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Kasky v. Nike: Lurking First Amendment Time Bomb for Marketers?

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Abstract - While attention has focused on the U. S. Supreme Court protecting corporate political speech, the Court has left untouched a California Supreme Court ruling of significance to marketers in their efforts to use advertising and public relations to offset what they view as unfair criticism. The case, *Kasky v. Nike*, stems from 1995 accusations that athletic footwear and apparel manufacturer Nike exploited and abused employees in Asian sweatshops. Through advertising and public relations efforts, Nike denied the claims. In 1998, Californian Mark Kasky sued, claiming Nike's denials violated laws regarding unfair competition and false advertising and, because the denials were "commercial speech," they were not protected by the First Amendment. California Superior Court dismissed the case and Kasky also lost in the state Court of Appeal, but won at the California Supreme Court. The U.S. Supreme Court ultimately declined to hear an appeal from Nike. As a result, companies doing business in California, including online, risk being charged with false advertising when attempting to defend themselves against accusations of unfair, illegal, or unethical corporate practices.

Keywords - corporate speech, First Amendment, *Kasky v. Nike*, advertising, public relations, false advertising, Nike, sweatshops.

Relevance to marketing Educators, Researchers and/or Practitioners - Contrary to frequent nearly-absolutist First Amendment interpretations, the California Supreme Court ruled marketers can be charged with false advertising if their defenses against improper behavior are found to be false. The rulings in the case *Kasky v. Nike*, is not limited to California, since businesses with online capability are, in effect, operating within that state.

Introduction

Nearly a decade has passed since the U. S. Supreme Court refused to resolve certain questions regarding First Amendment rights for businesses. While the Court controversially ruled in favor of corporate political speech in the well-

known *Citizens United v. Federal Election Commission* (2010), it has let stand a California Supreme Court ruling, *Kasky v. Nike* (2002). As a result, the *Nike case* can, in effect, muzzle the ability of businesses to defend themselves against criticism. This presents potential hazards for marketers given the importance of public relations and corporate and advocacy advertising, especially in areas where businesses may find themselves at the center of controversy or the targets of organized criticisms.

The purpose of this paper is to examine part of the legal atmosphere surrounding communications by commercial entities. The heart of the problem is the extent of First Amendment protection for what is called *commercial speech* and the definition of such speech. While discussing them, the paper takes no position on corporate manufacturing practices, the legitimacy of accusations made as a result of those practices, nor the validity of corporate defenses against those accusations. Rather, this paper focuses on questions raised in litigation surrounding corporate communications in controversial situations and the repercussions of those questions for companies doing business in California (including on the internet) or those affected by courts following precedent of the California Supreme Court.

The California Supreme Court ruling stems from accusations in 1995 that athletic footwear and apparel manufacturer Nike used sweatshops in Southeast Asia where employees were said to be underpaid, exploited, and abused. Nike denied the claims through a series of advertising and public relations efforts. In 1998, California resident Marc Kasky sued, claiming Nike's denials violated the state's laws regarding unfair competition and false advertising (Goldstein, 2002-2003). Kasky's argument was that Nike's defense about sweatshops was untrue and because Nike was engaged in commercial speech in defending itself, Nike was promulgating false advertising and the First Amendment did not protect it (*Kasky v. Nike*, California Supreme Court, 2002).

The originating court, the California Superior Court, dismissed the case and Kasky subsequently lost in the state Court of Appeal. However, upon going to the California Supreme Court, Kasky won. That court claimed Nike was engaged in commercial speech which has been recognized to be limited in its First Amendment protection. The state Supreme Court said Nike's speech was aimed at customers and ultimately designed to sell its products (*Kasky v. Nike*, California Supreme Court, 2002).

Nike appealed to the U. S. Supreme Court, which agreed to hear the case, but the writ of certiorari was dismissed as improvidentially granted, meaning the Court subsequently decided it should not have agreed to hear the case (*Nike, Inc. v. Kasky*, 2003).

Accusations Against Nike's Asian Manufacturing

Nike's manufacturing facilities prompting the controversy were in China, Vietnam, and Indonesia. They primarily employed women under the age of twenty-four. Nike had agreed to compliance with local laws regarding wages, health and safety and protection of the environment (*Kasky v. Nike*, California Supreme Court, 2002). However, on October 17, 1996, CBS News 48 Hours ran a story claiming Nike used sweatshop practices in Vietnam. In the story, reporter Roberta Baskin said women working in Nike-contracted Vietnamese factories worked long hours, were underpaid, and were struck by supervisors, while Nike made record profits and its founder Phil Knight was listed as the sixth richest man in America. Over the course of the next year, allegations of abuse by Nike appeared in the *Financial Times*, the *New York Times*, the *San Francisco Chronicle*, *Sporting News*, and more. Allegations included forced illegal overtime; physical, verbal, and sexual abuse, and unsafe working conditions.

