**Nike Corporation: Jumping the Hurdles of Social Responsibility Disclosure**

## The Acceptance Announcement

Lawrence Tribe hung up the phone in his cluttered office nestled within the walls of Harvard's Law School. He had just announced the news to James Carter, general counsel at Nike, Inc., that the US Supreme Court had accepted for trial the most volatile First Amendment case in 40 years. Tribe knew it would be only a matter of hours before his phone began ringing unceasingly with reporters wanting his opinion on the Court's acceptance of the case. After all, Tribe had been one of the primary crafters of the case's arguments, and the Supreme Court accepts less than one percent of the cases submitted for appeal.

That same day–January 11, 2003–Philip Knight, CEO of Nike Inc., phoned the head of the company's Public Relations (PR) Department to meet with him in his Beaverton, Oregon office. He wanted to know two things. First, what *could* they announce to the public with respect to the Supreme Court's acceptance of the case? Second, how should their PR campaign proceed under the uncertainty of the case's outcome?

Knight reflected over the matter momentarily while listening to the soft pitter-patter of the rain outside his expansive office window. The thought of the US Supreme Court judging a lawsuit against a few press release statements clarifying his company's overseas production methods still struck him as ridiculous, although he knew the case was about much more than petty newspaper articles. This particular litigation was threatening the accepted reporting and disclosure methods of every organization in the United States that would someday communicate its business practices to the public. The

implications of this lawsuit could crush the trend towards greater corporate transparency and cripple the developing role of businesses as responsible corporate citizens. Knight thought back to the benign beginning of how his PR campaign designed to create a conscientious company image soon became a spiraling nightmare of litigation and retrospection.

## Nike Corporation

In 1964, Philip Knight, a University of Oregon runner, co-founded Blue Ribbon Sports with his coach, Bill Bowerman (Nike, 2004). The idea was to import athletic shoes from Japan to compete in the German-controlled market. In 1965, the operation sold its shoes at high school track meets out of a van. A year later, Blue Ribbon Sports opened its first retail location, and in 1972 the company name changed to Nike in response to a dream of the first employee. The company grew dramatically over the coming decades, and Nike is currently the largest manufacturer of athletic supplies in the world (Parloff, 2002).

## Nike Outsourcing: A Slippery-Slope Operation

As the Japanese market matured a decade after Nike began contracting there for shoe production, Nike shifted its operations to cheaper Taiwanese and Korean suppliers. As demand increased over time, these suppliers further subcontracted to less-developed labor markets in countries such as China, Indonesia, Thailand, and Vietnam (Parloff, 2002). By 1999, Nike operations were so large the company received athletic wear from over 500 factories in 45 countries (Annual, 2003). Nike's control over and awareness of

the factory conditions decreased with each successive production level outsourced to subcontractors. This lack of awareness was poignantly reversed in June of 1996, however, when the conditions of Nike's factories became a nationwide media topic.

## Pointing the Finger: The First Allegations

Early that June, Bob Herbert, a *New York Times* columnist, boldly criticized Nike labor conditions with a harsh op-ed piece (1996). The accusations alleged that Nike built its wealth and products with the "slave" labor of young Asian women. The article said Nike used "sweatshops" of "wretched origins," and compared the corporation to a giant pyramid that crushed the backs of oppressed laborers (Herbert, 1996). This column created an immediate nationwide stir among consumers, activists, and international corporations. Soon afterwards, Nike found itself in a sweltering spotlight, with several nonprofit groups' studies hitting the newsreel. The accounts described human rights abuses, violence to laborers, and hideous working conditions within Nike's Asian facilities (Savage, 2002). The news rooted itself quickly in consumers, and protests and small boycotts sprang up around the country. Over 40 demonstrations occurred at nationwide Niketowns, with one Niketown grand opening being marred by the arrest of 19 demonstrators (Emerson, 2001). Nike's image was stained, and it was pressured to respond.

## The Public Relations Crusade

Nike responded by mobilizing a PR task force to aggressively confront this wave of attacks on its polished company image. The sporting goods company addressed

concerns through various media sources to answer all criticisms and satisfy its customers. The crux of the PR claims was that the factory conditions were equitable, the laborers were fairly paid, and that a clear code of conduct ensured companywide consistency.

*THE LABOR REPORT*

First, to grant credibility to its statements and to properly document the activities and conditions in its overseas operations, Nike commissioned social responsibility audits and surveys of various factories, which, in March of 1997, resulted in a carefully qualified 32-page report on factory conditions (Savage, 2002). Andrew Young, a former Atlanta mayor, prepared the report based on surveys of 20 factories in 6 Asian countries, and the report asserts that these operations met all applicable health, safety, and labor standards (Kasky, 2004). In particular, the report states that the average pay rate in these factories is double the local minimum wage. The account also indicates that the company "typically" grants "subsidies" for meals and medical treatment. Nike's statements regarding factory operations over the coming years would be based on the data contained within this report.

Nike presented its assertions of fair employee treatment, good factory conditions, and equitable companywide standards to the public through many mediums, including its statement of corporate responsibility, personal letters, website segments, college visits, and newspaper releases (Graulich, 2002). These statements, discussed below, were issued with the intent of disclosing CSR information along with defending Nike's practices and public image.

