. Consumer L. Rev. 115, 128 (2019).

[202] *Id.* at 137 (citing Carolyn L. Carter, Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes (2009), available at https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [https://perma.cc/2XGK-V6H5]).

[203] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *3 (C.D. Cal Dec. 20, 2022).

[204] Botwin, *supra* note 2010, at 137 (citing Justin Hakala, *Follow-On State Actions Based on the FTC's Enforcement of Section 5*, Wayne State Univ. Law Sch., Working Paper Grp., (Oct. 9, 2008), https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-0002/537633-00002.pdf [*perma.cc/U9US-XRMM*].

add in private causes of action, allowing individuals and organizations to file suit for deceptive trade practices."[205] In addition, "[i]n most states, state courts and federal courts in the jurisdiction have either followed or adopted the FTC's standards for deceptive trade practices."[206] For this reason, the FTC's rules on deceptive trade practices will be discussed to illustrate how those rules limit the claims that plaintiffs could successfully make against allegedly deceptive trailers.

The FTCA declares deceptive trade practices to be unlawful.[207] The law defines a "false advertisement" as one which is "misleading in a material respect."[208] In determining whether an ad is misleading, the law directs the FTC to take into account "representations made or suggested by" an ad, as well at "the extent to which the advertisement fails to reveal" material facts.[209] The issue for the Commission "is whether the act or practice is likely to mislead, rather than whether it causes actual deception."[210] However, the FTC generally does "not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously."[211]

To determine if false or deceptive advertising has occurred, the FTC considers three primary elements.[212] For there to be a finding of deceptive advertising, there must first "be a representation, omission or practice that is likely to mislead the consumer."[213] In considering this, the FTC will examine the "entire advertisement, transaction or course of dealing."[214] Deception can occur not only when a material misrepresentation is made or when inaccurate information is provided, but also when material information is omitted, "the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading."[215]

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[205] Botwin, *supra* note 2010, at 137 (2019) (citing Hakala, supra note 193; CARTER, *supra* note 191).

[206] Botwin, *supra* note 190, at 137 (2019) (citing Zlotnick v. Premier Sales Grp., Inc., 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)).

[207] 15 U.S.C. § 45(a) (2023); *see also* F.T.C. Policy Statement, *supra* note 189.

[208] 15 U.S.C. § 55(a)(1) (2023); *see also* F.T.C. Policy Statement, *supra* note 189, at 1.

[209] 15 U.S.C. § 55(a)(1) (2023); *see also* F.T.C. Policy Statement, *supra* note 189, at 1.

[210] F.T.C. Policy Statement, *supra* note 189, at 2.

[211] *Id.* at 4.

[212] *Id.* at 1.

[213] *Id.* (emphasis omitted).

[214] *Id.* at 2.

[215] *Id.*

Second, the challenged representation or practice is examined "from the perspective of a consumer acting reasonably in the circumstances," or when the practice is directed to a particular group, then from the perspective of that particular group.[216] The practice "must be likely to mislead reasonable consumers under the circumstances."[217] Because the consumer's reaction must be reasonable, businesses are not liable for every interpretation or reaction consumers may have.[218] However, to be reasonable, the consumer's "interpretation or reaction does not have to be the only one. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation."[219]

The third requirement is that "the representation, omission, or practice must be a 'material' one."[220] To be material, a representation or practice must be "one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers."[221] Omitted information is material when the "seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false[.]"[222] Materiality can also be found "when evidence exists that a seller intended to make an implied claim[.]"[223] Significantly, a determination that a practice is material "is also a finding that injury is likely to exist. . . . Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept."[224]

Thus, businesses can be liable for deceptive advertising if their advertising contains a material "representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[225] These standards help ensure that the subjective interpretation of a trailer by one person, or even a group of people, will not, by itself, be enough to subject a movie studio to liability for deceptive advertis-

[216] *Id.* at 1 (emphasis omitted).
[217] *Id.* at 2.
[218] *Id.* at 3.
[219] *Id.* (citations omitted).
[220] *Id.* at 1 (emphasis omitted).
[221] *Id.* at 5.
[222] *Id.* (citation omitted).
[223] *Id.* (citation omitted).
[224] *Id.* at 6.
[225] *Id.* at 2.

ing. Another case in which a movie trailer was alleged to be deceptive helps illustrate this.

