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What's the legal definition of PR?: An analysis of commercial speech and public relations

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ABSTRACT

This paper addresses how the law defines public relations under the First Amendment. The United States Supreme Court's denial of certiorari and California Supreme Court's decision in *Nike v. Kasky* (2002, 2003) categorized PR as commercial speech, which is subject to the same regulations as advertising. In the twelve years since those decisions were issued, federal and state appellate courts have re-interpreted *Nike v. Kasky* (2002, 2003) in a variety of ways. This study found that since 2003 courts have consistently held that PR is not always commercial speech. From this analysis a legal definition of public relations is presented, and implications for PR practitioners are discussed.

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1. Introduction

Crafting a definition of public relations is never easy. Scholars debate what specific characteristics of PR make it a unique form of communication and profession. However, the debate over PR's definition is not merely academic, it has important implications in the law. This legal definition has practical significance because it affects how much First Amendment protection PR receives. The legal debate about PR's definition revolves around its status as commercial speech. If public relations is commercial speech, then PR content can be heavily regulated by federal, state, and local governments. However, if PR is not commercial speech then public relations content cannot be restricted or regulated absent a compelling state interest that is narrowly tailored to achieve that interest. Speculation about PR and commercial speech stems from the 2002 California case *Nike v. Kasky*, which is the most significant appellate case that addresses the First Amendment protection given to public relations speech. In 2002 the California Supreme Court held that PR was commercial speech. However, in 2003 the United States Supreme Court issued a denial of certiorari, a court order declining to hear an appeal, of the California Supreme Court's decision in Nike v. Kasky (2002). Later Nike and Kasky settled out of court, ending the judicial wrangling over PR's legal definition.

This anticlimactic end to the debate over PR's commercial speech status has intrigued scholars since 2003 (Ki, 2004; Myers & Lariscy, 2013; Terilli, 2005). Because the United States Supreme Court declined to hear the appeal in Nike v. Kasky (2003) there is no universal approach to categorizing PR under the First Amendment. Despite the United States Supreme Court's decision denying certiorari, their certiorari decision has been discussed 22 times in federal appellate decisions, state appellate decisions, and administrative rulings since 2003. The United States Supreme Court's denial of certiorari has also been cited 326 times in court filings, such as briefs, motions, and petitions. Because the United States Supreme Court never

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overturned the Supreme Court of California's holding, the California Supreme Court's decision is also still binding precedent. Since 2002, the California Supreme Court's decision in *Nike v. Kasky* has been cited in 413 federal and state court cases and administrative rulings. The legal database Westlaw identifies 47 of these cases as containing significant analysis, more than a mere citation, of the California Supreme Court's decision. Perhaps more impressively, the California Supreme Court's decision in Nike v. Kasky (2002) has been cited 2049 times in court filings, including jury instructions, since 2002. These numbers are significant because they show that public relations' First Amendment status is still an ongoing issue in many courts in the United States.

The Nike v. Kasky (2002, 2003) case presents a unique situation in legal analysis. The 2002 California Supreme Court decision is binding authority in all California courts. The United States Supreme Court denial of certiorari is not precedent in any jurisdiction, but continues to be cited in federal and state court decisions. The fact that the California and United States Supreme Court's decisions are being cited indicates that courts are using both decisions to weave together new approaches to determine when and if public relations constitutes commercial speech. This is important for PR practitioners. How courts interpret PR under the First Amendment directly affects whether public relations content is subject to various content regulations. PR's First Amendment status directly affects whether practitioners can be sued for deceptive content, if social media content regulations apply to PR campaigns, and if the government can require PR to submit to the same restrictive guidelines on content as advertising.

This paper examines how courts interpreted and applied the commercial speech doctrine in Nike v. Kasky (2002, 2003) decisions from 2003 to 2015. This answers a broader legal and theoretical issue of what is the legal definition of public relations. Examining courts' application of the precedent of Nike v. Kasky (2002, 2003) details what the U.S. legal system defines PR as, and what value it gives it under the U.S. Constitution. By placing constitutional protection on PR as a form of speech, the legal system is in a unique position of giving tangible value to the field. This analysis explores what that value is, and how it affects modern public relations practice.

2. Literature review

Courts' interpretation of PR's definition speaks to a larger, more complex issue debated in public relations literature. For the past century, there has been a discussion and debate over what public relations is, and what role it plays in modern U.S. society. In their survey of literature on public relations historical development, Lamme and Russell (2010) found that American PR "has been understood as both a function and a profession" (p. 285). It is the cross section of doing public relations and being professionally identified as a PR practitioner that creates such a nuanced definition of the field. The practice of public relations is frequently identified by strategy or form of communication. The profession of public relations is identified by more institutional norms, professional associations, common values, ethics, and function within an organization. It is this interaction between the practice and profession informs may of the definitions of public relations.

The issue of identifying what public relations is not new. From the early 1900s practitioners such as Ivy Lee and Edward Bernays attempted to craft a definition of the field that embraced certain values and priorities of practice (Bernays, 1923, 1928; Russell & Bishop, 2009). Lee's "declaration of principles" contained many public relations functions couched in ethical values. He advocated that public relations provided information, but not pure promotional publicity for clients. Inherent in this process of news making was selecting what was important for the public to know, and acting responsible vis-à-vis the press (Russell & Bishop, 2009). This coincided with changes to concepts of publicity, which had come to mean something inauthentic and negative (Stoker & Rawlins, 2005).

