Chapter 2

Distinguishing Commercial from Noncommercial Speech

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There are undoubted difficulties with an effort to draw a bright line between “commercial speech” on the one hand and “protected speech” on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between “truthful” commercial speech, on the one hand, and that which is “false and misleading” on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.\footnote{Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787, 1 Media L. Rep. (BNA) 1930 (1976) [Rehnquist, J., dissenting], discussed in section 3:5.}
§ 2:1 Introduction: What the Distinction Is and Why It Matters

Whether governmentally regulated speech is classified as “commercial” or “noncommercial” usually determines the degree of judicial scrutiny the regulations must satisfy under the First Amendment. While regulation of political speech and other so-called “fully protected” speech must survive strict constitutional scrutiny,\(^2\) commercial speech has usually been subjected to a less rigorous test.\(^3\)

Thus, categorization of speech as “commercial” or “noncommercial” has been an important, sometimes determinative, and occasionally controversial constitutional process ever since the Supreme Court first squarely held in 1975\(^4\) and 1976\(^5\) that commercial speech enjoys First Amendment protection.\(^6\)

As evidenced in two of their commercial speech decisions in the mid 1990s, \textit{Rubin v. Coors Brewing Co.},\(^7\) and \textit{44 Liquormart, Inc. v. ...}

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\item[3.] This is usually classified as “intermediate scrutiny,” and exemplified by the 
\textit{Central Hudson} test for evaluating government restrictions on commercial speech under the First Amendment \textit{(see section 3:12)}. In applying the \textit{Central Hudson} version of intermediate scrutiny, false, misleading, and illegal commercial speech may be excluded, under part one of the four parts of the \textit{Central Hudson} test, from judicial scrutiny under the First Amendment, and government has the lesser burden of proving a substantial interest, directly and materially advanced by means no more extensive than necessary. Another version of intermediate scrutiny is the test for content neutral regulations imposing only a secondary impact on speech, as set forth in United States v. O’Brien, 391 U.S. 367 (1968) \textit{(federal ban on burning draft cards upheld as cards integral to Selective Service System)}; \textit{see also} Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) \textit{(upholding under O’Brien a federal “must carry” requirement imposed on cable television industry)}.
\item[6.] Another constitutional significance of the distinction between commercial and noncommercial speech was highlighted by Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), discussed in section 4:2, striking down San Diego’s ban on all outdoor advertising billboards and signs except for on-premises signs identifying the owner of the premises and advertising “goods manufactured or services rendered on the premises . . . .” The Court assumed that such on-premises signs were commercial speech, and struck down the ban because of the ordinance’s differential treatment of commercial and noncommercial speech.
\end{itemize}
Rhode Island, the Justices of the Supreme Court were unanimous in according First Amendment protection to commercial speech, but sharply divided on the appropriate degree of protection. Their various opinions in those two cases indicated that several Justices support greater First Amendment protection for commercial speech. Justice Thomas would scrap the Central Hudson test and substantially merge commercial speech with fully protected speech under the First Amendment, subjecting both to a form of strict scrutiny. Justices Stevens, Kennedy, and Ginsburg would apply strict scrutiny to “paternalistic” regulations of commercial speech designed to keep consumers in ignorance for their own good, but would apply the intermediate Central Hudson test to allegedly false, misleading, deceptive, or coercive commercial speech, and to governmentally required warnings or disclaimers designed to require that more information be provided to consumers. Justices O’Connor, Souter, and Breyer and Chief Justice Rehnquist would continue to apply intermediate scrutiny under the Central Hudson test to all commercial speech. Justice Scalia, although expressing sympathy with Justice Thomas’ concerns about governmental paternalism, also would adhere to the Central Hudson test.

The lesser First Amendment protection thus far afforded will continue to require a workable and predictable definition—a goal that has so far proven elusive. Indeed, the Court has recognized that it is easier in some respects to define what commercial speech is not, than to state what it is. Justice Blackmun’s opinion in Virginia Pharmacy, for example, made clear that commercial speech is not simply speech that someone spends money on to disseminate or publish. If it were otherwise, all paid advertisements, including political ones, would be partially protected commercial speech. But the Court had

9. Id. at 1517–18.
10. Id. at 1506–07.
11. Id. at 1521. In the wake of the 44 Liquormart case, lower federal courts acknowledged the apparent disagreement on the Supreme Court about whether Central Hudson afforded adequate First Amendment protection for commercial speech. See, e.g., United Reporting Publ’g Corp. v. Cal. Highway Patrol, 146 F.3d 1133, 26 Media L. Rep. [BNA] 1915 [9th Cir. 1998] [striking down state ban on release of information about arrested persons for commercial purposes]. After citing Justice Thomas’ concurrence in 44 Liquormart, the court of appeals concluded that “[w]e are compelled, however, under the Supreme Court’s current jurisprudence, to afford commercial speech less protection from government regulation than some other forms of expression.” Id. at 1136.
already made it clear in New York Times Co. v. Sullivan that paid political advertisements do not lose their constitutional protection simply because they were paid for and sought political contributions. Similarly, the Court reiterated in Virginia Pharmacy that sale of speech does not render it “commercial” for this purpose. Otherwise, most newspapers, books, movies, and other fully protected forms of speech would be commercial speech. Nor is speech on commercial subjects necessarily commercial speech, or else news and editorial coverage of business subjects would be commercial speech. Similarly, speech does not necessarily become commercial because it solicits money, or the category could encompass necessarily protected political or religious speech.

The Court’s apparent difficulty in framing an all-purpose definition in its outpouring of more than twenty commercial-speech decisions in the twenty years subsequent to Virginia Pharmacy in 1976 reflected both its intention to lower the risk of inadvertent inclusion of fully protected speech within the category, and its concern that all speech

15. Id. at 761–62.
16. Id. at 761.
18. See chapters 3, 4, 5 and 6.
19. Beginning with his dissent in Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980) [advertising by a utility promoting electrical products and the use of electricity was commercial speech], discussed in section 3:12, Justice Stevens has expressed continuing concern that regulation of such promotional advertising by the state could include fully protected speech:

For example, an electric company’s advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York’s promotional advertising ban and also within the bounds of maximum First Amendment protection. Id. at 581.

See also Justice Stevens’ analysis in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), discussed in section 5:7, striking down a city’s ban of commercial newsracks because it would have resulted in a removal of only a handful of newsracks from the city’s sidewalks, while more than 1,800 daily newspaper newsracks would remain. His opinion for the Court stressed the difficulty of defining the constitutional watershed between “newspapers” and “commercial handbills,” noting that the city focused on the content of the publication inside the newsrack to make this determination. He rejected the city’s proffered definition of commercial speech (“commercially motivated speech”) as impermissibly blurring the narrower definition of commercial speech as speech which does no more than propose a commercial transaction. The Court applied
components of commercial transactions—where speech and conduct are usually intertwined—be protected, while preserving government’s power to regulate commercial conduct.

Given these complex and conflicting concerns and goals, the Supreme Court’s about-face in the mid 1970s and inclusion of commercial speech under the protection of the First Amendment were met, at least initially, by a degree of skepticism from academic commentators. Some observed that none of the classic rationales for First Amendment protection, including democratic self-governance, individual autonomy, and a legitimate role in the so-called marketplace of ideas, could be comfortably applied—if applied at all—to commercial advertising. Professor Smolla20 reviewed the criticism:

Claims that commercial speech is undeserving of full—or perhaps of any—First Amendment protection are usually grounded in the judgment that commercial speech does not fulfill any of the functions traditionally advanced to justify the fact that we give heightened constitutional protection to speech at all. Thus, if one sees freedom of speech primarily as an aid to democratic self-governance,21 commercial speech is likely to be left out in the cold because it does not in any obvious or direct way appear to advance the processes of democracy.22 If one sees freedom of the narrower definition in order not to “inadvertently suppress” speech deserving of greater constitutional protection [quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 at 66 (1983)]. Justice Stevens’ more recent assertion in his concurrence in Rubin v. Coors Brewing Co., 514 U.S. at 493–94 (1995), discussed in section 6:2, and his primary opinion for the Court in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 501 (1996), discussed in section 6:4, that commercial speech regulation generally be subjected to stricter scrutiny, may in part reflect his desire to avoid dilution of protection for noncommercial speech by eliminating the discrepancy in the levels of First Amendment scrutiny between commercial and non-commercial speech.

22. Citing Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 STAN. L. REV. 299, 353–54 (1978) [arguing against protection for commercial speech because it bears no relation to processes of politics and public decision-making]; Thomas H. Jackson & John C. Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 VA. L. REV. 1, 5–6 (1979) (“[T]he first amendment guarantees of freedom of speech and press protect only certain identifiable values. Chief among them is effective self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by governmental regulation of commercial speech.”).
speech primarily as a vehicle for individual autonomy and self-fulfillment, commercial speech—at least when “spoken” through the artificial voices of inanimate corporations—does not seem to qualify as speech that lifts the human spirit of the speaker.[23] And if the oldest of free speech metaphors, “the marketplace of ideas,”[24] is one’s primary justification for enhanced protection of speech, commercial speech again falls short because its content seems largely devoid of anything that ought properly be called an “idea,” or as Collins and Skover maintain, much that can honestly be described as “information.”[25]

However, as Professor Smolla pointed out, and as has increasingly been recognized both in cases and by commentators, “commercial speech, as speech, should presumptively enter the debate with full First Amendment protection. The theoretical question should not be what qualifies commercial speech for First Amendment coverage, but what, if anything, disqualifies it.”[26]

Possible grounds for such disqualification—or at least for according lesser First Amendment protection to commercial speech than that afforded political and other noncommercial speech—were characterized in Virginia Pharmacy and other cases as “common sense differences” between commercial and noncommercial speech.[27] First,

23. Citing C. Edwin Baker, Human Liberty and Freedom of Speech 196 (1989) (claiming that commercial speech lacks “crucial connection with individual liberty and self-realization”); C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, Iowa L. Rev. 1, 3 (1976) (“[C]ommercial speech is not a manifestation of individual freedom or choice, unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone’s private or personal wishes.”).


