Legal Backgrounder

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Supreme Court Corporate Speech Rulings Fortify First Amendment Rights of Content Marketers

by John C. Greiner

Content marketing is a popular buzz word. One way to define the term is "the creation and distribution of 'content' with the purpose of attracting customers." That is a reasonable definition, but it could just as easily describe a newspaper, a television show, or a movie.

The Content Marketing Institute provides the following definition on its website: "Content marketing is about delivering the content your audience is seeking in all the places they are searching for it. It is the effective combination of created, curated and syndicated content."[1]

A feature of content marketing is that it most likely does not explicitly cajole readers or viewers to buy the content marketer's product. The content is designed to engage consumers by catering to their interests. So a food company may publish recipes online. A soft drink company may promote a blog on indie music. The lack of an explicit "buy this" exhortation is deemed a plus, not a negative.

Content marketing is really a long game. Consumers will associate the interesting content with the sponsor, and that will lead to more business, even though the content does not explicitly propose a transaction. However, that approach creates some interesting legal ramifications.

The constitutional bar is high and formidable for government regulation of "editorial" or "political" speech. Courts apply a "strict scrutiny" standard in such circumstances. That standard means the government not only must establish a compelling interest in the regulation, but it must also demonstrate the regulation is the "least restrictive means" for achieving its goal.

Commercial speech regulation, however, traditionally has been held to a lower standard. The government may regulate "commercial speech" when it concerns an illegal activity; it is misleading; or the government's interest in restricting the speech is substantial, the regulation in question directly advances the government's interest, and the regulation is narrowly tailored to serve the government's interest.

That standard is easy enough to understand. The tricky question is exactly what constitutes commercial speech. The confluence of content marketing, coupled with recent U.S. Supreme Court decisions, makes it even more complicated.

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[1] http://contentmarketinginstitute.com/2012/06/content-marketing-definition/, visited Apr. 15, 2015.

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One decision has defined commercial speech as speech "that does no more than propose a commercial transaction."[2] Read literally, that appears to be a pretty strict standard. It focuses not only on the speaker (to propose a commercial transaction the speaker would have to be some sort of commercial enterprise) but also on the content of the speech (is the speech asking another person to enter into a commercial transaction?).

But some courts have stretched that strict definition, essentially by focusing exclusively on the identity of the speaker, regardless of the content of the speech. In *Nike, Inc. v. Kasky*,[3] the California Supreme Court considered whether certain statements by Nike constituted commercial speech.

In its response to a media campaign on Nike's foreign labor practices, the company issued a variety of prepared statements: some made to journalists, others published as press releases, and others sent as letters to universities. Nike even retained a consulting firm co-chaired by former United Nations Ambassador Andrew Young to carry out an independent evaluation of its labor practices. Part of the media campaign drew attention to the favorable report and invited readers to consult it online.

Private plaintiffs challenged Nike's public relations campaign under California's consumer protection law in state court. When the appeal finally reached the California Supreme Court, it ruled that Nike's press campaign was commercial speech. The court defined commercial speech to cover all speech issued (1) by anyone "engaged in commerce", (2) to an "intended audience" of "potential . . . customers" or "persons (such as reporters . . .)" (3) likely to influence actual or potential customers or that conveys factual information about itself "likely to influence consumers in their commercial decisions."[4]

The plaintiff in *Nike* did not claim that Nike misled consumers into believing that Nike offers a better deal, that its products are better made, or even that they are cooler than the competition's. Those claims are more frequently the subject of false or deceptive advertising claims against companies like Nike. The lawsuit focused instead on Nike's labor practices in Southeast Asia.

The plaintiff alleged that these labor practices implicated an important social issue that consumers may use to make moral judgments about Nike that in turn influence their purchasing decisions. The plaintiff claimed that Nike's media campaign to counteract the bad press for its labor practices contained false or misleading statements about the labor conditions in Nike's factories.

Nike countered that its response campaign, in all its forms, was merely the company's engagement in a political discourse with the public to provide Nike's perspective on the labor conditions. According to Nike, given this purpose, Nike's statements belong at the core of the First Amendment's protections—a dispute between business and labor that should arguably be fully protected under the First Amendment.

Although the case initially made its way to the U.S. Supreme Court, that court dismissed certiorari as improvidently granted. Accordingly, the Court did not take the opportunity to reconsider its definition of commercial speech.

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[2] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976), *quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S.376, 385 (1973).*

[3] 45 P.3d 243 (Cal. 2002), *cert denied*, 123 S. Ct. 2554 (2003).

[4] *Id*. at 256.