Bernays (1923, 1928) defined public relations from the viewpoint of sophistication of practice. He distanced himself and his "counsel on public relations" from press agentry and publicity done in the late nineteenth and early twentieth centuries (Bernays, 1965; p. 287). Instead he focused on PR as a practice that used sophisticated techniques, namely psychographics, to communicate with publics to create maximized effect. His approach to public relations practice was to use communication tools to effectuate change in behavior of intended audiences. In addition to his approach to public relations practice, Bernays (1952, 1965) also advocated that public relations take on a professional identity. The "counsel on public relations" was supposed to be a stand-alone profession that served a specific function within organizations (Bernays, 1965; p. 287). His work in that area prompted many later developments in public relations such as practitioner licensing, professional organizations, and executive level status within organizations. In the 1950s Bernays defined public relations as a three part form of communication that informed, persuaded, and "integrate[d] attitudes and actions of an institution with its publics" (Bernays, 1952; p. 3).

Cutlip and Center (1958) provided their own critique of public relations definition in their popular textbook *Effective Public Relations*. Cutlip and Center (1958) challenged the historical characterization of public relations practice that was associated with "publicity, press-agentry, propaganda, and institutional advertising" (p. 5). Rather, they embraced a different definition articulated by Public Relations News that described PR as a "management function which evaluates public attitudes, identifies the policies and procedures of an individual or an organization with the public interest, and executes a program of action to earn public understanding and acceptance" (Cutlip & Center, 1958, p. 5). The management aspect of public relations practice gained considerable popularity in professional and academic definitions (Long & Hazelton, 1987). Harlow (1976) surveyed the definitions of public relations and used the "management function" language in his "working definition" of PR practice (p. 36). However, he found that in the 1970s the view of what public relations was and how it was practiced varied with some practitioners seeing PR's definition as static and others finding that the role of public and organization fundamentally

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changed the field. Bernays (1978) argued that the change of the perception of public relations practice was partially rooted in how the practice was taught as "an adjunct of communication" that ignored the social scientific roots of counsel of public relations (p. 15). For Bernays (1978) "public relations deal[t] with advice on action, based on social responsibility" (p. 15).

The responsibility of public relations became a defining issue in writings on public relations in the late twentieth century. Although Grunig and Hunt (1984) viewed public relations as a form of management, they also looked at PR through the lens of ethics and efficacy. From this they created a typology of public relations practice that led to the creation of the four models of public relations. Although criticized for its historical accuracy, the four models serves as a compartmentalization of PR practices: press agentry, information model, two-way asymmetrical, and two-way symmetrical (Grunig & Hunt, 1984; Lamme & Russell, 2010). This typology of public relations practice is a foundation on which excellence theory of public relations is built. Definitions of public relations practice emerged that embraced the idea of practitioners engaging in two-way communication with practitioners and publics in constant dialog with each other fostering mutual respect. This type of engagement aspect of public relations was also present in the PRSA's definition of PR in 1982: "Public relations helps an organization and its publics adapt mutually to each other" ("About Public Relations," n.d.).

The popularity of two-way communication may have resulted in some criticism of the management function definition. Corbett (2012) argued that "management function" definitions of public relations "evoke ideas of control and top-down, one-way communication" (Corbett, 2012). In recent years the word strategic has become more frequently used in public relations descriptions. The term strategic implies a convergence of communication practices that focuses on "purposeful communication activities" (Hallahan, Holtzhausen, van Ruler, Sriramesh, 2007, p. 27). However, despite the issues of determining meaning of strategic communication its use has become closely associated with public relations practice. In 2011–12 PRSA created a new definition of public relations that embraced the role of relationships, mutual respect, and strategic communication: "public relations is a strategic communication process that builds mutually beneficial relationships between organizations and their publics" (About Public Relations, n.d.). This definition focused more on the process of public relations rather than the professional identity of its practitioners. In fact, definitions of public relations increasingly center on the practice of PR and the multiple roles practitioners play within organizations (Broom & Dozier, 1986; Moss, Newman, & DeSanto, 2005; Vieira & Grantham, 2014).

All of these definitions present a view of how public relations is defined by practitioners, academics, organizations, or publics. Perception of public relations as a practice is of great concern to academics and practitioners alike, so the focus on defining the parameters of the field serves both academic and professional identity. However, research on the legal definition of public relations is underdeveloped. Most legal research done on public relations practice focuses on the larger laws in effect that regulate communication media (e.g. social media), communication content (e.g. defamation, litigation strategies), or organizational regulations that affect PR practice (e.g. mandatory disclosures) (Moore, Maye & Collins, 2011; Myers 2016; Myers, 2014; Reber, Gower & Robertson, 2006; Reber, Cropp, & Cameron, 2001; Watson, 2002).

Less attention is paid to how public relations is viewed by the legal profession. Commercial speech is a well-researched area, but its analysis is largely associated with advertising. Commercial speech's definition of and relationship to public relations is less researched. Moore et al. (2011) recognized that Nike v. Kasky (2002, 2003) represented a major challenge to public relations practice. Although their analysis did not examine the current trends in the precedent set in Nike v. Kasky (2002, 2003), they pointed out that the case had the potential to heavily restrict the freedom of public relations practice. Writing soon after the case was decided Ki (2004) concluded that Nike v. Kasky (2002, 2003) had the potential to severely stifle corporate speech. Nike v. Kasky (2002, 2003) also had larger impact in it presented a case where courts would have to decide what public relations is and what its value is to American society. However, unlike the definitions that have been debated over the past century over what public relations really means, the legal debate over public relations had tangible legal impact. How courts view PR directly impact the level of protection it received under the First Amendment of the U.S. Constitution. This study seeks to fill this gap in the scholarly literature, by examining how courts have used, extended, interpreted, or abandoned the precedent in Nike v. Kasky (2002, 2003) from 2003 until 2015.