*Statement of Corporate Responsibility*

In May of 1998, Philip Knight formally addressed the broad range of criticisms of his company by issuing a statement of corporate responsibility [Exhibit I], which committed Nike to six new standards for its manufacturing facilities, including factory monitoring, minimum age requirements, environmental safety standards, employee education programs, expansion of its micro-loan program, and greater transparency of corporate responsibility practices (Nike, 2004). To ensure compliance with these standards, Nike established a code of conduct to be enforced in all Nike manufacturing facilities by safety committees and trained supervisors. The company indicated that this code of conduct was displayed in a prominent place on factory walls to ensure all employees would be aware of their rights. These codes answered many of the lingering criticisms of Nike's practices and promised a safe, humane future for its production factories.

*Personal Letters*

In addition to issuing its responsibility statement, Nike sent scores of form and personal letters to university presidents and college athletic directors, some of Nike's most important clients. These letters told of the equitable conditions in the factories and assured these individuals of Nike's corporate responsibility (Graulich, 2002).

*Website Segment*

Nike also created a page on its website for athletic departments listing factory addresses in Vietnam and Taiwan so coaches and athletes could see where their

equipment was manufactured. A virtual tour of some production facilities was also placed on the web page so interested parties could see the inside workings of the factories and be reassured that the facilities were not sweatshops (Edwards, 2002). Nike specifically addressed students in portions of its website, and acknowledged the heated debates taking place on many campuses over the labor conditions.

### *Campus Visits*

The company made proactive efforts to directly answer the concerns and arguments of student activists protesting Nike's products by visiting college campuses and speaking with students. For example, at the University of North Carolina at Chapel Hill (UNC), the company sent a spokeswoman of Philippine descent to deliver a moving apology for past labor practices and to promise the students that manufacturing conditions had improved (Tkacik, 2003). UNC, which held a multimillion-dollar sportswear contract with Nike, began a globalization class focused on the company. Nike management, including CEO Philip Knight, visited the campus to lecture to concerned UNC students about the fairness of Nike's labor policies. Nike also invited teams of Dartmouth graduate students to tour Indonesian and Vietnamese factories for three weeks at Nike's expense (Nike, 2004). The company posted the student teams' reports on the Nike website, providing further evidence for students and critics of reasonable manufacturing practices.

### *Newspapers*

The newspaper was the most ubiquitous instrument the company used to distribute evidentiary materials supporting its production methods. Nike issued numerous press releases, opinion articles, and even full-page advertisements in major newspapers, all of which indicated that Nike factories were operating decently and paying a living wage. Philip Knight wrote a letter to the editor of the *New York Times* stating, “Nike has paid, on average, double the minimum wage as defined in countries where its products are produced under contract” (Parloff, 2002). The CEO also inferred that Nike factories actually help improve the impoverished economic conditions of the countries where they operate: “History shows that the best way out of poverty for such countries is though exports of light manufactured goods that provide the base for more skilled production” (Parloff, 2002).

Nike used the aforementioned methods to support its claims of good worker treatment, reasonable factory conditions, and global compliance with labor standards, which helped vindicate its corporate image. However, Nike did not report everything it discovered during its self-evaluation.

## A Skeleton in the Corporate Closet

In January of 1997, as Nike began aggressively assessing its own factories, one Ernst & Young audit of a Vietnamese facility returned horrific results. This particular factory had no drinkable water and toxic chemical concentrations up to 177 times the allowable safety limits. With respect to the laborers, 48 of the 50 worked longer than permitted hours, workers were punished for taking time off to attend funerals, and 80 percent had never read the code of conduct (Parloff, 2002). Some workers did not know

what "Nike" was. The section of the audit report entitled "safety committee" was merely stamped with the word, "non-existent" (Edwards, 2002). This audit was leaked to the *New York Times*, which, in November of 1997, proclaimed its unsavory results to a national audience in a front-page story.

## Litigation

While stirring his morning coffee in his San Francisco apartment, Marc Kasky read the November newspaper containing the information from the leaked responsibility audit. For him, the news report was the last straw in a series of contradictory statements from nonprofit groups and Nike officials regarding Nike's labor practices. Kasky, who holds a master's degree in city planning from Yale, sees himself as a vigilante corporate referee and has sued numerous companies over false advertising (Edwards, 2002). He became skeptical of Nike's labor practices several years earlier and stopped purchasing their products. Kasky said he was glad when the company adopted its code of conduct, but after reading the audit, he felt the code was just a charade. "It struck me as false advertising," Kasky said, "The Nike code of conduct is marketing their products. They're marketing it to me under false grounds" (Parloff, 2002).

