

(Cite as: 1127 F.3d 817)

United States Court of Appeals
Thirteenth Circuit

Clarice STARLING, Plaintiff-Appellant

v.

MANSON MEDIA CORPORATION,
Defendant-Appellee, and Zodiac Entertainment
Corporation, Defendant-Appellee

Argued and Submitted April 20, 2011.

Decided August 17, 2011.

Appeal from the United States District Court for
the District of Widener; M. Myers, District
Judge, Presiding, No. CV-02172012

Before: P. BATEMAN, J. GUMB, B.
LOOMIS, C.L. RAY, and S. TODD, Circuit
Judges

Opinion by Judge BATEMAN; Concurrence by
Judge LOOMIS; Dissent by Judge GUMB;
Dissent by Judge TODD.

BATEMAN, Circuit Judge:

In this appeal, we consider two issues of first impression in this circuit. First, we must determine whether an author's heir can exercise her termination rights in a grant of interest in the author's copyrighted work, when the heir previously executed an agreement not to terminate the original grant. Second, we must determine whether a documentary referring to an upcoming motion picture and airing immediately before the theatrical release of the motion picture is commercial or noncommercial speech under the First Amendment, and what the appropriate test is for making such a determination.

On March 15, 2006, plaintiff-appellant Clarice Starling filed a lawsuit against defendants-appellees Manson Media Corporation and Zodiac Entertainment Corporation (collectively "Appellees"), seeking declaratory and injunctive

relief regarding the ownership of rights in a story written by her father, and damages for Appellees' alleged violation of her statutory right of publicity. Starling and Appellees submitted cross-motions for summary judgment. After considering the parties' arguments, District Judge Myers granted Appellees' motion for summary judgment on Starling's claim that Manson's interest in copyrighted works authored by Dexter Morgan had been terminated. Additionally, Judge Myers granted Appellee's summary judgment on Starling's right of publicity claim on the basis that enforcement of the statute would violate the First Amendment because the use of Starling's likeness was not commercial speech. Starling appeals that February 17, 2011, decision to this Court.

We review *de novo* the district court's decision granting summary judgment based upon the Copyright Act and the First Amendment. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000); *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1016 (3d Cir. 2008).

The facts *818 before this Court are undisputed. The parties' disagreement is limited to the interpretation of statutory authority and case law applicable to these facts.

I. Factual Background

A. Parties' Backgrounds

1. Plaintiff-Appellant Clarice Starling

Since 1972, Clarice Starling ("Starling") has been employed as a Deputy Chief for Krueger City in the state of Widener. She has investigated over 10,000 murders, including seven different serial killing sprees. She has successfully captured four of the seven so-called "serial killers" who have killed in the state of Widener, and has been involved as a Special Investigator across the country in fifteen other

investigations, including the “Ghostface Massacre,” the “Buffalo Bill Killings,” and the “Good Guy Doll Murders.”

Starling also gained public notoriety for her appearances on the hit television show *Natural Born Killers with Doctor Hannibal Lecter* (“*Natural Born Killers*”). Dr. Hannibal Lecter, the host of the show, is a former psychiatrist who, throughout the course of his practice, treated an undisclosed number of convicted murderers. Every episode of *Natural Born Killers* features Dr. Lecter and a guest from the criminal justice field analyzing the crimes and psyche of a prominent murderer from the past. Starling first appeared as a guest in 1974 after capturing her first serial killer; she subsequently appeared thirty-seven times over the course of the show’s time on the air, far more frequently than any other guest.

2. Defendant-Appellee Manson

Manson Media Corporation (“Manson”) began operating in the early 1900s solely as a book publishing company. In the 1960s, Manson expanded and began producing various types of media, including motion pictures.

3. Defendant-Appellee Zodiac

Zodiac Entertainment Corporation (“Zodiac”) is a film company. Among other things, Zodiac owns Zodiac Movie Channel, a major cable television station that primarily shows full-length motion pictures.

B. Alleged Termination of Prior Grant

In 1947, Starling’s father, Dexter Morgan, a detective for the Voorhees County Police Department in Widener, wrote *American Psycho: The Cardinal Killer* (“*American Psycho*”), an overdramatized retelling of his investigation of the so-called “Cardinal Killings.” The aptly named “Cardinal Killer”

carried out his murders over the course of seven months, claiming seven different victims before he seemed to simply disappear. The Cardinal Killer murdered his victims in association with the “seven deadly sins”: gluttony, greed, sloth, lust, pride, envy and wrath. The Killer sought victims who exemplified each of these individual vices, killing an obese man in the name of gluttony, a corrupt city official in the name of greed, a “zombie-like” homeless man in the name of sloth, a polygamist in the name of lust, a local actress in the name of pride, and a notorious burglar in the name of envy. Interestingly, Morgan’s wife, Rita, was the final victim of the Cardinal Killer. It is assumed at the time that she was murdered for the sin of wrath because the Killer was angry with Morgan for investigating the case. Morgan returned home one evening to find his wife dead in the bathtub, her femoral artery having been slit with a straight razor.

In January of 1948, *819 Morgan and Manson executed an agreement (“1948 Grant”) transferring the rights to *American Psycho* to Manson for the original copyright term and the renewal term in exchange for \$5,000 and a percentage of royalties.

Morgan died in 1967 and was survived by his daughter, Starling, to whom Morgan bequeathed all property in which he had an interest. In late 1977, a representative of Manson sent Starling a letter soliciting her services as an expert in the investigation of violent murders and serial killings for a documentary Manson began working on. The letter also noted that Manson “want[ed] to clarify any property interest [Starling] might have in [her] father’s story *American Psycho: The Cardinal Killer*.” Starling wrote a letter in reply expressing an interest in participating in the documentary and stated: “I don’t know the source of confusion regarding my rights related to *American Psycho*. My understanding is that the contract Manson made with my father in 1948 governs.

Nevertheless, I am willing to reach some kind of clarifying agreement if you think it is beneficial or necessary to do so.”

Eventually, Starling signed an agreement with Manson on April 11, 1978 (“1978 Agreement”), stating in relevant part: “I, Clarice Starling, acknowledge that I currently receive royalty payments of the sales from the story entitled *American Psycho: The Cardinal Killer* published by Manson Media Corporation, and acknowledge that such royalty payments constitute my only interest in or rights to the story entitled *American Psycho: The Cardinal Killer*. In return for \$10,000, I agree that I will not assert any additional interest in the story entitled *American Psycho: The Cardinal Killer*.”