26. Smolla, supra note 20 [emphasis in original].


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commercial speech was said to be more “objective” than noncommercial speech because its truth is more easily “verifiable.” Second, commercial speech, driven by the profit motive of commercial advertisers, was asserted to be more “durable” than noncommercial speech. On both grounds, commercial speech was seen as less susceptible to being chilled by government regulation.

In their classic defense of greater First Amendment protection for commercial speech, Judge Alex Kozinski and Stewart Banner observed that

> [these two [“common sense”] differences pop up in most of the commercial speech cases in the few years after *Virginia State Board of Pharmacy*. They drop out of the more recent cases, which no longer need to resort to theory because they can draw upon the case law instead. In fact, since *Central Hudson*, examination of the nature of commercial speech is undertaken only when a dissenting Justice wants to point out that the majority opinion makes no sense, as did Justice Brennan in *Posadas*. But the two differences are never questioned; at no time has any member of the Court suggested that they do not justify a lower level of protection for commercial speech. That’s too bad, because when we examine the differences, we find that they can have any number of [“common sense”] implications for first amendment jurisprudence other than the ones they have been given.29

Kozinski and Banner analyzed the so-called “common sense” distinctions, noting that “in our experience, the more frequently common sense is invoked to support a proposition, the less likely it is to reflect common sense,”30 and asserting that, in many cases, the content of political advertising is less objective or verifiable, and often more durable, than commercial advertising.31

Professor Smolla additionally suggested that a major stumbling block to according greater First Amendment protection to commercial speech has been intellectual snobbery regarding advertising. "That segment of American culture that lives for a life of the mind, and indeed makes a living from the life of the mind, will naturally harbor some disdain for the coarser entries in the marketplace of ideas—those ideas that sell only goods and services."32 A similar thought was expressed by Kozinski and Banner:

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29. *Id.* at 634.
30. *Id.* at 634 n.37.
31. *Id.* at 635.
32. Smolla, *supra* note 20, at 783.
The commercial speech doctrine is the stepchild of first amendment jurisprudence: Liberals don’t much like commercial speech because it is commercial; conservatives mistrust it because it is speech. Yet, in a free market economy the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic or religious nature.\textsuperscript{33}

Justice Blackmun recognized the same comparison in his opinion for the Court in \textit{Virginia Pharmacy}: “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”\textsuperscript{34}

\textbf{§ 2:2 The Evolution of the Constitutional Definition: The Supreme Court Cases}

Chapter 3 describes the “reversal of fortune” history of protection of commercial speech by the Supreme Court. As explained there, the Justices likely were mindful in the 1970s of the unprotected past of commercial speech, which their predecessors had lumped in 1942 in \textit{Valentine v. Chrestensen}\textsuperscript{35} with defamation, obscenity, and “fighting words,” and they acted in a gingerly fashion in their evolution in the 1970s toward according First Amendment protection to commercial advertising. A significant hurdle in the evolution was how to define the newly protected category.

The Court’s opinion in \textit{Pittsburgh Press}\textsuperscript{36} in 1973 was its first clear acknowledgment that even if speech does “no more than propose a commercial transaction,” it may merit First Amendment protection. (But not, the Court concluded, on the facts of that case where the speech was a newspaper’s separation of classified employment advertising into separate gender labeled categories—illegal under a city’s antidiscrimination ordinance.) The Court also noted that if the speech “communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a

\begin{itemize}
\item 33. Kozinski & Banner, \textit{supra} note 28, at 652.
\item 35. \textit{Valentine v. Chrestensen}, 316 U.S. 52 (1942), described in section 1:3.1.
\item 36. \textit{Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations}, 413 U.S. 376 (1973), discussed in section 3:3. As the Court said in \textit{Pittsburgh Press}, “speech is not rendered commercial by the mere fact that it relates to an advertisement.” Help-wanted classified advertisements in a newspaper were “no more than a proposal of possible employment.” The advertisements in question were thus “classic examples of commercial speech” which, like the submarine advertisement in \textit{Valentine}, “did no more than propose a commercial transaction.”
\end{itemize}
movement whose existence and objectives are matters of the highest public interest and concern, it is not purely commercial.\textsuperscript{37}

Then, close on the heels of \textit{Pittsburgh Press}, the Court in a quick succession of cases upgraded the formerly dismissive phrase “speech that does no more than propose a commercial transaction” from being a reminder of the unprotected past of commercial speech, to the definition of a category meriting protection under the First Amendment—albeit lesser protection than categories of fully protected speech, all of which were assumed, without much analysis, to do something more than “propose a commercial transaction.”\textsuperscript{37}

The first step was in \textit{Bigelow},\textsuperscript{38} an abortion-counseling commercial advertising case. The Court noted that “[t]he diverse motives, means, and messages of advertising may make speech ‘commercial’ in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.”\textsuperscript{39} But the Court added, “[R]egardless of the particular label, a court may not escape the task of assessing the First Amendment interest at stake in weighing it against the public interest allegedly served by the regulation.”\textsuperscript{40}

The following year the Court completed the reformation of the formerly dismissive phrase (“does no more than propose a commercial transaction”) in \textit{Virginia Pharmacy}.\textsuperscript{41} Here, for the first time, the Court confronted the ultimate issue: Is advertising stating “I will sell you the X prescription drug at the Y price” protected? Yes, the Court concluded, because such speech was of value to consumers, possibly of “general public interest,” and “contributed to enlightened public decision-making in a democracy.”\textsuperscript{42}

Four years later in \textit{Central Hudson},\textsuperscript{43} almost as an aside, the Court referred to the New York State regulatory restriction on promotional advertising by electrical utilities thusly: “The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience.”\textsuperscript{44} This observation, which is too over-inclusive to be helpful in distinguishing commercial from noncommercial speech, has cropped up in cases

\textsuperscript{37} 413 U.S. at 385.
\textsuperscript{38} Bigelow v. Virginia, 421 U.S. 809 (1975), discussed in section 3:4.
\textsuperscript{39} Id. at 826.
\textsuperscript{40} Id.
\textsuperscript{42} Id. at 761.
\textsuperscript{44} Id. at 561.
where a court has chosen to cast a wide net around various types of commercial communications.\(^45\)

In its decision three years later in *Bolger v. Youngs Drug Products Corp.*,\(^46\) the Court for the first time analyzed some of these elements underlying the commercial speech definition. In *Bolger*, the Court considered whether three types of materials published by a condom manufacturer were properly classified as commercial speech:

- Multipage, multi-item fliers promoting a large variety of products available at drugstores, including prophylactics;
- Fliers exclusively or substantially devoted to promoting prophylactics; and
- Informational pamphlets generally discussing the desirability and availability of prophylactics and mentioning this manufacturer’s products in particular.

The Court held that while the pamphlets in the first two categories were clearly “speech which does ‘no more than propose a commercial transaction,’” proper classification of the informational pamphlets was a closer question. That the pamphlets were promotional did not, the Court said, of itself make them commercial speech. Nor did the reference to specific products or the manufacturer’s economic motivation in sending the pamphlets establish that status for the pamphlets. The Court held, however, that the combination of these characteristics—coupled with a concession by the parties—supported the district court’s conclusion that the pamphlets were properly characterized as commercial speech in their entirety.\(^47\) The Court also held that advertising is not entitled to the greater constitutional protection afforded noncommercial speech merely by virtue of the fact that it links a product to a current public debate—a caveat reminiscent

\(^{45}\) See, e.g., Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992), noted in text at n.91.


\(^{47}\) But even here the Court expressed a degree of caution:

Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech.

*Bolger*, 463 U.S. at 67 n.14. As discussed below, an earlier Seventh Circuit decision, Nat’l Comm’n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), presented a particularly vexing problem in classification of promotional advertising by a trade association designed both to address important issues of public concern and to tout the health benefit of eating eggs.
of the Supreme Court’s refusal to recognize similar linkage to public debate in *Valentine v. Chrestensen*.\(^48\)

Justice Stevens’ concurrence in *Bolger* again expressed his discomfort with the either/or classification of speech as commercial or noncommercial:

> Even if it may not intend to do so, the Court’s opinion creates the impression that “commercial speech” is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. That impression may not be wholly warranted. Moreover, as I have previously suggested, we must be wary of unnecessary insistence on rigid classifications, lest speech entitled to “constitutional protection be inadvertently suppressed.”

I agree, of course, that the commercial speech aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character. The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful; no such interest applies to fairy tales or soap operas. But advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation; conversely, the commercial element does not necessarily provide a valid basis for noncommercial censorship.