As a result of the accusations, Nike began a public relations campaign which included news releases and letters to newspapers, university presidents and athletic directors. Nike said Asian workers in factories it contracted with had protections against abuse, were paid a living wage (double, on average, the local minimum wage), and received free meals and health care. The company also bought full-page newspapers ads to promote a report Nike had contracted from GoodWorks International, LLC. The report stemmed from an investigation by former United States Ambassador Andrew Young disclosing no evidence of abusive or illegal conditions at Nike-contracted plants in China, Vietnam, and Indonesia (*Kasky v. Nike*, California Supreme Court, 2002).

Initial Filing of *Kasky v. Nike*

In 1998, San Francisco political activist Marc Kasky filed suit against Nike over the company's defense against its alleged sweatshop practices in Southeast Asia. Kasky claimed Nike had made false statements regarding the welfare of workers (*Kasky v. Nike*, California Superior Court, 1998). Although other companies engaged in outsourced Asian labor, Nike's production practices were long the focus of activists despite – or more likely, because of – its carefully crafted image of concern for social issues and its role as a celebrity corporation (Knight and Greenberg, 2002).

An amended version of the suit filed July 2 implied guilt on the part of Nike because after the first filing of the lawsuit on April 20, Nike responded with a news release on May 12 which said in the future it would change work standards to increase the minimum age of workers to sixteen and would follow U. S. standards regarding safety and air quality. The news release also said Nike would expand independent monitoring of its manufacturing and

educational offerings for workers, and increase its micro-enterprise loan program in Southeast Asia

Also, shortly after the April 20 filing of the unamended lawsuit, Nike on June 18 sent a letter to university presidents and athletic directors, claiming the company was following all relevant regulations regarding pay and overtime, health, safety, environmental conditions and that Nike staff members provided daily enforcement.

In making its argument regarding Nike's communications, the initial Kasky lawsuit said Nike had a code of conduct and memorandum of understanding designed to attract as customers those consumers desiring products not made in sweatshops. The suit also quoted a 1997 letter to the editor in the San Francisco Examiner by Nike Director of Communications Lee Weinstein which claimed that Nike was the leader in the industry in improving conditions in factories (Kasky v. Nike, California Superior Court, 1998).

Kasky argued that by making alleged false claims about its contractors' factories, Nike had violated the California Business and Professions Code and "Nike's misrepresentations were made with knowledge or with reckless disregard of the laws of California prohibiting false and misleading statements" (Kasky v. Nike, California Superior Court, 1998: 31-32). Kasky also claimed that Nike was engaged in "unfair business practices" and "committed acts of untrue and misleading advertising." As a remedy, Kasky called for the Superior Court to require injunctive relief for Nike to "disgorge all monies which Nike acquired" through illegal activity, to launch a court-approved information campaign "to correct any Nike statement and/or claim that this Court finds misleading or deceitful" and to prohibit Nike from "misrepresenting the working conditions under which Nike products are made" (Kasky v. Nike, California Superior Court, 1998: 33). Essentially, Kasky charged that Nike's defense of itself was false advertising.

In response, Nike called for dismissal of Kasky's lawsuit, which the Superior Court granted. Nike had argued the First Amendment prohibited the suit, as did the California constitution. Kasky then appealed (Goldstein, 2002-2003).

The Appeals Process

The California Court of Appeal (2000) also ruled against Kasky. Like the trial court, the appeals court focused only on the constitutional issues, and followed standard appellant court procedure in a dismissed case in that it assumed Kasky's allegations were true, that Nike had indeed misrepresented facts about its Southeast Asian production. In the appeals process, the California Court of Appeal and subsequently the California Supreme Court (2002) and the U. S. Supreme Court (2003) examined U. S. Supreme Court precedents regarding the concept of commercial speech. Among cases they cited were Virginia Pharmacy

Board. v. Consumer Council (1976) and *Bolger v. Young's Drug Products Corp.* (1983).

