

A CORPORATION'S RIGHT TO SELF-DEFENSE UNDER THE FIRST AMENDMENT: IS IT PROTECTED OR MERELY COMMERCIAL SPEECH?

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I. INTRODUCTION

How free is free speech? Is commercial speech entitled to any protection under the Constitution? Must corporations fear that every self-serving utterance could be turned against them as a deceptive trade practice? Does the First Amendment give corporations a license to lie? Resolution of these questions is being addressed in the Supreme Court in the case of *Nike, Inc. v. Kasky*.¹ Nike has been sued for repressions made to the press and in its Web site about its corporate social responsibility activities outside the U.S. The case is on appeal from the Supreme Court of California, which stunned corporate America in holding against Nike.²

II. BACKGROUND

Nike, Inc. has long been a magnet for controversy. In the Michael Moore documentary "The Big One," Philip Knight, the President of Nike, courageously agreed to be interviewed onscreen by leftist icon, Mr. Moore³ concerning Nike's manufacturing policies. These policies include charging premium prices for shoes endorsed by rich celebrities most notably Michael Jordan⁴, while manufacturing the shoes in low wage,

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¹ The two questions presented in the Petition for Writ of Certiorari are: 1. When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are “commercial speech” because they might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions? 2. Even assuming the California Supreme Court properly characterized such statements as “commercial speech,” does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below? The U.S. Supreme Court will hear arguments in April, 2003 and issue a ruling in June, 2003 on whether Nike can claim exemption under the First Amendment from a California deceptive trade practices law. It will not consider the merits of the original lawsuit. The petition for certiorari is available online at www.voluntarytrade.org/Court_cases/Private/Nike (date not provided).

²The opinion of the Supreme Court of California (Pet. App. 1a-64a) is published at 27 Cal 4th 939, 119 Cal.Rptr2d 296 and 45 P.3d 243. The opinion of the Court of Appeal of California (Pet. App. 66a-79a) is published at 93 Cal.Rptr. 2d 854. The orders of the Superior Court granting petitioners’ demurrer and dismissing the complaint (Pet. App. 80a-81a) are unpublished.

³ See www.michaelmoore.com(date not provided).

⁴ Nike had paid \$20 million a year to the legendary basketball player to endorse Nike products, including the eponymous Air Jordans. See, Parloff, Roger, “Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak their Minds. Will the Supreme Court Let it Stand?” FORTUNE, (Sunday, August 11, 2002).

low cost third-world countries.⁵ These practices have contributed to Mr. Knight's billionaire status⁶.

In June 1996, New York Times columnist Bob Herbert joined with critics of Nike accusing it of "cruelly exploiting cheap Asian labor."⁷ Shortly thereafter, Mr. Knight responded in a letter to the editor: "Nike has paid, on average, double the minimum wage as defined in countries where its products are produced under contract."⁸ Mr. Knight further waxed philosophically: "History shows that the best way out of poverty for such countries is through exports of light manufactured goods that provide the base for more skilled production."⁹

Such responses were not unusual for Nike, which felt that it had, for years, been "made the principal focus of the passionate world-wide debate over 'globalization'"¹⁰ The criticism of Nike began in 1995, generating "enormous media scrutiny and editorial commentary, much of it pointed and vituperative."¹¹ Nike was described as an immoral company, a potent charge in the current era where the vast majority of large companies proclaim their support for corporate social responsibility. Inundated by the press for responses to such charges, Nike "soon found itself responding on a daily, and even hourly, basis to claims that it was operating sweatshops in supposedly slave-labor conditions."¹² In an effort to clear its name, Nike commissioned former United Nations Ambassador Andrew Young to investigate the matter, which he found to be largely false.¹³ Nike then purchased so-called "editorial advertisements"¹⁴ and defended itself with numerous press releases, letters to the editor, and op-ed pieces in newspapers around the country, and in letters to officials at major national universities.¹⁵

⁵ Nike shoes have been alleged to be manufactured by sweatshop laborers earning \$2.20 a day in Indonesia or \$30 a month in Vietnam *Id.* The California Supreme Court thought it proper to point out that "[i]n 1997, it [Nike] reported annual revenues of \$9.2 billion, with annual expenditures for advertising and marketing of almost \$1 billion."