Appellee’s pamphlet entitled “Plain Talk about Venereal Disease” highlights the classification problem. On the one hand, the pamphlet includes statements that implicitly extol the quality of the appellee’s products. A law that protects the public from suffering commercial harm as a result of such statements would appropriately be evaluated as a regulation of commercial speech. On the other hand, most of the pamphlet is devoted to a discussion of the symptoms, significant risks and possibility of treatment for venereal disease. That discussion does not appear to endanger any commercial interest whatsoever; it serves only to inform the public about a medical issue of regrettably great significance.

I have not yet been persuaded that the commercial motivation of an author is sufficient to alter the state’s power to regulate speech. . . . [I]t may be more fruitful to focus on the nature of the challenged regulation than the proper label for the communications. . . . Any legitimate interests [this statutory ban on

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48. *See* discussion of the redrafted submarine handbill at issue in *Valentine* in section 1:3.1.
mailing contraceptive advertisements] may serve are unrelated to the prevention of harm to participants in commercial exchanges.\(^{49}\)

The individual elements specified in Bolger as an aid in characterizing the contraceptive advertising pamphlets as commercial speech have been cited—and Bolger occasionally miscited—as supporting a conclusion that one of those elements alone, or two of the elements in combination, are adequate to characterize the speech as “commercial,” even though it clearly does not, per se, “propose a commercial transaction.” In particular, the “reference to a specific product” in a promotional advertisement, particularly where there is identifiable “economic motivation” on the part of the advertiser, has been used as a basis for categorizing speech as “commercial,” even though the main thrust of the advertisement appears to be a discussion of public policy issues.

A pre-Bolger example (and a case cited by the Supreme Court in Bolger as an example of advertising speech combining reference to a product with commercial motivation) was National Commission on Egg Nutrition v. FTC,\(^{50}\) a decision applying an expansive definition of commercial speech. In Egg Nutrition, the Seventh Circuit held that an egg industry advertisement stating that “there is no scientific evidence that eating eggs increases the risk of . . . heart [and circulatory] disease . . .” was commercial speech. The court noted that the statement was not phrased as a statement of opinion “but categorically and falsely denied the existence of evidence that in fact exists and [was] made for the purpose of persuading people who read them to buy eggs.”\(^{51}\) The court quoted Bates v. State Bar of Arizona\(^{52}\) and its reiteration of the so-called “commonsense” differences between commercial and noncommercial speech. “Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech.”\(^{53}\) It reasoned that these distinguishing characteristics were present in the statements of the Commission. In the circuit court’s view, the Supreme Court’s commercial speech definition was “not intended to be narrowly limited to the mere proposal of a commercial transaction but extend[s] to false claims as to the harmlessness of the advertiser’s product asserted for the purpose of

\(^{49}\) Bolger, 463 U.S. at 81–83 [citations omitted].

\(^{50}\) Nat’l Comm’n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

\(^{51}\) 570 F.2d at 163.


\(^{53}\) Id. at 383.
persuading members of the reading public to buy the product.” As both Bolger and Egg Nutrition illustrate, advertising and solicitation messages may well address subjects of general concern, which, absent an explicit or at least an implied commercial proposal, would be fully protected speech.

In 1988, the Supreme Court again addressed the combination-of-characteristics issue in Riley v. National Federation of the Blind of North Carolina, Inc. It held that speech by paid professional solicitors for charity was fully protected under the First Amendment because 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.

The next year, however, in Board of Trustees of the State University of New York v. Fox, the Court rejected the contention that commercial solicitation in state university facilities—in this case a “Tupperware party” designed to sell cooking equipment in a student dormitory room—was “inextricably intertwined” with the educational content of the sales presentations, and thus not classifiable as commercial speech under Riley:

There is nothing whatever “inextricable” about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying or the audience from hearing those noncommercial messages and nothing in the nature of these things requires them to be combined with commercial messages.

The Court also distinguished commercial product sales solicitation from other forms of on-campus paid speech, including for-profit job counseling, tutoring, legal advice, and medical consultations in students’ dormitory rooms, which the Court said were not commercial speech.

A more recent example of speech with both commercial and noncommercial aspects was considered in Rubin v. Coors Brewing Co., in which the Court struck down a federal statute prohibiting specification of alcohol content on beer labels as an impermissible proscription of commercial speech. The Court’s opinion assumed

54. Egg Nutrition, 570 F.2d at 163.
57. Id. at 474.
without significant analysis that the content of such labels was commercial speech. While it seemed correct to conclude that specification of the alcohol content of malt beverages clearly was the communication of information to potential consumers, this information alone did not propose a commercial transaction. On the other hand, while specific information on a label makes no “proposal,” the label on a consumer product, taken as a whole, may perhaps more logically be classified as a commercial proposal.  

§ 2:3  Lower Court Cases Considering “Combination” Advertising

Examples of the treatment of hard-to-pigeonhole combination speech in the lower courts reflect a similar result-oriented imprecision, stemming at least in part from the Supreme Court’s propensity to apply the basic “commercial proposal” commercial speech definition more broadly and without much helpful analysis:

- An injunction against a pro-life clinic’s misleading advertising was upheld as proper regulation of commercial speech, in spite of content addressing issues of public concern.  

- A tobacco company’s newspaper advertisement entitled “Of Cigarettes and Science,” criticizing a government tobacco health risk study, was held by the Federal Trade Commission to be commercial speech, and thus subject to Commission jurisdiction.

- T-shirts and other sidewalk-sold merchandise carrying political, religious, or ideological messages “inextricably intertwined” with commercial speech were held to be fully protected speech.

60. For other label-as-commercial-speech cases, see Ass’n of Nat’l Advertisers, Inc. v. Lungren, 44 F.3d 726 [9th Cir. 1994], cert. denied, 516 U.S. 812 [1995], discussed in section 2:3; Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87 [2d Cir. 1998], discussed in section 14:3.3.


Military recruitment at a public university was held to be “purely commercial speech.”

A science publisher’s article in an independent scientific journal about a comparative survey favoring its own publications was held to be fully protected speech.

In contrast, an article in a trade journal by the president of a manufacturer favorably comparing its own product to a competitor’s was held to be commercial speech, subject to challenge under section 43(a) of the Lanham Act.

Product distributor’s comments that competitor was a member of the Church of Satan who used profits to support the church and that encouraged other distributors not to buy competitor’s products were commercial speech under the Lanham Act, despite the message’s arguably theological component.

In a case that arose under the same facts, a product distributor’s comments that a competitor was linked to Satan would be deemed commercial speech if, on remand, the trier of fact were to find that the product distributor had an economic motivation in repeating the rumor.

Oral statements made by boiler manufacturer regarding rival boiler manufacturer’s alleged price gouging, financial instability, and imminent sale were held to be commercial speech subject to Lanham Act challenge.

Use of an interior designer’s trade name on disgruntled customer’s Internet websites was commercial speech, subject to challenge under section 43(a) of the Lanham Act, because the websites’ hyperlinks served as a “conduit” that “steered potential customers” to designer’s competitors.

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64. Nomi v. Regents of Univ. of Minn., 796 F. Supp. 412 [D. Minn. 1992], vacated as moot, 5 F.3d 332 [8th Cir. 1993] (case moot because plaintiff had graduated).


67. Procter & Gamble Co. v. Haugen, 222 F.3d 1262 [10th Cir. 2000].


Letters sent by plaintiff’s counsel to office supply companies demanding that they stop using defendant’s allegedly infringing packaging in their catalogs were not commercial speech, and therefore not subject to challenge under section 43(a) of the Lanham Act. 71

Allegedly misleading statements in a letter sent by defendant to plaintiff’s distributors and manufacturers recommending against use of plaintiff’s extension cable because it would not work in conjunction with defendant’s computer product did not constitute commercial speech within the meaning of the Lanham Act; the statements were intended to promote industry compliance and simplify computer use for customers, not to influence consumer purchasing. 72

An informational website which provided editorial and historical commentary on Skippy, the cartoon character, and a biased version of a trademark dispute involving the Skippy peanut butter brand was fully protected speech because it did not propose any commercial transaction. 73

Off-premises adult entertainment canvassing was held to be commercial speech inextricably intertwined with noncommercial speech and protected by strict scrutiny. 74

Bus advertising of commercial products containing a pro-life message was held to be noncommercial speech and subject to a city ban on noncommercial messages on buses. 75

Los Angeles magazine’s use in an article of an altered photograph of Dustin Hoffman from the movie Tootsie was noncommercial speech. 76

Baseball league’s use of retired players’ names, voices, signatures, photographs and likeness on websites, documentaries, and game day programs was entitled to receive the full First Amendment protection accorded to noncommercial speech. 77

73. CPC Intl., Inc. v. Skippy, Inc., 214 F.3d 456 [4th Cir. 2000].
74. S.O.C., Inc. v. Cnty. of Clark, 152 F.3d 1136 [9th Cir. 1998].
75. Children of Rosary v. City of Phoenix, 154 F.3d 972 [9th Cir. 1998].
77. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 [Ct. App. 2001]; see also C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 [8th Cir. 2007] [finding producer’s use of baseball players’ names and playing records was for purposes of profit
• Magazine describing Olympic events, displaying photographs of athletes, and including Olympics-related paraphernalia, was noncommercial speech because it did not propose a commercial transaction and its content went beyond the economic interests of the speaker and its audience.  

78

• Home buyers’ public statements critical of the quality and workmanship of home builder’s homes and their picketing of home builder’s sites was not commercial speech where home buyers were not engaged in competing commercial activity, but were advocating legislation to protect buyers of new homes from unscrupulous home builders.  