American Psycho was relatively unpopular during its first fifty years. That changed dramatically in 2000 when current members of the Voorhees County Police Department discovered notebooks hidden in the Evidence Room by Dexter Morgan. These notebooks strongly suggested that Morgan had in fact been the Cardinal Killer; subsequent DNA tests confirmed the result. The story became a nationwide phenomenon, as the American public was outraged that a police officer could commit such horrific acts and hide such a dark secret. Later that year, Time Magazine published a story relating to the newly unearthed evidence and Morgan’s double life entitled *Dexter Morgan’s Dark Passenger*. Although Starling did not speak to anyone from Time Magazine, the article did speculate as to her reaction to the revelation.

On September 4, 2004, Manson granted the motion picture rights to *American Psycho* to Zodiac.¹ Starling, apparently hoping to more extensively exploit the popularity of *American*

Psycho, sent Manson a notice of termination on September 22, 2004, seeking to recapture the rights given to Manson in the 1948 Grant effective as of March 1, 2006. In February 2006, a representative of Manson sent Starling a letter stating that under the 1978 Agreement, Manson continued to possess the rights conveyed to it under the 1948 Grant, despite Starling’s attempt to terminate. On March 15, 2006, Starling initiated this action seeking, *inter alia*, declaratory relief *820 stating that the 1948 Grant was validly terminated.

C. Alleged Right of Publicity Claim

In addition to the terms stated above relating to the property rights of *American Psycho*, the 1978 Agreement contains the following provision:

“Clarice Starling agrees to be interviewed by Manson for a documentary film . . . in return for payment to Clarice Starling, regardless of whether or not any footage from Ms. Starling’s interview is ultimately used in *Helter Skelter* . . . Manson Media holds the unequivocal right to use the footage of Clarice Starling in any manner Manson Media sees fit, except that Manson Media is not entitled to use the footage to endorse any product or service.”

Footage from Manson’s interview of Starling was used in a documentary detailing notorious serial killers through history entitled *Helter Skelter*. Although much of the footage from Starling’s interview was not used in the final production of *Helter Skelter*, almost three of the total forty-eight minutes of run time in *Helter Skelter* were taken from Starling’s interview. *Helter Skelter* first aired on television in 1982 and received wide acclaim. The continued popularity of *Helter Skelter* is demonstrated by the fact that it was aired more than seventy-five times over the next twenty-five years.

¹ Appellees do not argue that the derivative works exception applies to Starling’s termination claim.

Contained within the footage from Starling's interview not used in *Helter Skelter* were her accounts of her father's investigation of the Cardinal Killer when he was still a police officer, as well as some of the strange behavior he exhibited after retirement. Despite not making it into the final cut of *Helter Skelter*, these stories sparked Manson's interest enough that it began a project for a fictional movie loosely based on the experiences of Morgan. These efforts were abandoned until 2003, when the project was revived before Manson sold the story and treatment to Zodiac. The project eventually materialized in Zodiac's film *Darkly Dreaming Dexter*.²

On March 3, 2005, Manson sent Zodiac a proposal to have an updated version of *Helter Skelter* shown on Zodiac Movie Channel before the scheduled release of *Darkly Dreaming Dexter* in theaters on November 11, 2005.

Laurie Strode, Manson's Chief Marketing Manager, sent an email to Sydney Prescott, the Programming Manager of Zodiac Movie Channel, stating in part as follows:

We have a great idea for Zodiac Movie Channel that is sure to dramatically increase interest in and ticket sales of Zodiac's upcoming film *Darkly Dreaming Dexter*! Manson Media has a documentary film called *Helter Skelter* that discusses a number of historical serial killers—it could almost be called the nonfiction version of *Darkly Dreaming Dexter*. It had tremendous success when it was released and is sure to generate extra buzz for *Darkly Dreaming Dexter*.

² Although *Darkly Dreaming Dexter* is loosely based on some of the facts obtained through Starling's *Helter Skelter* interview that were not in *American Psycho*, Starling did not bring up these facts below, and does not contest the subject-matter of the film.

Eventually, an agreement was reached and Zodiac Movie Channel aired a modified version of *Helter Skelter* ("Rebroadcast") on November 7, 2005. The original documentary had been altered by removing some segments, adding two interview segments of Starling discussing the Cardinal Killer, and adding five segments from *Darkly Dreaming Dexter* (totaling about two minutes). The two added interview segments of Starling were from original footage taken while creating the documentary and consisted of Starling's account of her father's experiences.

A host who stated that the program was sponsored by *Darkly Dreaming Dexter* introduced the documentary. The host appeared at the beginning and end of every advertisement break. Each time he reappeared, the host reminded viewers that the Rebroadcast was sponsored by *Darkly Dreaming Dexter*, stating "this broadcast is brought to you by the upcoming film, *Darkly Dreaming Dexter*." Additionally, each advertisement break included a trailer advertising *Darkly Dreaming Dexter*.³

II. Discussion

A. Termination of Prior Grant

***821** The Copyright Act of 1976 contains a provision giving authors and certain family members the inalienable right to terminate prior grants of copyright interests. 17 U.S.C. § 304(c). The termination right governed by this provision only applies to grants executed before January 1, 1978. *Id.* The prior grant may be terminated "notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future agreement. *Id.* However, the act only allows the termination to take place "where the author or owner of the

³ Other soon-to-be-released films were advertised during the commercial breaks as well.

termination right has not previously exercised such termination right.” *Id.* § 304(d).

Manson claims that Starling’s right to terminate the 1948 Grant was exercised in the making of the 1978 Agreement, and argues that this prevents her from trying to terminate at a later date. It further argues that despite the language contained therein, the 1978 Agreement was not an “agreement to the contrary” within the meaning of the Act.⁴ Starling argues that the 1978 Agreement was by its own terms an agreement to the contrary and that she was entitled to terminate the 1948 Grant in 2006, notwithstanding the 1978 Agreement. Like the district court, we agree with Manson.

Here, Starling was given the opportunity to exercise her right to terminate the original grant. The right, no doubt, served as a bargaining tool—and was thus “exercised”—in her negotiations with Manson that culminated in the 1978 Agreement. By Starling exercising her right to terminate the 1948 Grant, the statutory purpose of the right was fulfilled and Starling no longer held the right to terminate a prior grant.