⁶ *Id.*, Mr. Knight's Nike stock is estimated to be worth \$4.5 billion.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Petition, *supra* note 1 at 3.

¹¹ *Id.* According to the recitation of facts contained in the California Supreme Court decision: Beginning at least in October 1996 with a report on the television news program 48 Hours, and continuing at least through November and December of 1997 with the publication of articles in the Financial Times, the New York Times, the San Francisco Chronicle, the Buffalo News, the Oregonian, the Kansas City Star, and the Sporting News, various persons and organizations alleged that in the factories where Nike products are made workers were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.

¹² *Id.*

¹³ *Id.*

¹⁴ These are paid political advertisements, which according to the Petition for Certiorari are afforded the full protection of the First Amendment, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Mobil Oil Corporation is often credited with originating the concept of advocacy (or issues-related) advertising in an effort to educate the public about the oil industry in light of what it considered to be unfair and slanted anti-oil company and anti-business coverage in the media following the oil shocks of the 1970s.

¹⁵ Petition, for Certiorari at 3.

III. FREE SPEECH IN CALIFORNIA

Marc Kasky, a California resident and San Francisco community activist, sued Nike in April 1998 on behalf of the general public of the State of California¹⁶ under the California Business and Professions Code Unfair Competition Law¹⁷ and False Advertising Law,¹⁸ claiming that the company's many statements, which were aimed at the California consuming public, relating to its foreign workers were false and misleading, and that they were made for the purpose of maintaining and increasing its sales and profits. Specifically, Nike and several officers and directors, individually, had said that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a living wage, that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety.¹⁹

Kasky sought relief in the form of restitution requiring Nike to “disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice,”²⁰ and an injunction requiring Nike to “undertake a Court-approved public information campaign” to correct any false or misleading statement, and to cease misrepresenting the working conditions under which Nike products are made.²¹ Kasky also sought reasonable attorney fees and costs and other relief that the court deemed just and proper.

Nike demurred on grounds that Kasky failed to state facts sufficient to constitute a cause of action against Nike and that the relief plaintiff was seeking “is absolutely barred

¹⁶ See Parloff, *supra* note 3 at 1: “What does Kasky have to do with any of this? Nothing, really. With refreshing candor his complaint acknowledges that he “alleges no harm or damages whatsoever regarding himself individually.” But under the unusual terms of the California consumer protection laws, which encourage private citizens to ferret out corporate wrongdoing, “any person” can bring such a suit on behalf of “the general public.” So Kasky did.

¹⁷ Kasky v. Nike, Inc. at 949, 303, 250: California’s unfair competition law (UCL) (§ 17200 et seq.) defines “unfair competition” to mean and include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.).]” (§ 17200) The UCL’s purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.

¹⁸ Kasky v. Nike, Inc. at 950: California’s false advertising law makes it “unlawful for any person, . . . corporation . . . , or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . .” (§ 17500) Violation of this provision is a misdemeanor. As with the UCL, an action for violation of the false advertising law may be brought either by a public prosecutor or by “any person acting for the interests of itself, its members or the general public , and the remedies available to a successful private plaintiff include restitution and injunctive relief.” (§ 17535).

¹⁹ Kasky v. Nike, Inc. at 963.