In *Deming v. CH Novi LLC*,[226] plaintiff Deming argued that the trailer and other advertising for the 2011 film *Drive* "falsely promoted it as 'a chase, race, or high speed action driving film,' similar to *The Fast and the Furious* and that the preview failed to reveal that the film includes 'many segments of slow paced, interpersonal drama,' and is 'an extremely graphically violent film.'"[227] To evaluate Deming's claim, the court reviewed the trailer and the film, finding the trailer not to be "particularly inconsistent with the content of the film," and that "[e]very scene displayed in the preview also appeared in the film."[228] The court found that in addition to the racing scenes depicted in the trailer, the trailer also contained "several scenes with the main character and his neighbor and love interest, indicating that their relationship is a focus of the film."[229] There were also "several scenes of graphic violence[.]"[230] Ruling against Deming, the court found that "contrary to plaintiff's assertions, the trailer did not represent the movie to be solely about car racing and most of the scenes in the trailer do not show driving or racing scenes. Furthermore, any affirmative representations the trailer made about being a racing movie were not inaccurate; the movie does contain driving scenes."[231]

Here, the plaintiff alleged that a trailer was deceptive because she believed the trailer falsely emphasized certain elements of the film as being more prominent in the film than they actually were. While the court did not apply the standards for deceptive advertising discussed above, the thrust of the court's comparison of the contents of the trailer and the film was that the plaintiff's interpretation of the trailer was not reasonable. As the court's holding in this case shows, one person's subjective interpretation of a trailer will not, by itself, be sufficient to subject a studio to liability for deceptive advertising.

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[226] No. 309989, 2013 WL 5629814 (Mich. Ct. App. Oct. 15, 2013).

[227] *Id.* at 2.

[228] *Id.*

[229] *Id.*

[230] *Id.* These included "a scene where the main character smashes a man's face into the wall of an elevator, another where he repeatedly kicks a man lying on the ground, and third in which he holds a man on the ground and raises a hammer to smash the man's forehead." *Id.*

[231] *Id.* Plaintiff Deming further alleged that the film was anti-Semitic, and that the trailer was misleading for excluding any reference to the film's anti-Semitic nature. The court rejected this as well, finding no support for the plaintiff's allegation in the film or the trailer. *Id.* at 3.

There are some additional limitations that courts should consider in determining whether movie trailers are deceptive. First, a movie studio should not be liable for deceptive advertising simply because a trailer contains or depicts elements that are not included in the actual film. Returning to the FTC's deceptive advertising elements,[232] there should only be liability if such a trailer would mislead a reasonable consumer about the film's content, and if the misleading representation or omission in the trailer is a material one. For it to be material, it must lead the consumer to make a different choice than if the trailer had not included the misleading representation or omission. This appears to be the case in *Woulfe*, as plaintiffs alleged it was Ana De Armas' scene in the *Yesterday* trailer that persuaded them to rent and watch the movie.[233]

There is another reason that it would not be fair or just to automatically hold studios liable for trailers that include significant elements that turn out not to be present in the final film. That is because "[t]railers are often released well before the final film is finished," due to the necessity to create and stimulate interest and excitement for films well before their release dates.[234] Since this may be before the final film is complete, a trailer when it is created may accurately promote elements intended to be included in the film. However, in the process of finalizing the film, some of those elements may be cut from the film for artistic or creative reasons, or even for other reasons.[235] Thus, "[t]he necessity to advertise a movie with a long lead time is going to mean there's always a risk that moments used in the trailer will not end up in the finished film."[236]

In fact, that appears to be the situation in the present case. The scene featuring De Armas was shot with the intention of including it in the final film, and in fact, was included in an early version of the film shown to test audiences.[237] However, as discussed previously, the scene distracted test audiences from the main romantic story arc in the film, and audiences didn't appreciate the complication that De Armas' character created for that

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[232] *See supra*, notes 212–225 and accompanying text.

[233] Def.'s Suppl. Br. (Oct. 10, 2022), *supra* note 2, at 2–3.

[234] Eric Vespe, *New Ruling Declares Studios Potentially Liable For 'Deceptive' Movie Trailers*, SLASH FILM (Dec. 21, 2022 9:40 PM EST) https://www.slashfilm.com/1146027/new-ruling-declares-studios-potentially-liable-for-deceptive-movie-trailers/ [https://perma.cc/VSZ9-ELA9].

