

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. . . .”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.”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.”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.”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.”¹⁰⁸ According to Justice Brown, the majority’s test “contravenes long-standing principles of First Amendment law” in three ways.¹⁰⁹ First, despite the fact that commercial speech is to be distinguished by its content,

104. *Id.* at 960.

105. *Id.*

106. *Id.*

107. *Id.* at 961.

108. *Id.* at 984.

109. *Id.* at 981.

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."¹¹⁰ Third, the test stifles "the ability of speakers engaged in commerce, such as corporations, to participate in public debates over public issues."¹¹¹ 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."¹¹² 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. . . ."¹¹³ 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."¹¹⁴

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."¹¹⁵ 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.'"¹¹⁶ The dissenting justices concluded that Nike's speech deserved the full protection of the First Amendment.

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.¹¹⁷ But in a later 5-4 per curiam order, the Court dismissed the writ of certiorari as improvidently granted.¹¹⁸ 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*,^{118.1} 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

117. *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003).

118. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

118.1. *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322 (2004).

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."^{118.2} 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; "[r]ather, 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."^{118.3} 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.*,^{118.4} the court stated that "[e]ven 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."^{118.5} 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*,^{118.6} plaintiff sued the attorneys that represented his company in bankruptcy proceedings, alleging defamation, which he

118.2. *Id.* at 333 (citation omitted).

118.3. *Id.* at 344.

118.4. *Kasky*, 27 Cal. 4th 939.

118.5. *Bernardo*, 115 Cal. App. 4th at 346.

118.6. *Lockton v. Small*, No. H025958, 2005 WL 357890 (Cal. Ct. App. Feb. 15, 2005), *reh'g denied* (Mar. 8, 2005), *review denied* (June 8, 2005). *See also* *SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287 (D. Utah 2010) and *L-7 Designs, Inc. v. Old Navy, LLC*, No. 09-CV-1432(DC), 2010 WL 157494 (S.D.N.Y. Jan. 19, 2010), *aff'd in part, vacated in part*, 647 F.3d 419 (2d Cir. 2011) (press releases discussing defendant's view of the merits).

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.*,^{118.7} 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.¹¹⁹ For example:

of its case were not commercial speech because they did not propose a commercial transaction, did not seek to market plaintiff's products, and, although made out of an economic interest, that interest alone did not convert the press releases into commercial speech).

118.7. *Lubin v. Agora, Inc.*, 882 A.2d 833 (Md. Ct. Spec. App. 2005).

119. 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

- 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.¹²⁰
- A publisher's promotion of a book on conspiracy theories about President Kennedy's assassination was fully protected speech.¹²¹
- Advertising campaign for movie *Boyz N the Hood* went "beyond proposal of a commercial transaction and encompass[ed] 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").

120. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995). See also *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979); *Page v. Something Weird Video*, 960 F. Supp. 1438 (C.D. Cal. 1996); *Cher v. Forum Int'l, Ltd.*, 962 F.2d (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983); *Brown v. Twentieth Century Fox Film Corp.*, 799 F. Supp. 166 (D.D.C. 1992); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (birthday card with Paris Hilton's likeness and catch-phrase was not commercial speech because it was not advertising a product; rather, birthday card was the product); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010) ("gatefold" editorial feature on rock bands was noncommercial speech as a matter of law, and protected from misappropriation liability by First Amendment, notwithstanding foldout cigarette advertisements framing feature); *Groden v. Random House, Inc.*, 61 F.3d 1045, 23 Media L. Rep. (BNA) 1547 (2d Cir. 1995). The result in *Groden* was reached under the New York privacy statute, N.Y. CIV. RIGHTS LAW § 1951; for other New York cases to the same effect, see *Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995); *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694 (Sup. Ct. N.Y. Cnty. 1995); *Booth v. Curtis Publ'g Co.*, 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962); *Namath v. Sports Illustrated*, 363 N.Y.S.2d 276 (Sup. Ct. N.Y. Cnty. 1975); *Cohn v. Nat'l Broad. Co.*, 414 N.Y.S.2d 906 (App. Div. 1st Dep't 1979), aff'd, 50 N.Y.2d 885, cert. denied, 49 U.S. 1022 (1980); and *Freidan v. Freidan*, 414 F. Supp. 77 (S.D.N.Y. 1976). The U.S. Supreme Court indirectly endorsed the same concept in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983), discussed in section 4:4.
121. *Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995).

