Kasky v. Nike, Inc.: A Reconsideration of the Commercial Speech Doctrine

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KASKY V. NIKE, INC.: A RECONSIDERATION OF THE COMMERCIAL SPEECH DOCTRINE

I. INTRODUCTION

At issue is the definition of ‘commercial speech’ and how that definition relates to the constitutional protection provided by the First Amendment. The Nike case represents the difficulty in distinguishing between commercial and noncommercial speech. Courts and critics alike have noted that Supreme Court decisions on the issue of commercial speech is vague at best and does not transcend to contemporary times when commerce and public debate coincide with each other. The California Supreme Court’s decision in Nike v. Kasky affects not only corporate entities, but also the public in what constitutes ‘matters of public concern’ that are protected by the First Amendment. The Court’s holding broadens the definition of commercial speech, which, in turn, limits First Amendment protections. The Court has taken a paternalistic approach towards protecting the public against potential false or misleading speech, an approach that is altruistic, yet detrimental to society’s basic freedom of speech.

Part II of this case note will summarize the status of commercial speech doctrine by looking at the historical development of the doctrine. It will highlight the areas of speech that are difficult to categorize into one form of speech or another. This case note will primarily comment on the Nike case, which emphasizes the controversy of defining the commercial speech doctrine. Part III will summarize the relevant facts, procedural history, prior court holding, as well as the current status of the case, along with the strong dissenting opinions, which Nike repeatedly cited in its cert for certiorari to the Supreme Court. Part IV will highlight the criticisms and shortcomings of the current California Appellate Court holding and the need for the Supreme Court to re-consider commercial speech in lieu of this holding.
II. THE STATUS OF THE COMMERCIAL SPEECH DOCTRINE

Commercial speech relates to communication about commercial issues that convey information necessary for public decision-making, but is not part of public discourse.1 Unlike public discourse, commercial speech is valued for the information conveyed, and not as “participation in the process of democratic self-governance.”2

Currently, the doctrine of commercial speech is vague at best. Consideration of the distinction between commercial and noncommercial speech is speculative. The Court in Central Hudson formulated a test for determining the regulations of commercial speech and its constitutionality.3 Numerous judiciaries have interpreted the regulations for commercial speech in many different ways. However, the Central Hudson test has remained the test for commercial speech. With this test, the court considers whether the First Amendment protects the expression in question. Expression is protected if it’s lawful activity and not misleading. The second part of the test considers the nature of the protection.

There is no dominant test, however, for determining what actually constitutes commercial speech from noncommercial speech. This lack of distinction is important, for where noncommercial speech is protected, even if it is false or misleading, commercial speech is not. For example, whereas truthful advertising related to lawful activities is protected by the First Amendment, if the content or method is misleading, the states may impose restrictions.4 Misleading advertising can be prohibited entirely, but States may not absolutely prohibit certain types of potentially misleading information if it can be presented

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2. Id.
in a non-deceptive manner.\textsuperscript{5} The Supreme Court has not concluded on an exact working definition for commercial speech. Numerous Court decisions have proven that such a definition among the realm of advertising, political commentary, and the like, should not be forced. Further, the emergence of mixed commercial and noncommercial speech in a society shaped through corporate themes and advertising emphasizes the impracticality of a working definition.

\textit{A. Historical Summary of the Commercial Speech Doctrine}

Commercial speech first arose after 1976 when the Supreme Court reversed its deep-seated holding that “the Constitution imposes no... restraint on government” regulation of “purely commercial advertising.”\textsuperscript{6} In doing so, the Court abandoned the position that all such speech deserves no First Amendment protection. Further, the 1976 holding in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, enacted the theory of the commercial speech doctrine, a doctrine relatively undefined for purposes of the First Amendment. In fact, more than two dozen Supreme Court decisions on the subject of commercial speech have not been able to define what actually constitutes such speech.

In recent years, the impossibility of identifying the characteristics of commercial speech has been noted in Court decisions. In a 1995 Court decision, Justice Steven asserted the “artificiality of a rigid commercial/noncommercial distinction.”\textsuperscript{7} Further, in \textit{44 Liquormart}, a 1996 Supreme Court holding, Justice Thomas noted that the Court itself has at times stressed the “near impossibility of severing ‘commercial’ speech from speech

\begin{footnotesize}
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\item Id.
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necessary to democratic decision-making." The Ninth Circuit cited Thomas' concurring opinion in a 1998 opinion by stating "the current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and noncommercial speech."\(^9\)