3. Research questions and method

Given the importance of Nike v. Kasky (2002, 2003) to the First Amendment protection of public relations, and the complex status of public relations as commercial speech this study seeks to answer the larger question of how does the U.S. law define public relations? Related to that question is a secondary question of how does this definition of public relations comport with academic and professional definitions of PR. Given that Nike v. Kasky (2002, 2003) is the one case that directly addresses this issue and has been key in the legal identity of public relations it is necessary to examine how this case has been interpreted, applied, and limited by other courts. Because of that this study also attempts to answer the following legal questions:

- How did federal and state courts interpret and apply the United States Supreme Court's decision in *Nike v. Kasky* from 2003 to 2015?
- How did federal and state courts interpret and apply the California Supreme Court's decision in *Nike v. Kasky* from 2003 to 2015?

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- How do state and federal courts interpretations of *Nike v. Kasky* (2002, 2003) from 2003 to 2015 affect the legal status of public relations as commercial speech?

To answer these research questions, this study legally analyzed all cases the cited and discussed the California Supreme Court's Nike v. Kasky (2002) decision and the U.S. Supreme Court's order denying certiorari from 2003 until 2015.

The cases analyzed in this study were found using the Keycite function of Westlaw legal database. Westlaw is a legal database that both indexes and organizes all federal, state, and administrative decisions issued in the United States. KeyCite is a digital legal update of all cases, court documents, secondary publications, and encyclopedias that cite a specific case. For this study, both the California Supreme Court and the United States Supreme Court's decisions in Nike v. Kasky (2002, 2003) were entered Keycite function on Westlaw. For the United States Supreme Court's denial of certiorari in Nike v. Kasky (2003), KeyCite listed that 19 court cases, one Federal Trade Commission (FTC) case, and two FTC commissioner reports that cited and discussed the court's decision. KeyCite listed 47 cases that cited and analyzed the California Supreme Court's decision in Nike v. Kasky (2002). In total, 66 federal and state cases, one FTC case, and two FTC commissioner reports were legally analyzed for this study.

This legal analysis examines the legal trends in how courts interpreted, applied, or distinguished Nike v. Kasky (2002, 2003) from 2003 until 2015. Specifically legal analysis of case law looks at patterns in stare decisis, which is the legal doctrine that the decision in a previous legal case must be followed by trial and lower appellate courts. In common law systems like that in the U.S. stare decisis plays an important function for predictability and consistency in legal outcomes. However, in this study the application of stare decisis involves a further complication in that Nike v. Kasky (2002, 2003) is both binding and persuasive authority depending on the jurisdiction. In California the California Supreme Court's decision in 2002 is binding precedent on all California courts. However, outside of California the California Supreme Court's decision is persuasive, which means courts in other state or federal jurisdictions may or may not choose to follow the decision. Compounding this complexity is the status of the U.S. Supreme Court's denial of certiorari of Nike v. Kasky (2003). That decision is not binding on any jurisdiction because the decision is a court order that only applied to the Nike v. Kasky (2003) suit. However, it is apparent that courts are applying and discussing the denial of certiorari to many cases from 2003 until 2015.

Legal analysis is not just looking at what courts agree with previous decisions. It also includes an analysis of how courts follow the precedent. Each case presents new facts that may or may not nearly comport with previous cases. Because of this, court decisions must choose how they are going to address precedent, both persuasive and binding, in their court decisions. This analysis paid particular attention to how courts categorized public relations under the First Amendment with specific attention paid to if PR was subject to commercial speech regulation. The analysis of these cases showed how current courts view PR under the First Amendment. This resulted in the legal definition of public Relations, and four key implications that directly affect current public relations practice.

4. Commercial speech and its application to public relations

To fully appreciate the impact of public relations as commercial speech and the issues underlying the Nike v. Kasky (2000, 2002, 2003) decisions, it is important to understand the history of commercial speech development in the United States. Prior to 1975 the United States Supreme Court held that the government had unfettered discretion in regulating commercial speech, specifically advertising (Valentine v. Chrestensen, 1942). However, in a series of cases in the 1970s the United States Supreme Court gave commercial speech some First Amendment protection, which meant the government could regulate commercial speech in limited circumstances (Bigelow v. Virginia, 1975; Ohralik v. Ohio State Bar Association, 1978; Virginia Pharmacy Board v. Virginia Consumer Council, 1976). This First Amendment protection of commercial speech is weaker than that given to fully protected speech, which can only be regulated by the government when the regulation survives the highest judicial review, known as strict scrutiny (Consolidated Edison Co. v. Public Service Commission, 1980; United States v. Playboy Entertainment Group, 2000).

The rationale justifying a weaker First Amendment protection of commercial speech is rooted in the idea that commercial speakers have the ability to verify their message's accuracy to a greater level compared to political speakers or journalists (Virginia Pharmacy Board v. Virginia Consumer Council, 1976). According to the United States Supreme Court, commercial speakers' wealth means that regulation will not ever lessen commercial speakers' ability to speak (44 Liquormart v. Rhode Island, 1996; Board of Trustees State University of New York v. Fox, 1989). While commercial speech can be regulated, commercial speech regulations must meet certain requirements. The United States Supreme Court devised a four-part test to evaluate the constitutionally of commercial speech regulation. The test states a government can regulate commercial speech: (1) if the speech is protected by the First Amendment, (2) the law advances a substantial government interest, (3) the law directly advances the government's interest, and (4) the regulation is not more extensive than necessary (Central Hudson Gas & Electric Corporation v. Public Service Commission, 1980).