78.1

• Flying an Irish flag outside a pub did not constitute commercial speech, based on bar owner’s assertion that the flag was not being flown for a commercial purpose, but rather as a “message of deep felt ancestral identity.”  

78.2

• Rent stabilization ordinance making it unlawful for residential landlord to request, orally or in writing, that a tenant move for any reason not prescribed by the ordinance, does not regulate purely commercial speech because it applies regardless of whether the landlord is acting as a commercial speaker and applies to individuals who assist landlords, but have no commercial relationship with tenants at all.  

78.3

• Speech that was part of pregnancy-related services (which had commercial value) provided by religious center was intertwined with political and noncommercial speech on topics such as abortion, and therefore subject to strict scrutiny.  

78.4

and players’ identities were used for commercial advantage, but producer’s First Amendment rights in offering its fantasy major league baseball products superseded players’ right of publicity under Missouri law; see also Dryer v. Nat’l Football League, 689 F. Supp. 2d 1113 [D. Minn. 2010] (videos of former professional football players used by National Football League for historical promotions were neither infomercials nor purely expressive works but were advertisements for the NFL because they were “wholly positive depictions of the NFL” and not documentary-quality).


78.3. Baba v. Bd. of Supervisors, 21 Cal. Rptr. 3d 428 (Ct. App. 2004).

Other cases consider whether the economic motivation of the advertiser is, taken alone, a characteristic adequate to classify advertising content as commercial speech. The Supreme Court cautioned in Bolger that that factor, without more, should not be adequate.79 Were it otherwise, much fully protected speech—newspaper and broadcast and telecast programming, for example—published with economic motivation, usually seeking the profit required to keep the medium in business, would be subject to restraint.

Examples of cases holding “economic motivation” to be inadequate as a determining characteristic of commercial speech include:

- Fortune-telling for a fee also involved the communication of ideas and information, and was not commercial speech.80

- Statements in advertising for corporation’s computer software program providing an automatic futures trading system constituted commercial speech, but statements relating to the futures market generated and conveyed by the software itself were not commercial speech.81

- Magazine advertisements of course listings for the publisher’s school, and stories and articles unrelated to course offerings, were not commercial speech; the publisher’s “intentions” could not be the exclusive determinant.82

79. See, e.g., Justice Stevens’ concurrence in Bolger, quoted in text at note 49, supra.

80. Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 [1985]. See also Argello v. City of Lincoln, 143 F.3d 1152 [8th Cir. 1998] (quoting trial court’s observation that “there is a distinct difference between the offer to tell a fortune [‘I’ll tell your fortune for $20.’], which is commercial speech, and the actual telling of the fortune [‘I see in your future. . . .’] which is not”); Welton v. City of Los Angeles, 18 Cal. 3d 497, 556 P.2d 1119, 134 Cal. Rptr. 668 [1976] (street vending of maps to the stars’ homes did not constitute commercial speech).


• Insurance industry advertisements asserting that the quality of American life was threatened by an alleged crisis in the form of lawsuits against health care defendants were a “direct comment on a public issue” and not commercial speech.\textsuperscript{83}

• Standard & Poor’s published rating of corporate debt instruments, although “market driven . . . and . . . objectively verifiable,” was fully protected speech.\textsuperscript{84}

• Allegedly misleading communications from legal counsel opposing settlement of a class action, although having “an economic motive,” could not be characterized as commercial speech.\textsuperscript{85}

• Franchisor’s allegedly false promises to process potential buyers of franchisee’s franchise rights without undue delay, were promises made to induce settlement of a lawsuit between the parties, and were not commercial speech such that the exemption to the anti-SLAPP statute would apply.\textsuperscript{85.1}


\textsuperscript{84} Pan Am Corp. v. Delta Air Lines, Inc., 161 B.R. 577 (Bankr. S.D.N.Y. 1993). Accord In re Burnett, 269 N.J. Super. 493, 635 A.2d 1019 (Law Div. 1993) (quashing a subpoena duces tecum against a publisher of insurance trade publications, finding publisher’s activity protected by journalist’s privilege and his annual report to be a “news medium” protected under a state shield law). \textit{See also} Stephens v. Am. Home Assurance Co., 23 Media L. Rep. 1769 (S.D.N.Y. 1995) (annual rating of relative financial strengths of American insurance companies, distributed to subscribers only, held to be fully protected speech); \textit{but see} Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 [1985] (analogizing a false credit report issued by a rating agency to five subscribers to commercial speech, over a dissent by Justice Brennan stating that speech about commercial or economic matters or speech engaged in “for a profit” should not, for either of those reasons, be classified or treated as equivalent to commercial speech).

\textsuperscript{85} Georgine v. Amchem Prods., Inc., 160 F.R.D. 478 [E.D. Pa. 1995], rev’d on other grounds, 83 F.3d 610 [3d Cir. 1996]; \textit{see also} Quinstreet, Inc. v. Ferguson, No. C08-5525RB, 2008 WL 5146652 [W.D. Wash. Dec. 5, 2008] (statements on website that corporation’s attorney had falsified affidavits and judges had accepted them because they did not want to hear website owner’s case were not purely commercial speech because majority of statements criticized pending litigation and therefore were entitled to protection as criticism of governmental action).

\textsuperscript{85.1} Navarro v. IHOP Props. Inc., 36 Cal. Rptr. 3d 385 [Ct. App. 2005].
• Commodity investment advice newsletter contained editorial matter that did not propose a commercial transaction, and thus did not fit the “traditional” definition of commercial speech. 86

• Texas state university policy that prohibited state employees from acting as paid consultants or expert witnesses opposing the state in litigation was held to ban fully protected speech. 87

• As applied to landlords with religious objections to cohabitation, certain speech restrictions that were part of state housing laws prohibiting apartment owners from refusing to rent to unmarried couples were held to be directed at fully protected religious speech; although the speakers, as owners, could be assumed to have underlying economic motives, the relevant speech was in fact contrary to their economic interests. 88

• Lithographs and t-shirts reproducing a drawing of The Three Stooges were not commercial speech because they were not advertisements for a product. 89

• T-shirts listing names of soldiers killed in Iraq war, and advertisements for same, are noncommercial political speech. 89.1

• Diet book advocating high-fat, high-protein diet was noncommercial speech entitled to full First Amendment protection, notwithstanding its references to publisher’s products and services, where book was primarily a guide to leading a low carbohydrate lifestyle and the discussion was largely scientific in nature. 89.2

• Signs promoting “civic events,” which were construed to mean “events sponsored by governments,” did not qualify as commercial advertisements even though plaintiffs would profit

86. Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n, 149 F.3d 679 [7th Cir. 1998].
87. Hoover v. Morales, 146 F.3d 304 [5th Cir. 1998].
89. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 [Cal. 2001]; see also Winter v. DC Comics, 134 Cal. Rptr. 2d 634 [Cal. 2003] [use of popular musicians’ likenesses in comic books satisfied the transformative test set forth in Comedy III and was protected by the First Amendment], on remand, 2003 WL 22765174 [Cal. Ct. App. Nov. 24, 2003].
from leasing the signs, because the speech itself was not proposing a commercial transaction.  

- Pseudonymous letters that a disappointed bidder sent to government contracting officers questioning the conduct of the successful bidder constituted political—not commercial—speech.  

- Search engine results constituted noncommercial speech subject to the search engine’s editorial discretion, including discretion to exclude certain results.  

On the other hand, other courts have classified speech as “commercial” based on little more than the economic interests or profit motive of the speaker:  

- A management consulting firm’s independent analysis of the comparative strengths of Georgia seaports, distributed to customers of the ports, was held to be commercial speech.  

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89.4. Kuwait & Gulf Link Transp. Co. v. Doe, 92 A.3d 41, 50, 2014 PA Super 96 (2014) (“[T]he] [l]etters represent political speech because the award of substantial government contracts to contractors who are claimed to illegally engage in business with a prohibited foreign government directly implicates ‘the manner in which government is operated or should be operated.’ . . . [E]ven if we knew that the author wrote the [...] Letters with an economic motivation, that knowledge alone is insufficient to compel the classification of the [...] Letters as commercial speech . . . [G]iven the political nature of the [...] Letters, they are entitled to the highest level of protection and not the intermediate level of protection that commercial speech receives under the First Amendment.”)

89.5. Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433 [S.D.N.Y. 2014]. In Zhang, numerous New York writers and producers who had produced content regarding the democracy movement in China sued Chinese Internet search engine Baidu Inc. for censoring their works by excluding them from its search engine results. The court found that the search engine’s processes constituted editorial judgment, and it concluded that the First Amendment precluded the court from interfering with Baidu’s censorship. The central purpose of a search engine is to retrieve relevant information from the vast universe of data on the Internet and to organize it in a way that would be most helpful to the searcher. In doing so, search engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information. . . . And, of course, the fact that Baidu has a “profit motive” does not deprive it of the right to free speech any more than the profit motives of the newspapers.

