

THE APPLICABILITY OF THE PRIOR RESTRAINT DOCTRINE TO FALSE ADVERTISING LAW

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INTRODUCTION

Consider a situation where a small jewelry boutique, which primarily specializes in low-priced jewelry, crafts a marketing strategy to gain a larger share of the market. After recognizing the boutique's market gain, the boutique's larger competitor sues it for false advertising, alleging that the advertisements falsely promote the jewelry's quality. To provide temporary protection for the larger competitor alleging irreparable harm, the court grants a preliminary injunction against the boutique's marketing strategy, forcing the store to lose its edge in the market and nearly causing its bankruptcy. When the case is finally brought to trial, the judge ultimately determines that the small jewelry boutique's marketing strategy was not false, nor did it mislead any of its customers, and the preliminary injunction was wrongly granted. This hypothetical presents the issue of prior restraint, which hinges upon the idea that individuals have the right to publish speech as they see fit without preemptive government restrictions.¹

Although it might be argued that the small jewelry boutique has not suffered severe losses beyond the potential lost business during the period of the injunction, such an argument fails to consider the value of commercial speech. Commercial speech serves an important role in educating consumers about available market options, while helping to fuel competition and drive down prices.² Judges have considered the importance of free speech rights when granting preliminary injunctions in other legal contexts; however, this factor is routinely ignored in false advertising cases.³

This Comment explores preliminary injunctions issued in false advertising cases and argues that the prior restraint doctrine is implicated where the speech is found to be true and non-misleading upon a final adjudication

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¹ Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 *MERCER L. REV.* 1087, 1145 (2001).

² See *infra* Part III.

³ See *infra* Part I.B.

of the case. Part I of this Comment discusses the background of preliminary injunctions granted in false advertising cases, particularly after the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*⁴ This Part also highlights the various inconsistencies in the standard for preliminary injunctions in false advertising cases, which ultimately implicate the defendant's free speech rights. Part II proceeds by arguing that the prior restraint doctrine should be applied to false advertising cases to assuage all potential First Amendment concerns. This Part begins by analyzing the applicability of the prior restraint doctrine to cases involving other forms of speech, such as defamation and copyright infringement cases, and compares these other forms of speech to false advertising. Part III predicts and refutes common arguments against applying the prior restraint doctrine to false advertising law. Finally, Part IV advocates application of the prior restraint doctrine in the balancing of the interests prong under the *Winter* standard.

I. BACKGROUND—PRELIMINARY INJUNCTION STANDARDS AND PROBLEMS SINCE *WINTER*

A. *The New Standard for Preliminary Injunctions Under Winter v. Natural Resources Defense Council, Inc.*

Preliminary injunctions originated in the English courts of chancery and remain a part of civil procedure in the American judicial system.⁵ Today, courts grant preliminary injunctions in a broad range of legal contexts, including false advertising, copyright infringement, defamation, and obscenity.⁶ While courts have issued preliminary injunctions for centuries, courts have not always utilized a uniform standard in issuing or denying preliminary injunctions.⁷ It was not until the nineteenth century when a standard emerged that uniformly addressed the issuance of preliminary injunctions.⁸ This standard consisted of four factors: (1) the extent of harm to the plaintiff absent a preliminary injunction; (2) the balance between the harm to the plaintiff absent a preliminary injunction and the harm to the defendant if the injunction were granted; (3) the plaintiff's likelihood of success on the merits of the underlying case; and (4) the public interest.⁹ Until the articulation of the more uniform standard in *Winter*, circuits varied

⁴ 129 S. Ct. 365 (2008).

⁵ Bethany M. Bates, Note, *Reconciliation after Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1524 (2011).

⁶ See *id.* at 1525-26.

⁷ *Id.* at 1526.

⁸ *Id.*

⁹ *Id.* at 1528.

in their application of the four factors.¹⁰ Primarily, the circuits differed in the weight that they gave each factor, with some circuits treating several of the factors as mandatory while waiving others.¹¹

The Supreme Court recently adopted a new uniform standard for preliminary injunctions in *Winter v. Natural Resources Defense Council, Inc.*, which incorporates the four factors traditionally utilized by courts.¹² *Winter* articulated a more stringent standard for plaintiffs seeking preliminary injunctions, specifically requiring a showing that the plaintiff will likely suffer irreparable harm absent injunctive relief and that the irreparable harm suffered will outweigh the harm suffered by the defendant in the event the preliminary injunction issues.¹³ In *Winter*, environmental organizations sought a preliminary injunction against the Navy to prohibit it from using certain sonar during training exercises which would cause injury to marine life.¹⁴ Because the Navy's interest in conducting training exercises outweighed the environmental organizations' interest in preserving the environment, the Supreme Court held that the plaintiff was not entitled to a preliminary injunction.¹⁵ In finding for the Navy, the Court also indicated that the plaintiff bears the burden of proving all four prongs of the preliminary injunction test.¹⁶

While this Comment primarily addresses the inconsistencies in applying the *Winter* preliminary injunction standard to false advertising cases, courts have been criticized for an inconsistent application of the *Winter* standard in general. Circuits are still split in their application of the *Winter* standard, causing inconsistencies in the relief granted to parties at the preliminary injunction stage during litigation.¹⁷ Indeed, many circuits still employ the same tests that they did prior to *Winter*, giving more weight to some factors than to others.¹⁸ For example, some circuits still utilize the "sliding scale approach," which permits the district court to balance the plaintiff's potential for irreparable harm against its likelihood for success on the merits.¹⁹ Thus, courts still seem to be in need of clarification as to the interplay between the four factors established to succeed on a motion for

¹⁰ *Id.* at 1530.

¹¹ Bates, *supra* note 5, at 1530.

¹² *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

¹³ *Id.* at 376.

¹⁴ *Id.* at 370.

¹⁵ *Id.* at 382.

¹⁶ *Id.* at 374.

¹⁷ Bates, *supra* note 5, at 1546 ("Circuits that allow for serious questions going to the merits to suffice for the likelihood of success prong enable courts to undertake a more holistic and ultimately more equitable analysis, enabling plaintiffs to proceed to the discovery stage and access evidence that may be crucial to substantiating their claims.").

¹⁸ *Id.* at 1538.

¹⁹ *Id.*

preliminary injunction under *Winter*.²⁰ This has contributed to numerous issues in litigation involving preliminary injunctions, causing inequitable and inconsistent results for the parties.²¹

B. *The Standards for Issuing Preliminary Injunctions in False Advertising Law*

As in other legal contexts where it is often important for a court to grant a plaintiff preliminary injunctive relief to prevent potential harm to the plaintiff during the pre-trial period, plaintiffs filing false advertising claims face similar concerns. The plaintiff risks losing profit during the pre-trial period as a result of the alleged false advertising campaign, particularly where the false advertising claim is between two competitors. To prevent the negative effects of false advertising, including the discrediting of a product, the destruction of consumer confidence, and the impairment of “a communal or trade good will,” it may be necessary for courts to issue preliminary injunctions.²²

Courts analyze four factors in granting injunctive relief.²³ First, the court considers whether the plaintiff is likely to succeed on the merits of his claim.²⁴ Second, the court looks at whether the plaintiff is “likely to suffer irreparable harm in the absence of preliminary relief.”²⁵ Next, the court determines whether the “balance of equities” tips in the plaintiff’s favor.²⁶ Finally, the court analyzes whether an injunction would be in the public interest.²⁷ The plaintiff bears the burden of satisfying all four elements as articulated to succeed on a motion for a preliminary injunction.²⁸ Courts consider preliminary injunctions extraordinary remedies, and a plaintiff

²⁰ *Id.* at 1554.