The biggest issue with commercial speech is determining when speech is commercial or merely informational. In 1983 the United States Supreme Court attempted to define the characteristics of commercial speech in Bolger v. Youngs Drug Products Corporation (1983). In that case, a wholesaler of contraceptives mailed unsolicited information regarding contraceptive devices. These mailings were in violation of 39 U.S.C. §3001(e)(2), which prohibited the unsolicited mailing of contraceptive materials. The United States postal service notified the wholesaler of this violation (Postal Service, 1970). In response, Youngs Drug Products gave the wholesaler informational letters about their contraceptive devices to use with the unsolicited

mailings. The idea was that these non-promotional materials would not violate 39 U.S.C. §3001(e)(2) because they were information-only letters and not commercial advertisements (Postal Service, 1970). However, these informational circulars included promotional materials about contraceptive devices. The United States Supreme Court held that this mixture of promotional and informational material still constituted commercial speech. The court's ruling suggested that commercial speech had to have a combination of elements: (1) the speech must contain promotional messages, (2) the speech must specifically mention a product or service, and (3) the speech was created by an "economic motivation" (Bolger v. Youngs Drug Products Corporation, 1983, p. 67). However, the Court noted that any one of these elements alone did not automatically mean speech was commercial.

5. Background on the 2002 and 2003 *Nike v. Kasky* decisions

Since the creation of commercial speech as a distinct category under the First Amendment, commercial speech regulations were thought to only apply to advertising, not public relations. However, in the late 1990s this changed when Nike decided to use press kits and media outreach to quell a public relations crisis. In October of 1997 the television program *48 h* aired a segment about Nike's use of Chinese, Vietnamese, and Indonesian sweatshops that produced Nike athletic wear. In 1996 it was estimated that Nike had between 300,000 to 500,000 workers in southeast Asian factories, the majority of which were women under 24 years old. Nike did not own these factories, nor did they manage the factories directly. Instead Nike subcontracted its manufacturing work to locally owned Asian companies and then required them to adhere to certain workplace standards outlined in the manufacturing contract (Nike v. Kasky, 2000). Nike employed internal audits of these companies on a semi-regular basis. GoodWorks, a consulting agency that evaluates emerging markets, issued a report on Nike's subcontractor's factories authored by former U.N. Ambassador and Mayor of Atlanta Andrew Young. Young visited 12factories and gave a generally favorable review of factory conditions. However, other audits revealed worker claims of being underpaid, over-worked, and forced to work in hazardous conditions.

These negative reports surfaced in the media. As a result Nike began to receive negative media attention from print and broadcast media culminating in the *48 Hours* program. Nike's public relations counsel reacted to this negative publicity by sending letters to university athletic directors and college administrators denying the allegations made in the *48 Hours* program and other media outlets. In this letter, Nike spokesperson Steve Miller distanced Nike from its subcontractors, denied knowledge of these working conditions, and attempted to foster a dialogue with concerned athletic directors and coaches. Nike also responded to major newspapers denying the allegations made against their Asian manufacturing companies (Nike v. Kasky, 2002).

Marc Kasky, a resident of California and a San Francisco based consumer advocate, filed a lawsuit against Nike in April 1998 in California Superior Court. Kasky sued Nike based on California's Unfair Competition Law and California's False Advertising Law (Cal. Bus. & Prof. Code Ann. §17200; Cal. Bus. & Prof. Code Ann. §17500). Kasky alleged that Nike misrepresented themselves when they made statements claiming workers were not physically abused, factories followed labor laws, working conditions complied with health codes, workers received a living wage, and meals and medical care were provided (Nike v. Kasky, 2000).

Once Kasky brought suit in California Superior Court, California's trial court, Nike filed a demurrer arguing that the remedies sought by Kasky were in violation of the First Amendment of the United States Constitution. Nike claimed that Kasky could not sue them because false advertising claims only applied to commercial speech. Nike argued their public relations strategy was not commercial speech, but instead was protected speech on a matter of public concern. The California Superior Court agreed with Nike (Nike v. Kasky, 2000, 2002).

Kasky appealed the trial court's decision to the California Court of Appeal, First District, Division 1, which upheld the trial court's ruling. The Court of Appeal decision stated that Nike's PR was not commercial speech because the communications used did not try of bolster the image of a product to entice customers. Citing Bolger v. Youngs Drug Products Corporation (1983), the California Court of Appeal noted Nike's press releases and media kits were not commercial speech because they did not specifically mention a product and were not paid advertisements (Nike v. Kasky, 2000, p. 860). Kasky appealed this decision to the California Supreme Court.

5.1. California supreme court decision in 2002

The California Supreme Court reversed the Court of Appeal's decision and held that the public relations communication used by Nike was commercial speech. The California Supreme Court made a clear distinction between public relations done for image management and public relations that used factual representations. The Court stated that when a for-profit organization makes factual representations about its products or company, those representations must be accurate because they represent commercial speech. The Court emphasized that California's false advertising law was not limited to advertising alone, but applied to any potentially confusing or deceptive communication (Cal. Bus. & Prof. Code Ann. §17500). This meant that Nike's own public relations efforts, although not paid-for advertisements, was subject to the scrutiny of California's false advertising laws.