1. Starling has already exercised her termination rights

Petitioner cannot exercise her termination rights under the 1948 Agreement because she had already exercised those rights when she negotiated the 1978 Agreement. A termination right can only be exercised if “the author or owner of the termination right *has not previously exercised* such termination right.” 17 U.S.C. § 304(d) (emphasis added). An author or an author’s statutory heirs are only entitled to one opportunity, between them, to either exercise their termination rights or to use their

⁴ In the proceedings below, Appellees failed to assert that the 1978 Agreement superseded the 1948 Grant has thus waived the right to argue that here.

termination rights to enhance their bargaining power. *Penguin Group (USA) Inc. v. Steinbeck*, 557 F.3d 193, 204 (2d Cir. 2008).

In *Penguin Group*, Respondent executed an agreement whereby he granted the “sole and exclusive right” to publish several of Respondent’s works in the United States and Canada to the Viking Press in exchange for royalty payments based on net sales. Respondent’s widow executed an agreement in 1994 to continue publication of works covered in the prior agreement, to cover additional works by Respondent and Respondent’s widow, and to change the economic terms of the agreement in the widow’s favor. The 1994 Agreement expressly canceled and superseded the prior agreement. In 2004, Respondent’s son and grandson sought to terminate the grants made by Respondent to Viking under the first agreement. The Second Circuit held the grants could not be terminated because the 1994 agreement terminated the prior agreement.

Starling cannot exercise her termination rights under the 1948 Agreement because she exercised those rights as a bargaining tool to negotiate the 1978 Agreement. Starling received \$10,000 in exchange for an agreement to “not assert any additional interest” in her father’s story. The agreement expressly refers to royalty rights then held by Starling, but necessarily includes any termination rights then available to her by the then-effective 1976 Copyright Act. 17 U.S.C. § 304(c)-(d).

Like the *Penguin Group* widow, Starling exercised her one opportunity to negotiate more favorable terms in her father’s work based on her then existing rights to royalties and her newly acquired right to terminate the grant under the 1976 Act. Starling’s right to contract is not diminished by the 1976 Act whether she uses her rights to cancel the 1948 Agreement and supersede it or negotiate favorable terms in exchange for an agreement to “not assert any

additional *822 interest” in her father’s story. Starling no longer has any termination rights because she already exercised those rights when she negotiated the 1978 Agreement.

Further, termination rights can be exercised when a pre-1978 grant is in effect. However, when the pre-1978 grant is renegotiated, no pre-1978 grant remains to be terminated. We find this rule, promulgated by our sister circuits, to be persuasive. *See, e.g., Classic Media Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008); *Penguin Group (USA), Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008); *Milne ex rel Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005).

2. *The 1978 Agreement was not an “agreement to the contrary”*

Starling can no longer execute her termination rights because the 1978 Agreement is not an “agreement to the contrary.” Although 17 U.S.C. § 304 (c)(5) does not define an “agreement to the contrary,” a number of our sister courts have sought to interpret this phrase. *See, e.g., Milne*, 430 F.3d at 1045. Though the statute identifies “agreement[s] to make a will or to make any future grant” as agreements to the contrary, that list is considered illustrative and not comprehensive. 17 U.S.C. § 304(c)(5); *see also Classic Media*, 532 F.3d at 983.

For example, a settlement agreement that recharacterized works created years before as “works for hire” in order to avoid termination rights was found to be an agreement to the contrary. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 292 (2d Cir. 2002).

The term “agreement to the contrary” should not be construed so broadly so as to include “any agreement that has the effect of eliminating a termination right.” *Penguin Group*, 537 F.3d at 202. In *Penguin Group*, the Second Circuit held Respondent’s 1994 agreement was not an

agreement to the contrary. The 1994 agreement was executed to continue publication of works covered in Respondent’s 1938 Agreement, to cover additional works by Respondent and his wife, and to change the economic terms of the agreement in Respondent’s widow’s favor. The 1994 agreement expressly canceled and superseded the 1938 agreement.

Here, the 1978 Agreement neither sought to make a will or future grant, nor did it reclassify the work. The 1978 Agreement legitimately granted Starling a fairly bargained-for \$10,000 in exchange for an agreement to “not assert any additional interest” in her father’s story. Although the 1948 Agreement was not expressly revoked by the 1978 Agreement, Starling received additional remuneration in exchange for an agreement to “not assert any additional interest” in her father’s story.

We thus find that the 1978 Agreement is not an agreement to the contrary. Starling cannot exercise her termination rights because the 1978 Agreement relinquished her termination rights under the 1948 Agreement.

B. *First Amendment Limitation on the Right of Publicity*

Before addressing the merits of Starling’s right of publicity claim, the district court correctly sought to determine *823 whether the challenged speech was commercial or noncommercial because different kinds of speech are entitled to different levels of protection under the First Amendment. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). We note “the careful balance that courts have gradually constructed between the right of publicity and the First Amendment . . .” *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000). Appellees and Starling disagree as to whether the Rebroadcast was commercial speech. Again, like the district court, we agree with Manson.

Commercial speech that is misleading⁵ is not entitled to First Amendment protection and “may be prohibited entirely.” *In re R.M.J.*, 455 U.S. 191, 203 (1982).

Although the Supreme Court has not enunciated one test for distinguishing between commercial and noncommercial speech in all contexts, it has provided guidance in resolving this matter. We turn first to which test is appropriate for properly identifying commercial speech.

1. *The test for identifying commercial speech is whether the challenged speech does no more than seek to propose a commercial transaction*

At its core, commercial speech is that which “propos[es] a commercial transaction. *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980); *see also Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005) (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience”). In *Bd. of Trustees v. Fox*, the Court recognized that the test for identifying commercial speech is whether the speech seeks to “propose a commercial transaction” (hereinafter, the “commercial transaction test”). 492 U.S. 469, 473-74 (1989).

Further support for the commercial transaction test is found in our sister circuits’ application of the test to determine whether speech is commercial. *See Cramer v. Skinner*, 931 F.2d 1020, 1033 (5th Cir. 1991); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001); *Lavey v. City*

of Two Rivers, 171 F.3d 1110, 1114 (7th Cir. 1999).