B. The Gray Areas

Recent court cases have demonstrated how the lines of speech are blurred and that there is not a "two-level" theory of expression between commercial and non-commercial speech.\(^10\) The Court must consider the expression and assess the First Amendment interest at stake, then weigh it against the public interest that is served by the regulation.\(^11\)

One area of focus involves commercial speech and the world of science in which sellers express health claims about their particular products. A concern is that government regulation on a company or association's advertisement as commercial speech relating to a scientific debate may quash a company's "full panoply of protections available to its direct comment on [that] public issue."\(^12\)

For example, in *National Commission on Egg Nutrition (NCEN) v. FTC*, the Court refused to "be hesitant to prevent an advertiser from misleading consumers under the veil of important public debate."\(^13\) In this case, the NCEN sponsored advertisements to negate the idea that eggs are unhealthy. The ads asserted that

"there is no scientific evidence that eating eggs increases the risk of... heart... disease. ..."14 The Seventh Circuit held the ads were false claims constituting commercial speech. This holding, on one hand, prevents one side from participating in a public debate; on the other hand, it prevents an advertiser from misleading consumers by masquerading as public debate.

Another example involved a restriction on cigarette advertising. R.J. Reynolds, the tobacco company, created an advertisement entitled "Of Cigarettes and Science" which denoted correlations between cigarette smoking and health risks.15 The Federal Trade Commission (FTC) held that this advertisement was commercial speech under the factors of the Bolger v. Youngs Drug Products case.16 In Bolger, the Supreme Court classified a drug company's pamphlets on venereal disease and family planning as commercial speech focusing on factors on whether (1) the pamphlets were acknowledged as advertisements; (2) they focused on the advertiser's specific products and; (3) the advertiser had an economic motivation.17 Just as in Bolger, the FTC weighed the factors and classified R.J. Reynolds' advertisements as commercial speech. The FTC agreed to dismiss the complaint in return for Reynolds' retraction of all advertising in question.18

Further areas of 'gray' include non-factual advertising, in which the 'advertisement' does not consist of verifiable representations about a specific product or service. Another area involves corporate image advertising in which the 'advertisement' does not refer to an individual product or service, but rather portrays a positive image of the corporation itself.19 So far these forms of expression are not completely chilled or affected by government

14. Egg Nutrition, 570 F.2d at 159.
16. Id. (holding that the advertisement misled the public by asserting that the government study contained 'credible evidence' rejecting public health warnings of smoking-related health risks).
17. See Bolger, 643 U.S. at 66-7.
regulation under the commercial speech doctrine.20 The potential of such a regulation would mean that a corporation would be deterred from advertising its image. But it is difficult to imagine that if an employer fails to live up to this image, then an action for misrepresentation would be pursued.21

Yet another gray area closely related to the Nike case involves corporate commentary, otherwise known as issue or advocacy advertising, in which expression of corporate viewpoints are made on a matter of public concern. “Issue advertising constitutes a unique category of speech...sharing certain features of both core first amendment speech and commercial speech.”22 If such expression were to be held commercial, then the government would still have to demonstrate false or misleading statements in the expression. One example of this involves yet another tobacco company, the Philip Morris Company. The Company conducted an advertising campaign observing and promoting public awareness of the Bill of Rights.23 The advertisements could be viewed as either political or commercial expression. These advertisements could be viewed as a corporate attempt “to protect its commercial interests by promoting the ‘right’ to smoke as a political debate beyond the reasonable scope of regulation by state agencies.”24 Further, there was no specific product or service advertised, one of the factors considered in Bolger. However, the Company did not have any interference from the government in relation to its campaign.

“Barring abolition of the commercial speech category altogether, inevitably there will be times when the line between protected

21. Id. at 121.
editorial and commercial advertising in claims about the danger or innocuousness of an advertiser’s product will be hard to discern."25 The gray areas highlight this unpredictability and the Nike case sets the judicial stage for trying to discern the line between commercial and non-commercial speech in regard to corporate advocacy in an editorial.

III. NIKE V. KASKY26

Nike, Inc. is a marketer of athletic shoes and sports apparel.27 Nike is a multinational corporation.28 Nike’s marketing strategy focuses on a strong brand image associated with a distinctive ‘swoosh’ logo and distinctive slogan, “Just do it.”29 In promoting this image, Nike spends approximately one billion dollars per year in advertising and brand promotion.30 Nike’s promotions include sponsorship agreements with celebrity athletes, including Michael Jordan and Tiger Woods, as well as professional and college athletic teams.