²¹ *Id.* (contending that the creation of a uniform standard for preliminary injunctions would not only benefit the parties to litigation but would also benefit attorneys litigating in various jurisdictions, and it would “strengthen[] the marketplaces of ideas’ that are the state legislatures and lower federal courts” (quoting Ryan Griffin, Note, *Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values When Considering Preliminary Injunctive Relief*, 94 MINN. L. REV. 839, 867 (2010))).

²² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 778 n.4 (1992) (Stevens, J., concurring in judgment) (quoting Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 193 (1936)).

²³ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). Much of the analysis in this Section must be attributed to THOMAS M. WILLIAMS, FALSE ADVERTISING AND THE LANHAM ACT: LITIGATING SECTION 43(A)(1)(B) (2012) (extensively describing various aspects of claims filed under the Lanham Act).

²⁴ *Winter*, 129 S. Ct. at 374.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

must make a clear showing of entitlement to relief in order for a court to issue a preliminary injunction.²⁹ Additionally, the Federal Rules of Civil Procedure require plaintiffs to post security “in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”³⁰ Nonetheless, courts have recognized that the requirement to post security is not mandatory and is based upon the discretion of the court.³¹ While some courts exercise unlimited discretion when deciding whether to waive the bond requirement, some courts limit such discretion to cases that involve indigent parties or group challenges to a federal statute.³²

Most preliminary injunctions do not physically prevent the defendant from speaking or sharing his expression, but a preliminary injunction does punish such expressions afterward with civil liabilities or criminal penalties.³³ This subsequent punishment typically serves as a sufficient deterrent for defendants to avoid violating the injunction.³⁴ Even though “courts continue to pay lip service to the oft-repeated maxim that preliminary injunctive relief is an ‘extraordinary remedy,’” preliminary injunctions are granted “almost as of right.”³⁵ Indeed, some courts use a rather liberal standard and grant preliminary injunctions where there is a “better than negligible” chance of success on the merits if the balance of hardships weighs in the plaintiff’s favor.³⁶

1. Establishing a Showing of Success on the Merits in False Advertising Claims

In determining whether a plaintiff alleging a false advertising claim is entitled to a preliminary injunction, the court first examines whether the plaintiff is likely to succeed on the merits of his claim. In determining the likelihood of success, the court looks at all five elements required in a false advertising claim.³⁷ Although the Lanham Act sets forth the various ele-

²⁹ *Calvary Christian Ctr. v. City of Fredericksburg*, 800 F. Supp. 2d 760, 765 (E.D. Va. 2011).

³⁰ FED. R. CIV. P. 65(c).

³¹ *See, e.g., Popular Bank of Fla. v. Banco Popular de P.R.*, 180 F.R.D. 461, 463-65 (S.D. Fla. 1998) (holding that a district court’s failure to address whether plaintiff must post security in its preliminary injunction order did not render the preliminary injunction invalid).

³² *Id.* at 463.

³³ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 175 (1998).

³⁴ *Id.*

³⁵ John M. Newman, Note, *Raising the Bar and the Public Interest: On Prior Restraints, “Traditional Contours,” and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 325 (2011).

³⁶ Lemley & Volokh, *supra* note 33, at 202 (internal quotation marks omitted).

³⁷ *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002).

ments that comprise a false advertising claim, the elements are applied differently from circuit to circuit.³⁸ It seems that this inconsistency between circuits results from the vagueness of the Lanham Act itself; indeed, courts even differ on the ultimate goal of the Lanham Act false advertising provisions.³⁹ Depending on the circuit in which suit is brought, the protection afforded to the defendant's free speech rights may vary widely.⁴⁰ Because some circuits may favor granting relief to plaintiffs for false advertising claims, plaintiffs can sometimes forum shop from circuit to circuit if the various jurisdictions have jurisdiction over the claim.⁴¹

The plaintiff must first show that the representation was a false or misleading description or representation of fact in a commercial outline.⁴² Plaintiffs can satisfy this requirement by showing that the advertisement is either literally false or impliedly false based on the test established under *Skil Corp. v. Rockwell International Corp.*⁴³ If the plaintiff makes a showing of implied falsity, the plaintiff must then present additional extrinsic evidence of consumer deception, which is typically demonstrated through consumer surveys.⁴⁴ A consumer survey must reflect principles of scientific reliability established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴⁵ including requirements that the survey be objective and directed at the proper universe of respondents.⁴⁶ If the plaintiff makes a showing of literal falsity, then the court does not require evidence of consumer deception.⁴⁷ Courts typically dismiss this requirement for literally false advertisements because "[a] court's finding that a challenged advertising claim is literally false carries with it, among other things, the presumption that the claim's audience has been (or likely will be) deceived."⁴⁸ Further, the representation in question does not need to be a verbal statement; rather, it can include television commercials or a depiction of visual images on the Internet.⁴⁹

³⁸ See Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 834 (1999).

³⁹ *Id.* (noting that, although Congress has stated that one purpose of the law was "to protect persons engaged in such commerce," this provision has incited confusion as to whether it primarily protects consumers or competitors (quoting 15 U.S.C. § 1127 (1994)) (internal quotation marks omitted)).

⁴⁰ See *supra* note 17.

⁴¹ See *id.*

⁴² *Scotts Co.*, 315 F.3d at 272.

⁴³ 375 F. Supp. 777, 782-83 (N.D. Ill. 1974); WILLIAMS, *supra* note 23, at 107.

⁴⁴ *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 123 (4th Cir. 2011).

⁴⁵ 509 U.S. 579 (1993).

⁴⁶ See *id.* at 597; *PBM Prods.*, 639 F.3d at 123. For a general discussion on the admissibility of survey evidence to prove that a representation is misleading, see WILLIAMS, *supra* note 23, at 59-64.

⁴⁷ WILLIAMS, *supra* note 23, at 43.

⁴⁸ Richard J. Leighton, *Literal Falsity by Necessary Implication: Presuming Deception Without Evidence in Lanham Act False Advertising Cases*, 97 TRADEMARK REP. 1286, 1286 (2007).

⁴⁹ WILLIAMS, *supra* note 23, at 41-42.

One method of showing literal falsity is through the false by necessary implication doctrine.⁵⁰ The court will find that a statement is false by necessary implication where “the audience would recognize the claim as readily as if it had been explicitly stated.”⁵¹ In determining whether an advertisement has such an effect on its audience, the court must consider the claim in its entirety.⁵² Because this doctrine is easily confused with the analysis for determining whether a claim is misleading, the expansion of this doctrine has led to the general overreach of false advertising liability.⁵³

Misleading claims and claims that are false by necessary implication are distinguishable, as demonstrated by a simple example.⁵⁴ A misleading claim, such as the “strongest [stomach] antacid I could buy,” misleads consumers because it leads consumers to think that this product is better than competing brands.⁵⁵ While the claim might be literally true because it could contain the strongest amount of medicine out of any antacid offered on the market, the claim is misleading because consumers may understand the statement to mean that it is the most effective product in treating stomach problems.⁵⁶ In comparison, the same claim may also be deemed to be false by necessary implication because it “necessarily implies that the product provides the best indigestion relief, which is not true.”⁵⁷ When finding that a claim is false by necessary implication, the court does not consider how consumers perceive the message contained in the advertisement.⁵⁸

The determination of whether the representation is false or misleading is one example of an element that is interpreted differently among the circuits. Although in some cases courts truly analyze the evidence of deception and look closely at each term in the message for falsity, other courts seem to devote little consideration to this element.⁵⁹ For example, in one case, a judge determined that a claim was not literally false because of his

⁵⁰ *Id.* at 44.