The Supreme Court enumerated three factors that courts could consider in determining whether speech was commercial or noncommercial in *Bolger*. 463 U.S. at 66-67. First, whether the speech was an advertisement; second, whether the speech referred to a specific product or service; and third, whether the speaker had an economic motivation for the speech. *Id.* The Court suggested the combination of all three factors provided “strong support” for finding the challenged expression commercial speech. *Id.* The Court declined to hold, however, that all of the three factors or any combination of the factors is needed to support a finding of commercial speech. *Id.* at 67 n.14. It cannot be found, therefore, that the Court in *Bolger* promulgated a new test to determine whether particular expression is commercial speech.

Over the past three decades, the one test the Court has continually used to determine whether a particular expression is commercial speech is the commercial transaction test. Even *Bolger* recognized that at its core, commercial speech is speech that does no more than propose a commercial transaction. 463 U.S. at 66. Therefore, in deciding whether the Rebroadcast is commercial or noncommercial speech, we shall ask whether the Rebroadcast did no more than propose a commercial transaction.

2. *The Rebroadcast is noncommercial speech because it did more than propose a commercial transaction*

The Rebroadcast is noncommercial speech entitled to full protection under the First Amendment because it did more than propose a commercial transaction. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the challenged speech involved advertisements and promotion

⁵ Starling’s right of publicity claim is in essence a false endorsement claim. In this sense, the challenged speech is alleged to be misleading.

information from a pharmacist regarding the prices of prescription drugs. 429 U.S. 748, 749 (1976). The pharmacist was not trying to editorialize on any cultural, philosophical, or political subject. *Id.* at 761. The idea the pharmacist wished *824 to communicate was simply, “I will sell you x prescription drug at y price.” *Id.* at 761.

In contrast, the Rebroadcast provided information about cultural and historical events involving notorious historical crimes. The Rebroadcast was not a simple advertisement for *Darkly Dreaming Dexter*. Although the Rebroadcast contained two minutes of footage from *Darkly Dreaming Dexter*, viewers were never told that footage from that film was in the Rebroadcast, and there is no evidence that any viewers knew of the nature of that footage. Nothing in the Rebroadcast itself sought to market *Darkly Dreaming Dexter*. As such, the Rebroadcast cannot be characterized as merely a proposal to engage in a commercial transaction.

The Rebroadcast is not an advertisement in and of itself. We find an inherent difference between the rebroadcast of the documentary *Helter Skelter* and, for example, the advertisements for various products and services that were shown between segments of the documentary, including trailers for the film.

Obviously the Rebroadcast was intended to and likely did have an impact on the box office revenue of *Darkly Dreaming Dexter*. In this sense the Rebroadcast may be said to promote the film. However, we are not prepared to label all speech that has an impact on the sales of a product or service as commercial speech.

3. *Even when applying the Bolger test, the Rebroadcast cannot be classified as commercial speech*

While Circuit Judge Todd’s dissent focuses exclusively on a three-part test for determining

whether speech is commercial or noncommercial, the authority cited in his dissent reveals a lack of clarity in the test that we find unsatisfactory. For example, the test relied upon by the dissent provides that answering all three questions in the affirmative is “strong support” for concluding that the speech is commercial. However, the dissent ignores other possible considerations that might overcome such “strong support.”

Even if we adopted the *Bolger* “test” used by the dissent, we would find it inadequate. Under this analysis, the Rebroadcast cannot be found to be commercial speech because it satisfies none of the three enumerated “factors.”

The Rebroadcast is not an advertisement. Speech that is an advertisement is “speech about a product or service by a person who is offering a product or service at a price, directed to persons who may want and be willing to pay for, that product or service. *Kasky v. Nike, Inc.*, 45 P.3d 243, 312-13 (Cal. 2002) (citing *New York Times Company v. Sullivan*, 376 U.S. 254 (1964)). The Third Circuit found a cable-television production about a specific video game to be an advertisement in *Facenda v. National Football League Films*. 542 F.3d 1007, 1017 (3d Cir. 2008). That court concluded that the program was similar to a late-night infomercial because it focused on one product and advertised the sale of the game by featuring a clock that told viewers how many more days were left before it was available for purchase. *Id.*

The Rebroadcast possesses no similar attributes to the production in *Facenda*. *Helter Skelter* and the Rebroadcast is a documentary about serial killers throughout history. The Rebroadcast is an educational work with a documentary purpose, not speech directed to encourage viewers to purchase a certain product. Neither in Starling’s brief nor during oral arguments was it suggested that Manson or

Zodiac directed viewers to only see *Darkly Dreaming Dexter*. The fact that five segments of the *Darkly Dreaming Dexter*—encompassing a paltry two minutes of the entire Rebroadcast—were added in the Rebroadcast does not liken it to a late-night infomercial. We look at the Rebroadcast as a whole, not including the advertisements in between segments of the film. *See, e.g., Gaudiya Vaishnava Soc’y v. City of San Francisco*, 952 F.3d 1059, 1064 (9th Cir. 1991). As such, we cannot in good conscience classify the Rebroadcast of *Helter Skelter* as an advertisement.

To satisfy the second prong of *Bolger*, the Rebroadcast must contain references to a specific product or service “for the purpose of promoting sales of, or other commercial transactions in, [Respondent’s] products or services.” *Kasky*, 45 P.3d at 270. The record does not suggest that the segments of *Darkly Dreaming Dexter* included in the Rebroadcast *825 were identified as such; therefore, there was no known reference to *Darkly Dreaming Dexter* or its release within the body of the Rebroadcast. The advertisements shown during commercial breaks in between segments of the Rebroadcast cannot be found to satisfy this prong.

Manson and Zodiac have little to no economic motivation for the Rebroadcast. The economic motivation factor under *Bolger* is satisfied when a direct financial interest is established. 542 F.3d at 1017. In *Facenda*, our sister circuit found that the defendant’s licensing agreement with the creator of the video game established a direct “financial interest in sales of the video game. Here, the record does not support a finding that Manson had a financial interest in the profitability of *Darkly Dreaming Dexter*. Instead, the record is clear that Manson sold a story treatment to *Zodiac* prior to the Rebroadcast.

