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Public Relations Review 30 (2004) 419–430
Public Relations Review

Nike v. Kasky: reconsideration of noncommercial v. commercial speech

Eyun-Jung Ki*

College of Journalism and Communications, University of Florida, Gainesville, FL 32611-8400, USA

Received 28 April 2004; received in revised form 1 June 2004; accepted 20 August 2004

Abstract

This study examines the case of *Nike v. Kasky*. The primary discussion in this paper is about a public relations campaign by Nike that responded to allegations of poor working conditions for employees in their foreign factories. Whether false or misleading statements should be categorized as commercial or noncommercial speech, and therefore unprotected or protected, is the most important issue in the case. The main discussion is about the distinction between commercial and noncommercial speech, in terms of judicial scrutiny and the degree of protection afforded by each type of speech. The author suggests that speech such as that used by Nike should be protected under the First Amendment and proposes ways to prevent corporations from making false or misleading speech.

Keywords: Noncommercial speech; Commercial speech; Public relations; *Nike v. Kasky*; *Kasky v. Nike*; Legal issue in Public relations

1. Introduction

On September 12, 2003, when the United States Supreme Court refused to rule on *Nike, Inc. v. Kasky* (2003), and left the California Supreme Court decision in place, Nike's statements regarding its public relations campaign against alleged labor practices in foreign countries was determined to be commercial speech. The decision made by the California Supreme Court could have an important influence on public relations activities.

* Tel.: +1 352 846 1048; fax: +1 352 392 3952.
E-mail address: ejki@jou.ufl.edu.

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doi:10.1016/j.pubrev.2004.08.012

For approximately five years, many advertising and public relations professionals have followed the progress of the case because of its potential influence on their speech. According to a Wall Street Journal (2002) editorial, "the rest of the business community would do well to follow this case, because a Nike defeat will make everyone vulnerable." Ultimately, the case involves an argument over whether the First Amendment's free-speech protection extends to public relations activities.

In the time since the case was filed, a few academic papers have focused on the case. Most argued that, under the United States Supreme Court review, Nike's statement should be considered as noncommercial speech (Dobrusin, 2003; McGovern, 2002). However, none of the papers discussed the distinction between commercial and noncommercial speech, even though the most important issue in this case is whether Nike's allegedly false or misleading statements were commercial or noncommercial speech. Categorization as commercial or noncommercial speech determines judicial scrutiny and level of protection. Regarding false or misleading statements, the categorization is especially important because commercial speech does not receive any protection under the First Amendment. However, noncommercial speech is fully protected by the First Amendment, even if false or misleading.

In reconsidering whether the *Nike v. Kasky* case is commercial or noncommercial speech, this paper will take the following structure. Sections 2 and 3 provides a methodology for this research and a pertinent literature review, respectively. Background on the *Kasky* case is explored in Section 4. In Section 5, a distinction between commercial and noncommercial speech, including a discussion of significant court cases, is discussed. The next section, Section 6, offers an in-depth analysis of each court's decision on the case, including the California Court of Appeals decision, the California Supreme Court's decision, and the dissenting opinions of two California Supreme Court justices. Then, Section 7 follows with a discussion regarding Nike's statements as noncommercial speech.

2. Method

The principal methodology for this paper involves the analysis of court opinions. Cases were identified primarily through Lexis-Nexis, two books (Devore & Sack, 2001; Middleton, Lee, & Chamberlin, 2003) and law review articles (Dobrusin, 2003; Eberle, 1992; Kozinsky & Banner, 1990; McGovern, 2002) were found by using 'commercial speech and noncommercial speech,' 'commercial speech and public debate' and 'Nike v. Kasky' as key-word search terms in Lexis-Nexis.

Court opinions on the *Nike v. Kasky* case were the primary sources used, including an analysis of holdings by the California Appellate Court, the California Supreme Court, and the U.S. Supreme Court. Other cases regarding commercial speech and public debate are also discussed. In addition, California Business and Profession Code 17200, California's unfair competition law, California Business & Profession Code 17500, and California's false advertising law, were analyzed because of their relationship to the *Kasky* case.