Virginia Pharmacy Board v. Consumer Council

The Virginia Pharmacy case (1976) recognized First Amendment protection for commercial speech. The case involved the Virginia Pharmacy Board's prohibiting pharmacists from advertising prices of prescription drugs. The board claimed there was no First Amendment protection against announcing prices because pharmacists were involved in commercial speech and in the past the U. S. Supreme Court had declined much protection for it. Writing for the majority, Justice Harry Blackmun illustrated commercial speech in the context of the pharmacist merely wanting to sell a certain drug at a certain price and raised the question of whether such communication had any First Amendment protection (*Virginia Pharmacy*, 1976).

In upholding the advertising of pharmaceutical prices, Justice Blackmun wrote for the court that even though an advertiser may have strictly economic motives, the advertiser still should have First Amendment protection. He referred to the long-standing concept that labor disputes are mainly economic, but all parties in such disputes enjoy First Amendment freedom. And regarding advertising pharmaceutical prices, consumers, because of physical pain or illness, may have more interest in those prices than they do in unquestionably protected political speech. In addition, there may be strong societal interest in a free flow of commercial information. "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions" (*Virginia Pharmacy*, 1976: 766). In summary, *Virginia Pharmacy* opined that even though commercial speech can sometimes be regulated, there is critical importance in the free flow of market/commercial information that deserves some dimension of First Amendment protection.

Bolger v. Young's Drug Products Corp.

The *Bolger* case represented an attempt by the U. S. Supreme Court to develop the modicum of a test to determine what is and what is not commercial speech and is cited heavily in the appeals process of *Kasky*. Determining commercial speech seems akin to U. S. Supreme Court Justice Potter Stewart's oft-quoted statement regarding hard-core pornography: "I know it when I see it" (*Jacobellis v. Ohio*, 1964: 184). Splits among courts at all levels of the appeals process in *Kasky* demonstrated that judges might have a better idea of how to define pornography than they do the tests for what is or is not commercial speech.

Bolger was based upon a federal law prohibiting sending through the mail unsolicited advertisements for contraceptives against which *Young's Drug Products*, a manufacturer and marketer of contraceptives, claimed First

Amendment protection for its promotional materials. In the Bolger decision, the Court cited precedent recognizing some dimension of First Amendment protection for commercial speech (*Bigelow v. Virginia*, 1975). The court cited a “common sense distinction” between speech regarding specific transactions where fraud may occur – which are subject to regulation – and other types of speech (*Bolger*, 1983: 65). Examining Young’s claims, the Court noted the pamphlets and flyers were advertisements, they promoted products, and they were produced for commercial purposes. The combination of all these factors -- advertisements, products, commercial purposes -- meant Young’s printed materials were commercial speech. Despite this, they merited First Amendment protection because they dealt with social issues and the government had no compelling interest to prohibit the mailing of them (*Bolger*, 1983).

Kasky v. Nike in the California Court of Appeal

Upon receiving *Kasky v. Nike*, the California Court of Appeal (2000) reiterated that commercial speech is limited in ways that noncommercial speech cannot be limited and that deceptive or misleading commercial speech is restricted. It did so by citing *Florida Bar v. Went for It, Inc.* (1995) which in turn had cited *Board of Trustees of State Univ. of N. Y. v. Fox* (1989). The court also cited *Bolger*, discussed earlier in this paper, saying that three factors came into play regarding the contraceptive pamphlets: 1) because they were advertisements did not automatically mean they were commercial speech, 2) reference to a specific product did not automatically make them commercial speech, and 3) economic motivation for mailing the pamphlets did not constitute commercial speech. However, the combination of all three provided strong evidence that a lower court was correct in ruling that the pamphlets were commercial speech. In deciding *Kasky v. Nike*, the California Court of Appeal said the three factors of *Bolger* were applied by the U. S. Ninth Circuit Court of Appeals in *Association of Nat. Advertiser, Inc. v. Lungren* (1994) regarding manufacturers and distributors of consumer goods making environmental claims about products. The *Kasky v. Nike* decision also made reference to an earlier decision by the U. S. Seventh Circuit Court of Appeals in *National Commission on Egg Nutrition v. Federal Trade Commission* (1977) in which the court found false advertising in health claims regarding eggs. But the California Court of Appeal said *Kasky v. Nike* was different. Even though *Bolger*, *Egg Nutrition*, and *Association of National Advertisers* were similar to *Kasky*, they differed because they referred to specific goods. Instead, in *Kasky*, Nike’s defense against criticism did not involve specific products, but rather a good corporate image. While that image was needed to sell products, Nike’s communications were not focused on selling specific products. Also, in defending itself, Nike used public relations communications, not just advertising. Not selling specific products and not limiting itself to advertising put Nike outside two of the three points of the *Bolger* test, according to the California Court of Appeal. However, the court

recognized that false news releases can result in damages requiring injunctive relief and that not all three factors in *Bolger* must be present for speech to be considered commercial. “But we think that a public relations campaign focusing on corporate image, such as that at issue here, calls for a different analysis than that applying to product advertisement” (*Kasky v. Nike California Court of Appeal*, 2000: 7-9).