III. Conclusion

The district court properly granted Manson and Zodiac’s motion for summary judgment on Starling’s claim that she terminated Manson’s interest in copyrighted works authored by Dexter Morgan. Starling cannot exercise her termination rights under the 1948 Agreement because she already exercised those rights when she negotiated the 1978 Agreement, and the 1978 Agreement is not an “agreement to the contrary.” Additionally, the district court properly granted Manson and Zodiac’s motion for summary judgment on Starling’s right of publicity claim. The use of Starling’s likeness was noncommercial speech fully protected under the First Amendment. The test for identifying commercial speech is whether the challenged speech does “no more than seek to propose a commercial transaction.” Here, the Rebroadcast did more than merely propose a commercial transaction. The district court’s judgment is AFFIRMED.

RAY, Circuit Judge, joins in this opinion.

LOOMIS, Circuit Judge, concurring:

I. “Agreement to the Contrary” Interpretation

Because Congress prefaced § 304(c)(5)’s two examples of an “agreement to the contrary” with the word “including,” the canons of construction instruct that these examples illustrate the statute’s intended scope rather than create an exhaustive list. Thus, the canon of *ejusdem generis*⁶ should apply, rather than *expressio*

⁶ Simply put, when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.

*unius*⁷. The maxim of *ejusdem generis* provides that a general grant should be limited to items similar to specific examples listed. *E.g.*, *Milne*, 430 F.3d at 1043 (“When a statute contains . . . specific items and a general item, we usually deem the general item to be of the same category or class as the more specifically enumerated items”) (citations omitted); *see also US v. Salen*, 235 U.S. 237, 249 (1914) (“[T]he meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class”). Therefore, we should apply *ejusdem generis* and interpret “agreement to the contrary” in light of the two examples provided in § 304(c)(5).

The two examples in § 304(c)(5) establish “that the purpose of the statute is to protect the property rights of widows and children.” *Spier v. Bourne Co.*, 953 F.2d 774, 778 (1992). An agreement to make a will or to make any future grant both contract away future rights, which diminish the rights of the statutory successor if the party granting the future rights dies before the rights vest. *Milne*, 430 F.3d at 1046; *Spier*, 953 F.2d at 778. *826 Thus, §304 is designed to prevent a contingent grant of future rights by an author or heir from vesting in a publisher, rather than revering to the proper successor upon the grantor’s death. *See* 17 U.S.C. § 304.

⁷ A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. A court should only apply *expression unius* when it is “fair to suppose that Congress considered the unnamed possibility and meant to say no to it.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

In *Classic Media, Inc. v. Mewborne*, 532 F.3d 978 (9th Cir. 2008), the court allowed a contracting party, rather than the author’s widow or child, to utilize § 304(c)(5) notwithstanding an agreement entered into after 1978. That case, however, is distinguishable on its unique facts. The 1978 agreement in *Classic Media* only purported to put the agreement in line with agreements executed by the other heirs. *Id.* at 981. The court found it was improper for the publisher to convince the heir that the 1978 agreement only updated the 1976 agreement, and did not waive additional rights beyond the updated provisions of the agreement. *Id.* Disapproving of the publisher’s uniquely improper conduct, the Ninth Circuit noted the “vituperative gem of a letter” and “bombastic communication” the publisher sent to the heir when it later attempted to prevent her from asserting her rights. *Id.*

Classic Media’s unique facts are not present here. First, the 1978 Agreement was the first between Starling and Manson, not an update of a pre-1978 agreement between the same parties, such as in *Classic Media*. Second, the *Classic Media* court properly understood the purpose of § 304, but improperly applied it because of the case’s unique facts. Rather than applying the proper standard, the court only noted in dicta that “it may be possible for an author or heir to transfer the future rights scheduled to revert upon service of a termination notice, subject to surviving until the time such rights vested in the author or the heir.” *Id.* at 986 n.4 (citations omitted). This understanding properly applies to all of §304, which is meant to protect the rights of widows and children, not hamper the right of an individual currently holding a copyright from “an opportunity to share in [the copyright]” *Id.* at 984.

Penguin Group (USA) Inc. v. Steinbeck, 557 F.3d 193, 204 (2d Cir. 2008), on the other hand, exhibits the consensus approach to the application of §304(c). In *Penguin Group*, an

heir sold the additional rights she had pursuant to the termination right for valuable consideration. *Id.* at 201. This is precisely what Congress intended: for a current copyright holder to be able to negotiate his or her existing rights for additional compensation. And this is exactly what Starling did, leveraging her right to terminate to negotiate an additional \$10,000 under the 1978 Agreement. *See Penguin Group*, 557 F.3d at 202 (“We do not read the phrase ‘agreement to the contrary’ so broadly that it would include any agreement that has the effect of eliminating a termination right.”)

The examples in §304(c)(5) indicate that the statute should be read narrowly in order to protect widows and children, as recognized by the *Spier* court. Additionally, *Classic Media* is distinguishable on its facts and *Penguin Group* represents the proper understanding of §304, providing for a copyright holder to harness her rights for additional compensation, and publishers take these rights subject to the copyright holder living until the termination rights vest.

II. Public Interest in the Dexter Morgan Story

The Constitution gives Congress the power to secure “for limited Times” to authors the exclusive right to their writings. U.S. Const. art. I, § 8, cl. 8. Congress has done this through a series of Copyright Acts to provide for the protection of an author’s work for a fixed period of time. However, the Supreme Court has ruled that the phrase “for limited Times” does not limit the power of Congress to increase the duration of copyrights if it finds that the current term of copyright is insufficient to “promote the Progress . . . of useful Arts.” *Eldred v. Ashcroft*, 537 U.S. 186, 187-90 (2002).

At the heart of the Copyright Act is a balance between the artist’s rights during the term of the copyright and the public’s need for access to the

“fruits of an artist’s labor.” *Stewart v. Abend*, 495 U.S. 207, 228 (1990). Thus, the underlying policy is that the limited monopoly granted by the Copyright Act should provide sufficient bargaining power for the author to extract value from his work prior to the work passing into the public domain. *Id.* at 229.

Nevertheless, the value of protection as a means to stimulate progress in the “useful Arts” must be balanced against the public’s interest in having access to authors’ works when considering any extension of author protection. Congress recognized this concern for the benefit of the public as early as the 1909 Copyright Act, where congressional committees reported:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. At 7 (1909).

Through Manson and Zodiac’s efforts, Dexter Morgan’s story has been made available to the public in the form of a book, a documentary, and an upcoming fictional film. In exchange, Manson bargaining in good faith with Dexter Morgan for \$5,000 plus future royalty payments and further bargained with Starling for an additional \$10,000 in exchange for an agreement to “not assert any additional interest” in her father’s story. Now that her father’s work has increased in notoriety and popularity, she seeks to cash in by reneging on her former agreement.