⁵¹ *Id.* at 51 (quoting *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000)) (internal quotation marks omitted).

⁵² *Id.* at 52.

⁵³ Sarah Samuelson, Note, *True or False: The Expanding “False by Necessary Implication” Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve This Problem*, 30 *CARDOZO L. REV.* 317, 322 (2008).

⁵⁴ *Id.* at 321.

⁵⁵ *Id.* (internal quotation marks omitted).

⁵⁶ *Id.*

⁵⁷ *Id.* (emphasis omitted).

⁵⁸ *Id.*

⁵⁹ Burns, *supra* note 38, at 864-66 (explaining the numerous difficulties courts face in determining whether an advertisement is actually false or misleading, including the number of messages contained in a single advertisement; the possibility that some consumers may be misled, while others may not be; and the highly technical nature of many false advertising claims, about which courts typically lack expertise).

own observation of the advertised product.⁶⁰ In another case, the judge determined that the word “official” was literally false because there could be no other reasonable interpretation for the word.⁶¹ Because the determination of whether speech is false is crucial to determining whether it may be preliminarily enjoined, the defendant’s advertisement could be restricted even though the speech or expression contained therein is not actually false or misleading. Courts must take particular caution in ensuring that a defendant’s speech is actually false when making a finding of literal falsity because such a finding does not require a plaintiff to make any showing of actual consumer deception.⁶² When plaintiffs seek injunctive relief, the determination of whether the advertisement is literally or impliedly false is only subject to reversal if it is found to be clearly erroneous.⁶³ The substantial deference of appellate courts to the district courts’ findings on review additionally begs the need for accuracy in the district court’s decision.

The requirement for plaintiffs to show extrinsic evidence of consumer deception where the alleged advertisement is impliedly false presents another issue for the uniform application of the Lanham Act among courts. Despite the requirements under *Daubert* to ensure that surveys are scientifically reliable, many courts fail to properly consider those elements set forth in *Daubert* and instead treat consumer surveys as opinion polls.⁶⁴ Rather than polling individuals on their beliefs, a Lanham Act survey should demonstrate how the content of the speech in question influences consumer perceptions.⁶⁵ Such an analysis has the potential to greatly injure defendants because opinion polls merely measure false perceptions but they cannot establish a causal connection between that perception and the speech in question.⁶⁶

The issue of admissibility of faulty survey evidence was particularly prominent in *Pom Wonderful LLC v. Organic Juice USA, Inc.*⁶⁷ In *Pom Wonderful*, the court considered admitting into evidence several consumer surveys allegedly showing that advertisements for Pom juice misled consumers into believing that the juice was not from concentrate.⁶⁸ Pom em-

⁶⁰ *Media Arts Int’l Ltd. v. Trillium Health Prods.*, 25 U.S.P.Q.2d (BNA) 1764, 1770 (E.D. Pa. 1992) (involving a claim against defendant’s advertising campaign for a juicer).

⁶¹ *Nester’s Map & Guide Corp. v. Hagstrom Map Co.*, 760 F. Supp. 36, 36-37 (E.D.N.Y. 1991) (adjudicating whether the usage of the word “official” in the title “*Official New York Taxi Driver’s Guide*” constituted false advertising, since no agency or department of the City of New York authorized the use of the word “official”).

⁶² WILLIAMS, *supra* note 23, at 43.

⁶³ Burns, *supra* note 38, at 866 n.258.

⁶⁴ William W. Vodra & Randall K. Miller, “*Did He Really Say That?*” *Survey Evidence in Deceptive Advertising Litigation*, 92 TRADEMARK REP. 794, 836 (2002).

⁶⁵ *Id.*

⁶⁶ *Id.* at 837.

⁶⁷ 769 F. Supp. 2d 188, 193-201 (S.D.N.Y. 2011).

⁶⁸ *Id.*

phasized that the surveys contained numerous errors such as utilizing an improper universe of respondents, employing confusing and unclear questions, and failing to include a “don’t know” answer for respondents.⁶⁹ Most alarmingly, one of the surveys did not place a Pom juice advertisement in the context that consumers would normally be viewing it because the text that normally preceded the advertisement was removed from the survey.⁷⁰ Despite the issues with the survey, the court held that the survey’s flaws did not deem the survey completely inadmissible; rather, the flaws went toward the weight to be given to the survey.⁷¹ The court found that Pom’s critique of the surveys could be demonstrated through cross-examination, admission of contrary evidence, and proper instruction to the jury; however, this holding fails to take the persuasive power of such surveys into consideration.⁷² For example, even with the defendant’s ability to cross-examine, such a ruling favors the plaintiff because any fact finder could become biased after hearing the results of unreliable surveys.

The plaintiff must also demonstrate that the defendant’s misleading statement was placed in interstate commerce.⁷³ Although initially the Lanham Act required plaintiffs to show that the misrepresented goods or services entered interstate commerce, subsequent 1988 amendments required only that the actual statement be placed in interstate commerce.⁷⁴ The interstate commerce element has garnered differing analyses from various circuits.⁷⁵ For example, the Third Circuit adopted a four-factor test to analyze whether the statement entered interstate commerce, a test that has been applied by most courts, including the Second Circuit and Ninth Circuit.⁷⁶ This test, which is typically thought to have originated in the Second Circuit, has been criticized for expanding the Lanham Act to cover all commercial speech, which adversaries claim was never intended by Congress.⁷⁷ Opponents of the four-factor test include the Seventh Circuit, which has excluded

⁶⁹ *Id.* at 199.

⁷⁰ *Id.* at 200.

⁷¹ *Id.* at 200-01.

⁷² *Id.* at 201.

⁷³ *See* *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002).

⁷⁴ WILLIAMS, *supra* note 23, at 69.

⁷⁵ *See id.* at 69-72.

⁷⁶ *Id.* at 69-70 (requiring a showing that the advertising or promotion was “(1) commercial speech; (2) by a defendant in commercial competition with the plaintiff; (3) designed to influence customers to buy the defendant’s products; (4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry” (quoting *Pitney Bowes, Inc. v. ITS Mailing Sys., Inc.*, Civil Action No. 09-05024, 2010 WL 1005146, at *4 (E.D. Pa. March 17, 2010)) (internal quotation marks omitted)).