Kasky phoned Alan Caplan, a friend of Kasky's and a partner of the San Francisco firm of Bushnell, Caplan, & Fielding, LLP, which specializes in consumer litigation under California's broad consumer protection laws. Caplan was intrigued with Kasky's claim, and, recognizing the magnitude of the case, teamed up with the juggernaut class-action specialty firm of Milberg Weiss Bershad Hynes & Lerach. This was not the first time these two firms had united for a case, having already worked

together in the first half of the 90s to crack the invincible tobacco industry for tens of millions of dollars (Siegal, 1998). The team of lawyers won the eminent lawsuit against R.J. Reynolds, Young & Rubicam, and McCann-Erickson, single-handedly shutting down the infamous "Joe Camel" advertising campaign because it promoted unlawful cigarette sales to children. The lawsuit against Nike, filed in April of 1998, would be just as daunting. Not only would the suit be against one of the biggest corporations in the world, but the case would be poised between the conventions of typical advertising and the dynamics of public relations efforts. The distinguishing factor between advertising and most PR initiatives is the speech category used (commercial versus free speech) and the court's interpretation of commercial speech law, one of the murkiest topics in the US legal system.

## The Murky Laws of Commercial Speech

When analyzing the consequences suffered by Nike during its efforts to promote a socially responsible image, some legal terms and dilemmas will be analyzed. During this discussion, the term "commercial speech" refers to communication subject to false advertising regulations, like television commercials and newspaper ads, while "noncommercial," "political," and "free" speech refer synonymously to communication protected by the First Amendment and not held to a legal standard of accuracy (c.f. Graulich, 2002; Parloff, 2002).

The history of commercial speech law began when, in 1942, the US Supreme Court distinguished between general speech, which the First Amendment protects, and commercial speech, which is given no legal protection (Parloff, 2002). Since states were

given the power to regulate business transactions, the Court reasoned that the states should also regulate business-related speech. By 1976, the attitude of the Court had shifted to allow for limited First Amendment protection of commercial speech (Parloff, 2002). This ruling was intended to bolster commercial sources' ability to give information to the public.

The initial definition of commercial speech was limiting: speech that does "no more than propose a commercial transaction." However, with the evolution of advertising techniques and their synthesis with public relations, that definition widened to include claims about the production methods of manufacturers. Claims such as "dolphin safe" or "ozone friendly" are now legally recognized as commercial speech (Parloff, 2002). These laws are also very strict, such that even if the false statement is made accidentally, without malicious intent, the advertiser remains liable. The line between commercial and free speech became further clouded when courts decided that commercial speech was no longer limited to paid advertisements (Parloff, 2002). Essentially, our court system still has no clear definition of commercial speech or coherent set of standards from which to judge the nature of corporate communication.

## The Plaintiff's Arguments

Working within this haphazard framework of speech law, Kasky's legal team argued that Nike made incorrect and misleading statements during its PR campaign. Kasky argued that these statements qualify as commercial speech subject to consumer protection laws against fraudulent advertising because Nike spoke to promote the sale of products (Mauro, 2002). If Nike lost the case, it would be expected to (1) return all

profits in the state of California related in any way to the deceitful statements, (2) conduct another publicity campaign to correct misimpressions created by the statements, and (3) pay Kasky's attorney fees.

Specifically, Nike is said to have made incorrect and/or misleading statements in nine places: in Philip Knight's letter to the editor of the *New York Times*, in two personal letters Nike sent to critics, a form letter sent to universities, and in five press releases (Graulich, 2002). The specific "misrepresentations" outlined in the lawsuit were several loose references made by the company to the 32-page labor report, such as "free meals" as opposed to "subsidized meals," and assertions that the average factory paid double the minimum wage and complied with all health standards. Before the trial could take place regarding the truthfulness of the statements, however, Nike battled the premise of the case, arguing that the truthfulness of the statements is immaterial because, as free speech, they were protected by the First Amendment.

Kasky's lawyers conceded that if Nike's statements were classified as "free"—as opposed to "commercial"—speech, they would be "immune from state regulation" and the dispute would be surrendered (Greenhouse, 2003). Thus, the definition of commercial speech was the turning point of this case. Its outcome depended on whether or not Nike's PR statements–though not advertising in the traditional sense–could be classified as commercial speech.

The legal team behind Marc Kasky had a convincing argument. The team stated that the purpose of Nike's public relations effort "was to maintain and increase its sales and profits by appealing to consumers opposed to inhumane manufacturing practices" (Greenhouse, 2003). Hence, its motive was to campaign "for the commercial purpose of

selling shoes," which, under California law, constitutes advertising subject to strict regulation (Greenhouse, 2003). To illustrate the connection of Nike's PR statements to commercial motives, at UNC, Nike signed a renewable $11.6 million deal to equip the sports teams. The students vigorously lobbied against this contract until Nike assuaged their concerns by sending representatives and running full-page newspaper ads highlighting the company's humane labor standards (Tkacik, 2003). Thus, Nike's PR statements regarding company practices, although part of a debate on globalization and a defense of its labor standards, irrefutably gave the company economic benefit, placing the press statements within the gray area of corporate speech law.

## The Defendant's Rebuttal

Recognizing this case would be no home run, Nike drafted a pair of major league First Amendment scholars to go to bat against Kasky: Harvard Law School professor Lawrence Tribe and former Solicitor General of the Clinton administration, Walter Dellinger. Nike's legal team advanced two major arguments to defend its stance that its PR statements were not commercial in nature and that the lawsuit was unjust.