While the Copyright Act gave Starling a “second bite of the apple,” she now seeks a third bite that the Act does not allow. As such, Starling’s actions are *827 in conflict with her 1978 Agreement and with the provisions of the Copyright Act as interpreted by our sister courts. I therefore concur in the judgment regarding Starling’s termination rights; Starling should not unreasonably withhold the public’s access to Dexter Morgan’s story.

GUMB, Circuit Judge, dissenting:

The majority today erroneously holds that the 1978 Agreement extinguished Starling’s rights to the 1948 Grant because Starling’s right to terminate the 1948 Grant “no doubt served as a bargaining tool—and was thus exercised—in her negotiations with Manson that culminated in the 1978 Agreement,” thus fulfilling the “statutory purpose of that right.”

The Copyright Act of 1976 extended by nineteen years the term of copyright protection for copyrights in existence on January 1, 1978. 17 U.S.C. § 304(a). The Act also provided authors and certain family members the inalienable right to terminate prior grants of copyright interests. *Id.* §304(c); *see also Stewart v. Abend*, 495 U.S. 207, 230 (1990). This termination provision was largely designed to assure that term extension would benefit authors and their heirs. *See Classic Media v. Mewborn*, 532 F.3d 978, 984 (9th Cir. 2008).

The termination right only applies to grants executed before January 1, 1978, and the prior grant may be terminated “notwithstanding any agreement to the contrary, including an arrangement to make a will or to make any future agreement.” 17 U.S.C. § 304(c). Starling sought to terminate the 1948 Grant despite the provision in the 1978 Agreement purporting to prevent her from ever terminating the grant.

Contrary to the majority’s analysis, the 1978 Agreement did not terminate or supersede the 1948 Grant and thus the terms of the original grant were still in effect when Starling sought to terminate it. Moreover, the 1978 Agreement was clearly an “agreement to the contrary” within the meaning of the Copyright Act.

I. The 1978 Agreement did not terminate, supersede, nor exercise Ms. Starling’s right to terminate the 1948 Grant.

Starling had the right to terminate the original 1948 Grant under the Copyright Act of 1976. Section 304 of the Copyright Act of 1976 provides authors and their heirs with a right to terminate pre-1978 copyright Grants. 17 U.S.C. § 304. The 1978 Agreement did not revoke the 1948 Grant, therefore Starling had a pre-1978 grant which she could terminate. Furthermore, the 1978 Agreement was not an exercise of her one-time termination right. Consequently, Starling had the right in 2004 to terminate the 1948 Grant and recapture the copyright to *American Psycho: The Cardinal Killer*.

The plain language of the 1978 Agreement *828 did not revoke the 1948 Grant. *See, e.g., Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 453 (Mich. 2003). A subsequent agreement rescinds a prior grant only if the agreement expressly revokes the prior grant. *Penguin Group (USA) Inc. v. Steinbeck*, 557 F.3d 193, 196 (2d Cir. 2006) (finding a revocation where the new agreement stated that “it [would] cancel and supersede the previous agreement”). No language in the 1978 Agreement expressly revoked the 1948 Grant. The 1978 Agreement merely provided that “royalty payments constitute [Starling’s] interests in or rights to the story.” Thus, Starling was able to exercise her termination right in 2004 because the 1978 Agreement did not expressly retract the 1948 Grant.

The 1978 Agreement affirmed, rather than revoked, the 1948 Grant. A subsequent agreement does not cancel a prior grant merely by affirming its terms. *See Classic Media*, 532 F.3d at 989. Morgan received royalties in exchange for granting the copyright in *American Psycho: The Cardinal Killer* to Manson in 1948, which Starling inherited upon his death. The 1978 Agreement expressly confirmed the royalty payment schedule, stating that they constituted Starling's "only interest in or rights to the story." Thus, the 1978 Agreement did not revoke the 1948 Grant because it affirmed the original grant.

Further, Starling did not exercise her termination right by signing the 1978 Agreement because she did not have that right in 1978. An author or heir of a pre-1978 work cannot exercise her termination right until fifty-six years after the original grant of the copyright, or after January 1, 1978, whichever is later. *See* 17 U.S.C. § 304(c)(3). Morgan transferred the rights to *American Psycho: The Cardinal Killer* to Manson in 1948. Because the five-year window for effecting the termination of a transfer begins fifty-six years from the date the copyright was originally secured, the five-year termination window for Starling did not begin until 2006. 17 U.S.C. § 304(c)(3). Complying with § 304(c)(3) and (4)(a), Starling sent Manson an advance notice of termination on September 22, 2004, seeking to recapture the rights given to Zodiac on September 4, 2004, "not less than two or more than ten years before" the effective date of termination. 17 U.S.C. § 304(c), 4(a). In doing so, Starling could not have served a termination until 2004, and could not have terminated until 2006. Starling did not have the right to terminate the transfer of interest to *American Psycho* in 1978, and could not have done so for another twenty-eight years.

Starling did not exercise her termination right by using that right as leverage to secure more

favorable terms in the 1978 Agreement. When an author or heir uses her termination rights as a bargaining tool to secure a better deal in a new agreement, she indicates her intent to terminate the original grant. *See Classic Media*, 552 F.3d at 988-89 (explaining that an heir exercised his termination right by using the right to negotiate a new contract that resulted in "considerably more money") (discussing *Milne*, 430 F.3d at 1046-47). There is no evidence that Starling entered into negotiations with Manson or leveraged her termination right. In response to Manson's request to clarify the 1948 Grant, Starling replied that she was entitled to royalties and nothing more. Starling's rights remained the same and she did not receive considerably more money after signing the 1978 Agreement. In fact, when accounting for inflation, Manson's \$10,000 payment to Starling in 1978 was worth less than Manson's \$5,000 payment to Morgan in 1948. Therefore, Starling did not exercise her termination right because she *829 did not enter into negotiations with Manson where she used her termination right as a bargaining tool to broker a better deal.