Company’s misrepresentations to potential clients of former employee engaged in a competing business, designed to discourage clients from engaging his services, were held to be commercial speech.91

Solicitation of employment on public streets, which had resulted in congested traffic, was held to be commercial speech.92

Use of plaintiff celebrity’s name and footage of his hole-in-one shot in a videotape promoting defendant’s fundraising services constituted commercial speech because its sole purpose was to advertise and capitalize on plaintiff’s image.93

Itemization of a gross revenue tax on patient bills by health care providers was held to be commercial speech.94

Required responses by export-import businesses to an antiboycott questionnaire under federal law was held to be commercial speech.95

Environmental promotion on labels and containers of products as being “ozone-friendly,” “biodegradable,” “photodegradable,” “recyclable,” or “recycled” was commercial speech.96

Federal prohibition of the use of prerecorded voice messages sent to residential phone numbers without the consent of the called party, whether or not commercial speech, was classified as commercial speech regulation.97

Catalogue using a thirty-year-old photograph of appellants in a surf competition to promote the sale of its surf theme clothing was commercial speech.98

95. Trane Co. v. Baldrige, 552 F. Supp. 1378 [W.D. Wis. 1983], aff’d sub nom. Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 [7th Cir.], cert. denied, 469 U.S. 826 [1984]; compare Briggs & Stratton Corp. v. Baldrige, 539 F. Supp. 1307 [E.D. Wis. 1982], aff’d, 728 F.2d 915 [7th Cir.], cert. denied, 469 U.S. 826 [1984] [rejecting a First Amendment challenge to the Export Administration Act, 50 U.S.C. § 24001 et seq., the statute under which Trane held questionnaire responses required by the Act to be commercial speech].
96. Ass’n of Nat’l Advertisers, Inc. v. Lungren, 44 F.3d 726 [9th Cir. 1994], cert. denied, 516 U.S. 812 [1995].
98. Downing v. Abercrombie & Fitch, 265 F.3d 994 [9th Cir. 2001].
- Brochures, catalogues, and sales tags depicting Native American people and discussing the contribution of profits to Native American causes constitutes commercial speech where the primary purpose of these messages was to promote the sale of defendants’ products.  

- Operator of a website promoting tax avoidance was engaged in commercial speech, where website enticed readers to join operator’s organization and pay him for tax advice and referred to certain products for sale and the fee for each product.

- Because “the identity of the speaker is often crucial in determining whether speech is commercial speech,” picketing by “dissatisfied customers” critical of “unscrupulous homebuilders, which is arguably an issue of public concern,” is not considered commercial speech, and a request for a prior restraint must be denied.

- Federal requirement that stock promoters disclose the consideration that they have received for such promotion is a regulation of commercial speech.

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100. United States v. Bell, 414 F.3d 474 [3d Cir. 2005]; see also United States v. Schiff, 379 F.3d 621, 628 [9th Cir. 2004] [publication teaching readers how to “legally” stop paying federal income taxes qualified as commercial speech because it was an “integral part of [defendant’s] whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax”]; United States v. Standring, No. 1:04CV730, 2006 WL 689116, at *13 [S.D. Ohio Mar. 15, 2006] [finding primary function of defendant’s website and promotional materials was to sell fraudulent and illegal tax advice; inclusion of articles, publications, and other documents that purportedly mocked the government did not constitute political speech but “actually reinforce[d] the fraudulent commercial message and promote[d] tax evasion by duping customers into believing they [were not legally obligated to file tax returns or pay taxes”]; United States v. Clarkson, C.A. No. 8:05-2734-HMH-BHH, 2007 WL 1988257 [D.S.C. July 3, 2007] (permanently enjoining leader of an organization advocating a tax revolt, from disseminating false or fraudulent statements concerning federal taxes; defendant’s actions constituted commercial speech because organization requires members to pay dues and provides extensive information to members through products offered for sale) [discussed in section 14:29]; Pragovich v. IRS, 676 F. Supp. 2d 557 [E.D. Mich. 2009] [rejecting petitioner’s claim that summons issued by IRS to customers who purchased kits explaining how to file frivolous lawsuits to avoid paying federal taxes chilled his First Amendment right to petition for the redress of grievances and finding petitioner’s speech was misleading commercial speech unprotected by the First Amendment].


• Article published on nonprofit trade organization’s website was commercial speech, subject to a product disparagement claim under the Lanham Act, because the website mentioned specific painting services provided by the organization’s members and appeared to have been motivated by the members’ economic interest in discouraging individuals from hiring plaintiff’s painters.  

102.1

• Adoption website operator’s refusal to post profiles of opposite-sex couples on its website discriminated against plaintiffs on the basis of sexual orientation; website was a commercial enterprise and not expressive speech.  

102.2

• Public statements made by company constituted commercial speech where press release on company’s website advertised the company and statements made at an analysts’ forum and by the company’s president were directed at investors, were economically motivated, and specifically referenced the company’s product.  

102.3

• Condoms bearing pictures of Barak Obama and Sarah Palin constituted commercial, not political, speech because vendors’ intent was focused on selling products, rather than expressing a political view.  

102.4

• The purpose of fortune-telling was not commercial but was to benefit those involved, either for the entertainment value or for the informational value.  

102.5

• “Gripe” websites (with domain names similar to the domain name of plaintiff’s business but which showcased only criticism
of that business) were not commercial speech, as they did not propose a commercial transaction or seek to generate business; domain names did not in any way link to defendant’s website or mention defendant’s business as an alternative to plaintiff’s. 102.6

• Trade name of film company “I Choose Hell Productions LLC” could be commercial speech depending on how used. 102.7

• Statements by an executive about his company’s product quoted in a trade magazine constituted commercial speech, even though the article itself was not. 102.8

In 2002, the California Supreme Court issued an important decision concerning the definition of commercial speech. In Kasky v. Nike, Inc., 103 the Supreme Court of California decided 4-3 that plaintiff Kasky could proceed with his lawsuit against Nike, Inc. Kasky alleged that Nike made false statements in defending itself from attacks on its labor practices. The allegedly false statements appeared in press releases, in letters to newspapers, in a letter to university presidents and athletics directors, and in other documents distributed for public relations purposes. Kasky sued Nike under California’s Unfair Competition Law (UCL) and false advertising law.

The key issue addressed in the decision is whether Nike’s allegedly false statements should be categorized as commercial speech or non-commercial speech. Only commercial speech can give rise to claims under the UCL and false advertising law. The intermediate appellate court had dismissed Kasky’s complaint because it had concluded that Nike’s statements were noncommercial speech and, consequently, fully protected by the state and federal constitutions. The California Supreme Court reversed, introducing a new and extraordinarily broad definition of commercial speech.


102.7. Kalman v. Cortes, 723 F. Supp. 2d 766 [E.D. Pa. 2010] (plaintiff challenged blasphemy statute as unconstitutional restriction on speech; under Central Hudson, court concluded blasphemy statute was not narrowly tailored or supported by evidence: “mere possibility that some Pennsylvania citizens might find a corporate name containing the word ‘hell’ to be offensive cannot justify its suppression”).

102.8. SKEDKO, Inc. v. ARC Prods., LLC, No. 3:13-CV-00696, 2014 WL 2465577 [D. Or. June 2, 2014] (drawing a distinction between article, as noncommercial speech, and the quotes it contained, as commercial speech] (“The court cannot find a purpose behind [the] statements other than to promote his company’s product to potential customers. Therefore, the court finds that [the] statements constitute commercial speech.”).

The court formulated a three-part test for determining whether statements constitute commercial speech. The test applies “when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception. . . .”\textsuperscript{104} Under the test, the courts must consider three elements: the speaker, the intended audience, and the content of the message. All three elements are described so broadly that a huge range of corporate communications could become the subject of UCL claims.

First, the speaker element of the test will be met whenever the speaker is “someone engaged in commerce” or “someone acting on behalf of a person so engaged.”\textsuperscript{105} Statements by any commercial entity will satisfy the speaker element of the test.

The second element—the intended audience for the speech—is similarly broad. This element is 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 to or otherwise influence actual or potential buyers or customers.”\textsuperscript{106} Because “actual or potential buyers” of the goods sold by large corporations typically include a substantial percentage of Californians, this element will be met by much of those corporations’ speech.

The third element—the content of the speech—is satisfied 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 products or services.”\textsuperscript{107}

Practically speaking, the court’s three-part test for defining commercial speech could include virtually any statement made by a commercial enterprise concerning itself, or its products or services, that likely will be heard by, or repeated to, potential customers. Under that definition, corporations could be sued for a wide range of factual statements (assuming a plaintiff was willing to allege the statements were false).

Justice Brown’s dissenting opinion criticized the majority’s creation of an overly broad test for commercial speech that when “taken to its logical conclusion, renders all corporate speech commercial speech.”\textsuperscript{108} According to Justice Brown, the majority’s test “contravene[s] long-standing principles of First Amendment law” in three ways.\textsuperscript{109} First, despite the fact that commercial speech is to be distinguished by its content,
the test relies on two criteria wholly unrelated to the speech’s content: the identity of the speaker and the intended audience. Second, “the test violates a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive.”

Third, the test stifles “the ability of speakers engaged in commerce, such as corporations, to participate in public debates over public issues.” Frustrated by the majority’s test, Justice Brown urged the U.S. Supreme Court to step in and reconsider the commercial speech doctrine.

Along the same lines, Justice Brown, as well as Justice Chin in his separate dissent, reasoned that the majority’s test unfairly, and unconstitutionally, handicaps one side of the public debate. Justice Brown stated that “[u]nder the majority’s test, only speakers engaged in commerce are strictly liable for their false or misleading representations. . . . Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements.” Justice Chin added, “[w]hile Nike’s critics have taken full advantage of their right to ‘uninhibited, robust, and wide-open’ debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike’s critics enjoy. . . .” The majority expressly disagreed with its dissenting colleagues, stating that the argument was “misdirected because the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact.”