⁷⁷ *Id.* at 70.

application of the Lanham Act where the statements in question were made orally, from person to person.⁷⁸

The plaintiff must next show that the defendant's representation was material.⁷⁹ To demonstrate materiality, the plaintiff must show that the defendant misrepresented an essential quality of the product and that such misrepresentation is likely to influence consumers' purchasing decisions.⁸⁰ Finally, the plaintiff must show that it is likely to be injured as a result of the representation.⁸¹ Courts will find that a plaintiff has been or is likely to be injured upon a demonstration of a direct diversion of sales from the plaintiff to the competitor as a result of the advertisement.⁸² Additionally, where the product or company is found to have lost reputational or goodwill standing with its consumer base, courts will find that the plaintiff has been injured or is likely to be injured.⁸³

2. Irreparable Harm Requirement

The second element that the plaintiff is required to satisfy under *Winter* to obtain a preliminary injunction is that he must demonstrate irreparable harm in the absence of a preliminary injunction. To demonstrate irreparable harm, the plaintiff typically must show that the harm is actual and imminent and cannot be compensated by monetary damages at judgment.⁸⁴ For example, in *In re Microsoft Corp. Antitrust Litigation*,⁸⁵ the rival software manufacturer alleged future irreparable harm from the risk that the market for computer software would tip toward Microsoft's product; it also alleged present harm to its right to compete and to prevail in the software market.⁸⁶ The court held that the rival software manufacturer failed to clearly show that it would suffer irreparable harm absent a preliminary injunction because the future harm that the manufacturer alleged was only speculative.⁸⁷ Similarly, in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*,⁸⁸ the court found that the plaintiff must make a clear

⁷⁸ See, e.g., *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 804 (7th Cir. 2001) (finding that statements made by the defendant and its lawyers "made over a conference table in an effort to negotiate a contract, or included in the contract's language, could [not] be called 'commercial advertising or promotion'").

⁷⁹ *Scotts Co.*, 315 F.3d at 272.

⁸⁰ WILLIAMS, *supra* note 23, at 67.

⁸¹ *Scotts Co.*, 315 F.3d at 272.

⁸² WILLIAMS, *supra* note 23, at 72.

⁸³ *Id.*

⁸⁴ See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 529 (4th Cir. 2003).

⁸⁵ 333 F.3d 517 (4th Cir. 2003).

⁸⁶ *Id.* at 527.

⁸⁷ *Id.* at 530.

⁸⁸ 550 F.2d 189 (4th Cir. 1977).

showing that the harm cannot be readily ascertained or calculated with any accuracy.⁸⁹ The court there found that the potential damage to plaintiff's reputation and goodwill constituted irreparable harm.⁹⁰

Although the plaintiff must typically demonstrate actual and imminent harm that cannot be compensated by monetary damages at judgment, the court may find that monetary damages are sufficient where the defendant is likely to be insolvent at judgment, or where the plaintiff's business will not survive until the judgment stage.⁹¹ In *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*,⁹² the seller filed for a preliminary injunction that would direct the buyer to enter a "lockbox" agreement where all revenues from the wireless phone systems would be paid into a bank, with a portion of the funds distributed to the seller.⁹³ The seller of wireless phone systems was held to have demonstrated irreparable harm because the harm it suffered was similar to the granting of an injunction in order to ensure that the defendant is not insolvent at judgment.⁹⁴

Courts previously presumed irreparable harm where plaintiffs could demonstrate a strong likelihood of prevailing on the merits and only a possibility of harm (the "sliding scale" approach)⁹⁵; however, *Winter* has largely overturned such precedent.⁹⁶ In addition to the sliding presumption scale, prior to *Winter*, some circuits also recognized a rebuttable "presumption" of irreparable harm.⁹⁷ This presumption is generally based on the notion that it is difficult to ascertain damages in false advertising cases, particularly where the damages are based on harm to reputation or goodwill.⁹⁸ While *Winter* caused circuits to largely overrule the sliding presumption scale, it is unclear whether *Winter* has overruled the presumption of irreparable harm from false advertising.⁹⁹ Some courts have yet to rule on whether the presumption can still be upheld after the *Winter* ruling.¹⁰⁰ Other courts that have ruled on the applicability of *Winter* to false advertising cases have generally decided to disallow the irreparable harm presumption

⁸⁹ *Id.* at 197.

⁹⁰ *Id.* (stating that "[w]ord-of-mouth grumbling of customers" can give Blackwelder a "reputation for general unreliability as a merchant" and could "set back Blackwelder's efforts to become known as a 'full-line' furniture discountor").

⁹¹ *See, e.g., Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

⁹² 17 F.3d 691 (4th Cir. 1994).

⁹³ *Id.* at 693.

⁹⁴ *Id.* at 696.

⁹⁵ *See, e.g., Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183-84 (8th Cir. 1998).

⁹⁶ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374-75 (2008); *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011).

⁹⁷ WILLIAMS, *supra* note 23, at 107.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 108.

in light of the ruling in *Winter*.¹⁰¹ For example, beginning in 2009 the Second Circuit district courts began to require plaintiffs to show at least a probability of irreparable harm in order to receive a preliminary injunction.¹⁰² Similarly in *Osmose, Inc. v. Viance, LLC*,¹⁰³ the Eleventh Circuit affirmed the district court's decision not to apply a presumption of irreparable harm and instead to analyze whether the advertisements would cause irreparable harm on their face.¹⁰⁴

3. Balance of Equities Test

Besides needing to demonstrate irreparable harm, plaintiffs are required under the third prong of the *Winter* standard to show that the harm they will suffer absent a preliminary injunction outweighs the harm to the defendant if the injunction were granted.¹⁰⁵ Because the court can award damages upon a final adjudication of the case, the only damages the court considers in the balance of the equities test are those that occur between the preliminary injunction motion and trial.¹⁰⁶ The Seventh Circuit noted that the focus of the harm to the defendant should be limited to the harm of eliminating the false advertisement,¹⁰⁷ rather than eliminating the entire product from the market. In *Scotts Co. v. United Industries Corp.*,¹⁰⁸ the Fourth Circuit also considered whether “any irreparable harm that the defendant might suffer . . . would not be either cured by the defendant’s ultimately prevailing in the trial on the merits or fully compensated by the injunction bond.”¹⁰⁹ Because the defendant only dealt regularly with one customer, the Home Depot, the court recognized that the defendant’s task of informing customers of the outcome of the litigation would be significantly easier than if it had more customers.¹¹⁰

¹⁰¹ *Id.*

¹⁰² *Id.* at 112.

¹⁰³ 612 F.3d 1298 (11th Cir. 2010).

¹⁰⁴ *Id.* at 1320.

¹⁰⁵ *See, e.g.*, *Calvary Christian Ctr. v. City of Fredericksburg*, 800 F. Supp. 2d 760, 764 (E.D. Va. 2011).

¹⁰⁶ *See, e.g.*, *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992).

¹⁰⁷ *See, e.g., id.*

¹⁰⁸ 315 F.3d 264 (4th Cir. 2002).

¹⁰⁹ *Id.* at 285 (quoting *Gateway E. Ry. Co. v. Terminal R.R. Ass’n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994)) (internal quotation marks omitted).

¹¹⁰ *Id.*

4. Public Interest

In granting preliminary injunctions, courts generally find the public interest to be best served by eliminating any potentially confusing and deceptive information.¹¹¹ The importance of the public interest prong varies based on the product or service involved in the false advertising litigation.¹¹² For example, in *PBM Products, LLC v. Mead Johnson & Co.*,¹¹³ the court found the public interest to be particularly important because the litigation involved a false advertising claim against an infant formula manufacturer, which implicated “issues of public health and infant well-being.”¹¹⁴ Courts have also recognized that commercial speech can serve the public interest by providing useful information about available products on the market.¹¹⁵ The court in *Abbott Laboratories v. Mead Johnson & Co.*¹¹⁶ reflected on the importance of commercial speech, noting that granting a preliminary injunction to restrict competing products may be detrimental to the public interest in a narrow market.¹¹⁷ The court noted that a preliminary injunction in this context created the risk of a monopoly.¹¹⁸ Nonetheless, the court found that the interest in protecting consumers from deception and confusion outweighed that of helping to prevent a monopoly in a particular market.¹¹⁹

II. THE PRIOR RESTRAINT DOCTRINE AS A REMEDY FOR THE NON-UNIFORM PROTECTION OF DEFENDANTS’ RIGHTS IN FALSE ADVERTISING CASES

Although *Winter* articulated one standard through which the court may issue a preliminary injunction, this standard has been applied unevenly in false advertising cases since its promulgation. This causes an inconsistency both in the relief granted to plaintiffs and the protection of defendants’ rights. While the discrepancies between the application of the *Winter* stand-

¹¹¹ WILLIAMS, *supra* note 23, at 118.