Writing for the majority, Justice Joyce Kennard acknowledged that even though the United States Supreme Court did not provide a bright line test for commercial speech, the California Supreme Court would use the three factors articulated in Bolger v. Youngs Drug Products Corporation (1983) to determine if Nike's speech was commercial. Using Bolger v. Youngs

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Drug Products Corporation (1983), the California Supreme Court looked to Nike's commercial status, the intended audience of Nike's PR campaign, and the commercial content in the PR campaign (Nike v. Kasky, 2002, p. 258). According to Justice Kennard the first two factors pointed to commercial speech because Nike was a corporation who sent materials to customers.

The California Supreme Court also analyzed nexus of content and speaker to determine if Nike's speech was commercial. According to Justice Kennard, speech that involves image management of a company always has economic motivations, even if that speech involves a public controversy. Justice Kennard wrote that it did not matter if the PR communications used by Nike included materials that purely addressed the public debate over sweatshops. By attempting to preserve its reputation and its relationships with college administrators by refuting allegations, Nike was mixing commercial speech and non-commercial speech (Nike v. Kasky, 2002).

Justice Kennard's decision was not unanimous. Justices Ming Chin and Janice Brown strongly criticized the extension of commercial speech status to public relations. Justice Chin noted that Justice Kennard's majority decision held a double standard between for-profit organizations and nearly everyone else engaged in speech. He noted that the nexus between Nike's business practices and public concern of sweatshop labor was such that it was impossible to divorce commercial speech from non-commercial public debate. Justice Brown criticized the majority's opinion and the United States Supreme Court's creation of commercial speech as a separate speech category that receives less First Amendment protection. She wrote that decisions like Nike v. Kasky (2002) limited organizations' ability to engage in public debate and feared that if the California Supreme Court's decision in Nike v. Kasky (2002) remained law it could erode corporations' speech rights altogether. Nike petitioned the United States Supreme Court to make a final decision in their case.

5.2. United States supreme court decision in 2003

To appeal a case to the United States Supreme Court, the justices on the court must first grant the appellant permission, known as a writ of certiorari. In Nike v. Kasky (2003) the United States Supreme Court initially granted certiorari only to later reverse itself. The reason why the United States Supreme Court declined to hear the case was because the appeal was interlocutory, or without a final disposition from the trial court. Writing the denial of certiorari Justice John Paul Stevens said that it would be best for the United States Supreme Court to not rule on an important constitutional issue given the ongoing nature of the case.

Despite denying certiorari, Justice Stevens' opinion and Justice Stephen Breyer's dissent provide insight into how the United States Supreme Court could have ruled in Nike v. Kasky (2003). Justice Stevens reasoned if the United States Supreme Court ruled that Nike's speech was not commercial the underlying lawsuit would have been moot because the false advertising laws would not have applied to Nike's PR campaign. This may be an indicator that he and others on the Court would have found Nike's PR campaign to be part of commercial speech. Recognizing the complexity of PR statements that are addressing "an ongoing discussion and debate about important public issues," Justice Stevens wrote that the most important fact in the case was the untruthful nature of Nike's statements denying knowledge of their subcontractors' sweatshops (Nike v. Kasky, 2003, p. 664).

In a dissenting opinion Justice Breyer argued the United States Supreme Court should have granted certiorari because previous decisions did not give much guidance on the issue of mixed commercial and non-commercial speech. He said that because Nike used mixed commercial and non-commercial speech, commercial speech regulations should not apply. He noted that even though Nike used a "traditional advertising format" in its letter to college administrators and athletic directors, the letter was also used for non-commercial purposes (Nike v. Kasky, 2003, p. 677). According to Justice Breyer commercial speech cannot always be completely demarcated from fully protected speech. He cited Nike's letter to athletic directors as evidence that the company was engaging with specific publics about a matter larger than commercial sales. Justice Breyer also noted that laws giving lower standard First Amendment protection to speakers engaged in mixed commercial and non-commercial speech meant that commercial entities were always at a distinct disadvantage. This denial of certiorari was effectively the end of Kasky's case against Nike. Both parties soon settled out of court, and no other court actually determined if Nike's public relations content was actually false.

6. Findings: federal and state court interpretations of *Nike v. Kasky* 2003–2015

Since the United States and California Supreme Courts issued their decisions in Nike v. Kasky (2002, 2003), appellate and trial courts have interpreted, expanded, and re-defined the contours of those courts' interpretation of public relations speech. As shown in Table 1, the United States Supreme Court's decision in Nike v. Kasky (2003) has been cited 22 times, and analyzed in a cross-section of federal and state courts including the United States Court of Appeals in the Second, Eighth, Ninth, and District of Columbia Circuits.

As Table 2 shows, courts' discussion and analysis the United States Supreme Court's decision in Nike v. Kasky (2003) revolved around two issues—standing and commercial speech.

The standing issue is the less important of the two because it refers to California's unusual law that allows citizens to bring suit on behalf of all citizens (Cal. Bus. & Prof. Ann. §17204). Because this issue involves analysis on who can bring a civil lawsuit under state law it has less applicability to public relations. However, the commercial speech issue is extremely important to public relations. While appellate courts that cite Nike v. Kasky (2003) acknowledge that false information is unprotected, they also hold that the content of public relations communication is not necessarily commercial speech.

Table 1
Breakdown of Jurisdictions Citing U.S. Supreme Court decision in Nike v. Kasky (2003).

