Advertising and Commercial Speech

A First Amendment Guide

Second Edition

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Incorporating Release #11
May 2015
#132113

Practising Law Institute
New York City

#4906
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}

\section*{§ 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 \textsuperscript{33} Kozinski & Banner, \textit{supra} note 28, at 652.
\item \textsuperscript{35} Valentine v. Chrestensen, 316 U.S. 52 (1942), described in section 1:3.1.
\item \textsuperscript{36} Pittsburgh Press Co. v. Pittsburgh Commun’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 \textit{more} than “propose a commercial transaction.”\textsuperscript{38}

The first step was in \textit{Bigelow},\textsuperscript{39} 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{40} 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{41}

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{42} 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{43}

Four years later in \textit{Central Hudson},\textsuperscript{44} 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{45} This observation, which is too over-inclusive to be helpful in distinguishing commercial from noncommercial speech, has cropped up in cases

\begin{itemize}
\item \textsuperscript{37} 413 U.S. at 385.
\item \textsuperscript{38} Bigelow v. Virginia, 421 U.S. 809 (1975), discussed in section 3:4.
\item \textsuperscript{39} \textit{Id.} at 826.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 761.
\item \textsuperscript{44} \textit{Id.} at 561.
\end{itemize}
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 benefits of eating eggs.
of the Supreme Court's refusal to recognize similar linkage to public
debate in Valentine v. Chrestensen.\footnote{See discussion of the redrafted
submarine handbill at issue in Valentine in section 1:3.1.}

Justice Stevens' concurrence in Bolger again expressed his discom-
fort 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 non-
commercial 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 dis-
cussion of the symptoms, significant risks and possibility of treat-
ment 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 commu-
nications. . . . Any legitimate interests [this statutory ban on
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 Arizona52 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).
51. 570 F.2d at 163.
53. Id. at 383.
persuading members of the reading public to buy the product.\textsuperscript{54} 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.\textsuperscript{55} 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,\textsuperscript{56} 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.\textsuperscript{57}

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.,\textsuperscript{58} in which the Court struck down a federal statute\textsuperscript{59} prohibiting specification of alcohol content on beer labels as an impermissible proscription of commercial speech. The Court’s opinion assumed

\textsuperscript{54} Egg Nutrition, 570 F.2d at 163.
\textsuperscript{56} Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989), discussed in section 5:4.
\textsuperscript{57} Id. at 474.
\textsuperscript{59} 27 U.S.C. § 205(e)(ii).
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.60

§ 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.61
- 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.62
- 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.63

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." \(^{64}\)

• 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. \(^{65}\)

• 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. \(^{66}\)

• 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. \(^{67}\)

• 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. \(^{68}\)

• 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. \(^{69}\)

• 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. \(^{70}\)

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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].


66. 15 U.S.C. § 1125(a). Semco, Inc. v. Amcast, Inc., 52 F.3d 108 [6th Cir. 1995]. See also Fuente Cigar, Ltd. v. Opus One, 985 F. Supp. 1448 [M.D. Fla. 1997] [similar analysis in Lanham Act § 43(a) case holding that comments made by representative of cigar company in an independent cigar magazine article were “commercial advertising or promotion”].

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{73}

• Off-premises adult entertainment canvassing was held to be commercial speech inextricably intertwined with noncommercial speech and protected by strict scrutiny.\textsuperscript{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.\textsuperscript{75}

• \textit{Los Angeles} magazine’s use in an article of an altered photograph of Dustin Hoffman from the movie \textit{Tootsie} was noncommercial speech.\textsuperscript{76}

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

\textsuperscript{71} Avery Dennison Corp. v. ACCO Brands, Inc., 2000-1 Trade Cas. (CCH) \$ 72,882, 2000 U.S. Dist. LEXIS 3938 (C.D. Cal. Feb. 22, 2000).
\textsuperscript{72} Multivideo Labs., Inc. v. Intel Corp., 2000-1 Trade Cases (CCH) \$ 72,777, 2000 WL 12122 (S.D.N.Y. Jan. 7, 2000).
\textsuperscript{73} CPC Int’l, Inc. v. Skippy, Inc., 214 F.3d 456 (4th Cir. 2000).
\textsuperscript{74} S.O.C., Inc. v. Cnty. of Clark, 152 F.3d 1136 (9th Cir. 1998).
\textsuperscript{75} Children of Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998).
\textsuperscript{76} Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).
\textsuperscript{77} Gianfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 (Ct. App. 2001); see also C.B.C. Distrib. & Mkrg., 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.

• 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.

• 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.”

• 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.

• 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.

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].
§ 2.3  ADVERTISING AND COMMERCIAL SPEECH

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

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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].
81. Commodity Futures Trading Comm’n v. Vartuli, 228 F.3d 94 (2d Cir. 2000).
• 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.\(^{83}\)

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

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

• 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.\(^ {85.1}\)

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\(^{84}\) 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]. 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]; but see Dun & Bradstreet, Inc. v. Greenmoor 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].

\(^{85}\) 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]; see also Quinstreet, Inc. v. Ferguson, No. C08-5525RJB, 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].

\(^{85.1}\) 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.  

• 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.  

• 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.  

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

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

• 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.  

• 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. 89.3

- Pseudonymous letters that a disappointed bidder sent to government contracting officers questioning the conduct of the successful bidder constituted political—not commercial—speech. 89.4

- Search engine results constituted noncommercial speech subject to the search engine’s editorial discretion, including discretion to exclude certain results. 89.5

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. 90


89.4. Kuwait & Gulf Link Transp. Co. v. Doc, 92 A.3d 41, 50, 2014 PA Super 96 (2014) (“[The] |]letters 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

98. Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).
• Brochures, catalogues, and sale 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.99

• 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.100

• 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.101

• Federal requirement that stock promoters disclose the consideration that they have received for such promotion is a regulation of commercial speech.102


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. Standing, 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]; Fragovich 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


102.3. Neuralstem, Inc. v. StemCells, Inc., 2009 WL 2412126 (D. Md. Aug. 4, 2009) (finding, however, that the statements were misleading, because they incorrectly or incompletely presented facts about certain litigation, and therefore were not entitled to First Amendment protection); see also Yeager v. AT&T Mobility, LLC, No. Civ. S-07-2517, 2011 WL 3847178 (E.D. Cal. Aug. 30, 2011) (denying motion for reconsideration, holding press release discussing emergency preparedness of cellular telephone provider was commercial speech under "Bolger").


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.\footnote{102.6}

- Trade name of film company "I Choose Hell Productions LLC" could be commercial speech depending on how used.\footnote{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.\footnote{102.8}

In 2002, the California Supreme Court issued an important decision concerning the definition of commercial speech. In \textit{Kasky v. Nike, Inc.},\footnote{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.


\footnote{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"].

\footnote{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."].