¹¹² *See, e.g.*, *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 127-28 (4th Cir. 2011); *see also* *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2002). In *Jarrow Formulas*, the plaintiff alleged that the defendant’s advertisements for its probiotic nutritional supplement were false and misled consumers about the content of the product. The court recognized that the public interest is particularly strong where health and medical products are involved. *Jarrow Formulas*, 304 F.3d at 841.

¹¹³ 639 F.3d 111 (4th Cir. 2011).

¹¹⁴ *Id.* at 127-28.

¹¹⁵ *See infra* Part III.

¹¹⁶ 971 F.2d 6 (7th Cir. 1992).

¹¹⁷ *Id.* at 18-19.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

ard may affect the plaintiff's rights in addition to the defendant's rights, the unequal protection of defendants' free speech rights is particularly concerning. Whereas the false advertising plaintiff is asserting a claim against another party, the defendant is merely trying to protect its product's advertisements in the marketplace.

The unequal protection of the parties' rights is further troublesome when considering the importance of injunctions during the pre-trial period. While preliminary injunctions might be considered only temporary remedies, "[t]he grant or denial of a preliminary injunction is often the most crucial decision a trial judge can make, one that has the frequent effect of completely ending litigation."¹²⁰ Because the plaintiff's likelihood of success on the merits is one of the factors considered in the preliminary injunction test, the grant or denial of a preliminary injunction can often serve as a signaling function for the plaintiff's potential success at trial.¹²¹ Specifically, parties can deduce from this information whether they should settle the case or proceed to trial.¹²² After the court grants a preliminary injunction to the plaintiff, the defendant is more likely to think that there is a greater risk of losing at trial because the court has already made an initial ruling on the merits of the case.¹²³ While the signal may be accurate in some cases, both parties' lack of complete information increases the likelihood that the defendant is acting erroneously by settling pre-trial with the plaintiff.¹²⁴

As discussed previously, one inconsistency in the relief granted to parties under the *Winter* standard results from the little consideration that some courts devote to determining whether an advertisement is false or misleading. Yet another discrepancy in protecting defendants' rights results from the admission of unreliable survey evidence depicting alleged consumer deception. If unreliable survey evidence is deemed admissible, and the courts fail to devote sufficient time to sorting out false or misleading speech from true and non-misleading speech, the court risks incorrectly deeming commercial speech false or misleading. The defendant may therefore be improperly restricted from displaying its advertisement in the marketplace.

¹²⁰ Newman, *supra* note 35, at 327.

¹²¹ *Id.* at 327-28.

¹²² *Id.* at 328.

¹²³ *Id.*

¹²⁴ *Id.* ("If the standard applied by courts in deciding whether to grant preliminary injunctive relief is too low, it will grant plaintiffs who would ultimately have lost at a trial on the merits undeserved bargaining power—the shield becomes a sword.")

A. *The Prior Restraint Doctrine and Its Applicability to Various Forms of Speech*

Injunctions are particularly worrisome with regard to free speech protection because they “carry greater risks of censorship and discriminatory application than do general ordinances.”¹²⁵ Justice Antonin Scalia noted that “an injunction against speech is the very prototype of the greatest threat to First Amendment values.”¹²⁶ To counteract this threat against free speech, the Supreme Court gradually developed the prior restraint doctrine.¹²⁷ Since as far back as 1788, courts have recognized the importance of prohibiting “previous restraints” on speech in order to uphold the protection of speech under the First Amendment.¹²⁸ The doctrine is based on the general idea that “every person may publish what it [sic] sees fit, and any judgment of the law upon it shall be reserved til afterwards.”¹²⁹ The prior restraint doctrine not only prohibits the judicial branch from preemptively restricting speech but also restricts the other branches of government.¹³⁰ Despite the extra shield of protection that the prior restraint provides free speech, the doctrine has largely come under criticism for justifying subsequent restrictions on speech.¹³¹ Scholars have noted “[b]ecause the prior restraint doctrine is not a substantive protection, it ‘leaves open the possibility that this same speech-suppressive activity might be found constitutional if sufficiently redesigned and recast in the form of a subsequent sanction.’”¹³² Nevertheless, such criticism fails to consider that the purpose of the prior restraint doctrine is to prevent speech from being preliminarily restricted prior to a final adjudication that the speech in question is infringing.¹³³ The prior restraint doctrine has been historically used to “preserve the murky line between protected and unprotected speech,” and has not been used as a general, overarching protection of speech.¹³⁴

With regard to the applicability of prior restraints to copyright law, speech under the First Amendment can be clearly grouped into two categories.¹³⁵ Either speech is protected under the First Amendment—and therefore cannot be restrained by the government—or it is unprotected and may

¹²⁵ *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764 (1994).

¹²⁶ *Id.* at 797 (Scalia, J., concurring in the judgment in part and dissenting in part).

¹²⁷ Meyerson, *supra* note 1, at 1145.

¹²⁸ Newman, *supra* note 35, at 361.

¹²⁹ Meyerson, *supra* note 1, at 1145 (quoting *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 743 (1882)) (internal quotation marks omitted).

¹³⁰ *See id.* at 1094.

¹³¹ *Id.* at 1088-89.

¹³² *Id.* at 1088.

¹³³ *See id.* at 1145.

¹³⁴ *Id.* at 1089.

¹³⁵ Newman, *supra* note 35, at 362.

be subject to restraints.¹³⁶ This distinction is particularly important when discussing the constitutionality of commercial speech, because there is a fine line that separates protected commercial speech from non-protected commercial speech. Commercial speech that is true and non-misleading receives protection under the First Amendment; however, commercial speech that is false or misleading does not receive any constitutional protections.¹³⁷ As a result, the court's determination of whether the speech is false or misleading is an extremely important one, as it can mean the difference between restraint and no restraint. "Here . . . is [exactly] where the prior-restraint problem arises."¹³⁸ When the court must make the determination of whether speech is protected or unprotected at the preliminary injunction stage, without possessing full information about the case, the risk for error in this determination is especially great. Professors Mark Lemley and Eugene Volokh recognized this argument with regard to obscenity.¹³⁹ As in false advertising law, speech that satisfies the three-prong test articulated in *Miller v. California*¹⁴⁰ may be considered obscene and can be regulated; however, speech that does not satisfy this test may not be restricted.¹⁴¹ The professors argued that, because of the risk of restricting protected speech, speech must be rigorously protected from prior restraints even where the speech is ultimately adjudged not constitutionally protected.¹⁴²

Although the analysis in this Comment is limited to the prior restraint doctrine and its applicability to preliminary injunctions, scholars have argued that the doctrine is applicable to injunctions in general, even those that involve a final adjudication.¹⁴³ What this means is that defendants may argue that a plaintiff's request for a permanent injunction improperly restricts their right to free speech, even where the restriction occurs after a judicial proceeding. This argument finds support in the Supreme Court's ruling in *Alexander v. United States*,¹⁴⁴ where the Court stated that "permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints" because they place a "restraint on future speech."¹⁴⁵ Regardless of whether the speech restriction is a permanent in-

¹³⁶ *Id.*

¹³⁷ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

¹³⁸ Newman, *supra* note 35, at 364.