²⁰ *Id.*

²¹ *Id.*

by the First Amendment to the United States Constitution and Article I, section 2(a) of the California Constitution.”²² After considering the arguments and authorities submitted by the parties, the court took the matter under submission and later sustained the demurrers without leave to amend. Plaintiff appealed from the dismissal of the complaint. The Court of Appeal affirmed the judgment. Like the superior court, the appellate court identified as the crucial issue whether Nike’s allegedly false and misleading statements were commercial or noncommercial speech for purposes of analyzing the protections afforded by the First Amendment to the federal Constitution and by article I, section 2 of the California Constitution. The appellate court also concluded that Nike’s statements were noncommercial speech and therefore subject to the greatest measure of protection under the constitutional free speech provisions. The court stated that this determination “compels the conclusion that the trial court properly sustained the defendants’ demurrer without leave to amend.” The California Supreme Court then granted plaintiff’s petition for review.

Since the case came to the California Supreme Court after the Superior Court sustained defendants’ demurrers, the Court had to begin by accepting the truth of the plaintiff’s factual allegations. After lengthy consideration and recitation of the precedent the Court concluded that “when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.”²³ Nike’s Petition for Certiorari was granted on January 10, 2003.²⁴ The U. S. Supreme Court will not consider the merits of the original lawsuit, but will determine whether a corporate right of free speech exempts Nike from the California Deceptive Trade Practices statute.

IV. MARKETING SOCIAL RESPONSIBILITY

What is a corporation’s role in society? Should a company engage in ethical and philanthropic activities, or should it merely seek profit-making endeavors? Further, should a company brag about its good deeds? And finally, does discussing its contributions to society constitute “protected speech?”

For years business managers have been exhorted by social critics, business educators, and even the Association to Advance Collegiate Schools of Business (AACSB), to follow the dictates of the socially responsible managerial ideology. According to one respected business textbook:

The ascendance of the social responsibility concept represents one of the most striking ideological shifts in American history. From the settling of the nation until

²² Id.

²³ Id.

²⁴ Many special interest groups, including the ACLU, have filed briefs supporting Nike’s Petition. They include The Center for the Advancement of Capitalism, the Center for Individual Freedom, the U.S. Chamber of Commerce, the Pacific Legal Foundation, the Council of Public Relation Firms, the Civil Justice Association, and 32 newspapers, broadcasters, and professional media associations. Exxon Mobil and four other companies have also filed supporting briefs.

roughly 1950, business was expected to concentrate on one goal – the production and distribution of the best products at the lowest prices. Of course, social responsibility arguments were raised, but business was largely exempt from any affirmative duty for the resolution of social problems. Rendered practical perhaps by increasing prosperity, the public, led by business scholars and critics, began in the 1950s to consider a larger role for corporate America. Now . . . the role of business in society has been radically altered. Profit seeking remains central and essential, but for most businesspersons, the new and rather unwieldy ingredient of social responsibility must be added to the equation.²⁵

Assuming that companies such as Nike really believe in this new ideology of social responsibility, does it actually generate business for the firm? Will customers gladly pay more for a product that is made and sold by a responsible company and eschew a cheaper product made by a less responsible company? A variety of studies have been conducted concerning the profitability of so-called “socially responsible” firms versus their less responsible counterparts; the results have been relatively inconclusive.²⁶ Mobil, long considered the originator of so-called “advocacy advertising,” has commented upon the positive spillover effect emanating from its long affiliation as a sponsor of public television: “We know our efforts have won us friends and we believe our involvement with PBS has persuaded an important segment of our society to look at Mobil in a new light, to be more open-minded when we speak out on issues.”²⁷

Socially responsible companies are attracting not only socially conscious customers but also socially conscious owners. Investors seeking to put their money into socially responsible firms want to screen out those firms they consider to be socially irresponsible or to actively invest in those firms they think of as being socially responsible. Thus, there are negative social screens and positive social screens.²⁸

²⁵ McAdams, Tony with Freeman, James and Hartman, Laura Pincus, *Law, Business, and Society* (Irwin, McGraw-Hill, 5th ed. 1998) p. 103.