The Nike issues, according to the California Court of Appeal, involved debate on a public matter. And like *Virginia Pharmacy Board*, the court noted the parallel with First Amendment protection for speech in labor disputes, citing *Thornhill v. Alabama* (1940): *Thornhill* said the First Amendment stemmed from oppressive government but in an industrial society (as of 1940) there was a need for similarly unfettered information in labor disputes. Nike’s situation “places its labor practices in the context of a broader debate” regarding offshoring labor once done domestically (*Kasky v. Nike California Court of Appeal*, 2000: 10). Nike’s economic motivation in defending itself, the Court of Appeal said, did not remove its First Amendment protections, given public interest in labor practices. And the court reiterated that limits on noncommercial speech are narrow, related only to libel, obscenity, fighting words, and certain rare situations.

In summary, the California Court of Appeal said Nike deserved First Amendment protection because the case involved corporate image instead of products, that it involved public relations, not just advertising, and that public issues – in this case, labor practices – were involved.

Kasky v. Nike in the California Supreme Court

Kasky then appealed to the California Supreme Court (2002) and there met success. As with the Court of Appeal, the state supreme court used the *Bolger* three-point test (advertising format, product references, commercial motivation) and found that two of the items were present.

The California Supreme Court said speech that is false has no constitutional value *per se*, but is protected to preserve the atmosphere required for debate of public issues. Commercial speech “can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate” (*Kasky v. Nike, California Supreme Court*, 2002: 20). Because Nike was a “commercial speaker to a commercial audience” making comments about its own operations to promote sale of its products, Nike was engaged in commercial speech and was under narrow rules than normally allowed by standard First Amendment protections of free speech (*Kasky v. Nike, California Supreme Court*, 2002: 2).

The California Supreme Court also said state regulation of advertising had a long history, but it was not until the 1970s that the U. S. Supreme Court ruled there was some First Amendment protection for it and cited the *Virginia Pharmacy Board* (1976) case discussed earlier in this paper, and reiterated the

idea that free enterprise required a free flow of ideas. And the California Supreme Court cited a U. S. Supreme Court case requiring commercial speech to be about lawful activity and not be misleading in order to qualify for First Amendment protection (*Central Hudson Gas & Elec. v. Public Service Commission*, 1980). The California high court also cited the U.S. Supreme Court's position that while there is general protection for false speech – especially political speech – such protections are not all-encompassing especially where there are no public issues and the false speech is damaging. It also cited the U. S. Supreme Court's provision of three reasons for making distinctions between commercial and noncommercial speech and for not providing First Amendment protection for commercial speech that is false: 1) disseminators of commercial speech can more easily verify the speech, 2) commercial speech is “hardier” than noncommercial speech in that the profit motive means commercial speakers “are less likely to experience a chilling effect from speech regulation” and 3) government authority to regulate commercial transactions means the same authority applies to communications regarding those transactions (*Kasky v. Nike*, California Supreme Court, 2002: 9).

Ultimately, the California Supreme Court said the U.S. Supreme Court had no one-size-fits-all test to determine commercial from noncommercial speech, but there could be a “limited purpose” test. When courts would be required to determine if speech is regulated to prevent commercial deception “categorizing a particular statement as commercial or non commercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.” (*Kasky v. Nike*, California Supreme Court, 2002: 12).

Addressing the three elements, the court said 1) Nike was, indeed, functioning as a “commercial speaker;” 2) Nike's letters to universities and its other communications were aimed at potential buyers, and 3) the contents of the communications were commercial, “...describing its own labor policies, and the practices and working conditions in factories where its products are made.” Bringing Nike under regulations against false or misleading speech provides an incentive for Nike to verify the truth of its statements which fulfills the U. S. Supreme Court's position on protection of commercial speech to provide the free flow of commercial information outlined in the *Virginia Pharmacy Board* (1976) case (*Kasky v. Nike*, California Supreme Court, 2002: 15).