Jurisdiction	Number of Cases or Memos
Federal Courts of Appeals	10
Federal District Courts (Trial Courts)	7
Federal Agencies	3 (Includes 2 FTC Memos)
State Appellate Courts	1
State Trial Courts	1

N = 22.

Table 2
Legal Precedent Supported by Citing U.S. Supreme Court decision in Nike v. Kasky (2003).

Areas of Legal Precedent	Number of Cases or Memos
Standing Issues	10
Commercial Speech Issues	12 (Includes 2 FTC Memos)

N = 22.

Table 3
Breakdown of Jurisdictions Citing California Supreme Court decision in Nike v. Kasky (2002).

Jurisdiction	Number of Cases
Federal Courts of Appeals	1
Federal District Courts (Trial Courts)	12
Federal Agencies	0
State Appellate Courts	34
State Trial Courts	0

N = 47.

Surprisingly, federal and state courts have interpreted and applied the Nike v. Kasky (2002, 2003) decisions in a very narrow way that suggests courts are uncomfortable with all public relations speech being categorized as commercial speech. In fact, of the 22 cases and federal agency memos that cite the United States Supreme Court's decision in Nike v. Kasky (2003), five of them specifically cite Justice Breyer's dissent as evidence that mixed corporate and non-corporate speech is not commercial speech and deserves First Amendment protection given to fully protected speech (Casciani v. Nesbitt, 2009; Dadd v. Mount Hope Church, 2010; Full Value Advisors v. S.E.C., 2011; New York State Restaurant Association v. New York City Board of Health, 2008; U.S. v. Alvarez, 2010). Several courts agree with Justice Breyer's concerns about extending commercial speech status to content that contains a mixture commercial and non-commercial speech. The fact that the United States Supreme Court's decision in Nike v. Kasky (2003) is a denial of a petition for certiorari rather than a binding decision on an argued case may be an indicator of why these courts feel comfortable citing a dissenting opinion as precedent.

Of all the cases that cite the United States Supreme Court's decision in Nike v. Kasky (2003), those associated with the FTC are the most vocal in criticizing the inclusion of public relations as commercial speech. In three FTC documents, one case and two memos, it is evident that the FTC, the federal agency tasked with regulating promotional speech, believed Nike was engaged in fully protected speech when it issued its public relations statements (In the Matter of Daniel Chapter 1, 2010; Rosch, 2008a,b). The FTC decision In the Matter of Daniel Chapter 1 (2010) specifically mentions that then FTC Commissioner Thomas Rosch, an attorney and prominent expert in trade regulation, disagreed with Justice Stevens's decision in Nike v. Kasky (2003). Rosch's criticism was rooted in the idea that public relations is not a low form of communication that merely promotes an organization's monetary needs. Instead Rosch said that organizations frequently have something legitimate and important to add to public dialogue. He noted that "the First Amendment cannot be divorced from the money that is required to participate fully in the marketplace of ideas, whether it be the ongoing debate over healthcare, or the solicitation of money by nonprofit organizations, or the election of candidates for public office" (In the Matter of Daniel Chapter 1, 2010, p. 16).

However, Rosch was not categorical in his denunciation of including corporate PR into the commercial speech category. He noted that organizations' PR frequently serves both promotional and informational purposes. In his 2008 remarks, Commissioner Rosch noted that "image" and "'message' advertising" presented difficult legal issues when regulated by commercial speech laws because image is tied to promotion as well as public dialogue (Rosch, 2008b, p. 3). However, image management is not automatically commercial speech, especially if that image restoration strategy is associated with larger social concerns. According to Rosch (2008a,b) this form of image management within the context of public debate does not constitute commercial speech because it serves as a mechanism to foster dialogue in the marketplace of ideas.

The California Supreme Court's decision in Nike v. Kasky (2002) was also widely cited, mainly within California jurisdictions. As Table 3 indicates the California Supreme Court's decision was discussed and analyzed by federal and state courts in 47 separate cases.

As shown in Table 4, similar to the cases that cited the United States Supreme Court's decision, courts cited the California Supreme Court's decision for multiple legal issues.

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Table 4
Legal Precedent Supported by Citing California Supreme Court decision in Nike v. Kasky (2002).

Areas of Legal Precedent	Number of Cases
Commercial Speech Regulation	29
Statutory Interpretation of False Advertising Law	12
Congruency between California and U.S. Constitutions	4
Standing	2

N = 47.

In addition to an analysis of commercial speech, courts cited Nike v. Kasky (2002) for legal issues involving the interpretation of California false advertising laws, the congruence between the United States and California constitutions, and standing. While these last three areas mentioned are important to general communication litigation, they do not have specific application to PR.

Of the 29 cases that specifically addressed commercial speech and public relations a trend emerged. California courts cited Nike v. Kasky (2002) to support the California Supreme Court's use of the three part criteria in Bolger v. Youngs Drug Products Corporation (1983) or the fact that false speech received no First Amendment protections. However, California court decisions signaled that judges were uncomfortable with the wholesale categorization of PR as commercial speech. Some cases began carving out exceptions to the blanket rule that public relations was commercial speech arguing that PR used for certain purposes was information rather than promotional. In a series of cases that involved public relations communications regarding pharmaceutical information, California appellate courts held that prescription drug companys' public relations content were not commercial speech when information included in press releases and media kits was statutorily required to be disseminated (Beeman v. Anthem Prescription Management, 2007; Beeman v. Anthem Prescription Management, 2013; A.A.M. Health Group, Inc. v. Argus Health Systems, 2007; ARP Pharmacy Services Inc. v. Gallagher Bassett Services Inc., 2006; Bradley v. First Health Services Corp., 2007). This is particularly true of public relations that includes drug ingredients. The California Court of Appeal for the Fourth District held that informational materials sent to individuals that lists the ingredients in a prescription drug was not commercial speech even though those individuals who the materials were sent to bought the drug (Nagel v. Twin Laboratories, Inc., 2003).