The California Supreme Court's commercial speech analysis focused almost exclusively on the identity of the speaker. Because Nike is engaged in commerce, according to the court, any words it uttered were intended to influence a potential buyer. Under this expansive view, then, the critical question is the speaker's identity. If the speaker is a "commercial enterprise" its speech is "commercial" no matter its content.

A more recent opinion from the United States Court of Appeals for the Seventh Circuit seems to adopt the *Kasky* viewpoint. In *Jordan v. Jewel-Osco,*[5] Michael Jordan filed a right of publicity claim against the Jewel-Osco grocery chain. Jewel-Osco had placed an advertisement in a commemorative edition of *Sports Illustrated* centered on Jordan's election to the National Basketball Hall of Fame. The ad featured a pair of gym shoes with Jordan's number 23 on the tongue, with the following text:

A Shoe In!

> After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel–Osco salutes # 23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

Jewel-Osco argued that the ad was not "commercial speech" (and therefore was protected by the First Amendment from Jordan's claims) because it did not propose any commercial transaction and was essentially a congratulatory note.

The trial court agreed, and granted summary judgment in favor of Jewel-Osco. On appeal, however, the Seventh Circuit reversed, finding that the speech was indeed "commercial." In the Seventh Circuit's view:

> Jewel's ad is an example of a neighborly form of general brand promotion by a large urban supermarket chain. What does it invite readers to buy? Whatever they need from a grocery store—a loaf of bread, a gallon of milk, perhaps the next edition of *Sports Illustrated*—from Jewel–Osco, where 'good things are just around the corner.' The ad implicitly encourages readers to patronize their local Jewel–Osco store. That it doesn't mention a specific product means only that this is a different genre of advertising. It promotes brand loyalty rather than a specific product, but that doesn't mean it's 'noncommercial.'[6]

This holding, like the *Kasky* holding, seems to focus on the speaker's identity more than on the content of the speech. Had the exact same congratulatory note come from an individual not engaged in a commercial enterprise, it is unlikely the ruling would have come out the same way.

But this returns the analysis to the definition of content marketing mentioned above. If content marketing doesn't explicitly propose a commercial transaction (and isn't false or misleading), is it "commercial speech"? The *Kasky* and *Jordan* courts would say yes, because the content marketer is a "commercial enterprise." But that analysis may not carry the day under more recent United States Supreme Court rulings.

[5] 743 F.3d 509 (7th Cir. 2014).
[6] *Id*. at 519.

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In *Citizens United v. Federal Election Commission,*[7] the Court struck down federal legislation that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. In the Court's view, the question was whether the government could ban speech based on the speaker's corporate identity. The Court said it could not.

The Court ruled that corporate speech is protected by the First Amendment. Thus, any regulation that imposes a burden based on the speaker's corporate identity violates the First Amendment protections to which the corporate speaker is entitled.

More recently, the Supreme Court ruled in *Burwell v. Hobby Lobby Stores*[8] that for-profit business entities enjoy the right of free exercise of religion guaranteed by the First Amendment. According to the Court, arguments that the federal law at issue in *Hobby Lobby Stores* "does not protect for-profit corporations because the purpose of such corporations is to make money . . . flies in the face of modern corporate law."[9] The Court added, "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else."[10]

If corporate entities have First Amendment protections which cannot be abridged by virtue of that corporate identity, can content marketing be regulated under any standard other than strict scrutiny? Consider these scenarios. A critic employed by a newspaper writes a scathing review of a new band. He says the lead singer must be tone deaf to sing so poorly. If the band sues for libel, the reporter and the newspaper will be subject to utmost First Amendment protection.

Now consider that instead of appearing on a newspaper site, the review appears on a website created and hosted by a soft drink company. Under the *Kasky* logic, this very same review would be "commercial speech," and subject to less constitutional protection, simply because the publisher is a commercial enterprise. Presumably, the review could also be subject to applicable consumer protection laws on the theory that it is misleading.

But that discrepancy in regulatory treatment would be based exclusively on the corporate identity of the speaker. And under *Citizens United* and *Hobby Lobby,* it is impossible to see how that analysis would stand.

Sound business reasons support the increased use of content marketing. Recent U.S. Supreme Court decisions, which suggest that content marketing may be regulated more like editorial speech than commercial speech, is one more development that should promote its growth.

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[7] 558 U.S. ___, 130 S. Ct. 876 (2010).
[8] 573 U.S. ___ (2014), 134 S. Ct. 2751 (2014).
[9] 134 S. Ct. at 2770 (citation omitted).
[10] *Id*. at 2771.

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