²⁶ *Id.* At 107: “A recent review of 21 published studies found that in 12 studies highly socially responsible firms were more profitable than less socially responsible firms, in only one study were socially responsible firms found to be less profitable, and in eight studies no relationship between responsibility and profits could be measured. From this the reviewers concluded that ‘socially responsible firms certainly perform no worse, and, perhaps, perform better than non-socially responsible firms.’ This seems as accurate a conclusion as any.” Profitability, however, does not necessarily indicate that the company’s sales were enhanced by their socially responsible activities. The company’s profits could, for instance, benefit from lower employee turnover due to employee satisfaction with the firm’s humanitarian policies.

²⁷ Sturdivant, Frederick D., *Business and Society* (Irwin 1985) p. 307. In hard times, however, companies are less willing to spend money on this type of advertising to promote its political views. Exxon-Mobil has shifted priorities and intends to focus its outreach on causes involving the environment, public health, and other educational opportunities. “The economy is so bad that all corporations want to see a definite uptick in sales and promotional dollars are spent selling a specific product rather than just to project a positive message about the company.” Ryan, Suzanne C., “Exxon drops funds for PBS ‘Masterpiece’”, *Boston Globe* (12-14-2002).

²⁸ Carroll, Archie B. and Buckholtz, Ann K., *Business and Society: Ethics and Stakeholder Management* (Southwestern 2003) p. 60. Some of the negative social screens that have been used in recent years include

Socially conscious investments in pension funds, mutual funds, and municipal and private portfolios now exceed \$2.2 trillion.²⁹ Moreover, a growing corps of brokers, financial planners, and portfolio managers are available to help people evaluate investments for their social impacts.

The financial performance of socially conscious funds shows that investors do not have to sacrifice profitability for principles. Recent evidence suggests that investors expect and receive competitive returns from social investments.³⁰ It should be added, however, that there is no clear and consistent evidence that returns from socially conscious funds will equal or exceed the returns from funds that are not so carefully screened. Therefore, socially conscious funds are valued most highly by those investors who really care about the social performance of companies in their portfolios and are willing to put their money at some risk. A recent study concluded that high corporate social performance tends in fact to lead to an increase in the number of institutional investors holding a given stock.³¹

V. ADVOCACY ADVERTISING VERSUS SOCIAL RESPONSIBILITY ASSERTIONS

In 1936, a group of California chain stores ran an ad to sell not their products but their position on a proposed new tax, and a new kind of advertising was born. Today, issue advertising or advocacy advertising, is being used to sell corporate points of view on everything from unfriendly takeovers to nasty rumors. By the early 1970s, many businesses decided that public affairs and corporate image advertising would be stepped up.³² For example, IBM and IT&T began waging extensive campaigns to better explain themselves to the public. A few firms even began to advocate issues of public policy through advertising. Today, many companies are aggressive practitioners of advocacy advertising.³³

Advocacy advertising is, by definition, advertising that advocates a position in the political or social arena. The primary purpose of such advertising is, according to its supporters, educational, while to its opponents it would be considered the spreading of disinformation. Mobil is often associated with the origination of the practice of taking out advertising in major newspapers in order to get so-called equal time to balance unbalanced reporting as perceived by Mobil and much of corporate America. The practice can be traced back to the oil crisis of the 1970s when President Carter pushed for passage of the Windfall Profits Tax to supposedly punish the oil companies for making "obscene" profits. Mobil was roundly criticized for claiming that its profits were needed for exploration and development purposes and then turning around and using them to

the avoidance of investing in tobacco manufacturers, gambling casino operators, defense or weapons contractors, and firms doing business in South Africa.

²⁹ Carroll, Archie B. and Buckholtz, Ann K., *Business and Society: Ethics and Stakeholder Management* (Southwestern 2003) p. 59.

³⁰ "Good Works and Great Profits," *Business Week* (February 16, 1998), 8.