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

- Television miniseries about actress Elizabeth Taylor was fully protected.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.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.^{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.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.”^{125.1}
- Satirical blog post was not commercial speech, despite plaintiff’s claim that the post attacked the plaintiff’s commercial interests.^{125.2}

122. Lewis v. Columbia Pictures Indus. Inc., 23 Media L. Rep. (BNA) 1052 (Cal. Ct. App. 1994) (unpublished).

123. Taylor v. Nat’l Broad. Co., 22 Media L. Rep. (BNA) 2433 (Cal. Super. Ct. 1994).

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).

124.1. Winter v. DC Comics, 134 Cal. Rptr. 2d 634 (Cal. 2003), *on remand*, 2003 WL 22765174 (Cal. Ct. App. Nov. 24, 2003).

125. Pickrell v. Verio Pac., Inc., No. B144327, 2002 WL 220650 (Cal. Ct. App. Feb. 11, 2002).

125.1. Nichols v. Moore, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004).

125.2. Farah v. Esquire Magazine, 736 F.3d 528 (D.C. Cir. 2013).

In *ETW Corp. v. Jireh Publishing, Inc.*,¹²⁶ 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."¹²⁷ 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."¹²⁸

The unauthorized use of a photograph was defended as art and not a commercial enterprise in *Nussenzweig v. DiCorcia*.^{128.1} 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

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).

128.1. *Nussenzweig v. DiCorcia*, 814 N.Y.S.2d 891 (Sup. Ct. N.Y. Cnty. 2006).

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*,^{128.2} 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."^{128.3} 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

128.2. *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004).

128.3. *Id.* at 918.

to control the commercial use of his or her identity.”^{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.”^{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.”^{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.’”^{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.”^{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.*,^{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.

128.4. *Id.* at 920 (quoting *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (citations omitted)).

128.5. *Id.* at 922.

128.6. *Id.* at 926.

128.7. *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)).

128.8. *Id.* at 928.

128.9. *Rezec v. Sony Pictures Entm’t, Inc.*, 10 Cal. Rptr. 3d 333 (Ct. App. 2004).

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

128.10. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

128.11. *Id.* at 256.

128.12. *Rezec*, 10 Cal. Rptr. 3d at 338.

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.*

128.19. *Id.* at 146 (quoting *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th 1220, 1231 (1999)).

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.”^{128.20}

In *Kronemeyer v. Internet Movie Data Base, Inc.*,^{128.21} 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.*,^{128.22} which did not involve a special motion to strike under section 425.16, and *Nagel v. Twin Laboratories, Inc.*,^{128.23} 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.

128.21. *Kronemeyer v. Internet Movie Data Base, Inc.*, 2007 Cal. App. Unpub. LEXIS 2997 (Ct. App. Apr. 13, 2007).

128.22. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

128.23. *Nagel v. Twin Labs., Inc.*, 134 Cal. Rptr. 2d 420 (Ct. App. 2003).

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."^{128,24}

§ 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*,¹²⁹ 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.¹³⁰ 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.¹³¹

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.*,¹³² 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*,¹³³ 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

128.24. *Kronmeyer*, 2007 Cal. App. Unpub. LEXIS 2997, at *13-14.

129. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), discussed in section 3:8.

130. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), discussed in section 3:9.

131. *In re Primus*, 436 U.S. 412 (1978), discussed in section 3:9.

132. *In re R.M.J.*, 455 U.S. 191 (1982), discussed in section 4:3.

133. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990), discussed in section 5:6.

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

134. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994), discussed in section 5:10.

135. Perhaps, without analysis, echoing the Court's own economic "motivation" comment in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980), quoted in section 2:2.

136. *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992).

137. *Texans Against Censorship, Inc. v. State Bar of Tex.*, 888 F. Supp. 1328, 1344 (E.D. Tex. 1995) ([E]conomic 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").

139. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001).

140. *Edwards v. Dist. of Columbia*, 765 F. Supp. 2d 3 (D.D.C. 2011).

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.*,¹⁴¹ 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.

141. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).

In *Stutzman v. Armstrong*,¹⁴² 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*,¹⁴³ 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.

142. *Stutzman v. Armstrong*, No. 2:13-CV-00116-MCE-KJN, 2013 WL 4853333 (E.D. Cal. Sept. 10, 2013).

143. *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014).

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.