First, Nike representatives used political–not commercial–speech, because, by its definition, political speech is that used in a debate. The company concludes that since it was speaking as a participant in a national debate about the effects of globalization, it should receive First Amendment protection (Greehouse, 2003). To illustrate, if a corporation were arguing over a controversial issue in the context of a lively debate, its statements would receive the same generous liability protection as those of a political figure, editorial writer, or community activist participating in the debate. "Discussion of

public issues … occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection," the company said (Biskupic, 2003). If Nike's statements were political in nature, they would receive legal protection and the dispute over the statements' accuracy would become irrelevant.

Second, Nike argued that the case is unjust because the court, by ruling against Nike, would create a double standard between corporations and their critics. Any individual could lambaste a company with unproven accusations and expect full First Amendment protection; however, if a company defended itself, it would be subject to litigation for even an accidental misstatement–or what a jury might decide is a misstatement. For example, critics are free to accuse Nike of using Asian "sweatshops" and "slave" labor to produce goods, and those accusations, whether accurate or not, are fully defended as free speech. If Nike rejoins by asserting compliance with health standards, it could be sued for false advertising if a jury felt it was misleading in any way. Lawrence Tribe stated that Kasky's position "is entirely one-sided, the decision grants favored treatment to accusations against companies," but cripples the defenders (Savage, 2003). If the ruling would, in fact, create a double standard, then out of fairness, the Court would be inclined to uphold Nike's defense.

## Court One, Court Two, Court Three–You're Out!

Initially, the Nike case went to the San Francisco Superior Court and was quickly thrown out without trial because the court accepted Nike's stance that its statements were subject to First Amendment protection. Kasky then appealed to the California Court of Appeals, and the case was again rebuffed on grounds similar to those in the Superior

Court. Kasky appealed again to the California Supreme Court–and, surprisingly, on May 2, 2002, the court's opinion reversed: the California Supreme Court ruled in favor of Marc Kasky, overturning the two previous courts' rulings (Edwards, 2002).

The California Supreme Court ruled by a narrow 4-3 decision, agreeing that the Nike PR statements were commercial speech. The Court defined Commercial Speech as speech used "to promote and defend its sales and profits and makes factual representations about its own products or operations" (Greenhouse, 2003). To decide what speech lies within these limits, the Court established a three-part test: (1) speech made by entities or individuals "engaged in commerce," (2) speech targeted at an audience including "actual and potential purchasers," and (3) speech that included "representations of fact of a commercial nature" (Greenhouse, 2003). Nike's challenged statements—assertions of ethical business practices made to customers—met all three sections of the test and were subject to liability to the extent of being proven misleading. The case was to return to the San Francisco Superior Court for trial.

Justice Joyce Kennard of the California Supreme Court said of the decision, "Our holding … in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its own sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully … we do not consider this a remarkable or intolerable burden to impose on the business community" (Edwards, 2002). Although Justice Kennard's remarks sound logical, the alarmed business community fears that the consequences of the ruling would be calamitous.

## The Court Ruling's Consequences

A California Supreme Court ruling against Nike would have widespread consequences for every U.S. company doing business in California, including every Fortune 500 company. Regardless of who would win the trial in the San Francisco Superior Court, if corporations were held to the higher court's broad definition of commercial speech, the business world would be in trouble. Listed below are the major possible outcomes proposed by the business community of how this open definition of liable corporate speech could affect different entities in a variety of sectors.

### *Corporations*

For corporations, the implications would be far reaching. If a corporation's defense of criticism using typical PR efforts were treated as only a sales pitch, it could be victim to multiple frivolous suits debating the truth of any statement, draining the company's resources, and quickly silencing its public communication (Byrum, 2003). Critics could, however, continue rampant verbal assaults on the company because of their First Amendment protection. "Uttering a word would become far more risky than keeping silent, if this ruling stands," said Tribe (Savage, 2003).

### *Lawyers*

With corporate communication under such scrutiny, corporate speech lawyers would be on guard to edit or eliminate even the most mundane press releases because of litigious implications. They would constantly be challenging PR representatives on the necessity of press releases and whether or not distributing them would be worth the risk,

and lawyers could possibly replace many traditional roles in public relations (Graulich, 2002).

### *Media*

The muzzling effect a Supreme Court ruling could have on companies and their representatives could prevent companies from even making remarks to the media on matters of importance. Tens of thousands of company spokespersons and public relations organizations could be gagged from speaking out on controversial matters (Byrum, 2003). News segments on US businesses would be meager, with companies holding back all information that could be questioned by the most discriminating listener (Lane, 2003). Advertising revenues could be lost and jobs cut in all segments of business reporting.

### *Public*

However, the public would have the most to lose if the California ruling were to hold. The information the public receives from official corporate sources would be sparse and press conferences would be rare. News leaving any company would be older and diluted by the pens of scores of lawyers. Media accounts on divisive issues would be lopsided or flatly uncontested by the accused. The robust, uninhibited debate so necessary in a democracy could be jeopardized in all issues involving corporations (Parloff, 2002).