Other California cases held that certain types of promotional material did not constitute commercial speech if the content of those promotions did not directly relate to a product. This means that PR done for organizations that do not directly sell products to consumers likely are not commercial speech. Lockton v. Small (2005) is typical in this regard. In Lockton v. Small (2005) the California Court of Appeal for the Sixth District held that investor relations PR did not constitute commercial speech because stock reports were informational and disseminated to stockholders who were not customers. Part of the reason for this rationale is investor relations are frequently statutorily mandated by federal agencies. The California courts also note that investor relations is predicated on transparency between the customer and the organization. Investment PR usually takes the form of financial information and insights into the organization as opposed to direct appeals for purchasing products or services.

Some cases even found that PR was not commercial speech when an organization who disseminated promotional PR did not directly sell the product or service. This situation was found in several cases where an organization merely promoted services or ideas in general without specifically trying to attract customers. In Demetrides v. Yelp (2014) the California Court of Appeal for Second District held that Yelp reviews were not commercial speech because the did not advocate for customers to dine at restaurants, but merely provided non-economically motivated opinions. Even advocacy for an organization does not necessarily mean public relations is commercial speech. In Bernardo v. Planned Parenthood (2004) a pro-choice group disseminated materials about family planning. However, because Planned Parenthood does not directly provide family planning services, the California Court of Appeals held that their public relations materials did not constitute commercial speech.

All of these cases that cite the United States and California Supreme Courts' decisions in Nike v. Kasky (2002, 2003) show that the categorization of public relations as commercial speech is not absolute. Courts and the FTC carved out exceptions to Nike v. Kasky (2002, 2003) that focused on the audience, speaker, and content of the message. While the California Supreme Court's decision has not been overturned, it has not been cited as a justification for including PR as commercial speech since 2002. Instead what has emerged is a gradual dismantling of this precedent by federal and state courts. Because public relations frequently is used to disseminate information and to build relationships with key publics, these cases show that many PR communications may not be considered commercial speech. Given this reality it is important for practitioners to know how this First Amendment status affects PR practice.

7. The legal definition of public relations and implications for PR practitioners

These cases indicate that the legal definition of public relations hinges on content. Under the law public relations is a varied communication practice that contains promotional, informational, persuasive, and legally mandated content. Depending upon the content public relations communication receives varied degrees of First Amendment protection. In a practical sense this view of public relations means that courts recognize its value in society. However, courts also recognize that public relations content frequently inhabits a space on the cusp of protected and semi-protected speech. This legal definition

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of public relations both mirrors and contradicts many of the definitions of PR. First Amendment speech protection seems to reflect what academic literature denotes as bad or good PR practice. For instance, press agentry as defined by the four models would most likely be unprotected because it uses disinformation and manipulation to reach audience while two-way symmetrical communication would likely be semi or fully protected depending on the goal of its content (Grunig & Hunt, 1984). Public relations practices that value relationship maintenance and engagement with publics seems to be a form of communication that receives higher levels of First Amendment protection.

However, courts' definition of public relations is much broader than what public relations research would view as PR. Professional identity or labels are not addressed in legal definitions of public relations. The debate within the definitions of public relations over corporate placement, professional identity, the role of stand-alone professional organizations, and C-suite access is irrelevant to the legal analysis of PR (Bernays, 1965; Cutlip & Center, 1958; Harlow, 1976). While the definition of PR embraces the dichotomy of profession and practice, courts looks only to practice, and more specifically content, in its definition of public relations. In this sense the current legal definition of public relations embraces the idea of strategic communication more so than any other (Hallahan et al., 2007). It views public relations as a broadly defined type of deliberately produced communication.

When the United States Supreme Court denied certiorari in Nike v. Kasky (2003) many scholars feared that what would follow would be a severe curtailing of commercial speech rights and greater restrictions on public relations (Terilli, 2005; Ki, 2004). However, despite these fears what emerged in the past 12 years is a slow backing away from categorizing public relations as exclusively commercial speech. This provides some insight into the legal definition of public relations. Similar to the modern definition of public Relations, the law seems to recognize that public relations plays many functions within an organization. Courts' interpretation of PR's role shows that there is some understanding that content produced by PR practitioners is not exclusively promotional. Rather, the legal definition of public relations acknowledges that there are multiple functions of public relations within an organization that addresses a variety of publics for a variety of purposes.

For courts evaluating the value of public relations they look at is content and purpose. They do not examine professional standards, identification, or organizational purpose. When the content and purpose of PR is promotional and related to products and services, then it is commercial speech, which receives some protection under the First Amendment. When the content and purpose of PR is informational or engaging in public debate then it is fully protected under the First Amendment. In sum, the legal definition of public relations seems to reflect PR practice. Cases dealing with PR's First Amendment status reflect the promotional and informational aspects of the field. More interestingly, however, legal interpretations of public relations show that courts recognize that the function of PR goes beyond mere promotion, and that as a form of communication it serves an important role within American society.