Further, both dissenting opinions pointed out that this case typifies the circumstances where commercial speech and noncommercial speech are “inextricably intertwined.” Justice Brown explained that “[i]n such cases, courts must apply the ‘test for fully protected expression’ rather than the test for commercial speech.” Justice Chin agreed, stating that “[c]ontrary to the majority’s suggestion, Nike realistically could not discuss its general policy on employee rights and working conditions and its views on economic globalization without reference to the labor practices of its overseas manufacturers, Nike products, and how they are made. . . . Attempting to parse out the commercial speech from the noncommercial speech in this context ‘would be both artificial and impractical.’” The dissenting justices concluded that Nike’s speech deserved the full protection of the First Amendment.

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110. Id. at 982.
111. Id.
112. Id. at 985.
113. Id. at 970.
114. Id. at 967.
115. Id. at 988.
116. Id. at 976.
In 2003, the Nike case was accepted for review by the U.S. Supreme Court. But in a later 5-4 per curiam order, the Court dismissed the writ of certiorari as improvidently granted. The Court’s dismissal left standing a highly criticized decision of the Supreme Court of California. The U.S. Supreme Court’s decision to dismiss the writ was unusual in that three justices wrote separate opinions. Justice Stevens wrote a concurring opinion (joined by Justice Ginsburg and, in part, by Justice Souter), in which he identified three reasons why the Court’s decision to dismiss the writ of certiorari was correct:

1. the judgment entered by the California Supreme Court was not final;
2. neither party had standing to invoke the jurisdiction of a federal court; and
3. the reasons for avoiding the premature adjudication of novel constitutional questions applied with special force to this case.

There were two dissenting opinions. Justice Kennedy wrote a one-line dissent. Justice Breyer, joined by Justice O’Connor, wrote a twenty-one-page dissent. He made clear that he not only would have reviewed the case on the merits, but likely would have found that the speech regulations in question must be reviewed under a form of heightened scrutiny and that they could not survive such scrutiny. Justice Breyer’s opinion largely relied upon principles of public speech—the importance of protecting the various voices in a debate concerning matters of public concern—rather than principles of commercial speech.

The issues raised by the California Supreme Court’s broad definition of commercial speech may very well find their way back to the U.S. Supreme Court, but not in the context of the Nike case. After the case was remanded, the parties settled their dispute.

In Bernardo v. Planned Parenthood Federation of America, plaintiffs sued Planned Parenthood under California’s Unfair Competition Law and False Advertising Law, alleging that Planned Parenthood’s websites contain information that causes women to make uninformed decisions about critical health-related issues, particularly concerning the safety of abortion versus childbirth. The district court granted Planned Parenthood’s special motion to strike the complaint. The California Court of Appeals affirmed, rejecting plaintiff’s argument that the

statements on defendants’ websites were commercial speech that properly should fall under the purview of California’s Business and Professional Code.

Plaintiff sought to enjoin the publication of four “fact sheets” on Planned Parenthood’s website. The first fact sheet stated that the alleged link between abortion and an increased rate of breast cancer has not been sufficiently established by medical evidence and that those who support the existence of this link generally are opposed to abortion. Two of the fact sheets provided answers to frequently asked questions about health and safety issues related to both abortion and childbirth. The fourth fact sheet contained a statement that abortion is “eleven times safer than carrying a pregnancy to term.” The evidence submitted by Planned Parenthood in opposition to the anti-SLAPP motion indicated that none of the statements in question proposed a transaction of any kind; “rather, they were all educational in nature and asserted Planned Parenthood’s positions on disputed scientific and medical issues of public interest with which [plaintiff] strenuously disagreed.”

Plaintiffs pointed to the presence of a toll-free phone number and hyperlinks on the website that could be used by visitors who wanted more information on specific services or clinics as evidence of commercial purpose. The court explained that any economic motivation that might arise from the websites’ relationship to various affiliated clinics that provide family planning advice and services is insufficient in and of itself to turn the statements into commercial speech.

Relying on Kasky v. Nike, Inc., the court stated that “even were we to assume that the toll-free number and Planned Parenthood’s hyperlinks to information about specific clinics and services constituted commercial speech, the noncommercial speech published in the various Web pages would still receive full First Amendment protection.” The court concluded that the content of Planned Parenthood’s statements were merely opinions within an area of legitimate scientific debate, not representations of fact.

In Lockton v. Small, plaintiff sued the attorneys that represented his company in bankruptcy proceedings, alleging defamation, which he
claimed prevented him from obtaining future employment. Defendants appealed from a partial denial of their anti-SLAPP motion. Among the issues on appeal was whether certain statements made by defendants constituted commercial speech not protected by the anti-SLAPP statute. The Court of Appeal concluded that statements made in press releases and SEC filings were not commercial speech. Applying the limited-purpose test from *Kasky v. Nike*, the court found the speech had little in the way of product references or economic motivation. Moreover, the court found that the statements did not propose a commercial transaction.

In *Lubin v. Agora, Inc.*<sup>118.7</sup> the court affirmed the denial of a motion to enforce subpoenas served on a newsletter publisher that requested production of the publisher’s subscriber lists for certain investment newsletters and a list of purchasers of an investment report. The court rejected the government’s argument that, because the publications in question were allegedly commercial speech, the subscriber information also qualified as commercial speech. The subscribers had received other publications that were not commercial speech, and so the subscriber list information did not fit within the Supreme Court’s limited definition of commercial speech. A slightly different issue was raised with respect to the subpoena for information concerning purchasers of the investment report. These individuals were not necessarily subscribers to defendant’s regular publications. Nonetheless, the court held that the purchaser information also did not qualify as commercial speech because the investment report did more than propose a commercial transaction between defendant and the purchasers. In a footnote, the court questioned the government’s underlying premise, that is, that readers of commercial speech enjoy a lesser right to anonymity than readers of fully protected speech.

### § 2:4 Lower Court Cases on Promotion of Movies, Books, and the Like

The courts normally afford full First Amendment protection to advertising promoting speech in books, movies, and other fully protected media.<sup>119</sup> For example:

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<sup>119</sup> However, and without significant analysis, the result has differed where the advertising is for “adult entertainment.” See, e.g., State v. Holmberg, 545 N.W.2d 65 (Minn. Ct. App. 1996) [affirming conviction of adult}

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2–30
• A newspaper’s promotion of its story about NFL quarterback Joe Montana’s Super Bowl record by sale of promotional posters with the player’s likeness for $5 each was fully protected speech.  

• A publisher’s promotion of a book on conspiracy theories about President Kennedy’s assassination was fully protected speech.

• Advertising campaign for movie "Boyz N the Hood" went “beyond proposal of a commercial transaction and encompassed the
bookstore operators under a statute forbidding display of merchandise or pictures of “products or entertainment” on the premises in the windows or other areas visible from outside the building, such display held to be commercial speech]. See discussion of other adult entertainment commercial speech cases in section 14:1.

The result also has differed where the advertising campaign is found to be misleading. See, e.g., Keimer v. Buena Vista Books, Inc., 75 Cal. App. 4th 1220 (1999) [book promotion not protected by Central Hudson where text was misleading]. But see Lacoff v. Buena Vista Publ’g, Inc., 705 N.Y.S.2d 183 [Sup. Ct. N.Y. Cnty. 2000] [holding that the same book cover statements at issue in Keimer were fully protected speech and noting that the First Amendment protects “even erroneous statements in the contents of [the book in question], and on its cover”).


ideas expressed in the motion picture which it promotes,” and was not commercial speech.\textsuperscript{122}

- Television miniseries about actress Elizabeth Taylor was fully protected.\textsuperscript{123}

- Comic book author’s statements in fan letters and interviews that plaintiff was the inspiration for a fictional character in his book did not amount to commercial speech.\textsuperscript{124}

- Use of popular musicians’ names in connection with advertising and promotion of comic books fell within the incidental use privilege and did not go beyond what is allowed in promotion and advertising of a protected product.\textsuperscript{124.1}

- Litigant’s allegedly false website statements about the case and false or disparaging statements about his litigation opponent were not commercial speech, even though the litigation arose out of a commercial dispute.\textsuperscript{125}

- Documentary film exploring guns and violence in America, including a segment on the bombing of the Federal Building in Oklahoma City, is not “a work of pure ‘commercial speech,’ as it does much more than simply propose a commercial transaction.”\textsuperscript{125.1}

- Satirical blog post was not commercial speech, despite plaintiff’s claim that the post attacked the plaintiff’s commercial interests.\textsuperscript{125.2}

\begin{footnotes}
\textsuperscript{124} Doe v. TCI Cablevision, 2002 WL 1610972, 30 Media L. Rep. [BNA] 2409 (Mo. Ct. App. 2002), transferred, 110 S.W.3d 363 (Mo. 2003), cert. denied sub nom. McFarlane v. Twist, 540 U.S. 1106 (2004), after remand, Doe v. McFarlane, 207 S.W.3d 52 (Mo. Ct. App. 2006), reh’g and/or transfer denied [July 26, 2006], transfer denied [Dec. 19, 2006] (finding author’s use of former professional hockey player’s name as the name of villainous character in his comic book was not protected speech under the First Amendment; predominant purpose of the use of the name was to sell comic books and related products rather than an artistic or literary expression about the hockey player).
\textsuperscript{125.2} Farah v. Esquire Magazine, 736 F.3d 528 (D.C. Cir. 2013).
\end{footnotes}
In *ETW Corp. v. Jireh Publishing, Inc.*, pro golfer Tiger Woods sued a sports artist, claiming that a print including a likeness of Woods infringed and diluted his trademark and violated his common law right of publicity. The Sixth Circuit affirmed the district court, granting summary judgment in the artist’s favor.

