

## Corporate Publicity and First Amendment Protection

We recently became aware of a case that we believe will interest you. In *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), the Supreme Court of California considered whether California's Unfair Competition Law can be applied to a corporation's statements about its labor practices.

In *Nike*, a California resident brought a false advertising action against the Nike corporation pursuant to Cal. Bus. & Prof. Code §§ 17204 and 17535, claiming that Nike made false and misleading statements in full-page newspaper advertisements, press releases and letters to university presidents. The advertisements, press releases and letters rebutted various accusations of unacceptable working conditions in Nike's Asian factories by stating that Nike workers enjoy a living wage and working conditions that comply with local law.

In finding that Nike intended the statements to promote sales, the 4-3 divided court held that Nike's statements constituted "commercial speech." Once characterized as such, the statements were no longer entitled to complete First Amendment protection. Indeed, the United States Supreme Court has ruled that freedom of speech does not extend to misleading or untruthful commercial speech. Accordingly, Nike could be held liable under California's Unfair Competition Law if its statements were proven false or misleading.

Noting that the United States Supreme Court has not adopted a controlling test to distinguish commercial from non-commercial speech, the California Supreme Court extrapolated a "limited purpose" test from relevant federal case law to

determine when corporate speech is "commercial" and therefore subject to regulation. According to the court, speech qualifies as commercial if the speaker is engaged in commerce, the intended audience consists of actual or potential buyers and the speech comprises representations of fact of a commercial nature. Even though the communications did not promote Nike products, the court found that all three elements were satisfied: (i) Nike sells consumer goods; (ii) the press releases and letters were intended to influence consumers; and (iii) the descriptions of Nike's labor practices and factory conditions were factual representations about its own business operations which Nike could readily verify.

Interestingly, the dissent noted that Nike's commercial and noncommercial speech are inextricably intertwined because Nike is unable to participate in public debate about labor policy without discussing its own factories. In addition, the dissent cautioned that the ruling would create a one-sided debate, as Nike's critics enjoy a free speech advantage over Nike.

In light of this decision, companies may need to evaluate more closely information that is disseminated in press releases, letters and other media. According to the *Nike* court, corporate speech made in pursuance of profit or sales can be within the purview of state unfair competition laws, even when made outside of a traditional advertisement.

We note that Nike recently announced that it will seek review of this decision by the United States Supreme Court.

For more information on this topic or on other developments in privacy or data collection, please contact any of the following or the K&E partner or associate with whom you normally deal.

Chicago

Ross Weisman  
312/861-2120

London

Barbara Jones  
+44 (0)20 7816 8780

Los Angeles

David Shukan  
213/680-8591

New York

Stephen Johnson  
212/446-4920

Washington

Marc Zwillinger  
202/879-5023

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