This definition has significance for practitioners because it means that much of their work is fully protected by the First Amendment. Communications that are fully protected under the First Amendment are not subject to the regulations of federal and state agencies, lawsuits regarding speech content, and judicial evaluations regarding content. Because of the complexity of PR's status as protected, semi-protected speech, and, in some rare situations, unprotected speech, it is important for practitioners to know four key ways these laws affect practice.

First, practitioners should recognize that public relations and advertising are not legally distinct because of industry norms. Rather their distinction is based on content and purpose rather than self-identities or industry labels. While public relations scholarship and practice usually draw a distinction between PR and advertising as paid versus unpaid promotion, these cases show that payment is irrelevant to content labeled commercial speech. Judges and lawyers usually are not trained in the nuanced distinctions of PR and advertising. Instead they look to the content and motivation behind a communication to determine if it is commercial speech. As Nike v. Kasky (2002) shows, having content labeled as commercial speech severely limits PR. It opens public relations up to regulations and allows for lawsuits predicated on false advertising claims. This does not mean PR practitioners should try to avoid producing content that is commercial speech—quite the contrary. Commercial communications are frequently the most profitable form of PR practice. What this does mean is practitioners should stay abreast of regulations that affect advertising, and know that when laws affecting advertising content frequently affect PR content as well.

Second, practitioners need to recognize that an initial denial during a crisis can create negative legal consequences. In crisis communication, lawyers frequently limit PR's communications for fear these strategies will create evidence for upcoming litigation. In civil procedure, both state and federal, a party being sued must deny the allegations once the lawsuit is filed. Otherwise, the party has legally admitted fault. However, as seen in Nike v. Kasky (2002, 2003) an initial denial coupled with a PR campaign that bolsters the denial message can expose an organization to other lawsuits based on false advertising. Knowing the power and liability of denial can help practitioners push back against organizational instincts of issuing denials during a crisis. Given this legal reality practitioners may have new opportunities to voice their concerns to legal departments and gain a more prominent role in organizational management.

Third, practitioners need to know that public relations can be commercial or non-commercial speech. As the cases in this study show, commercial versus non-commercial status is important. Knowing that an organization's speech is commercial signals that the PR campaign must adhere to relevant content based laws that regulate speech. Nike v. Kasky (2002, 2003) and its subsequent case law gives a clear test for determining a speech's status. Practitioners should ask three questions to determine if their speech is commercial: (1) is the organization I am working for a for-profit; (2) is my speech targeted to customers; and (3) is the content of my PR materials promoting a product or service? If the answer to all three questions is yes then the speech is most likely commercial. This has practical significance. If a practitioner determines their communications

are commercial they need to make sure there are adhering to relevant legal regulations, specifically from federal agencies that regulate speech content, such as the FTC.

Fourth, practitioners need to know that having laws that restrict commercial speech is not necessarily negative. While commercial speech is less protected under the First Amendment and is encumbered by more regulations than other forms of speech, these encumbrances do not make it impossible for practitioners to practice good PR. In fact these types of regulations serve as legal mandates to produce honest and trustworthy communications. Because the efficacy of PR campaigns are frequently evaluated by the level of transparency, relationship building, and trust it only makes sense that practitioners would want to adhere to laws that ensure those values and ethical goals. Frequently government limitations are depicted as bureaucratic meddling that hampers development and progress. While this can be true, the rationale behind commercial speech regulation is rooted in the same principles of good PR.

8. Conclusion

Nike v. Kasky (2002, 2003) is a legal watershed for public relations practice because it made lawyers and practitioners evaluate the legal definition of PR. From an analysis of Nike v. Kasky (2002, 2003) and the cases that followed, it seems that the legal definition of PR is as complex as the field itself. It shows that U.S. courts are likely to see public relations practice as more than promotional advertising because it functions as a form of communication that disseminates content on important issues. These case law developments also show that for many courts public relations is understood in many of the same ways that Ivy Lee articulated over a century ago. Of course, it is not known what, if anything, judges know about the professional field of public relations. However, these cases do show that courts are not so willing to categorize PR as a homogeneous form of communication. While PR practice is still negotiating its legal identity it seems that currently the legal definition of the field at least acknowledges that PR has elements of establishing public trust, maintaining relationships, and fostering dialogue.

However, this does not mean public relations is given the highest level of protection under the First Amendment. A more technical analysis of the cases reveals that legally PR is divided into two distinct categories—commercial and non-commercial. Non-commercial public relations enjoys a greater freedom than commercial. Despite this freedom, non-commercial public relations is limited because it only serves as a conduit for information, dissemination of disclosures, and legally mandated reports. Commercial public relations seems to be characterized by its advocacy, persuasion, and use of targeted communication with key publics. It is the public relations that is probably most lucrative for practitioners to engage in, and, as a result, the most regulated.

Despite these tradeoffs, Nike v. Kasky (2002, 2003) has not done harm to public relations in the past 12 years. In fact, this case forced courts to redefine their concept of commercial speech, advertising, and public concern. This study serves as an initial step for a long-term evaluation of public relations' legal status. Studies that update and explore case law, such as Nike v. Kasky (2002, 2003), are necessary to provide practitioners with an accurate and timely understanding of how laws affect PR practice. As this study shows, courts use case law in various ways and extend, apply, limit, and redefine laws on a continual basis. In the next 12 years, Nike v. Kasky (2002, 2003) will undoubtedly change and those changes will directly impact the legal and practical definition of public relations. By staying current with these developments practitioners not only will learn what the courts think of their practice, but how courts may regulate the public relations in the twenty-first century.

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