³¹ Graves, Samuel B. and Waddock, Sandra A., "Institutional Owners and Corporate Social Performance," *ACADEMY OF MANAGEMENT JOURNAL* (Vol.37, No. 4, August 1994), 1034-1046.

³² Starling, Grover, *The Changing Environment of Business* (Southwestern College Publishing 1996) p.722.

³³ *Id.* at 722.

purchase Montgomery Ward. One famous ad from Mobil titled “Malice in Wonderland – How TV Reports the Recovery” published in the Wall Street Journal illustrates the technique:

Ever get the queasy feeling watching the three TV networks' news programs that you're peering through the looking glass, like Alice? We do, especially when watching news reports on the economy. Television news seems to turn most of the positive indicators of a healthy economic recovery into negatives. It's like Humpty Dumpty telling Alice: 'When I use a word . . . it means just what I choose it to mean – neither more nor less.'³⁴

The ad then detailed the findings of a study from a supposedly non-biased non-profit institute that found numerous examples of network bias against big business and capitalism. The company then returned to its editorializing as follows:

These distortions turn economic facts into drama – and occasionally into soap opera. And that's a pity, because millions of Americans rely principally on network television for information on complex public issues.

We do wish the networks would more carefully segregate opinion from news. When one masquerades as the other, the harm is not just to the viewers, but to the nation as a whole.

Alice's make-believe world belongs on the bookshelf, where it's clearly labeled fiction. TV news should deal in facts.³⁵

It is useful to note that nowhere in the ad did the company refer to its products. The only reference to itself at all was in the use of the editorial “we” to indicate the company's disgust with the policies of the television networks. Advocacy advertising may be viewed as a response to the alleged bias of the news media against business. It would be hard to conceive of an issue more central to a discussion of how business can influence public opinion than this.³⁶ Certainly, this type of editorializing is protected speech even though uttered by a public company. This must, however, be distinguished from a company like Nike seeking to promote its image and enhance its sales by trumpeting its good corporate citizenship.

³⁴ Sturdivant, Frederick D., *Business and Society* (Irwin 1985) p. 297.

³⁵ *Id.*

³⁶ Starling, Grover, *The Changing Environment of Business* (South-western College Publishing 1996) p. 722. How well does advocacy advertising work? One poll showed that the Mobil ads indeed have had high visibility. Among administration, congressional, and other government leaders, 90 percent had read them. On the other hand, though the ads were found useful by 33 percent of government leaders polled, 66 percent said that the ads were of little or no use to them in understanding issues and indicated that the ads did not influence their opinion on any policy matter. Yankelovich, Skelly, and White, Inc. 1978.

VI. A RIGHT TO LIE?

Does a company such as Nike have a First Amendment right to lie about its social responsibility whereas it could not lie about the characteristics and virtues of its product?³⁷ Nike's position is that its case is not about a right to lie, but rather it is "about the chilling effect on speech that comes anytime you would face severe penalties if any jury were to find, rightly or wrongly, that your speech had been 'misleading.'"³⁸ In the Nike case, Nike had made several factual claims concerning the working conditions at its contractors' plants. A 1997 Ernst & Young audit cast serious doubts on many of those claims.³⁹ Kasky alleges that third-party reports show that Nike contractors in Vietnam and China were paying less than the local minimum wage, despite Nike's claims to the contrary. For purposes the Supreme Court's review, however, the truthfulness of Nike's claim should not be the issue, instead the Court should concern itself with whether, even if Nike's assertions are false, the State of California can impose penalties on the company for speaking its mind, even though others might disagree with its positions and its recitation of the facts.