3. Literature review

The literature review consists of two sections. Section 3.1 briefly describes how other scholars have discussed the demarcation between commercial and noncommercial speech. Section 3.2 discusses the approach of three papers that focus on the *Nike v. Kasky* case.

3.1. Demarcation between commercial and noncommercial speech

Before the U.S. Supreme Court, the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*. (1976) provided a definition for commercial speech. It presented a definition for what was not to be included as commercial speech. The definition used in *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations* (1973) that commercial speech does "no more than propose a commercial transaction," is the generally accepted standard.

After this definition appeared, several scholars discussed its appropriateness. Stern (1999), for instance, described the definition of commercial speech as appropriate, whereas, Kozinski and Banner (1990) argued that the definition does not correspond with the way advertising is currently conducted because current advertisements do not mention any commercial transaction-related information such as product qualities, prices, or places to buy the products. Additionally, they claimed the two characteristics of commercial speech are no longer useful tools for classifying commercial speech. The two characteristics of commercial speech they found obsolete were; (1) it is supposed to be more objective because truth is more easily verified, and (2) it is claimed to be more durable because advertising is an indispensable condition of commercial profits. Thus, regulation is not likely to chill commercial speech. In another study, Collins and Skover (1993) reexamined First Amendment doctrines concerning commercial speech in light of the role of mass media advertising in contemporary American culture.

Some other scholars have argued that public debate in the form of advertising should be protected under the First Amendment. Redish (1971), who suggested a theoretical framework for the constitutional protection of commercial speech, pointed out that contributions to public debate, in the form of commercial advertising, are in no meaningful way different from traditionally protected contributions. Post (2000) disagreed that commercial speech is relevant to communication about commercial issues that carry valuable information for public decision-making, but is not part of the public discourse.

Simpson (1994) indicated that the intermediate scrutiny restriction of the United States Supreme Court on commercial speech simply weighs on public interest, as perceived by the Court, against the state interest, as asserted by the government. He added that any individual rights to speak and exchange information, which are protected by the First Amendment, are lost in the process. In this regard, some scholars have criticized court decisions on commercial speech cases (Kaplar, 1991; Kozinski & Banner, 1990; Redish, 1971). McGovern (2002), for example, criticized that the court decision in *National Commission on Egg Nutrition (NCEN) v. Federal Trade Commission* (1977) prevented one side from participation in the public debate.

3.2. Literature review of Nike v. Kasky

Nike v. Kasky has been a controversial issue in newspapers, in magazines, and on television, since the lawsuit was filed. However, a review of the pertinent literature shows that only a few articles that appeared in academic journals dealt with this case.

In the first instance, McGovern (2002) suggested that the case required the U.S. Supreme Court to reconsider its commercial speech doctrine. The author suggested that the issue was central to the very definition of commercial speech and an example of relevance for constitutional protection provided by the First Amendment. McGovern criticized the California Supreme Court "for taking a paternalistic approach towards protecting the public against potentially false or misleading speech; an approach that is altruistic, yet detrimental to society's basic freedom of speech" (p. 336). In spite of his position, the

author concluded that a case-by-case analysis is still the most workable when dealing with commercial speech cases and suggested that requiring companies to file corporate and social responsibility statements could be the best solution for situations like this case.

In another article written by Dobrusin (2003), the author posed two primary questions: (1) "What is a corporation to do when a court determines that speech, not involving its products, is speech aimed solely at facilitating a commercial transaction?" and (2) "If speech can be reasonably read to propose more than a mere commercial transaction, but rather a public debate, how can that court properly refuse to sustain a demurrer on First Amendment grounds?" (p. 1140). She argued that the duty of the court, when entertaining an attack upon the speech of a corporate defendant, is not to simply assume the allegations to be true, but to fairly read those allegations without discounting the noncommercial elements blatantly disclosed within them. She criticized the *Kasky v. Nike* majority opinion of the California Supreme Court as providing an illogical rationale for applying a "limited purpose" test instead of using the Bolger test.