## Is the Ruling *Really* That Bad?

Many have convincingly demonstrated that the court's ruling would be beneficial if upheld. If businesses are liable for the statements they make, consumers would be protected from lies, and companies would have strong incentive to maintain responsible conduct. Much like the pollution standards imposed on industrial companies, speech standards would force businesses to operate according to specific guidelines, and those companies would quickly conform their practices to stay in business. Furthermore, for a corporation to maintain its share in the competitive marketplace, it must remain in the public eye and must continue the public dialogue demanded by consumers and shareholders. If the company shares correct information reviewed by a capable lawyer—something many companies already do—would it really have anything to fear? Alan Caplan commented,

> The companies that don't lie, the companies that don't misrepresent things, don't have any problem with this decision. Don't forget, if a company misrepresents its product and gets sales, they're just taking sales away from someone else…. If a company is going to issue press releases, they are going to have to tell the truth. That shouldn't upset any corporation (Edwards, 2002).

Caplan's solution sounds simple: "tell the truth," but unfortunately the dilemma is anything but simple. The commercial speech definition is complicated not so much because of legal system inadequacies as it is the sophistication of corporate operations. Can we reasonably hold any company with over a million employees across 50 countries to a standard of current, exact information regarding all its facilities and affiliated labor

practices at all times under penalty of law? If any misstatement regarding such issues as labor and environmental practices or management intent were to carry legal implications, then companies seeking to communicate more information to stakeholders would be faced with challenging obstacles.

## Supreme Appeals

Nike found the California ruling unacceptable and quickly took measures to appeal to the US Supreme Court. In a move of terrific seriousness, Nike hired Tom Goldstein of Goldstein & Howe in Washington D.C. to construct its appeal. Goldstein is the attorney who presented Al Gore's case to the Supreme Court against George W. Bush regarding the 2000 election results in Florida. Goldstein believed Nike's position had the symptoms of a case that would capture the attention of the Court. He said, "What you have is the California Supreme Court setting itself up as the lowest common denominator for the planet. When … a single jurisdiction effectively, by fiat, adopts what will have to be a national rule, then the U.S. Supreme Court is very likely to step in" (Edwards, 2002). The U.S. Court's acceptance would be rare indeed, for it would normally reject an appeal in a case that has not been resolved in lower courts, and, even among those cases resolved previously, the Court accepts less than one percent of the appeals (Greenhouse, 2003).

The case, however, would provide the U.S. Supreme Court an opportunity to clear up the "hardest definitional issue that's ever come up in the history of commercial-speech cases," said New York University law professor Burt Neuborne (Tkacik, 2003). The Court currently has a definition of commercial speech established from a case in 2001, which defines commercial speech as "speech that does no more than propose a commercial transaction," an unclear, narrow definition at best. By accepting the case and

making a firm ruling, the court could set a precedent that would finally resolve the nebulous issue of commercial speech. Indeed, one California justice urged Washington to reconsider the dichotomous approach to commercial and noncommercial speech (Greenhouse, 2003). Corporate politics and sophisticated advertising schemes have furthered the hybridization of commercial and noncommercial speech. This combining of speech categories increases the need for clear legal standards, but makes the creation of a definitive line between commercial and noncommercial speech difficult to draw. Thus, the Supreme Court's ruling is needed as well as timely.

On January 11, 2003, the U.S. Supreme Court accepted the Nike case, sending the corporate and political world into a flurry of legal advocacy.

## Choosing Sides

Soon after the announcement that the US Supreme Court would hear the case, numerous agencies, entities, and organizations began filing *amicus litmus* (friend of the court) briefs to express concern and opinion for the case's outcome. The following points list some entities that supported Kasky, and the questions and concerns they raised regarding the case's outcome.

- Reclaim Democracy: A Colorado-based anti-corporate group concerned about corporations being given a constitutional "corporate right to lie" (Kasky, 2004). What would happen to corporate America, and consumers, if companies were no longer responsible for correct speech? What could occur if all major corporations were given a defensible political voice?

- Sierra Club:  As a well-known environmental activist group, the Sierra Club is always on the lookout for companies violating social responsibility (Graulich, 2002).  If Nike were to win the case, what precedent would the victory set for companies that allegedly violate civil responsibility?  Would irresponsible corporations see Nike's victory as a "green light" to continue environmental or human rights abuses and then cover up under misleading, but protected, speech?

The following entities are among the gamut of major corporations, government bodies, and private organizations that supported Nike, and the questions they submitted to the discussion:

- ACLU:  As a determined defender of civil rights and an active participant in controversial issues across the country, it is concerned about the robustness of public debate (Tkacik, 2003).  Would Nike's labor dispute be better resolved through public discourse than in a courtroom?
- European Union: As a multinational entity with law and policy developing in multiple stages across various borders, the EU depends heavily on the transparency of business communication to promote country-to-country investing within the Union and to the United States (Bush, 2003).  How would international businesses react if they could suddenly be sued in the U.S. for using the same transparent speech required to do business abroad?  If U.S. companies suddenly became relatively silent compared to companies in other countries, how might international investors react?
- PR Organizations:  These entities are most concerned with the abundance, timeliness, and correctness of information delivered to the public, and in helping

companies maintain open dialogue with consumers and shareholders (Bush, 2003). How would corporate withdrawal from public discourse affect the roles of PR representatives? What sources would the public turn to for information if companies stopped communicating?