The painting at issue commemorated Woods’ victory at the Masters Tournament, incorporating several views of Woods and the clubhouse, and a montage of other famous golf champions. The painting was then sold as limited edition prints by the artist. Woods’ licensing agent, ETW Corp., owns the trademark registration for the mark TIGER WOODS for use in connection with photos, calendars, etc. Although the words did not appear in the painting itself, Woods claimed that the defendant infringed the TIGER WOODS mark by using those words in marketing materials to sell the prints.

At the outset, the court determined that the prints were not commercial speech because they did not propose a commercial transaction. The court then found that under the fair use doctrine, the uses of Woods’ name on the back of the envelope containing the print and in the narrative description of the print were purely descriptive and there was nothing to indicate the name was used in bad faith.

ETW also claimed that the artist violated section 43(a) of the Lanham Act, arguing unauthorized use of Woods’ likeness. The court held that, “as a general rule, a person’s image or likeness cannot function as a trademark.” Finally, with respect to Woods’ claims of false endorsement and invasion of right to privacy, the court concluded that the artist’s First Amendment freedom of expression outweighed Woods’ interests. It stated that “[a] piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events. It would be ironic indeed if the presence of the image of the victorious athlete would deny the work First Amendment protection.”

The unauthorized use of a photograph was defended as art and not a commercial enterprise in *Nussenzweig v. DiCorcia*. Defendant, a professional photographer, created a series of photographs taken on the streets of New York City, which he entitled “Heads.” To create the images, defendant took candid, unstaged photographs of people in

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126. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003).
127. *Id.* at 922.
128. *Id.* at 936; *but see* Facenda v. NFL Films, 542 F.3d 1007 (3d Cir. 2008) (finding cable-television production *The Making of Madden NFL 06* was commercial speech rather than artistic expression, because program promoted only the football video game and had no documentary purpose).
Times Square. Defendant did not seek or obtain consents to photograph any of the people whose likenesses he included in the collection. One of the photographs was of the plaintiff, an Orthodox Hasidic Jew who held a deep religious conviction that the use of his image for commercial and public purposes violates his religion.

The court dismissed plaintiff’s claim, finding that defendants had made a prima facie case that the photograph was “art,” which is exempt from the reach of New York’s privacy laws because it is constitutionally protected speech. The court explained that this was not a subjective determination, and could not be based on the personal preferences of either party or the court. Instead, the court relied on defendant’s demonstration of his reputation as a photographic artist in the international artistic community and his description of the creative process he used to shoot, edit, and select the photographs used in the “Heads” project. The court added that the photographs were not simply held for sale in the gallery, but were also exhibited and reviewed by the relevant artistic community. Finally, the court noted that none of the photographs were used to advertise anything other than the “Heads” collection.

In *Bosley v. Wildwett.com*, a television news anchor moved for a preliminary injunction against various defendants who licensed and distributed still images and film clips of plaintiff in various states of undress while participating in a “wet t-shirt” contest. Plaintiff claimed that defendants used depictions of her, billed as “the naked anchor woman,” to market their sexually explicit wares and that the depictions were created and distributed without plaintiff’s consent. Plaintiff further asserted that the dissemination of this material caused her employer to ask for her resignation and has made it difficult for her to attain further employment in broadcast journalism. The district court issued a temporary restraining order (TRO), prohibiting defendants from selling the video of the plaintiff’s performance or otherwise using depictions of her on their websites or advertisements. The TRO was later amended to clarify that such prohibition extended only to the use of these images for the purposes of promoting their goods. Specifically, defendants were not prevented from “mentioning Plaintiff . . . or engaging in a public discourse about the incident.” Following a stay on the TRO issued by the Sixth Circuit, the district court granted plaintiff’s motion for a preliminary injunction.

Plaintiff asserted a violation of her common law right to privacy, as well as her statutory right to publicity, that is, “an intellectual property right of recent origin which is the inherent right of every human being

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128.3. *Id.* at 918.
to control the commercial use of his or her identity.\textsuperscript{128.4} Defendants responded that the use of these images was not for a commercial purpose because the images and film clips were not used to promote a product other than the product in which they appeared. The court disposed of this argument, concluding the speech was commercial speech because the use of the images was designed to “directly promote the sale of videos and [website] memberships.”\textsuperscript{128.5}

The court further held that defendants’ speech was misleading, and therefore failed the first prong of the Central Hudson test. The court reasoned that “the informational function of advertising is impaired when one wrongfully appropriates another’s image for commercial purposes. The underlying deception is the myth that an individual actually endorses or supports a product when, in fact, she does not.”\textsuperscript{128.6} Defendants argued in the alternative that the use of the images should fall under the public affairs or newsworthiness exception to the right of publicity. The court rejected this argument, holding that, “when there is a ‘mixed message’ of ‘advertising’ combined with ‘news’ and/or commentary on public issues, the entire message is labeled ‘commercial speech.’”\textsuperscript{128.7} Similarly, the court held the images did not contain a sufficient creative or editorial component to permit a finding that they were protected as expressive material; “[i]t appears that Defendants are using the images of Plaintiff Bosley solely for the purpose of commercially exploiting her fame.”\textsuperscript{128.8} Finally, the court discarded defendant’s argument that the injunction would amount to a prior restraint, concluding that the doctrine of prior restraint is inapplicable to commercial speech.

In Rezec v. Sony Pictures Entertainment, Inc.,\textsuperscript{128.9} film viewers brought an action against a motion picture studio seeking injunctive relief, restitution, and disgorgement after defendant studio advertised the studio’s film by portraying a person as a film critic and attributing to him laudatory reviews. The district court denied defendants’ special motion to strike, holding that the advertisements in question were commercial speech and therefore did not fall under the ambit of the anti-SLAPP statute. The California Court of Appeal affirmed.

\begin{itemize}
\item \textsuperscript{128.4} \textit{Id.} at 920 [quoting ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 928 [6th Cir. 2003] [citations omitted]].
\item \textsuperscript{128.5} \textit{Id.} at 922.
\item \textsuperscript{128.6} \textit{Id.} at 926.
\item \textsuperscript{128.7} \textit{Id.} at 924 [quoting J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY: NEWS OR COMMENT ON PUBLIC ISSUES IN AN ADVERTISING CONTEXT § 7.4 (2d ed. 2000)].
\item \textsuperscript{128.8} \textit{Id.} at 928.
\item \textsuperscript{128.9} Rezec v. Sony Pictures Entm’t, Inc., 10 Cal. Rptr. 3d 333 (Ct. App. 2004).
\end{itemize}
To determine whether this speech was subject to laws designed to prevent false advertising, the court applied the three-part test from *Kasky v. Nike, Inc.*\(^{128.10}\) Upon consideration of “the speaker, the intended audience, and the content of the message,” the court concluded that the speech in question was commercial speech.\(^{128.11}\) First, the court found that defendant Sony is a commercial speaker because “Sony is engaged in the business of marketing films.”\(^{128.12}\) Second, the intended audience consists of “potential moviegoers.”\(^{128.13}\) Third, the content of the speech is commercial because “Sony represented to the public that someone named David Manning had commented favorably on its films.”\(^{128.14}\) The court therefore concluded that “Sony’s ads . . . proposed a commercial transaction, nothing more.”\(^{128.15}\)

The studio argued that “[t]he critical question is whether the promotional material relates to a speech product that is itself protected.”\(^{128.16}\) They posited that, because movies are a form of expression that is afforded First Amendment protection despite the fact that they are made for profit, so too should advertisements for such expression be protected. The court rejected this argument, explaining that “[u]nder Sony’s absolutist approach, every film advertisement, no matter how false, would be outside the scope of consumer protection laws.”\(^{128.17}\) The court differentiated advertisements that are “merely . . . adjunct[s] to the exhibition of the film[s],” such as the use of a portion of the film itself or a still image of the film’s contents, and advertisements that do not “reflect any character or portion of the films,” such as the fictional critic’s comments at issue in this case.\(^{128.18}\) Those advertisements that fall in the latter category are commercial speech and must therefore be truthful and nonmisleading in order to enjoy First Amendment protection. The court also noted the practical implications of defendant studio’s position; specifically that a ruling in its favor would allow film studios to advertise that a film had won certain awards when it had not.

The dissent distinguished between statements that may be verified as false or misleading and those statements that are mere opinion or “rhetorical hyperbole,” such as those at issue in this case.\(^{128.19}\) The

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128.11. *Id.* at 256.
128.13. *Id.*
128.14. *Id.*
128.15. *Id.*
128.16. *Id.* at 338 (citation omitted).
128.17. *Id.* at 339.
128.18. *See id.*
dissent also noted that the critic named in the advertisements was not so well-known that the use of his name, which may have been entirely fictional, amounted to a material deception of the reasonable consumer. The dissenting judge focused on the content of the speech, stating that “there is no danger that granting the special motion to strike would permit false advertisements containing verifiably false statements of fact.”