A court applies the limited purpose test when it must decide whether certain speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception. Categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message (Kasky v. Nike, 2002). Bolger v. Young's Drug Products Corporation (1983) established three indicators to determine commercial speech, which came to be called the "Bolger test." The three indicators are: (1) It is in some form of advertisement; (2) the advertisement refers to a specific product or products; (3) the speaker has an economic motivation (Bolger v. Young's Drug Products Corporation, 1983). The author concluded that Nike's statements should be considered as statements concerned with public debate and mixed commercial speech.

Gower (2003) focused primarily on the two appellate court decisions in the *Kasky v. Nike* (2002) case and their implications for the future of corporate speech. The author criticized the California Supreme Court decision for influences that could potentially corrupt the public debate. She discussed whether corporations should be held to a higher standard of fault than strict liability for false speech, and concluded that by imposing strict liability for false or misleading statements on corporations, courts deny members of the public their First Amendment rights by denying them a full debate of the issues.

She added that the court left in place a highly problematic and paternalistically limited purpose test. Gower utilized cases as primary sources, and law journals, law reviews and newspaper articles as secondary sources for the legal research in her study.

In the articles published before the case was settled, all three authors supported Nike's statements as noncommercial speech, although there were slight differences in their perspectives. Particularly, the authors of the first two articles (Dobrusin, 2003; McGovern, 2002) attempted to influence the U.S. Supreme Court's final decision. They seemed to attempt to persuade the justices into considering the Nike statement as noncommercial speech, which is fully protected under the First Amendment.

This paper differs from the literature in several ways and makes new contributions to existing scholarships in the field. First, this paper provides a comprehensive explanation of how to distinguish commercial from noncommercial speech. Although the most important determining element in the *Nike v. Kasky* case is the distinction between commercial and noncommercial speech, none of the existing articles thoroughly discussed the differences. Such a distinction is critical, given that, as commercial speech, the Nike statements would not be protected, but as noncommercial speech they would.

Furthermore, none of the studies thoroughly identified Nike's statement as a part of the public debate in the Nike controversy. Focusing on the question of why Nike's statement is a matter of public debate would contribute to scholarly discourse on one of the most important issues in the case.

4. Background of *Nike v. Kasky*

Nike is the world's leading manufacturer and seller of athletic shoes and apparel (Kasky v. Nike, 2002). Subcontractors in Southeast Asian countries, such as China, Vietnam, and Indonesia, manufacture most of Nike's products, and many of its workers are women under the age of 24. Since March 1993, under a memorandum of understanding with its subcontractors, Nike has assumed responsibility for its subcontractors' compliance with applicable local laws and regulations concerning minimum wage, overtime, occupational health and safety, and environmental protection (Kasky v. Nike, 2002).

In early 1996, the international mass media began to cover various allegations against Nike: Workers were said to have received less than the local minimum wage, to have been required to work overtime, to have been subjected to verbal, physical, and sexual abuse, and to have been exposed to toxic chemicals without adequate safety equipment in violation of local occupational health and safety regulations (Kasky v. Nike, 2002).

In response, Nike started a public relations campaign refuting the allegations (Kasky v. Nike, 2002). Nike issued press releases, wrote letters to editors, university presidents, and athletic directors, and purchased full-page ads in major newspapers to publicize a report by GoodWorks International. Former United States Ambassador Andrew Young prepared the report under a contract with Nike and found no evidence of unsafe working conditions in Nike's overseas factories. Nike distributed the documents for public relations purposes.

In April 1998, Marc Kasky, California labor activist, filed a lawsuit claiming that Nike violated the California false advertising statute, California Business and Professional Code (Sections 17500 and 17200), in its public relations campaign by publishing false and misleading statements. Kasky alleged that Nike made six misrepresentations concerning its labor practices during the public relations campaign:

> That workers who make NIKE products are . . . not subjected to corporal punishment and/or sexual abuse; that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours; that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions; that NIKE pays average line-workers double-the-minimum wage in Southeast Asia; that workers who produce NIKE products receive free meals and health care; that NIKE guarantees a 'living wage' for all workers who make NIKE products. (Kasky v. Nike, 2002, p. 170)

Additionally, Kasky allegedly claimed that the Young report, said to prove that Nike was "doing a good job and operating morally" was false. Nike immediately moved to dismiss the suit claiming that the speech in question was noncommercial speech and subject to the protection of the First Amendment's strict scrutiny.