Nike subcontracts most of its manufacturing to companies in China, Vietnam and Indonesia.31 Between 300,000 and 500,000 workers are employed in the overseas factories that produce Nike products.32 As of early 1993, Nike has taken full responsibility for its subcontractors’ compliance with local laws and regulations relating to, among other aspects, minimum wage, overtime, child labor, working conditions, environmental protections.33

Starting in 1996, several news reports alleged that Nike

27. Id. at 168.
28. Id.
29. Id.
30. Id.
31. Id.
32. See Kasky, 79 Cal. App. 4th at 168.
participated in ‘sweat shops’ in which it exploited cheap Asian. The media and public interest reports accused Nike of acts such as “12 hour work days, compulsory overtime, violation of minimum wage laws, exposure to dangerous levels of dust and toxic fumes, and employment of workers under the age of 16.”

Nike responded to the adverse publicity and reports with a public relations campaign. Nike defended its Asian factories’ practices and standards by negating the remarks about illegal or unsafe Asian working conditions through press releases, letters to newspapers, letters to university personnel, and in other documents for public relations purposes. Particularly, Nike responded to a New York Times op-ed piece that accused Nike of cruelly exploiting Asian labor. Nike CEO Philip Knight defended Nike’s overseas factory conditions in a letter to the editor, which the Times published. Nike also bought full-page advertisements in national newspapers publicizing an investigative report that found that the charges against Nike were largely false.

In April 1998, a San Francisco community activist, Marc Kasky, brought suit against Nike asserting violations of California unfair trade practice and false advertising law. The complaint alleged that Nike had made false or misleading statements when it responded to the criticisms of its Asian labor practices in the editorials, press releases, personal letters to critics and form letters sent to athletic directors at colleges and universities. Kasky sued Nike in violation of California’s false advertising law and California’s unfair competition law, alleging that Nike made the

34. See Kasky, 79 Cal. App. 4th at 169.
35. Id. at 170.
36. Roger Parloff, Can We Talk?, Fortune, Sept. 2, 2002, p. 102 (referring to New York Times columnist Bob Herbert’s statements that “Nike executives...are not bothered by the cries of the oppressed. Each cry is a signal that their investment is paying off”).
37. Id.
40. Id.
false and misleading statements negligently and carelessly and
"with knowledge or reckless disregard of the laws of California
prohibiting false and misleading statements." 42 Further, Kasky
alleges that Nike made such statements "in order to maintain
and/or increase its sales and profits...through its advertising,
promotional campaigns, public statements and marketing...."
43

Nike argued that the complaint must be dismissed because it is
"absolutely barred by the First Amendment to the United States
Constitution and Article I, section 2(a) of the California
Constitution." 44 The Superior Court and Court of Appeals agreed
with Nike in focusing solely on the issue of whether Nike’s
allegedly false and misleading statements were commercial or
noncommercial for purposes of analyzing the protections afforded
by the First Amendment. 45 The Appellate Court held that Nike’s
statements were noncommercial speech and therefore protected by
the First Amendment. 46

The Court relied on Bolger in dealing with the distinction
between commercial and noncommercial speech, which
considered three factors – advertising format, product references,
and commercial motivation. 47 The Court distinguished Nike from
Bolger, stating that Nike’s communications “intended to promote a
favorable corporate image of the company” whereas the
communications in Bolger concerned specific goods. 48 Nike’s
communications did not relate to Bolger’s characteristics of
advertising format or reference to a specific product. The Court
highlighted the issue of public concern in that the “heart of the
First Amendment protection” lies in "the liberty to discuss publicly

42. Kasky v. Nike, Inc., 45 P.3d 243, 248 (Cal. 2002); petition for cert. filed
44. See Kasky, 45 P.3d at 248.
46. Id.
and truthfully all matters of public concern. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” 49 Just as the ‘exigencies’ concerned labor disputes in Thornhill, the Court here held that the “labor practices of foreign contractors of domestic companies come within the ‘exigencies’ of our times.” 50 Therefore, Nike’s defenses against criticisms of their labor practices constitute matters of public concern worthy of First Amendment protection. Further, the Court noted that the fact that Nike has an economic motivation in defending its corporate image shouldn’t diminish the significance of such speech. 51

The California Supreme Court reversed the lower court’s decision in a 4-3 decision. 52 The majority held that Nike’s speech is commercial and therefore actionable under state law receiving no protection under the First Amendment to the extent that it’s false or misleading. 53 The Court reached its decision by concluding that the messages in question were “directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products.” 54