[235] *See, e.g.*, *Missing Trailer Scenes*, TV TROPES, https://tvtropes.org/pmwiki/pmwiki.php/Main/MissingTrailerScene [https://perma.cc/B2A5-ENB5].

[236] Vespe, *supra* note 223.

[237] Def.'s Suppl. Br. (Oct. 10, 2022), *supra* note 2, at 7 ("the Segment was part of a scene that was 'shot for inclusion in' the movie").

storyline. As a result, producers decided to cut the scene.[238] Thus, the trailer appears to have accurately represented the film at one point, although not the film's final version. While it is beyond the scope of this paper to detail how courts should handle situations such as this, where and when a consumer views a trailer for a film should be a factor in determining whether a consumer is reasonably misled by a trailer that inaccurately reflects a movie's content. The mere existence of such a trailer should not give rise to liability, as trailers released by studios well in advance of a film's release can have a perpetual life online and on social media, when the trailer is shared and reposted by others.

Instead, the focus should be on the role of the studio in providing the trailer at a particular time and in a particular location. For example, the studio should generally not be liable for releasing what turns out to be an inaccurate trailer in material aspects well in advance of the release of the actual film. But if, for example, it were to use that trailer to advertise that film on television or in theaters while the film is playing in theaters, then that could be a more appropriate basis for imposing liability. The same conclusion could be appropriate if that trailer is made available for consumers at the point of purchase for buying or renting a copy of the film. As a studio would be authorizing the outlet that sells or rents copies of the movie to do so, it should also be able to authorize the advertising content that would accompany the film at the point of sale. This is how the plaintiffs in *Woulfe* came to view the allegedly deceptive trailer for *Yesterday*, as it was available for them to view on Amazon, where they rented the film after viewing the trailer.[239]

Finally, one option for studios to protect themselves when releasing trailers before a film has been finalized is to simply disclose that fact in the trailer, although they may be reluctant to do so for artistic reasons or to avoid distracting viewers with a disclaimer while trying to sell them on a film. Videogame makers, whose product also requires long lead times to develop, and whose final products may have differences from how the games were previously advertised, have used this approach.[240] Once again, FTC deceptive advertising rules provide some guidance here. Disclaimers must be

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[238] *Id.* (The scene "was not included in the movie's final cut because . . . that scene and the particular storyline that it was a part of (Jack developing a relationship with the character Ms. de Armas portrayed) did not fit the creators' ultimate vision for what they wanted to see in the final film.")

[239] Woulfe v. Universal City Studios LLC, No. 2:22-cv-00459-SVW-AGR, 2022 WL 18216089, at *3 (C.D. Cal Dec. 20, 2022).

[240] *Vespe*, *supra* note 223.

"legible and understandable."[241] They may not prevent a finding of deceptive advertising when they are in fine print or when consumers' attention is otherwise directed away from the disclaimers, for example.[242]

In conclusion, the court's December 20, 2022, ruling in *Woulfe v. Universal* is significant because it appears to be the first in which a court allowed a lawsuit to proceed in which consumers allege that a movie trailer is misleading for containing elements which are not in the movie itself.[243] Whether Universal is liable here has yet to be determined at the time of this writing. The lawsuit does raise the question of what level of First Amendment protection to be accorded to commercial speech, such as a trailer, that promotes protected First Amendment products, like movies.[244] Due to the Supreme Court's suggestion in its *Bolger* footnote that full protection for commercial speech may be appropriate in this situation, this has been somewhat of an open question.[245] An examination of the cases cited by the Court to support this assertion,[246] as well as the Court's commercial speech cases involving protected First Amendment activities since *Bolger* was decided,[247] leads to the conclusion that the Court only meant that full protection should only be afforded to commercial speech when it involves religious and charitable solicitation. It does not appear that the court intended full protection to categorically be applied to commercial speech involving entertainment products. Regardless of the ultimate outcome in *Woulfe v. Universal*, the court was correct in that case to hold that the First Amendment did not automatically protect Universal from liability for its allegedly deceptive trailer.[248]

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[241] F.T.C. Policy Statement, *supra* note 189, at 4.
[242] *Id.*
[243] *Woulfe*, 2022 WL 18216089.
[244] *Id.* at 28.
[245] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 n.14 (1983).
[246] *See supra*, notes 110–133 and accompanying text.
[247] *See supra*, notes 134–1587 and accompanying text.
[248] *Woulfe*, 2022 WL 18216089, at *32.