The California Court of Appeals found in favor of Nike and dismissed Kasky's claim (Kasky v. Nike, 2000). The court held that "the communications at issue served to promote a favorable image through press releases and letters," and thus did not fit two of the three characteristics of commercial speech, advertising format and reference to specific product, and that they were part of a public dialogue on a matter of public concern (p. 175). However, the California Supreme Court overturned the lower court judgment, issuing a 4-3 decision that Nike's statement was indeed commercial "[b]ecause 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" (p. 175).

Nike sought and was granted a writ of certiorari by the U.S. Supreme Court. However, the U.S. Supreme Court dismissed the case on the basis that a certiorari should never have been granted (Nike v. Kasky, 2003). The Supreme Court rejected certiorari, citing the following three reasons. First, the judgment entered by the California Supreme Court was not final within the meaning of the jurisdiction, because Congress has granted the court appellate jurisdiction regarding state litigation only after the highest state court in which judgment could be made had rendered a final judgment. Secondly, neither party had standing to invoke the jurisdiction of the federal courts. Kasky had not asserted any federal claim and had failed to allege any injury to himself that was "distinct and palpable." Finally, reasons for avoiding premature adjudication of the difficult First Amendment questions were raised in the case because the speech at issue represented a blending of commercial speech, noncommercial speech and debate of public importance issues.

5. Distinction between commercial and noncommercial speech

It is necessary to discuss the distinction between commercial and noncommercial speech because the issue at hand is whether Nike's false or misleading statements are commercial or noncommercial speech. Categorization of speech as "commercial" or "noncommercial" determines the degree of judicial scrutiny the regulations must satisfy under the First Amendment.

Noncommercial speech, such as political, religious, or public debate speech is entitled to be fully protected under the First Amendment, and a content-based regulation is valid under the Amendment only if it can withstand strict scrutiny. That means, in order to justify the content-based regulation of noncommercial speech, the government has a burden of proof to demonstrate narrowly tailored regulation that proves a compelling government interest.

On the contrary, regulation of commercial speech based on content is less problematic (Bolger v. Youngs Drug Product Corp, 1983). To determine the validity of a content-based regulation of commercial speech, the U.S. Supreme Court has articulated an intermediate-scrutiny test. This test was articulated in the Central Hudson case (Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 1980). The components what a court needs to decide for this test are: (1) whether the speech is commercial expression and eligible for First Amendment protection; (2) whether the government asserts a substantial interest in regulating the expression; (3) when the second condition is satisfied, courts examine whether the regulation directly advances the governmental interest asserted; (4) whether the regulation is sufficiently narrow. Under this relaxed test, the government is not required to demonstrate a compelling interest in justifying a regulation. A choice of test between strict scrutiny and intermediate scrutiny is a deciding factor in the litigation.

In addition, commercial speech has several characteristics distinguishable from noncommercial speech. First, in commercial speech the truth is more easily verified by the information distributor than in noncommercial speech, such as news reports or political commentary, because the advertiser should know more about the product or service provided than anyone else (Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 1976). Secondly, commercial speech is "hardier" than noncommercial speech because a profit motive exists for speaking. For this reason, commercial speech is less likely to experience a chilling effect from speech regulation. Finally, more intense regulation of commercial speech is justified in order to prevent commercial harms to consumers or unfair competition in the market.

Purely commercial speech has historically been outside constitutional protection. Not until 1942, in *Valentine v. Chrestensen* (1942), did the Supreme Court first consider commercial speech doctrine that denied First Amendment protection to commercial speech. In a contest between the ability of the government to restrict speech and the freedom of the advertiser to speak, restriction won the day. In the case, Chrestensen had a submarine, which was exhibited for profit. To attract people, he provided handbills advertising the boat and distributed them on the street. Valentine, a New York City Commissioner, advised Chrestensen that he could not disseminate his advertisements and assured him that literature "devoted to information or a public protest" was entirely permissible (p. 53).