The Court considered the relevant Supreme Court decisions on commercial speech in formulating a “limited-purpose test” to categorize speech as commercial. 55 The Court’s test requires consideration of three elements – the speaker, the intended

53. Id.
54. Id.
55. Id. at 256.
audience, and the content of the message.\textsuperscript{56} In Central Hudson, the Court held that commercial speech is speech that proposes a commercial transaction.\textsuperscript{57} Therefore, if the speaker and intended audience engage in commercial transactions, then they are engaging in commercial speech. Further, in Bolger, the Court held that advertising format and economic motivation imply commercial speech.\textsuperscript{58} The speaker and intended audience who are affected by these factors in speech are most likely to be engaging in commercial speech. Here, the Court held that Nike satisfies the first element because the speaker is engaged in commerce.\textsuperscript{59} Nike also satisfies the second element because the intended audience are potential purchasers of Nike's products.\textsuperscript{60}

In Bolger, the Court notes product references when considering the content of the message.\textsuperscript{61} Here, the Court understands 'product references' to include not only price, qualities or availability of items, but also "statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product [as well as] statements about the education, experience, and qualifications of the persons providing or endorsing the services."\textsuperscript{62} Here, the Court held that Nike satisfied that third 'content' element because it was making factual assertions about its own business operations.\textsuperscript{63}

\textsuperscript{56} Id.
\textsuperscript{58} See Bolger, 463 U.S. at 66-7.
\textsuperscript{59} See Kasky, 45 P.3d at 258.
\textsuperscript{60} Id.
\textsuperscript{61} See Bolger, 463 U.S. 60 (1993).
\textsuperscript{63} Id. at 258.
The Court negated Nike's argument that its speech was not commercial because they were part of "an international media debate on issues of intense public interest." The Court cites Bolger in stating that Nike may not "immunize false or misleading product information from government regulation simply by including references to public issues." Nike's allegedly false and misleading expression relate to the conditions and practices in its factories that produce its products, which is commercial in nature. Further, the Court held that Nike could have discussed the public matter of economic practices without integrating its own practices.

The Court also rejected Nike's argument that regulating its speech as commercial favors one point of view over another. The Court reasoned that the rejection suppresses false and misleading statements, not points of view. The Court cites Virginia Pharmacy in stating that a speaker that promotes its own product is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" because the speech is "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." The Court did not consider the issue of whether the speech was actually false or misleading.

64. See Kasky, 45 P.3d at 259.
66. Id. at 261.
67. See Kasky, 45 P.3d at 261.
70. See Kasky, 45 P.3d at 262.
The three dissenting opinions stressed the need for the Supreme Court to grant certiorari of the Nike case and to reconsider the commercial speech doctrine. First, the dissent argued that irrespective of Nike’s economic motivation, the public has a right to receive information on matters of public concern and that Nike’s economic motivation is not dispositive in identifying speech as commercial. Second, the dissent argued that Nike’s speech is not traditional commercial speech as the Supreme Court has held. Under Virginia Pharmacy, commercial speech is “speech which does not more than propose a commercial transaction.” The dissent argues that Nike’s expression went beyond that by providing information on international labor rights, which is a matter of public concern. The dissent analogized Nike’s issue with Thornhill, decided in 1940 yet still good case law, which held that labor disputes are purely economic. Just as the First Amendment protects both the employer and employees in Thornhill, both the consumers and Nike should be protected as well. Further, the dissent argues that the commercial elements of Nike’s statements are ‘inevitably intertwined’ with the noncommercial elements and that Nike cannot comment on public issues like labor practices without implicating its own labor practices.

On July 31, 2002, the California Supreme Court denied a rehearing of the matter. Nike filed a writ of certiorari to the Supreme Court, in which the Court will decide in late 2002 or early 2003 if they will hear the case. In its writ, Nike argued that

74. See Kasky, 45 P.3d at 265.
76. See Kasky, 45 P.3d at 267.
“not since New York Times v. Sullivan has [the Supreme Court] been confronted with a lower court ruling as profoundly destructive of free speech” as the California Appellate Court decision in this case. 78 Additionally, public interest groups, businesses, media outlets and other associations, including the ACLU, filed a series of amicus briefs on behalf of Nike. 79

IV. POTENTIAL EFFECTS FROM THE NIKE CASE

A Wall Street Journal editorial argued that “the rest of the business community would do well to follow this case, because a Nike defeat will make everyone vulnerable.” 80 In our media-drenched world, the activists, trial lawyers and politicians know how to run a campaign of vilification. But surely when the Founding Fathers passed the First Amendment, they believed they were ensuring a healthy debate, not stacking it. 81 Public concern includes corporations and businesses. Issues such as global warming, the environment, human rights and diversity, which are matters of public concern, relate directly or indirectly to companies’ products, services or operations. There is no getting around it and corporations should not be restricted from speaking their mind because they are economically involved.