In Kronemeyer v. Internet Movie Data Base, Inc., plaintiff appealed a trial court order granting a special motion to strike his complaint for declaratory relief pursuant to the anti-SLAPP statute. The California Court of Appeal affirmed. Defendant was an Internet website providing a database of information concerning films, television, actors, and other industry professionals. Plaintiff claimed he was an executive producer of two movies and a television program, but that defendant’s website did not attribute credit to him for these productions. He also claimed that he followed the procedure established by the defendant to correct credit mistakes on the site, but received no response to his queries. Plaintiff asked the court to require the defendant to identify him as an executive producer on its website.

Plaintiff argued, among other things, that any speech by defendant was not in connection with a public issue or an issue of public interest as required by section 425.16. In support of this argument, plaintiff contended that defendant’s website constitutes unprotected commercial speech because defendant earns money from the website. The court rejected plaintiff’s reliance on Kasky v. Nike, Inc., which did not involve a special motion to strike under section 425.16, and Nagel v. Twin Laboratories, Inc., which it found was factually distinguishable. In Twin Laboratories, the court found no protection under section 425.16 for a list of ingredients found on the defendant’s product labels and on a website. The court placed heavy reliance on the fact that the speech at issue did nothing more than list the product’s ingredients.

Here, the court found the listing of credits on the defendant’s website was information rather than directed at sales. According to the evidence, the website provided a message board and a chat room for members as well as listing credits for over 400,000 movies and television shows. The site was visited by more than thirty-five million people each month. The court therefore concluded that the credit listings on the website were not commercial speech and were protected by section 425.16. The court reasoned that “[i]f appellant’s position

128.20. Id. at 148.
that the prospect of some financial benefit from a publication places the material in the area of ‘commercial speech,’ it would include virtually all books, magazines, newspapers and news broadcasts. There is no authority for such a sweeping definition.”

§ 2:5 The Expansive Treatment of Professional Marketing

The Supreme Court and lower courts have generally applied a somewhat more elastic version of the “commercial proposition” definition in considering government regulation of the client communications of lawyers, doctors, and other professionals. In Bates v. State Bar of Arizona, its first application of commercial speech protection to lawyer advertising and solicitation, the Supreme Court held that newspaper advertising of the price of routine legal services was commercial speech. The advertising was clearly within the definition of “speech that did no more than propose a commercial transaction.” Similarly, the Court had no trouble the next year in holding that aggressive in-person solicitation by a lawyer who pursued a young accident victim to her hospital room was commercial speech that could be categorically banned. In contrast, that same year the Court characterized a letter from an ACLU lawyer to addressees who had attended a meeting to discuss rights of victims of unwanted sterilization operations, offering pro bono lawsuits against doctors who performed the operation, as fully protected speech.

While the results in Bates, Ohralik, and Primus reflected a relatively straightforward application of the “commercial proposition” definition, in successive professional solicitation decisions the Court has applied a more relaxed definition, tending to define virtually all communications between lawyers and potential clients as commercial speech. For example, in In re R.M.J., the Court held unanimously that listing specialty areas of practice on attorney announcements to nonclients, and specifying the jurisdictions in which an attorney was licensed to practice, were all truthful commercial speech, restriction of which was impermissible under the Central Hudson test. In Peel, the Court held that a designation on an attorney’s letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy was commercial speech, but that it could not be banned solely on the grounds that it was “potentially misleading.” There was

no meaningful discussion by the Court of why truthful notation of such a qualification was, per se, commercial speech; that status was simply assumed by the Court. The Court took the same approach in a listing of the professional qualifications of a Florida investment advisor, who was also a certified public accountant.¹³⁴

Given the Supreme Court’s tendency to characterize virtually all lawyer marketing communications and their components as commercial speech,¹³⁵ it is not surprising that the lower courts have similarly held that speech is commercial speech even though it plainly does “more than propose a commercial transaction.” For example:

- State prohibition of the use of the professional designation “psychologist” and similar terms was permissible regulation of commercial speech related solely to the economic interests of the speaker.¹³⁶
- Lawyer newsletters on general legal subjects were held to be distributed “for the purpose of obtaining professional employment,” and were commercial speech.¹³⁷
- Nonlicensed accountants may advertise their availability as accountants, but not describe their services with the words “professional,” “independent,” “experienced,” or “quality,”¹³⁸ even when not specifically proposing a commercial transaction.
- Employment advertisements indicating a preference based upon gender identity or sexual orientation were commercial speech.¹³⁹

On the other hand, at least one court has steered away from finding that licensing requirements for professional tour guides restricted commercial speech. In Edwards v. District of Columbia,¹⁴⁰ owners and operators of a company that ran Segway tours of the District

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¹³⁷. Texans Against Censorship, Inc. v. State Bar of Tex., 888 F. Supp. 1328, 1344 (E.D. Tex. 1995) (“Economic motivation is not totally irrelevant to the determination of whether speech is commercial or noncommercial . . . manifestly, one reason lawyers propose commercial transactions in their advertisements is to make money.”), aff’d without opinion, 100 F.3d 953 (5th Cir. 1996); see also Stern v. Bluestone, 850 N.Y.S.2d 90 (App. Div. 1st Dep’t 2008), rev’d and remitted, 12 N.Y.3d 873 (2009).
¹³⁸. Volin v. Bd. of Pub. Accountancy, 422 Mass. 175, 661 N.E.2d 639 (1996) [prohibited material was commercial speech because it “relate[d] solely to plaintiffs’ economic interests”].
unsuccessfully sought to enjoin enforcement of a municipal regulation requiring tour companies to pay registration fees, pass examinations, and obtain licenses. The court concluded that the regulation did not implicate commercial speech because the speech was not incidental to a commercial transaction—the speech at issue, the tours, was the transaction itself.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the EEOC filed suit on behalf of a Muslim teenager against Abercrombie & Fitch for allegedly engaging in religious discrimination in its hiring practices when the young woman sought work as a “Part-Time Impact Associate” (PTI). Abercrombie, which exemplifies an East Coast collegiate style described as “casual” and “preppy,” maintains a “Look Policy” that states guidelines for employees regarding the clothes they are expected to wear at work. However, since 2006, Abercrombie had made at least seventy exceptions to its Look Policy. In addition, since 2010, Abercrombie had provided religious accommodations for hijabs on a case-by-case basis.

Abercrombie’s interview protocol consists of an interview guide, whereby Abercrombie trains its managers not to ask questions beyond what is included in the guide. An interview score of six or higher is considered to meet expectations and result in a recommendation for hire. However, a store does not need to hire every applicant who receives such a score.

During the woman’s interview, she was asked about her attire. In addition to a hijab, she also wore clothes that were inconsistent with Abercrombie’s Look Policy. Despite her appearance, she still received a score of seven for her interview. According to Abercrombie, it did not hire her because she was unavailable Monday through Thursday and it was the retail “low season.”

The EEOC brought a claim alleging disparate treatment and failure to accommodate under Title VII. Abercrombie argued that enforcement of Title VII in this case would be unconstitutional because it would violate Abercrombie’s First Amendment right to commercial speech. The court held that Abercrombie’s argument failed because Abercrombie’s control of the appearance of its PTIs was not commercial speech. Because PTIs mainly “process shipment and fill the sales floor,” they are not like models; their job responsibilities do not include serving as living advertisements for the Abercrombie brand. Since Abercrombie was unable to show that the PTIs' appearances were advertisements, the first prong of the *Bolger* test was not satisfied.

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In *Stutzman v. Armstrong*, plaintiffs brought an action under several California statutes against Lance Armstrong and others for alleged misrepresentations contained in his book. In part, defendants raised the First Amendment as a defense to plaintiffs’ claims.

The court divided the speech at issue into three categories: (1) statements contained within the book, (2) statements relating to the book, including promotional statements, and (3) statements made by the authors relating to Armstrong’s use of performance enhancing drugs, but which did not specifically refer to the book or promote the book.

The court found that the first and third categories of statements were not commercial speech, and were afforded full First Amendment protection. The court found that the second category of speech does more than propose a commercial transaction, so it considered the statements under the three *Bolger* factors. Ultimately, the court found that “the commercial aspects of the book, and the promotional statements made about the book, are inextricably bound to the non-commercial contents of the books [*sic*].” Therefore, these promotional materials were also afforded full First Amendment protection as noncommercial speech.

Outside of the advertising context, professional speech may nevertheless be considered commercial speech. For example, in *King v. Governor of New Jersey*, licensed counselors challenged a statute which prohibited them from engaging in sexual orientation change efforts (SOCE) with minors. Plaintiffs alleged, inter alia, that the statute violated their professional free speech rights. The district court rejected this First Amendment challenge, because it concluded that the SOCE statute regulated conduct, not speech or expressive conduct.

On appeal, the Third Circuit held that the SOCE statute survived this First Amendment challenge, but disagreed with the district court’s reasoning. The court held that the SOCE communications are speech for First Amendment purposes, but are afforded lesser protection. The court focused on the proper level of protection that should be afforded to speech occurring as part of the practice of a licensed profession and compared professional speech to commercial speech. After surveying the Supreme Court’s commercial speech jurisprudence, the court likened professional speech to commercial speech in that it (1) serves an informational function otherwise not obtained by the general public; and (2) occurs in an area traditionally subject to government regulation.


The court then applied *Central Hudson* to the SOCE statute. The court concluded that New Jersey had met its burden because the SOCE statute directly advanced New Jersey’s interests of protecting its most vulnerable citizens from practices that the legislative record demonstrated were questionable. Further, the court concluded that plaintiffs did not show that New Jersey could have advanced its interests in a less restrictive manner. Accordingly, the court held that the SOCE statute did not violate plaintiffs’ professional speech rights.