Chrestensen then prepared a two-sided circular, one side of which contained a political protest and the other an advertisement copy. When Chrestensen was advised against distributing the circular, he filed a lawsuit to prohibit interference on the basis of the Fourteenth Amendment. He was granted an injunction, which was affirmed on appeal. On petition for writ of certiorari, the U.S. Supreme Court reversed the appeal, finding that the legislative body was free to regulate to what extent one could pursue an occupation in the streets, as long as it did not infringe upon free speech. The U.S. Supreme Court held that a free speech violation did not occur because the only purpose of the respondent (Chrestensen) in adding the political protest to the circular was to avoid the ordinance.

The 1964 case of *New York Times Co. v. Sullivan* (1964) was not a commercial speech case. It is well-known for its holding that a public official must prove "actual malice" by the defendant in order to prevail in a libel suit. However, the U.S. Supreme Court took a small step toward constitutional protection for commercial speech in the *Sullivan* case when it proclaimed that the First Amendment protects political criticism of public officials, even when the criticism appears in a paid advertising format. In another advertising element decision regarding solicitation of funds for support of the civil rights movement, the U.S. Supreme Court determined that, for the ad in question, it was immaterial whether the editorial advertisement was purchased and that the advertisement was protected political speech because:

> It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. (p. 266)

More importantly, in political debate the First Amendment must protect some false statements, and the U.S. Supreme Court in *Sullivan* observed, "Freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "(pp. 271–272)

In the 1960s and 1970s, the Court began to create an area that was considered noncommercial speech and worthy of protection, despite appearing in an advertising format. In the case of *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* (1973), commercial speech was recognized, in its own right, as serving a valuable function in society. The Court's opinion in *Pittsburgh Press* clearly acknowledged for the first time that, even if speech does "no more than propose a commercial transaction," it may deserve First Amendment protection. Additionally, the Court indicated that if speech "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern," it is not purely commercial (p. 385).

In 1976, under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the U.S. Supreme Court categorically assigned commercial speech to the area of First Amendment protection. The Court held that "advertising, however, tasteless and excessive it may sometimes seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at

what price" (p. 765). This information is "a matter of public interest." The Court, in *Virginia Pharmacy,* distinguished commercial speech's "objectivity" and "hardiness" as "commonsense differences" from noncommercial speech (p. 771) (Bates v. State Bar of Arizona, 1977; Central Hudson Gas & Electronic Corp. v. Public Service Commission, 1980).

A mixed formation of commercial and noncommercial speech has appeared in modern society. Issue advertising is a good example because it comprises a unique category of speech, sharing certain features of both core First Amendment speech and commercial speech (Lurie, 1987). In the case of *Riley v. National Federation of the Blind of North Carolina, Inc*. (1988), the U.S. Supreme Court addressed the combination-of-characteristics issue. The Court held that speech by paid professional solicitors for charity was fully protected under the First Amendment since the commercial aspects of the solicitations were of lesser magnitude and were "inextricably intertwined" with the fully protected content of the presentations regarding charitable programs.

However, one year later in the *Board of Trustees of the State Univ. of N.Y. v. Fox* (1989), the Court rejected the contention that commercial solicitation in state university facilities was "inextricably intertwined" with educational content of the sales presentations, and thus not classified as commercial speech under *Riley*.

6. Analysis of *Nike v. Kasky*

This section discusses each court's holdings according to chorological order. It focuses on the California Court of Appeals, which decided in favor of Nike, and the California Supreme Court opinion, which overturned the lower court judgment. Also included is a test applied by the California Supreme Court. Due to unavailability, this paper excludes explanations of the California District Court opinion. In addition, the U.S. Supreme Court opinion is excluded because its reasons for rejecting a review of the case were already explained in the background of the case.

6.1. California Court of Appeals

In the California Court of Appeals, the theory of the plaintiff, Kasky, was that alleged misrepresentations were commercial speech, which is not fully protected by the First Amendment under U.S. constitutional law. However, the state appeals court determined that the speech at issue served to improve a favorable image through press releases and letters, and thus did not fit within two of the three characteristics of commercial speech; namely advertising format and reference to a specific product.