¹³⁹ *See Lemley & Volokh, supra* note 33, at 173-74.

¹⁴⁰ 413 U.S. 15 (1973).

¹⁴¹ *Id.* at 36-37.

¹⁴² *See Lemley & Volokh, supra* note 33, at 173-74.

¹⁴³ *See, e.g., Erwin Chemerinsky, Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 163 (2007) (reiterating the Court's acknowledgement that even a permanent injunction following a judicial proceeding constitutes a prior restraint on speech because it places a "true restraint on future speech" (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)) (internal quotation marks omitted)); Meyerson, *supra* note 1, at 1095.

¹⁴⁴ 509 U.S. 544 (1993).

¹⁴⁵ *Id.* at 550.

junction or a preliminary injunction (temporary restraining order), injunctions restrict speech and fall under the prior restraint doctrine.¹⁴⁶ For example, in *Nebraska Press Ass'n v. Stuart*,¹⁴⁷ the Supreme Court struck down an injunction prohibiting the publishing or broadcasting of confessions or facts that implicated the defendant in a murder case.¹⁴⁸ Even though the preliminary injunction was only limited until a jury could be impaneled, the preliminary injunction posed the same threat to restricting free speech as a permanent injunction.¹⁴⁹

Preliminary injunctions quite frequently act as unconstitutional prior restraints on speech in copyright infringement cases.¹⁵⁰ Particularly since preliminary injunctions are routinely granted in copyright cases, there is a high likelihood that speech originally restricted by a preliminary injunction may later be deemed non-infringing upon a final adjudication of the case.¹⁵¹ In their article on preliminary injunctions in copyright law, Professors Lemley and Volokh argued that several factors contributed to the fact that a preliminary injunction was not likely to be predictive of the plaintiff's success at trial.¹⁵²

One such factor is the court's tendency toward "preservation of the status quo" until the final adjudication of the case, which usually translates into granting a preliminary injunction to prevent publication of the material at issue.¹⁵³ In copyright cases, the status quo typically refers to the situation existing prior to the defendant's publication of the allegedly copyright-infringing material.¹⁵⁴ Where the decision of whether the published material infringes on a copyright is a difficult one to make, judges tend to lean toward granting the preliminary injunction to preserve the status quo, thus risking enjoining speech that is not actually infringing.¹⁵⁵ Preserving the status quo was used as a justification for the court's decision in *United States v. Noriega*,¹⁵⁶ where CNN was restricted from broadcasting tape re-

¹⁴⁶ Meyerson, *supra* note 1, at 1100-01.

¹⁴⁷ 427 U.S. 539 (1976).

¹⁴⁸ *Id.* at 570.

¹⁴⁹ Meyerson, *supra* note 1, at 1100-01.

¹⁵⁰ Lemley & Volokh, *supra* note 33, at 150.

¹⁵¹ *See id.* at 188.

¹⁵² *Id.* at 200-04.

¹⁵³ *Id.* at 202 (quoting *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)) (internal quotation marks omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Presumably, if a copyright case is proceeding to trial, then the decision of whether the published material actually infringes on a copyright will almost always be difficult for the trier of fact. This is because if the case was clear-cut, the party with less likelihood of winning at trial would not want to risk spending excessive litigation costs on trial when the chance of winning is so low. Since judges tend to lean toward granting a preliminary injunction to preserve the status quo when the ultimate result is unclear, judges likely grant preliminary injunctions to preserve the status quo with shocking frequency.

¹⁵⁶ 117 F.3d 1206 (11th Cir. 1997).

cordings of Panamanian dictator Manuel Noriega's attorney-client conversations until the court determined the issue.¹⁵⁷ In *Noriega*, the Eleventh Circuit preserved the wrong status quo, which affected the defendant's free speech rights. The correct status quo was that CNN had a right to broadcast the information whenever it chose to.¹⁵⁸ The status quo did not encompass restricting speech while the court decided the issue.¹⁵⁹ Additionally, because preliminary injunctions are typically granted only shortly after the request is initially filed, the parties have limited time for briefing and contemplation of the issues.¹⁶⁰ Whereas preparation for an average copyright trial typically takes months, judges issue preliminary injunctions within ten days of filing the request.¹⁶¹ If such preliminary hearings sufficiently adjudicated the copyright case, then it would be unnecessary to proceed with a further adjudication of the merits at trial.¹⁶²

The literature by Professors Lemley and Volokh arguing that preliminary injunctions act as prior restraints in copyright infringement cases was released in 1998, but other scholars have recently argued that the problem has escalated since then.¹⁶³ In comparison to other types of speech, such as libel, which receives constitutional protection during the interlocutory stage of litigation, copyright law receives no such protection.¹⁶⁴ One scholar, John Newman, argues that, while judges have recognized the importance of the right to speak in obscenity law and have "erected the prior-restraint doctrine as a prophylactic guard against possible restrictions of protected . . . speech," there are no such guards in cases involving copyright infringement.¹⁶⁵

Professor Erwin Chemerinsky propounded a similar argument against preliminary injunctions in cases involving defamation. Because of the Supreme Court's emphasis that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," it is evident that injunctions are unconstitutional as a remedy in defamation cases.¹⁶⁶ Considering that the Supreme Court has never previously upheld a preliminary injunction in a defamation case, Chemerinsky argues that it is even more conclusive that such preliminary injunctions are constitutionally invalid.¹⁶⁷ "[D]amages, not injunctions, are the appropriate

¹⁵⁷ Meyerson, *supra* note 1, at 1099.

¹⁵⁸ *Id.* at 1101.

¹⁵⁹ *See id.*

¹⁶⁰ Lemley & Volokh, *supra* note 33, at 201.

¹⁶¹ *Id.*

¹⁶² *See id.* at 201-02.

¹⁶³ *See, e.g.,* Newman, *supra* note 35, at 374.

¹⁶⁴ *Id.* at 364.

¹⁶⁵ *Id.*

¹⁶⁶ *See* Chemerinsky, *supra* note 143, at 166 (alteration in original) (quoting *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam)) (internal quotation marks omitted).

¹⁶⁷ *Id.* at 167.

remedy in a defamation action,” and injunctions should not be used as a remedy whatsoever in defamation suits.¹⁶⁸

B. *Application of Prior Restraint Doctrine to False Advertising Cases*

As previously discussed, legal scholars have applied the theory of the prior restraint doctrine to other types of law, including copyright law and defamation.¹⁶⁹ Generally, the argument against granting a preliminary injunction in these contexts is that both the parties and the court lack complete information about the case to make such an important decision about one of the most protected rights under the U.S. Constitution, the right to free speech.¹⁷⁰ The concerns present upon an issuance of a preliminary injunction in copyright infringement and defamation cases are also present in false advertising cases. In particular, because of the varying standards between circuits in applying the elements required to succeed on a preliminary injunction in a claim for false advertising, and the unreliable survey methods on which courts rely to determine consumer deception, it is possible that a defendant’s speech can be improperly restricted without actually being misleading or false.