The California Supreme Court also rejected Nike's argument that regulating its speech would limit public debate to one point of view, that of Nike's critics, saying California law only limits false commercial speech. Expressions of Nike's opinions on general policy questions are fully protected by the First Amendment; Nike's commercial speech is not.

Dissenting, Justice Ming Chin said while Nike's critics rightfully take advantage of full First Amendment protection, the court's majority said Nike cannot. “Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate... Irrespective of Nike's

economic motivation, the public has a right to receive information on the matters of public concern” (Kasky v. Nike, California Supreme Court, 2002: 21). Justice Chin also said Nike’s defense of its labor practices was not traditional product-oriented marketing toward consumers and was not commercial speech.

Other dissent came from Justice Janice Brown. She was critical of how the majority applied the Bolger three-point test, claiming two of its criteria, identity of the speaker and the audience, were not relevant and as a result the California Supreme Court majority had departed from the overarching principles of the U. S. Supreme Court. “Like the purported discovery of cold fusion over a decade ago, the majority’s test for commercial speech promises much, but solves nothing.” She said the test makes First Amendment protection dependent upon who the speaker is rather than content, thus “stifling the ability of certain speakers to participate in the public debate..[T]he majority unconstitutionally favors some speakers over others and conflicts with the decisions of other courts” (Kasky v. Nike, California Supreme Court, 2002: 26).

Also, Justice Brown said: “Nike’s commercial statements about its labor practices cannot be separated from its noncommercial statements about a public issue, because its labor practices are the public issue” and Nike cannot discuss overseas labor practices without bringing in its own overseas labor practices (Kasky v. Nike, California Supreme Court, 2002: 27, emphasis in original). As a result, according to Justice Brown, the Bolger test violates the First Amendment by limiting the ability of corporations to participate in debates regarding public issues. Logic of the majority opinion, said Brown, makes commercial speech of all corporate speech, something not retained by the U. S. Supreme Court which long recognized that in commenting on a public issue a business may by necessity promote its products or operation.

While admitting the California Supreme Court was not bound by the decisions, Justice Brown also cited several state cases similar to Kasky. In *Gordon & Breach Science Publishers v. AIP* (1994), non-profit defendant AIP said through news releases and letter-writing that its scientific journals were less expensive and superior to those of for-profit publisher Gordon & Breach. When Gordon & Breach sued for false advertising, AIP’s communications were held to be non-commercial speech fully protected by the First Amendment. Likewise in *Oxycal Laboratories, Inc. v. Jeffers* (1995), the defendants published a book critical of Oxycal’s products which was also designed to promote their own products. Oxycal sued for false advertising, but the court held with Jeffers, saying the commercial speech in the case was secondary to the noncommercial aspects. The extent of the public issue dimension of Nike’s overseas situation is demonstrated, according to Justice Brown, “as various government officials and organizations have proposed and passed resolutions condemning Nike’s labor practices” (Kasky v. Nike, California Supreme Court, 2002: 26).

Justice Brown said differences between commercial and noncommercial speech are not black and white; rather there is a growing gray area And the U.

S. Supreme Court's "all or nothing approach" to distinguishing commercial speech "will eventually lead us down one of two unappealing paths: either the voices of business in public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity" (*Kasky v. Nike*, California Supreme Court, 2002: 36).

Nike Appeals to the U. S. Supreme Court

After losing in the California Supreme Court, Nike appealed to the U. S. Supreme Court. The court initially agreed to hear the case, then declined. Justice John Paul Stevens wrote the court's opinion on dismissal with Justices Ruth Ginsberg and David Souter concurring. The Court said there were three reasons for dismissal: 1) the California Supreme Court never entered a final judgment, meaning the U. S. Supreme Court could not have jurisdiction, 2) neither party had standing to bring the issue to federal courts – Kasky was functioning on his own behalf and had suffered no damage; Nike had no standing because the California Supreme Court had merely affirmed the case against Nike's claim that it was irrelevant -- and 3) the U. S. Supreme Court already had rules in effect balancing commercial against noncommercial speech and questions in the Nike case would better be served in a full study of the record of facts than in the unproven statements of a pleading.

Dissenting from the dismissal, Justice Anthony Kennedy wrote that the case involved free speech regarding public matters and delaying a decision might restrict free speech; that Nike, at least had standing since it could suffer harm from Kasky's lawsuit and was, in effect, limited by California law in what it could say. Also, despite the U. S. Supreme Court's statement that the California Supreme Court never entered a final judgment, its decision focused on the veracity of Nike's speech. Justice Kennedy also reiterated the argument that Nike's statements involved an issue of public debate, and that commercial speakers will have to exercise discretion in their speech with which their opponents are not burdened (*Nike, Inc. et al. v. Kasky*, 2003).