The majority's holding that Starling impliedly terminated the 1948 Grant unjustly rewards publishing companies, running contrary to the Congressional intent behind the Copyright Act of 1976. Congress sought to protect authors and their heirs from publishing companies who inherently possess more bargaining power. *See* 495 U.S. at 218-219; *see also Classic Media Inc. v. Mewborn*, 532 F.3d 978, 989 (9th Cir. 2008) (noting that an heir was likely unaware of her termination right because her agreement was executed in March 1978, just two months after § 304(c) became effective). Manson, a publishing company operating for over one hundred years, possessed specialized knowledge of the industry. Conversely, Starling, a law enforcement officer, expressed confusion about her rights. Also, Starling signed the 1978 Agreement on April 11th of that year, only three months after the effective date of the new

Copyright Act. Starling's and Manson's dealings reflect a disproportionate knowledge as to Starling's rights in 1977 and how her rights would change in 1978, thus echoing the policy concerns of Congress when it passed the Copyright Act of 1976.

II. The 1978 Agreement was an "agreement to the contrary"

The Copyright Act of 1976 created Starling's right to terminate the 1948 Grant in 2004. Congress passed the Act to protect the interests of authors and their heirs by providing them with an inalienable right to terminate grants of their copyright interests. *See Stewart*, 495 U.S. at 230. Congress passed § 304 of the Copyright Act of 1976 to repudiate the ill-effects of *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), which severely limited the protections *830 provided by the Copyright Act. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 185 (1985). The Copyright Act of 1909 created two twenty-eight year copyright terms to allow an author a second chance to renegotiate the terms of her original grant after the market determined the work's fair value. *Id.* at 185. *Fred Fisher* held that the Copyright Act of 1909 permitted authors to assign both their original and renewal copyright terms to publishers at any time; subsequently, publishers routinely demanded both in the initial grant. 318 U.S. at 659; *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 284 (2d Cir. 2002). This decision effectively eliminated the ability of authors to renegotiate their rights in the future.

Congress overrode *Fred Fisher* by creating a right for authors to terminate their original grants to publishers via § 304 and the "agreements to the contrary" clause of the Copyright Act of 1976. *See* 17 U.S.C. 304(c)(5). This clause created an inalienable right for authors and their heirs to terminate their copyright grants. *See Stewart*, 495 U.S. at 230; *see also N.Y. Times Co. v. Tasini*, 533 U.S.

483, 496 n.3 (2001) (noting that § 203, the parallel provision to § 304, which discusses post-1978 grants, creates an "inalienable authorial right to revoke a copyright transfer"). Courts disagree on whether agreements to the contrary allow authors and heirs to contract around their inalienable termination right. *Compare Steinbeck v. Penguin Group (USA) Inc.*, 433 F. Supp. 2d 395, 399 (S.D.N.Y. 2006), *rev'd*, 537 F.3d 193 (2006) *with Milne*, 430 F.3d at 1043. Whether or not an author or heir may contract around her inalienable termination right thus depends on how broadly or narrowly a court construes "agreement to the contrary."

The broadest interpretation of an agreement to the contrary allows an author to exercise her termination right irrespective of any contract that purports to, or has the effect of, contracting away her termination right. *See, e.g., Steinbeck*, 433 F. Supp. 2d at 399 n.10. Under the intermediate approach, agreements to the contrary possess characteristics similar to wills or future grants, providing authors a limited right to contract around their termination right. *See, e.g., Classic Media*, 532 F.3d at 983. Courts applying a narrow interpretation of agreement to the contrary strictly limit the definition to wills or future grants. *See, e.g., Milne*, 430 F.3d at 1043.

Starling prevails as a matter of law regardless of which interpretation of "agreement to the contrary" is applied because her 1978 Agreement with Manson was a future grant. While no case has expressly defined the term "future grant" for the purposes of § 304, every court to examine the issue has suggested that the term refers to an agreement addressing the assignment of rights that might vest at some future point. *See, e.g., Classic Media*, 532 F.3d at 980 (holding that an assignment is an agreement to the contrary when the only interest held by the author is a future right to terminate); *Penguin*, 537 F.3d at 204 ("authors or their statutory heirs holding termination rights . . .

[have] an opportunity to threaten . . . to exercise termination rights and extract more favorable terms.”) The 1978 Agreement included Starling’s promise not to assert any additional rights pertaining to *American Psycho: The Cardinal Killer*. This blanket forbearance of her legal rights included rights that may arise in the future. The 1978 Agreement is therefore a future grant because Starling entered into a contract with Manson affecting rights that vest in the future, relating to *American Psycho*. As a future grant, the 1978 Agreement is void as an agreement to the contrary; Starling therefore possessed the right to terminate in 2004.

Even if the 1978 Agreement is not a future grant, it is still an agreement to the contrary. Congress included § 304(c) and the “notwithstanding any agreement to the contrary” language in the Copyright Act of 1976 to avoid giving “litigation-savvy publishers . . . a blueprint” to exploit their superior bargaining power over authors. 310 F.3d at 291. Manson approached Starling, asking her to clarify her father’s grant and Starling cooperatively obliged. Finding that Starling extinguished her termination right this way allows publishers to divest heirs of their right by strategically presenting them with what appear to be innocuous reaffirmations of their benefactors’ grants.

The majority erred by *831 holding that (1) Respondents may strip Starling of her termination rights by recharacterizing a post-1978 clarification agreement as a termination-leveraged renegotiation that serves as an alternative to statutory termination, and that (2) the 1978 Agreement, which the majority believes extinguished Starling’s termination rights, is somehow not a disfavored “agreement to the contrary.” I respectfully dissent.

TODD, Circuit Judge, dissenting:

The majority’s First Amendment analysis is erroneous. In *Bolger*, the Supreme Court laid the foundation for what I believe to be the appropriate test for determining whether speech is commercial or noncommercial. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). The court should ask: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech. *Id.* at 66-67. Answering each of these three questions in the affirmative provides “strong support” for concluding that the speech is commercial. *Id.* at 67. With these factors in mind, I have no difficulty concluding the Rebroadcast is commercial speech.

I. *Bolger* is the clearest test to ascertain commercial speech

The Supreme Court’s reasoning in *Bolger* offers the clearest method for determining the existence of commercial speech and we should thus apply its reasoning. Commercial speech is subject to less protection than other forms of speech due to its lower rank in the hierarchy of First Amendment priorities of protected speech. *See, e.g., Cardtoons L.C. v. MLBPA*, 95 F.3d 959, 970 (10th Cir. 1996).