VII. U.S. SUPREME COURT PRECEDENT

The First Amendment to the United States Constitution may guarantee freedom of speech,⁴⁰ but that right is limited by other considerations.⁴¹ The U.S. Supreme Court places speech into three categories: fully protected political speech⁴², limited protected speech (offensive and commercial), and unprotected speech.⁴³ Among the considerations

³⁷ According to Mr. Kasky's attorney this case should not pose a particularly difficult free speech question: "They can still get up and say whatever they want about globalization," he explains. "They can say, 'Look, wages are lousy, even by local standards, but we think it's okay because in the end, two generations from now, they'll be in the mainstream of wage earners in that part of the world.'" What Nike can't do—at least without subjecting itself to commercial-speech regulations—is make specific false or misleading factual claims about its products and how they're made, he argues. "If you're going to lie, commit a fraud, you can be sued over it," Caplan says. "The principle in this case is not earth-shaking." Parloff, Roger, "Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak their Minds. Will the Supreme Court Let it Stand?" *Fortune* (August 11, 2002).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ "Congress shall make no law . . . abridging the freedom of speech. . . ."

⁴¹ According to Justice Holmes in *Schenck v. U.S.*, 249 U.S. 47 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

⁴² For example, the government could not pass a law that forbids citizens from criticizing the current administration. This right has been extended to corporations; however, while many special interest groups have filed Amicus Briefs supporting Nike's position in this case, see *supra* at note 23, not all interest groups agree that a corporation should be entitled to a political voice. Some view the Kasky case as a key opportunity to re-examine the judicial creation of constitutional rights for corporations and to raise awareness of the far-reaching effects such protection have in law and civic society. "We believe corporations have no need for protected 'free speech,' because they have no legitimate claim to a political voice." Nike v. Kasky—Corporate Right to Lie? <http://www.reclaimdemocracy.org>

⁴³ Cheeseman, Henry R., *Business Law* (5th ed. 2004), p.58.

is the type of speech involved, because the courts have given greater First Amendment protection to so-called political speech than to so-called commercial speech.⁴⁴ These types of speech are designated "so-called," because the text of the First Amendment to the Constitution makes no such distinction.⁴⁵

In 1942 the U.S. Supreme Court decided *Valentine v. Chrestensen*,⁴⁶ which, for the first time, drew a distinction between protected ordinary and mostly unprotected business-related speech.⁴⁷ In 1976, however, in the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁴⁸ the Court reversed course acknowledging that some forms of commercial speech are entitled to some First Amendment protection. In that case the State of Virginia had a statute prohibiting pharmacies from advertising the price of prescription drugs. The Court struck down the statute on First Amendment grounds, acknowledging, however, "commercial speech is subject to proper time, place, and manner restrictions."⁴⁹ The next year, the Court struck down a similar state rule prohibiting lawyers from advertising their services.⁵⁰ One rationale discussed in *Bates* was to ensure the public's right to receive information from commercial sources.⁵¹

Inevitably, the pendulum began to swing back in the other direction as now-emboldened companies began testing the limits of their newfound freedom. In 1975, for instance, the Federal Trade Commission (FTC) enjoined an egg industry group from taking out newspaper ads minimizing the connection between eggs and heart disease. A federal appeals court upheld the FTC order, even though the egg industry's messages would have been fully protected by the First Amendment had they been uttered by anyone unconnected to the industry. The state of the law has been described as "a mess" by Professor Robert Post of the University of California at Berkeley's School of Law, a leading scholar in the area.⁵²

VIII. Thorny Implications

⁴⁴ See Meiners, Roger E. and Ringleb, A.H., *The Legal Environment of Business* (West Pub.2003) at 128.

⁴⁵ *Id.*

⁴⁶ 316 U.S. 52 (1942).

⁴⁷ *Id.* at 54, "The Constitution imposes no . . . restraint on government as respects purely commercial advertising."

⁴⁸ 425 U.S. 748 (1976).

⁴⁹ Cheeseman, Henry R., *Business Law* (Prentice Hall, 2001) at 54.