Among supporters Nike had as it went before the U. S. Supreme Court were labor unions (aggressive protestors of Nike's production standards) (Goldstein 2002-2003). Also supporting Nike was the American Civil Liberties Union (Brief Amici Curiae, 2002).

Results of Kasky v. Nike

Goldstein (2003-2004), who had filed as a friend of the court on behalf of Nike at the U. S. Supreme Court later said the court's refusal to hear the case would chill corporate speech. He fully expected that the court would eventually overturn the California Supreme Court ruling. He noted that an immediate result of *Kasky v. Nike* was an application of its ruling by People for the Ethical Treatment of Animals to remove web site statements by Kentucky Fried Chicken

regarding the treatment of chickens. PETA dropped the suit when KFC agreed to change language on its web site.

Nike itself settled with Marc Kasky for \$1.5 million to be paid over three years to the Fair Labor Association (Kang, 2003).

Ramifications for Marketers

Despite the claim of the majority at the California Supreme Court, and separate from the serious issues of labor practices in Southeast Asia, *Kasky v. Nike* would seem to provide a risk of chilling free speech in what could be relatively benign situations. That's because in corporate messaging, whether by advertising or by other means, there can be disagreements. For instance, the Federal Trade Commission regularly challenges claims in advertising. Marketers receiving such challenges may genuinely disagree with FTC opinions. Does the disagreement on the part of marketers mean the marketers desire to engage in false advertising? Or is it just a matter of differing opinions about what constitutes truth or accuracy?

Based upon how *Kasky v. Nike* now stands, businesses can be put at a disadvantage when expressing opinions dissenting from that of challengers. The challengers have free reign to voice criticism against the marketer; the marketer is limited to "truthful" response, which can be difficult if the challengers are the only ones able to disseminate what it views as truth. For example, a manufacturer may be in compliance with long-standing law and regulations regarding air emissions. However, a challenge may develop from an environmental activist group possessing an alternative interpretation of how air emission regulations are to be enforced. The challengers provide information, similar to what happened in *Kasky*, indicating that the manufacturing company is, based on the challengers' interpretation, polluting the air and such information is disseminated through the news media and on the internet. The limitations of *Kasky* mean that the manufacturer would not be able to present to the public its own interpretation of air emission regulation due to risks of being accused of false advertising.

In addition, businesses under *Kasky v. Nike* can be burdened with great technical, scientific, legal, accounting or other professional expense in proving the veracity of their claims, while challengers need only call a news conference or post a web site. Also, growing applications of social media in reviewing business products and practices present the need for companies to respond to myriad criticisms and attacks, some legitimate, some spurious.

As indicated by the California Court of Appeal, an issue worthy of public debate would be restricted due to allegations of false advertising in the response of a business to challengers: "The high court (U. S. Supreme Court) has never held that commercial speech must have as its only purpose the advancement of

an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech” (Kasky v. Nike California Supreme Court, 2002: 19, emphasis in original).

In her dissent in the California Supreme Court decision, Justice Brown said increased commercialism, politicization of commerce, and more sophisticated advertising mean “the gap between commercial and noncommercial speech is rapidly shrinking. As several commentators have observed, examples of the intersection between commercial speech and various forms of noncommercial speech, including scientific, political, and religious speech, abound” (Kasky v. Nike California Supreme Court, 2002, 26). Indeed, a company’s operations – communication about which the California Supreme Court majority held to be commercial speech – “may be the subject of public debate in the media,” according to Justice Brown. “These operations may even be a political issue as organizations, such as state, local, or student governments, propose and pass resolutions condemning certain business practices.” Given such situations, business operations become public concern and deserve full First Amendment protection (Kasky v. Nike, California Supreme Court, 2002: 30).

At this writing, there are controversial business-related public issues foretold by Justice Brown, including scientific issues regarding claims of climate change, political issues regarding corporate personhood, and religious issues regarding federal mandates involving contraception and abortion coverage in employer-provided health insurance.

For companies doing business in California (including out-of-state companies entering California on the internet), Kasky represents a ticking time bomb for unwary marketers. Finally, influence of the California Supreme Court is far-reaching, as its decisions are followed by more courts around the country than any other in the United States (Dear and Jessen, 2007).

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