Many interests were at stake with the double-edged consequences of this lawsuit and the national precedent that was to be established by the U.S. Supreme Court. Regardless of the direction the Court could have voted, the ripple effects would have touched hundreds of organizations and entities.

## An Unexpected Response

The anticipating public was shocked when, on June 26, 2003, the Supreme Court voted in a 6-3 decision to dismiss the case back to the San Francisco Courts, saying that a ruling would be premature due to an incomplete factual record. The justices acknowledged the importance of the case and complexity of the issue, stating that Nike's speech represents a blending of commercial speech, noncommercial speech, and public debate, which Nike claims defeats the premise of the California Supreme Court decision. Justices Sandra Day O'Connor, Anthony Kennedy and Stephen Breyer contended in a lengthy dissent that the Court should have tackled these questions, saying that the Court has an obligation to define commercial speech (Kilpatrick, 2003).

Eager parties on both sides of the case voiced disappointment, saying the issues they had hoped to have resolved were left unanswered. The court's decision essentially returned the burden of distinguishing ethical commercial speech to public hands. Perhaps

this is best; it may be unrealistic for the public expect the Supreme Court to answer this controversy with a tidy, packaged ruling for an issue best resolved on a case-by-case basis. Mary Stoll (2002) contends that with a weak system of international law, consumers use the media to monitor companies and effectively become the watchdogs of unacceptable behavior. This relationship is necessary because companies then have incentive to behave correctly regardless of legal constraints because of the fear of deserved moral reprobation for unacceptable actions (Stoll, 2002). Thus, leaving the public and local districts with the charge over the corporate speech issue may be most beneficial for all parties involved for the time being.

The case returned to California where Nike had nothing to gain by going to trial, and further damages to sustain if it lost. Thus, on September 12, 2003, Nike made a charity settlement with Kasky, contributing $1.5 million over the next three years to the Fair Labor Association, an organization that monitors companies' treatment of workers (Campbell, 2003). By contributing funds to a company engaged in corporate policing, Nike avoided legal expenses and admission of liability while improving its transparency (Linn, 2003; Murray, 2003). Unfortunately, this settlement just leaves the commercial speech issue hanging, thus encouraging future, similar lawsuits that must be resolved on a case by case basis rather than by an overarching legal precedent.

Nike vs. Kasky will certainly stimulate the activities of corporate lawyers and increase their influence on public relations. The questions raised in this article ask whether liability threats will leave companies more engaged in public relations efforts but with more substantiated information in detail and abundance, or being more bland and dull to avoid legal predators. We will probably see much of both. Eliot Schrage,

Professor at Columbia Business School and former vice president of global affairs at Gap, believes this case will actually improve PR communications, "Smart companies will not use it as a shield to block disclosure. Rather, they will use it as a sword to sculpt and craft a more accurate and transparent program that can withstand even silly law suits" (Murray, 2003). The relationship between corporate lawyers and PR departments should be reexamined to strengthen the influence of the two disciplines on corporate communication. This would serve to protect companies from liability and cause them to be more judicious in selecting material reported to the public, which could cause some otherwise descriptive press releases to be plain and less informative (Graulich, 2002).

Although the Nike vs. Kasky case has been resolved, the debate and issues it generated will have lasting practical consequences for the future of public relations as companies attempt to find a standard for how to disseminate important non-quantitative information to stakeholders and the public.

## The Final Score

Lawrence Tribe pondered the Supreme Court decision to dismiss the case. His mind raced over the hundred reasons the Court justices should have reversed the California Supreme Court's decision. Nike would certainly settle the case and never return to the San Francisco courts. Although the US Supreme Court had declined to rule on the case for the time being, the controversial issue surrounding the application of commercial speech regulation to public relations activities had been immortalized, and would surely resurface in due time. Although the full effects of the case remain to be seen, it had undoubtedly altered the landscape of public relations practices and opened

the eyes of corporate America to the need for greater accountability and responsibility when promoting company image.

## Questions

*Ethical*

1. What constitutes an unethical or misleading statement?
2. Was Nike's withholding of the single Ernst & Young audit ethical, recognizing that the majority of the audits were very positive?
3. Where does the difference exist between a company putting forth a favorable corporate image and being misleading?

*Strategic*

1. Apart from the lawsuit, was Nike's PR campaign an effective way to change public opinion of the company? Which method is best used to answer corporate criticisms?
2. What changes could Nike have made to its campaign to have avoided the lawsuit? Was the lawsuit foreseeable?
5. How should Nike restructure its PR campaigns to avoid similar lawsuits in the future?

*Legal*

1. Should companies' public-relations campaigns be protected under the First Amendment?
2. What legal risks are taken when a company issues a press release? What business or reputation risks are taken by remaining silent on important issues?
3. What is the difference between self-interested corporate dialogue and commercial speech?

4. Many major corporations–such as ExxonMobil and Microsoft–were vocal in defense of Nike when the case went to the US Supreme Court, and faced many risks for doing so. What legal or political risks did these companies take in publicly speaking in behalf of a company being sued for lying to consumers? When and to what extent should companies defend other companies with business problems?