In lieu of the recent Nike decision, a speaker’s inability to predict which category their speech falls can create a chilling effect on their expression. 82 The Court in Virginia Pharmacy

78. Cert for certiorari —


81. Id.

82. See Alan Howard, The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework, CASE W. RES. L. REV. 1093, 1119 (stating that “speakers...might be inclined to steer well clear of an unpredictable definitional boundary”).
stated that commercial speech’s ‘objectivity’ and ‘hardiness’ were the ‘commonsense differences’ from noncommercial speech.83 “The ambiguous ‘commonsense’ standard prevents commercial speakers from knowing whether their speech will be protected by the Court and discourages the distribution of important commercial information.”84 This commonsense standard, which takes profit motive, into account, can also be found in noncommercial expression, including book publishing and news reporting.

The recent decision signals at least two negative implications to businesses regarding corporate responsibility. First, global human rights and environmental practices can be subject to litigation in the United States. Second, corporations should not publicly state their social responsibility practices — “this decision sets a precedent for global corporate social responsibility efforts.”85 For example, as a result of the lower court decision, Nike stated in October that it would not publicly release its annual corporate responsibility report. This report summarizes Nike’s progress made in areas such as labor compliance, community affairs and workplace programs.86

The decision also implies a restriction on spontaneous conversation between the media and corporate officials over public issues. Lawyers would have to monitor and counsel corporations on their expression in the public forum, including op-ed commentaries, to prevent lawsuits. All press releases, letters to editor, customer mailing, op-ed article and web posting could be the basis for civil and criminal action. Corporate speakers would

have a difficult time addressing issues of public concern implicating their business or defending themselves in public forum. One media critic defended Nike by arguing that "extending the definition of commercial speech from corporate statements about publicly debated business operations...is unnecessary. When a business practice becomes a matter, the media filter and scrutinize potentially misleading corporate speech and place it into context."87

A. What will the Supreme Court decide?

Supreme Court may apply a more consistent First Amendment analysis to regulations on truthful speech in respect to commercial speech. Past Court decisions concerning expression by corporations has "avoided the facile assumption that the commercial character of the entity from which corporate speech emanates renders that speech intrinsically commercial."88 Rather, the Court has considered both content and context of corporate expression in its analysis. For example, in Central Hudson, the Court refused to provide full First Amendment protection to the utility’s advertising of energy-saving devices that linked to the current public debate of national conservation.89 Alternatively, in Consolidated Edison, the Court recognized the First Amendment protection for the utility’s comments on the public issue of nuclear power, which the company included in its commercially related monthly bill.90 The Court has maintained a vision of speech distinct from public discourse and valued only as information. "Contemporary dissatisfaction with the Central Hudson test

90. Consolidated Edison, 447 U.S. at 535.
suggests that this vision is now under considerable pressure."\textsuperscript{91}

It is hard to imagine an applicable working definition for determining commercial speech. ‘Commercial transactions’ are too broad of a working definition whereas you can find a commercial aspect to almost any First Amendment case. A case-by-case basis analysis is still work-able; it may be more commonsense to refuse a unitary standard of review. In the instant case, the government could require corporations like Nike to issue audited corporate and social responsibility statements. Information relating to labor and management practices could be disclosed, similar to a corporation’s financial statements. False statements would be punishable in a predictable manner.

V. CONCLUSION

There is no “clean distinction between the market for ideas and the market for goods and services.”\textsuperscript{92} The distinction between expressive and economic activity is interchangeable. The government still identifies with the importance of public discourse and public concern versus the need to protect the public from false and misleading speech. “A Klan leader’s vague but heartfelt threat to consider vengeance against racial minorities may be more alarming than a slight misstatement of the nutritional content of retail cereal, but it is the latter that is subject to regulation and penalty.”\textsuperscript{93} But the recent \textit{Nike} decision may be too much governmental regulation. At least four Supreme Court Justices have argued for a new approach to commercial speech in which it is expression protected like public discourse, yet subject to regulations that serve individual state interests to preserve “a fair bargaining process.”\textsuperscript{94} The \textit{Nike} case may provide that

\begin{itemize}
\item[94.] 44 Liquormart v. Rhode Island, 517 U.S. 484, 501-2 (1990); see also
\end{itemize}
opportunity.

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