Comparing the *Bolger, Egg Nutrition,* and *Association of National Advertisers* decisions to this case, the Court proclaimed that, despite similarities to the present case, one fundamental aspect distinguished *Kasky* from the other three cases: they communicated in order to convey information or representations about specific characteristics of goods (Kasky v. Nike, 2000). However, the Nike speech at issue was intended to promote corporate image and attract consumers to buy company's products.

6.2. Supreme Court of California

In deciding whether Nike's commercial statements were protected under the First Amendment, the court started with the statement that speech must be lawful and cannot be misleading. In making its judgment, the court examined whether there was a substantial government interest in regulating speech, and whether the regulation in question would advance the proffered interest. The court allowed that false

or misleading statements could find protection under the First Amendment, but circumvented discussion of any protection of Nike's statements by deeming the type of speech represented in the Nike releases as not falling into the required category. That meant that Nike's statements were categorized as commercial speech, which is not protected when the speech is false or misleading. The rational of the court in refusing to protect Nike's statements was an attempt to limit or eliminate false and misleading speech.

In summary, the majority justified its decision through the opinion that denial of First Amendment protection to false or misleading commercial speech was appropriate in order to encourage promotion of truthful advertising, and help consumers in the process of deciding what services and products to purchase.

The California Supreme Court formulated a three-part test, called a "limited-purpose test," for deciding whether the statement at issue was in the category of commercial speech. The court decided to apply the test, because the U.S. Supreme Court has not yet adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment, and a high court's commercial speech decision suggests that it is possible to formulate a limited-purpose test. This test applies "when a court must decide whether a particular speech may be subjected to laws aimed at preventing false advertising and other forms of commercial deception" (p. 960). Courts require categorizing a particular statement as commercial or noncommercial speech by consideration of three elements: the speaker, the intended audience, and the content of the message.

First of all, the "speaker" element of the test will be satisfied whenever the speaker is "someone engaged in commerce" or "someone acting on behalf of a person so engaged" (p. 960). Nike satisfied this element because its officers and directors were engaged in the speech. In this respect, any statements by any commercial entity will satisfy the "speaker" element of the test.

The "intended audience," as the second element of the test, will be satisfied if the intended audience is "likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message, or to otherwise influence actual or potential buyers or customers" (p. 960). The majority agreed that the second element was satisfied because Nike's letters to university presidents and directors of athletic departments were addressed directly to actual or potential purchasers of Nike's products because the addressees were major buyers of athletic shoes and apparel. Additionally, Kasky claimed that the press releases and letters to newspaper editors were designed to influence actual, as well as potential, buyers of Nike's products.

The third element, the "content" of the speech, will be met if the "speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's productions or services" (pp. 960–961). The majority in the California Supreme Court determined that Nike's statements were made with the intent of supporting its flagging consumer reputation, which would serve to attract consumers into buying Nike products over time.

Justice Ming W. Chin started his dissent with recognition of American's passion for freedom of speech. Americans do not want to rely on the government to dispense information because they want to decide what they choose to believe. Because of the failure of the majority to consider the cherished right and public duty to contribute to the marketplace of ideas, Justice Chin claimed that Nike was denied the First Amendment rights to which it was entitled—the same protection that Nike's critics take for granted.

As a result of the majority's narrow view of protected speech, Nike was effectively denied the ability to participate in free, as well as open, debate because of the fear of violating California's Unfair

Competition Law. Justice Chin noted that the majority engaged in an overzealous effort to protect the public from false and misleading advertising, but in doing so, silenced and suppressed Nike's ability to participate in the public debate. Therefore, one side was unfairly hindered in order to benefit the other.

In the opinion of Justice Chin, the suppression of one side of a debate offends the most basic principles of the First Amendment. He added that the majority committed the very sin it claimed it warded against: injury to public good—for when one party in a debate is silenced, the public is denied its right to hear both sides of the story.