⁵⁰ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁵¹ See also, *Central Hudson Gas v. Public Service Comm. Of NY*, 447 U.S. 557 (1980)(state ban on ads promoting electricity consumption struck down); *44 Liquormart v. Rhode Island*, 517 U.S. 499 (1996)(state ban on advertising of alcohol prices struck down); *Thompson v. Western States Medical Center*, 535 U.S. (2002)(federal restrictions limiting advertising of drugs overturned).

⁵² Parloff, Roger, "Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak their Minds. Will the Supreme Court Let it Stand?" *Fortune* (August 11, 2002). "The Supreme Court of the United States has not addressed . . . the boundary between commercial speech and other forms of speech in many, many years, and the existing precedents are extremely vague."

Does this opinion only affect companies based in California? In our increasingly interconnected world, the answer is a resounding NO!⁵³ Nike maintains an elaborate Web page that describes its ethical and socially responsible practices. Under principles laid out in numerous decisions, by the use of a highly interactive Web site, which even permits the purchase of many products, Nike is doing business in California and is subject to the jurisdiction of that state.⁵⁴

Since Nike's critics are unquestionably entitled to full First Amendment protection, can Nike reasonably be guaranteed less protection? If so, is the government siding with the anti-business forces in a largely political debate? Nike and its supporters claim that even the freedom of the press will be affected, because companies will not be able to respond to charges against them for fear of being accused of violating deceptive trade rules. Every response will have to be vetted by the legal department, which will undoubtedly require the inclusion of all sorts of disclaimers such as are currently associated with pro forma financial statements under the Private Securities Litigation Reduction Act of 1995.⁵⁵ Nike has received support from a number of sources including the expected business interests, but also including some less likely sources such as the American Civil Liberties Union of Northern California and even Bob Herbert, the New York Times writer who arguably instigated the entire affair.⁵⁶

⁵³ "If your communication is received in California," explains Dellinger, a partner at O'Melveny & Myers, "and you're doing business there--which means every FORTUNE 500 company--you have to immediately worry, right now, about any public statements you make about your company's practices." *Id.*

⁵⁴ Cavaliere F. and Mulvaney T., "Recent Developments in Jurisdictional Cyberlaw," SOUTHERN L.J. (Fall 2000) p. 51.

⁵⁵ Pub.L.No. 104-67, 1995 U.S.C.A.N. (109 Stat. 737), amending the Security and Exchange Act of 1933 (12-22-95) and the Security and Exchange Act of 1934.

⁵⁶ "As much as it pains me to say it," Herbert wrote in a column in May, "I am not in favor of stifling the speech of the loud and obnoxious and terminally exploitative Nike Corporation." Parloff, Roger, "Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak their Minds. Will the Supreme Court Let it Stand?" Fortune (August 11, 2002).

IX. CONCLUSION

Nike's Web site contains its "Corporate Responsibility Report,"⁵⁷ which approaches the subject on its global responsibility with a realistic perspective. According to the section on "Labor Practices," which carries a 2001 copyright date:

How much do we really know about issues in all of these factories? Not enough. Every time we look closer, we find another thing wrong. Too much overtime. Wage errors. Too much heat. Involuntary pregnancy testing. An abusive supervisor. Among the most difficult dilemmas is worker rights. Was she dismissed because of poor work performance, or because she was campaigning for a union? Every time we peel another layer off the onion we find another complex set of issues that our compliance and production people work with factory management to try to resolve.⁵⁸

Was this realization that business ethics and social responsibility in the global arena is tricky achieved because of the *Kasky* lawsuit? Without doubt, the *Kasky* case has made companies sensitive to the ramifications of social responsibility puffery. If the Supreme Court upholds the lower courts, then such sensitivity will stick around and become normal business practice. But what will happen if the Court overturns the decision from California?

⁵⁷ Available online at <http://www.nike.com/nikebiz/nikebiz.jhtml?page=29>.

⁵⁸ *Id.* The report is extremely large due to extensive graphics. It is recommended that the report be downloaded in Adobe's Acrobat Reader "pdf" format in piecemeal sections, such as the Labor Practices section.