

JUST SUE IT: The Case of Kasky v. Nike

Introduction

Kasky v. Nike was a legal case in the United States that rose all the way to the Supreme Court and which has implications for how companies approach and communicate their corporate social responsibility (CSR) policies, initiatives and performance.

Overview

In the 1990s, Nike found itself at the center of a heated debate on working conditions and human rights in its supply chain. At the time, the issue made Nike's brand a lightning conductor for a variety of globalization controversies.

To address the debate Nike launched a campaign that included newspaper advertisements, letters to editors and correspondence with college and university presidents. Nike's aim was to demonstrate that it had taken steps to improve conditions for overseas workers, and to reassure customers that it was a company that deserved continued trust and loyalty.

Marc Kasky, a Nike critic, objected to this campaign. In 1998 he sued Nike under California's unfair competition and false advertising laws, alleging that the company's claims were misleading. The case rose through the courts until it reached the California Supreme Court in spring 2002. The result was a 4-3 split decision in favour of Kasky, which Nike then appealed to the US Supreme Court.

The case turned on the distinction between 'political' speech and 'commercial' speech. Under US constitutional law, political speech, or speech on public issues, enjoys special protection and freedoms. Commercial speech, on the other hand, is not subject to the same protection. Unlike political speech it can be regulated by government, making it subject, for example, to truth in advertising laws. The US Supreme Court was asked to decide whether Nike's statements indeed constituted commercial speech, or political speech entitled to First Amendment protection. It was widely expected that the Court would produce a landmark decision which would clarify the free speech rights of corporations.

In a surprising development, the Supreme Court handed down a one sentence ruling stating that their decision to review the case had been "improvidently granted." Basically, the Court changed its mind about hearing the case and side-stepped making a judgement on the free speech issue.

The case was then set to go to trial, but in September 2003, Marc Kasky and Nike announced a settlement stipulating that Nike would pay \$1.5 million to the Washington, DC-based Fair Labor Association (FLA) for "program operations and worker development programs focused on education and economic opportunity." The case therefore came to a close, without the nature of Nike's claims ever having been established.¹

¹ Although the case was heard by several courts, the truth or falsity of Kasky's allegations and Nike's defense was never decided because the case never went to trial. When the suit commenced, Nike's first legal move was to file demurrers (objections that there were insufficient legal grounds to proceed with the case) on First Amendment free speech grounds. The case was dismissed, and Kasky appealed and lost. Kasky then appealed again, to the California Supreme Court, and won. Nike then appealed to the US Supreme Court, and neither lost nor won when the Court accepted the case but ultimately declined to review.

Implications

- For companies: *Kasky v. Nike* means that corporations have reason to be more cautious about the public statements they make. Because the case settled, the California Supreme Court's decision will for the time being stand, and its sweeping definition of commercial speech now applies to all speech by corporations that reaches California. As the American Civil Liberties Union (ACLU) observed, "If you are a business speaker, your ability to speak out on a public issue that directly affects your company is dramatically affected." As the scope of public issues on which companies are expected to engage broadens, they are being given a powerful incentive to pull back and remain silent.
- For Sustainable Development (SD): The scrutiny applied to a company's actions and words with regard to services and practices, including environmental and social performance, has risen. Companies must be more careful about the accuracy of their public statements. That's a good thing. The question is how this balances against growing demands for transparency. To the extent that this case puts a chill upon corporate willingness to communicate, as it already has with Nike, the SD agenda will suffer.
- For others: A host of interests keenly watched this case. Among those who filed amicus briefs² on Nike's behalf were the ACLU, the Bush administration, public relations and advertising trade associations, most major media groups, the Business Roundtable and the US Chamber of Commerce.³ Among those in Kasky's corner were Global Exchange, the Sierra Club, Reclaim Democracy and Domini Social Investments. The range of interested parties shows how many pockets of society have a keen interest in corporate behaviour.

Despite the somewhat anticlimactic outcome of the case, one thing is clear: courts are acknowledging that corporate behaviour – including labour practices – influences consumer choice and trust. And they are struggling with the fact that corporations, whose activities are increasingly a matter of public concern, may have a significant voice in matters of public debate.

Further Sources

- www.nike.com/nikebiz/nikebiz.jhtml?page=52
Overview from Nike's perspective as well as news and latest press releases.
- <http://reclaimdemocracy.org/nike/index.html>
Kasky web page from Reclaim Democracy, a U.S based NGO focused on promoting stronger more active democracy.
- www.motherjones.com/news_wire/nike.html
How it all started. An early (1997) account from Mother Jones, a non-profit dedicated to social justice through investigative reporting, on conditions at Nike's Southeast Asian factories.

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² An amicus brief is submitted to the court by an individual/group not party to the case in question.

³ ExxonMobil, Monsanto, Microsoft, Bank of America and Pfizer also filed a joint *amici curiae* brief in support of Nike.