Justice Chin argued that Nike's statements offered insight into a public controversy that was of interest, not only to consumers of Nike products, but also to the public as a whole, despite whether or not they might ever purchase a Nike product. Finally, Justice Chin indicated that Nike's statements were one example of a mixture of commercial and other protected speech, thus deserving of full protection under the First Amendment.

In Justice Janice R. Brown's dissenting opinion, she criticized that the majority created too broad a test for commercial speech and that when "taken to its logical conclusion, (it) render(ed) all corporate speech commercial speech" (p. 984). She added that the test "contravenes long-standing principles of First Amendment law" in three ways.

First, despite the fact that commercial speech is distinguished by its content, the test completely relied on two elements unrelated to speech content: identity of the speaker, and the intended audience. In doing so, the majority was out of step with guiding principles supported by the U.S. Supreme Court. Secondly, "the test violated making the identity of the speaker potentially dispositive" (p. 982). Approximately 20 years ago, the U.S. Supreme Court decided that the identity of a speaker should not be a decisive factor in deciding the protection of speech (Pacific Gas & Elec. Co. v. Public Util. Comm'n, 1986), and "speech does not lose its protection because of the corporate identity of the speaker" (p. 16). Thirdly, the test suppresses "the ability of speakers engaged in commerce, such as corporations, to participate in public debates over public issues" (p. 16) because the rule imposing strict liability on a speaker for false factual assertions regarding a matter of public concern "would have an undoubted 'chilling effect' on speech, which has constitutional value" (Kasky v. Nike, 2000, p. 983).

Justice Brown added that the court should wade through a factual analysis, using a test developed in a bygone commercial era: one in which politics, advertising and public debate had more "sharply defined boundaries," and that they had failed to consider the contemporary global economy and market realities.

7. Discussion and conclusion

The California Supreme Court determined Nike's statements regarding public relations activities against alleged labor practices in foreign countries as being commercial speech because the messages in question were directed by a commercial speaker at a commercial audience, and because they represented the speaker's own business operations for the purpose of promoting sales of company products. Applying the "limited purpose test" (speaker, audience, and message) is likely to lead to a possible chilling of corporate public relations activities because corporate speech can be easily satisfied with the three elements of the test. For all practical purposes, the three-part test employed by the court for determining commercial speech includes any statement made by any corporation to potential consumers regarding its products or services (Brody & Viggiano, 2002). For example, the second element, "intended audience,"

includes large numbers of people, especially for large corporations selling goods or services, such as Coca Cola, Nike, and McDonalds.

This case serves as a reminder to public relations professionals that their efforts may be well-considered commercial speech and subject to government regulation. Thus, the court ruling could have a profound chilling effect on corporate communication toward the public and create an environment where corporations are reluctant to speak on matters of public importance. For instance, Nike said it would no longer publish corporate social responsibility reports in order to avoid potential liability that could arise from statements made in the reports.

Unfortunately, this leads to negative effects on the First Amendment rights of the public, as well as the rights of corporations, because the public has a First Amendment right to receive information in order to make a proper judgment about a publicly debated issue. The California Supreme Court decision could limit expression of views on public issues, although speech concerning public issues occupies the "highest rung of the hierarchy of the First Amendment values," and is entitled to special protection because such speech is "more than self-expression; it is the essence of self-government." Under the U.S. Constitution, "the First Amendment removes government restrictions from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." Thus, the First Amendment fully protects, as well as encourages, public debate on 'matters of public concern' and erroneous statements are inevitable in free debate.

In the public debate of issues, the public needs to hear both sides of an argument in order to make a proper judgment. Nike's public relations campaign was a form of dialogue on a matter of public concern, and therefore, was noncommercial speech. The speech at issue deserved protection because it provided information that was vital to public debate. As Justice Chin recognized, Nike's statements provided insight into a public controversy that was of interest to Nike's consumers, as well as to the public as a whole.

Mass media serves as an effective watchdog over corporate press releases, thereby helping to limit false or misleading corporate public relations activities. Thus, when a corporation's speech becomes a matter of public concern, the media scrutinizes corporate speech and typically places potentially misleading statements into context. Therefore, the informational function of advertising should be protected under the First Amendment.

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