*CSR Statements*

1. Could audited CSR statements solve the dilemma of what and how companies should report their operations to the public?
2. What effect could audited CSR have on the business field of public relations?
3. Would the public trust corporate social responsibility statements in the light of major scandals involving corporate transparency and fraudulent financial statements?

## Exhibit I: Nike's Social Responsibility Mission

*RESPONSIBLE LABOR PRACTICES*

On May 12, 1998, Phil Knight announced six new initiatives to improve factory working conditions and increase opportunities for people who manufacture Nike products. They are:
**Expanding Independent Monitoring**: Working with NGO (non-government organization) participation, Nike will initially focus on Vietnam, Indonesia and China. The ultimate goal is to establish a global system of independent certification of the company's labor practices, much the same way financial information in this annual report is certified.

**Raising Minimum Age Requirements**: Nike has increased the minimum age of footwear factory workers to 18 and the minimum age for all other light manufacturing workers (apparel, accessories, equipment) to 16. There is no tolerance for exception.

**Strengthening Environmental, Health and Safety Standards**: Nike launched the Environmental, Health and Safety Management System (EHSMS) in June of '98. The program, developed with two consultant groups (The Guantlett Group and Environmental Resources Management), will provide every factory where Nike footwear is made the tools and training to effectively manage and ensure continuous improvement throughout their environmental, health and safety programs. The program helps each factory develop a fully functioning EHSMS by June 2001.

*Key Environmental, Health, and Safety Initiatives*:
a) Indoor air testing of all footwear factories, and the monitoring of any necessary corrective measures to bring air quality to OSHA levels.
b) Accelerated replacement of petroleum-based, organic solvents with safer water-based compounds. In an average month, nine of ten Nike shoes are made with water-based adhesives, with parallel substitutions underway for primers, degreasers and cleaners used in traditional footwear production.

**Expanded Worker Education**: The Jobs + Education program offers footwear factory workers educational opportunities, such as middle school and high school equivalency courses. The classes will be free and scheduled during non-work hours. Factory participation is voluntary, but by 2002 Nike will order only from footwear factories that offer some form of after-hours education.

**Increasing Support of the Micro-enterprise Loan Program**: The Jobs + Micro-enterprise Program will provide loans to women to create small businesses. Building on a successful program already responsible for 1000 loans in Vietnam, Nike will expand the program to reach an equal number of families in Indonesia, Thailand and Pakistan.

**Building understanding**: Through the Rising Tides program, Nike is providing research grants and logistical support to universities and colleges to expand the academic body of knowledge on corporate responsibility, contract manufacturing and development issues involving Nike and other companies. Nike will also convene a series of open forums to foster dialogue with factory workers and partners, academics, NGOs and others interested in these issues.

We are serious about these initiatives. We recognize that there is no finish line. Our goal is continuous improvement. Based on our new initiatives, we have amended and are enforcing the Nike Code of Conduct that directs out factory partners accordingly. Nike will sever its business relationship with any manufacturer refusing to meet these standards or exhibiting a pattern of violations. In the last year, Nike has terminated business with eight factories in four countries for not meeting our Code of Conduct requirements. (Nike, 2004).

**Exhibit II: Timeline of Accusations and Remedies**

Early 1990s: Nike begins receiving some criticism for poor conditions at it subcontractors' factories.

June 1996: Bob Herbert prints article accusing Nike of dangerous sweatshop conditions.

July 1996: Nike begins an aggressive campaign to improve nationwide public relations and answer accusations.

January 1997: An Ernst & Young audit is conducted on a large Vietnamese factory, finding unsatisfactory conditions.

March 1997: Nike writes a 32-page report on suitable conditions found in a sample of 20 factories in six Asian countries to authoritatively answer the criticisms of labor conditions.

November 1997: New York Times writes the leaked Ernst & Young audit into a front-page story.

1998: Nike forms six new guidelines to improve their corporate responsibility

April 1998: Marc Kasky files the first law suit against Nike for misleading advertising in PR statements.

May 2002: California Supreme Court rules 4-3 in favor of Kasky, overturning the rulings of the two lesser courts.

January 2003: US Supreme Court agrees to rule on the case by July of that year.

September 2003: US Supreme Court declines on 5-3 vote to judge Nike case, sending the case back to California.

October 2003: Nike makes charity settlement, donating $1.5 million to the Fair Labor Association, an organization dedicated to checking the responsibility abuses of companies.

WORKS CITED

Argenti P.A. & Forman J.: 2002, The Power of Corporate Communication: Crafting the Voice and Image of Your Business (McGraw-Hill, New York, NY), pp.197-266.

Biskupic, Joan: 2003, 'Nike Case: Are Press Releases Free Speech?', USA Today, January 13, A.02.

Browne, M.N. & Haas P.F.: 1974, 'Social Responsibility: The Uncertain Hypothesis', MSU Business Topics 22(3), 47-51.

'Bush Administration, ACLU, Organized Labor, Media and European Entities Join Together to Protect First Amendment in Supreme Court Case Involving Nike, Inc.' 2003, PR Newswire, March 3, 2003, 1.

Byrum, Reed B.: 2003, 'Nike's Speech Fight is our own', Advertising Age, 74(3), 22.

Campbell, Duncan: 2003, 'Nike's big ticking-off: How America's first amendment on free speech kept accurate corporate reporting away from company spin', The Guardian, Nov 17, 25.