Common sense ultimately dictates whether a particular communication constitutes commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). Moreover, just because commercial speech enjoys a limited degree of protection under the First Amendment, it is not immune from government interference. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002); *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942). Courts, therefore, must consider the many characteristics of speech when deciding whether

expression is commercial. *See Bd. of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989).

Even with the small degree of protection accorded to commercial speech by the Court, little case law exists for how to define commercial speech. Many courts, including the Supreme Court, have held that commercial speech exists when advertising or proposing an economically important product or service. *See, e.g.*, 535 U.S. at 366 (holding that prescription-drug related advertisements subject to heightened government regulation constitute commercial speech); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (suggesting that speech proposing a “commercial transaction” constituted commercial speech, but failing *832 to explicitly define the term in detail); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that an advertisement containing political information possessed some commercial qualities).

However, other courts have instead focused on the economic nature of the communication. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (linking commercial speech with “economic interests”); *United Reporting Pub. Corp. v. Cal. Highway Patrol*, 146 F.3d 1133, 1137 (9th Cir. 1998) (finding that commercial speech concerns a “pure economic transaction”). At the same time, the “economic interests” test does not apply to every communication initiated as a result of monetary incentive. *See, e.g., Boule v. Hutton*, 328 F.3d 84 (2d Cir. 2003).

With the confusing array of tests for commercial speech, *Bolger* clearly distills all of the tests into a single analytical framework. The *Bolger* test shows breadth and depth by directing courts to consider the content, scope, and context of speech. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (finding speech to be

commercial under the commercial transaction test, while also enumerating the merits of the *Bolger* test).

The *Bolger* test’s flexibility helps courts determine whether speech like the Rebroadcast is commercial. No single factor is dispositive in classifying speech as commercial. *Bolger*, 463 U.S. 66-67; *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 97 (2d Cir. 1998). The *Bolger* test uniquely allows courts to independently weigh the merits of all three factors. *See Bad Frog*, 134 F.3d at 97. The test is also adaptable because speech that overwhelmingly satisfies one factor is likely commercial, irrespective of whether the speech meets the other prongs. *See* 463 U.S. at 68 n.14; *Semco v. Amcast*, 52 F.3d 108, 113 (6th Cir. 1995). The *Bolger* test’s flexibility makes it pragmatic and the appropriate test for determining whether speech like the Rebroadcast is commercial.

The test’s three prongs provide a reproducible framework for courts to consider when determining whether speech is commercial, maximizing efficiency and fairness. *See United States v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005). Moreover, the test presents speakers with clear and predictable guidelines before engaging in speech potentially subject to government regulation, reducing the need for courts to police commercial speech. *See Nike v. Kasky*, 539 U.S. 654, 680 (2003) (dismissing *cert.*) (Bryer, J. dissenting). The framework and guidelines provided by the *Bolger* test lead to efficiency in courts and fair outcomes for speakers by creating reproducible and consistent results, making this test well-suited for determining whether speech is commercial.

The *833 *Bolger* test effectively identifies commercial speech in circumstances involving a mix of commercial and noncommercial speech, like the Rebroadcast. A multi-factor test helps discern the proper classification of hybrid

speech containing commercial and noncommercial elements. 463 U.S. at 66-67. The Rebroadcast contained both a discussion of murderers and serial killers in history and inducement for viewers to see *Darkly Dreaming Dexter*, a related film. The Rebroadcast was hybrid speech and thus the tripartite *Bolger* test effectively enables an effective analysis to determine whether this hybrid speech is predominantly commercial.

II. The Rebroadcast is commercial speech under the *Bolger* test

The Rebroadcast satisfies the advertisement prong of the *Bolger* test because it encouraged viewers to purchase tickets to see *Darkly Dreaming Dexter*. The Court noted in *Virginia State Board* that “advertising is the *sina qua non* of commercial profits.” 425 U.S. at 772 n.24. The Second Circuit elaborated upon the meaning, holding that the word “advertisement,” as used in the Lanham Act, is speech made for the purpose of influencing the purchasing public. *See Boule v. Hutton*, 328 F.3d 84, 92 n.7 (2d Cir. 2003). Zodiac aired the Rebroadcast with a host’s reminders that the documentary was “sponsored by *Darkly Dreaming Dexter*,” and interspersed the Rebroadcast with the film’s trailer. Manson and Zodiac strategically linked the Rebroadcast and the film in the minds of the viewers, influencing the public’s decision to purchase tickets and fulfilling the advertisement prong of the test.

Manson and Zodiac included in the Rebroadcast clips from *Darkly Dreaming Dexter*, thereby satisfying the *Bolger* test’s specific reference prong. Speech satisfies this prong when it explicitly mentions a product. 463 U.S. at 66-67. Manson and Zodiac inserted into *Helter Skelter*, the original documentary, two minutes of footage from *Darkly Dreaming Dexter*, constituting more than four percent of the Rebroadcast’s length. The Rebroadcast satisfies the specific reference element of the *Bolger* test

because it made significant and explicit use of *Darkly Dreaming Dexter*.

The Rebroadcast satisfies the economic motivation prong of *Bolger* because Manson and Zodiac aired it to increase sales of *Darkly Dreaming Dexter*. When parties enter into an agreement for the purpose of increasing sales of a product, the resultant speech is economically motivated. *See Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008). Manson proposed that Zodiac use the Rebroadcast to “generate extra buzz” and “dramatically increase interest in and ticket sales” for *Darkly Dreaming Dexter*. Manson’s documentary also received increased exposure from this agreement. The Rebroadcast satisfies the economic motivation prong of the *Bolger* test because both Manson and Zodiac had a direct financial interest in airing the documentary.

I have no difficulty concluding that the Rebroadcast is commercial speech. The programming clearly advertised *Darkly Dreaming Dexter*; references were made to the film throughout the programming; and Manson and Zodiac’s economic motives in creating and airing the modified *Helter Skelter* documentary are obvious. I would reverse summary judgment in favor of Starling and hold that, because the Rebroadcast is commercial speech, the First Amendment contains no limitations on Starling’s right to publicity claim that are not already built into that statute. *See Central Hudson*, 447 U.S. at 563 (“The government may ban forms of communication more likely to deceive the public than to inform it.”) (citations omitted).

Based on *834 Circuit Judge Gumb’s rationale, I would also grant summary judgment in favor of Starling as to the issue of copyright termination and remand the matter for a determination of Starling’s right of publicity claim.