The similarities between preliminary injunctions in false advertising law and those in copyright infringement or defamation cases indicate that the prior restraint doctrine would help to guard against the free speech concerns in false advertising law. First, the speech or expression involved in all three bodies of law receives the same protection under the First Amendment. If the court determines at the preliminary injunction stage that the speech either infringes on copyright, is defamatory, or is false or misleading, the speech is not constitutionally protected and may be restricted by the courts. If the court determines the speech or expression does not violate any of these principles, then it is deemed protected by the First Amendment and it may not be restrained by the court. These similarities indicate that in each body of law it is extremely critical that the court make a correct determination of whether the speech is protected or not, or risk infringing on the defendants’ free speech rights.

In addition to receiving the same protection under the First Amendment, another similarity between false advertising law and cases involving copyright infringement and defamation is the great potential for error during the preliminary injunction stage. Regardless of the type of speech restricted by the preliminary injunction, judges are restricting speech based on limited information about the merits of the case.¹⁷¹ This increases the

¹⁶⁸ *Id.* at 169.

¹⁶⁹ *See supra* Part II.A.

¹⁷⁰ *Supra* Part II.A.

¹⁷¹ Newman, *supra* note 35, at 354-55.

likelihood for judicial error, which has extremely negative implications when it involves free speech rights.¹⁷² Additionally, defamation and copyright infringement cases involve similar factor-shifting tests in granting preliminary injunctions similar to those that are utilized in false advertising cases. For example, in copyright infringement cases, courts also recognize a presumption of irreparable harm upon a showing of likelihood of success on the merits.¹⁷³ Such shifting requirements lighten the plaintiff's burden in seeking a preliminary injunction, which in turn risks exposing the defendant to restrictions on his right to free speech. Most importantly, like preliminary injunctions issued in false advertising cases, preliminary injunctions issued in copyright infringement and defamation cases lack a uniform standard.¹⁷⁴

III. LIMITED PROTECTION OF COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT

The similarities between false advertising law and other types of law to which the prior restraint doctrine has been applied advocates for the application of the prior restraint doctrine to false advertising to protect defendants' speech during the preliminary injunction stage. Nonetheless, opponents of applying the prior restraint doctrine to false advertising may argue that commercial speech generally receives less protection under the First Amendment than other types of speech. While commercial speech may receive less First Amendment protection than other types of speech, such as political speech, the speech has nevertheless received First Amendment protection from courts as long as the advertisement in question is not false or misleading.¹⁷⁵ Indeed, speech involved in false advertising cases receives the same protection under the First Amendment as copyright and defamatory speech, for which scholars have already advocated for application of the prior restraint doctrine.¹⁷⁶ True and non-misleading commercial speech largely benefits the public interest because it helps economic players exchange information in the marketplace and ensures that consumers are better informed about their purchases. Because of the important role of commercial speech in the marketplace, the Supreme Court has deemed commercial speech to be within the realm of the First Amendment right to free speech.¹⁷⁷

¹⁷² *Id.*

¹⁷³ *Id.* at 356-57.

¹⁷⁴ Bates, *supra* note 5, at 1554.

¹⁷⁵ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

¹⁷⁶ See *supra* Part II.B.

¹⁷⁷ See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

Despite the potential deleterious effect of false or misleading advertisements on consumers, the benefits of commercial speech both to producers and consumers outweigh any potential harm.¹⁷⁸ Commercial expression not only “serves the economic interest of the speaker,” it also assists the broader society in disseminating information.¹⁷⁹ Specifically, advertisements serve a critical role in the exchange of information between transactional players in the marketplace. This proposition is best illustrated with an example of an advertisement for a common household good, Pepto-Bismol.¹⁸⁰ Advertisements provide direct information about the apparent qualities of a good and allow consumers to extract indirect information about the “experience qualities” of the good as well.¹⁸¹ Thanks to the commercial jingle—“nausea, heartburn, indigestion, upset stomach, diarrhea”—consumers are able to directly gain information about the symptoms that Pepto-Bismol treats.¹⁸² Without being exposed to advertisements that make the function of a particular product apparent, consumers lack information to make appropriate purchasing decisions.

The exchange of information between producers and consumers through advertisements is even more important when information about the experience quality of an item needs to be conveyed. Since an informational asymmetry frequently exists between buyer and seller, advertising often serves as a signaling device to consumers about product quality.¹⁸³ For example, such an informational asymmetry typically exists between buyers and sellers in the market for used cars.¹⁸⁴ The large discrepancy between the price in cars that are sold new in the showroom and those that are driven off the lot is a result of an informational asymmetry.¹⁸⁵ While the seller possesses information about the “experience qualities” of a used car, the buyer does not know whether the car is a good car or a “lemon,” so bad cars must

¹⁷⁸ This statement assumes that consumers are properly able to identify their needs and select products and services that will fulfill them if the correct information is readily available. Where consumers are not able to identify their needs, then greater protection of consumers is necessary through increased regulation of the information contained in advertisements. For example, the dissent in *Bates v. State Bar of Arizona* illustrates that because the average layperson cannot determine what legal services she needs, any advertisement for legal services has a high potential of misleading her. 433 U.S. 350, 391-94 (1977) (Powell, J., concurring in part and dissenting in part).

¹⁷⁹ See, e.g., *Cent. Hudson*, 447 U.S. at 561-62.

¹⁸⁰ Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 731-32 (1974).

¹⁸¹ *Id.* at 730-32 (defining “experience qualities” as those attributes that are not determined by consumers prior to purchase, such as the taste of a certain brand of canned tuna).

¹⁸² See *id.* (saying, by way of example, that the statement “Pepto-Bismol is a remedy for upset stomachs” attracts consumers with upset stomachs, rather than consumers with athlete’s foot).

¹⁸³ See Hao Zhao, *Raising Awareness and Signaling Quality to Uninformed Consumers: A Price-Advertising Model*, 19 MARKETING SCI. 390, 391 (2000).

¹⁸⁴ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

¹⁸⁵ *Id.*

sell at the same price as good cars.¹⁸⁶ Signaling mechanisms, such as CARFAX and eBay Motors, have been created to solve the inefficiency resulting from this informational asymmetry.¹⁸⁷ By revealing information about used cars that are being sold, such webpages reduce the informational asymmetry and help consumers differentiate between high-quality cars and poor-quality cars.¹⁸⁸

Besides providing educational benefits to consumers, commercial speech also keeps markets competitive and subsidizes media content.¹⁸⁹ Because advertisements alert competitors to their rivals' offerings of better or cheaper services, advertisements help ensure that competitors are always working to offer better products and drive down their prices.¹⁹⁰ Commercial speech additionally helps society by subsidizing various forms of media, including radio and television.¹⁹¹

The arguments against applying First Amendment scrutiny to preliminary injunctions that restrain commercial speech fail to take into consideration the increasing span of commercial speech. While commercial speech was once easily distinguishable from non-commercial speech, the line has become increasingly blurred.¹⁹² Modern advertisements are frequently presented in the form of entertainment, which integrate commercial messages into storylines.¹⁹³ The line between commercial and non-commercial speech is blurred further still by the recent trend toward interactive advertisements.¹⁹⁴ By using new technologies, including social media websites and other Internet platforms, producers have encouraged consumers to help create and become a part of their advertisements.¹⁹⁵ As a result, "[i]f you think carefully enough, you can find a commercial aspect to almost any first amendment case."¹⁹⁶

Courts have also recognized the importance of balancing the benefits of commercial speech (by upholding its protection under the First Amend-

¹⁸⁶ *Id.*

¹⁸⁷ Gregory Lewis, *Asymmetric Information, Adverse Selection and Seller Disclosure: The Case of eBay Motors 7-8* (Sept. 27, 2007) (unpublished manuscript), available at <http://www.gsb.stanford.edu/facseminars/past/07-08/ame.html>.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 CHARLESTON L. REV. 503, 510, 512 (2011).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 512.