Davenport, Kim: 2000, 'Corporate citizenship: A stakeholder approach for defining corporate social performance and identifying measures for assessing it', Business and Society 39(2), 210-220.

Edwards, Jim: 2002, 'Taking it to the big guys', Brandweek, 43(29), 18-23.

Emerson, Tony: 2001, 'Swoosh Wars: In an Operation Modeled on the Clinton Campaign Machine, Nike Takes on its Enemies', Newsweek, March 12, 35-40.

Epstein, M.J. & Freedman, M.: 1994, 'Social Disclosure and the Individual Investor', Accounting, Auditing & Accountability Journal 7(4), 94-100.

Filios, Vassilios P.: 1984, 'Corporate social responsibility and public accountability', Journal of Business Ethics 3(4), 305-314.

Filios, Vassilios P.:1986, 'Review and Analysis of the Empirical Research in Corporate Social Accounting', Journal of Business Ethics 5(4), 291-307.

Florini, Ann: 2003, 'Business and Global Governance', Brookings Review 21(2), 4-9.

Gelb, D.S. & Strawser, J.A.: 2001, 'Corporate social responsibility and financial disclosures: An alternative explanation for increased disclosure', Journal of Business Ethics 33(1), 1-13.

Graulich, David: 2002, ‘Press Release: Write in Haste … Repent’, National Law Journal, 25(6), D.12.

Greenhouse, Linda: 2003, ‘Supreme Court to Review Nike Case in Major Look at Free Speech Rights of Companies’, New York Times, January 11, A.12.

Herbert, Bob: 1996, ‘Nike’s Pyramid Scheme’, New York Times, June 10, A.17-A.23.

Kilpatrick, Jack: 2003, ‘Justices should have tackled commercial-speech case’, Deseret News, Oct 6, A09.

Lane, Charles: 2003, ‘Nike Speech Case Goes to High Court’, Washington Post, January 11, E.01.

Linn, Allison: 2003, ‘Firms finding a little good will stretches a long way’, Rocky Mountain News, Oct 25, 5.C.

Mauro, Tony: 2002, ‘Let Nike Speak up for Itself’, USA Today, October 14, A.15.

McAlister, D.T. & Ferrell, L.: 2002, ‘The role of strategic philanthropy in marketing strategy’, European Journal of Marketing 36(5/6), 689-707.

McCabe, Douglas M.: 2000, ‘Global Labor and Worksite Standards: A Strategic Ethical Analysis of Shareholder Employee Relations Resolutions’, Journal of Business Ethics 23(1), 101-111.

Murray, Sarah: 2003, ‘Communicating CSR Activities: Corporate messages on responsibility call for sensitivity - but without transparency, they lose credibility’, Financial Times, Sep 29, 4.

‘Nike Annual Report and Proxy Statements’: 2004, Nikebiz.com: The Inside Story, Accessed January 8, 2004. <http://www.nike.com/nikebiz/nikebiz.jhtml?page=17>

‘Nike vs. Kasky’: 2004, Reclaim Democracy: Restoring Citizen Authority Over Corporations. Accessed January 6, 2004. <http://www.reclaimdemocracy.org/nike/index.html>

Parloff, Roger: 2002, ‘Can we talk?’, Fortune 146(4), 102-112.

Porter M.E. & Kramer, M.R.: 2002, ‘The competitive advantage of corporate philanthropy’, Harvard Business Review 80(12), 56-68.

Raynard, Peter: 1998, ‘Coming together. A review of contemporary approaches to social accounting, auditing and reporting in non-profit organisations’, Journal of Business Ethics 17(13), 1471-1480.

Reynolds, M.A.: 2001, ‘Greener CPA: An Alternative Vision’, Ohio CPA Journal 60(1), 61-64.

Robertson, D.C. & Nicholson, N.: 1996, ‘Expressions of corporate social responsibility in U.K. firms’, Journal of Business Ethics 15(10), 1095-1106.

Savage, David G.: 2002, ‘The State; Nike Takes ad Liability Case to High Court’, Los Angeles Times, October 15, B.6.

Schwartz, Mark S.: 2002, ‘A Code of Ethics for Corporate Codes of Ethics’, Journal of Business Ethics 41(1/2), 27-44.

Siegal, Nina: 1998, ‘The Last Days of Joe Camel. How a Team of Lawyers Defeated Big Tobacco’, California Lawyer, November.

Sillanpää, Maria: 1998, ‘The Body Shop values report - Towards integrated stakeholder auditing’, Journal of Business Ethics 17(13), 1443-1457.

Stoll, Mary L.: 2002, ‘The Ethics of Marketing Good Corporate Conduct’, Journal of Business Ethics 41(1/2), 121-129.

Stormer, Flora: 2003, ‘Making the shift: Moving from ‘Ethics Pays’ to an inter-systems model of business’, Journal of Business Ethics 44(4), 279-289.

Tkacik, Maureen: 2003, ‘Just How Far Does First Amendment Protection Go? High Court May Decide to Hear Whether Nike’s PR Statements to Media, Others Are Protected’, Wall Street Journal, January 10, B.1.