¹⁹² *Id.* at 516-17.

¹⁹³ *Id.* at 517.

¹⁹⁴ *Id.* at 517-18.

¹⁹⁵ Thierer, *supra* note 189, at 517 (discussing an example from an advertisement for BMW cars, which featured several short films that were directed by famous movie directors and included the renowned British actor Clive Owen, and arguing that if such films were placed in a cinematic context there would be no question that they would be rigorously protected under the First Amendment).

¹⁹⁶ *Id.* (quoting Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990)) (internal quotation marks omitted).

ment) with the potential detriments to consumers (by excluding false and misleading speech from such protection). Nevertheless, it seems that this balancing test weighs in favor of the benefits, given that the Supreme Court has held that even incomplete factual information in advertisements is better for consumers than no information offered at all.¹⁹⁷ To determine whether commercial speech receives protection under the First Amendment, the court must first determine whether such speech is false, misleading, or related to illegal activity.¹⁹⁸ If the speech does not fit into one of those categories, then the government's regulatory ability is more limited and the government must assert a substantial interest in order to regulate the speech.¹⁹⁹ If the speech is not false or misleading and the government does have a substantial interest in regulation, then the court must determine whether regulation directly advances the governmental interest and whether the restriction is narrow enough to only encompass the interest served.²⁰⁰

Opponents of this Comment's thesis may claim that preliminary injunctions are not actually causing the defendant harm because the injunction is only limited to the defendant's alleged false advertisement. Therefore, the defendant is still permitted to advertise his product through other marketing campaigns. While this may seem like a logical counterargument in theory, in practice it would be extremely costly for the defendant to create a new marketing scheme.²⁰¹ Bearing the high cost of devising a new marketing scheme is a particularly bad idea when considering the short time period between the preliminary injunction and trial. Besides the high cost of creating a new marketing scheme and distributing it in the marketplace, consumers may identify a product based on certain speech or expressions contained in a particular advertisement.²⁰² A restraint on such an advertisement would not only be costly for the defendant but may also cause a loss of goodwill if consumers no longer see the product's identifying advertisements in the marketplace.²⁰³

¹⁹⁷ Compare *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374-75 (1977), with *supra* note 178 (differing from the majority opinion in that the dissent finds all legal advertising misleading, whereas the majority holds that only advertisements for complex legal issues have the potential to mislead consumers).

¹⁹⁸ See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64 (1980).

¹⁹⁹ See, e.g., *id.* at 564.

²⁰⁰ See, e.g., *id.* at 566.

²⁰¹ See, e.g., Douglas Barney, *High Cost of Marketing Ability; Canadian Software Start-Up Incurs \$5.6 Million Debt*, *COMPUTERWORLD*, Jan. 20, 1986, at 146 (discussing the failure of a Canadian start-up company because of an expensive marketing strategy, which spent \$3 million on product development and more than \$1 million on packaging).

²⁰² See *supra* notes 168-171 and accompanying text (demonstrating the manner in which consumers identify and remember products based on marketing strategy).

²⁰³ *Supra* notes 168-171 and accompanying text.

IV. FACTORING THE PRIOR RESTRAINT DOCTRINE AS A CONSIDERATION IN THE *WINTER* STANDARD

Although it is evident that the prior restraint doctrine presents an issue in false advertising only where the speech is finally adjudged to be truthful and non-misleading, free speech rights merit greater protection under the *Winter* standard. As discussed previously, the free speech protections granted by the First Amendment are so vital to the doctrinal fabric of our nation that courts must ensure that they do not improperly restrict these rights. While it is easy to assert that the *Winter* standard does not sufficiently protect free speech concerns in false advertising cases, it is more difficult to contemplate a suitable location for such concerns within the standard.

Scholars have suggested various solutions to remedy free speech concerns present upon an issuance of a preliminary injunction in other legal contexts. In copyright law, for example, it has been suggested that courts should consider First Amendment concerns through a balancing of the interests test under the “public interest” prong of the four-factor *Winter* standard.²⁰⁴ Since the first three factors of the *Winter* standard determine that a preliminary injunction is the appropriate remedy, and is necessary, based on the facts of the case, it is argued that free speech values would be best addressed in the public interest prong.²⁰⁵ In balancing “any harm to the defendant’s personal-integrity interest caused by granting the preliminary injunction, and . . . whether granting the injunction would promote progress in the marketplace of ideas,”²⁰⁶ courts can sufficiently incorporate the defendant’s free speech rights.

Incorporating free speech considerations into the public interest prong is a possibility in the false advertising context; however, it seems that free speech concerns are better addressed in the balance of the equities element. This is largely because free speech considerations primarily affect the defendant’s individual rights. Whereas the public interest prong considers the effect of a grant or denial of a preliminary injunction on society as a whole, the balancing of the equities prong considers only the defendant’s interests as weighed against the plaintiff’s interests. In weighing the balance of the equities between the plaintiff and defendant, courts consider only those damages that occur between the preliminary injunction motion and trial.²⁰⁷ As illustrated by the court’s holding in *Scotts Co.*, courts must determine whether the defendant might suffer harm that would not be cured by the defendant’s success at trial.²⁰⁸ Free speech considerations logically fit under this category of harm. If a defendant is improperly restrained from advertis-

²⁰⁴ Newman, *supra* note 35, at 326.

²⁰⁵ *Id.* at 371-72.

²⁰⁶ *Id.* at 369.

²⁰⁷ *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 19 & n.6 (7th Cir. 1992).

²⁰⁸ *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002).

ing his product, the defendant cannot recoup his losses from the violation of his right to free commercial speech. Although the court can award the defendant a monetary sum to reimburse him for economic losses suffered from diminished sales during the restricted time period, the defendant cannot recover the harm to his right to advertise his goods in the marketplace.²⁰⁹ The court cannot possibly calculate the extent to which the defendant's product may suffer in the future from harm to goodwill.

CONCLUSION

Preliminary injunctions issued by courts in false advertising cases constitute a prior restraint on the defendant's right to free commercial speech where the speech is determined upon a final adjudication to be true and non-misleading. Particularly because of the various inconsistencies between the circuits in applying the *Winter* preliminary injunction standard in false advertising cases, defendants leave the protection of their free speech rights to the whim of the court. While permanent injunctions involve a final adjudication of the merits prior to restricting speech, judges lack information and time during the preliminary injunction stage to properly determine whether speech is protected under the First Amendment. Although commercial speech receives less protection than other forms of speech under the First Amendment, commercial speech serves an important role in today's marketplace, in that it educates consumers about purchasing options. Indeed, the parallels between false advertising and other forms of speech to which the prior restraint doctrine has been applied indicate that the doctrine should be equally extended to false advertising law. Courts should factor the prior restraint doctrine into their weighing of the balance of the hardship test under the *Winter* standard in order to ensure that such important rights are adequately protected.

²⁰⁹ See, e.g., *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994).