Center for Advanced Study & Research on Intellectual Property

CASRIP Newsletter - Spring/Summer 2006, Volume 13, Issue 2

Are Advertisements Invisible to the Law?

by Tristan Kenyon-Schultz[*]

I. Overview

Advertisements hold a precarious position in American jurisprudence. Since the mid-twentieth century, ads have been treated by courts as fundamentally different and lesser forms of creative works.[1] In fact, some courts have stated that no advertisement is creative.[2] While the U.S. Supreme Court has slightly modified its treatment of advertisements over time, no court has fundamentally altered its view that there is a noticeable and firm demarcation between ads and creative works.

This underlying assumption presents problems to many modern advertisers as they move beyond the simple black-and-white division between ads and artistic works. As consumers have become more savvy and advertisers have attempted to cut through the "clutter," the polar-opposites of art and ads are converging. As often occurs with developing social trends, the law has not kept pace with this shift. As a result, most ads receive less fair use and First Amendment protection that traditional creative works.

The greatest anomaly in the current legal status of advertisements is that visual and literary works can be advertisement-like and still preserve their creative use defenses (e.g. fair use and First Amendment rights). No matter how artful or creative the work is, an ad receives less protection.

This double standard places advertisers in a dilemma. Commercial works will always receive weak creative use defenses, while a creator of an artistic work will receive protection despite commercializing the work. The current judicial interpretation that divide art from commercial speech are too simplistic to accommodate the convergence between high art and low (or functional) art. While these interpretations present problems for advertisers, they also present opportunities for advertisers to navigate around this black-and-white view of advertisements. Although the Supreme Court has rejected obvious attempts by advertisers to use non-commercial purposes to protect commercial speech, no court has prohibited a careful tying of art with commerce or subordinating an advertisement to an artistic expression.

This article explores some of the weaknesses of current advertising law jurisprudence and suggests some approaches for protecting ads as creative works.

II. From Commerce

Much like the Supreme Court's rejection of the claim that federal power over trademarks originates in the intellectual property clause of the Constitution, the judicial understanding of "creative works" is limited to expressions produced away from commerce.[3] According to this view, copyrights and patents have economic purposes and functions while trademarks and advertisements are creations of commerce. From the limited early records of the Constitution and Supreme Court decisions, there appears to be an underlying assumption that creative works based on the intellectual property clause are a fundamental aspect of human expression.[4] Conversely, intellectual property created for notification or enticement (e.g. trademarks and advertisements) are functions of a market economy and have not tied to higher human needs.[5]

Trademarks, developing from commerce and not social betterment, have fundamentally different ideological underpinnings than copyrights or patents. Most noticeably, trademarks originate from tort concepts of unfair competition and consumer harm. Because of these commercial origins, trademark law has less concern for the protection of creativity and human expression. Thus, there is lesser treatment of intellectual property created in commerce,[6] and for trademarks, this lesser treatment has limited federal power of enforcement. In fact, trademarks were not federally protected until 1905. The resulting Lanham Act created partial federal regulation over an area that was previously considered outside of the scope of federal power.[7]

Just as trademarks have an uneven history of protection, advertisements have received little protection from federal law. Arguably it was not until the creation of the Federal Trade Commission in 1890 that advertisements became an area of interest to the law.[8] Even then, legal interest was limited to the enforcement of health and safety regulations.[9] This left the resulting, and larger, segment of advertisements outside the scope of most federal and state law. This lack of legal interest has placed advertisement law in four distinct and somewhat unrelated areas of the law: copyright law, trademark law, unfair competition, and rights of persona/publicity.

Since none of these four areas of the law were created with advertisements in mind, the resulting understanding of advertisement law is complex and contradictory. In practice, this has meant that some underlying concepts of advertisements are protectable intellectual property, while ads as a whole are viewed simply as vehicles of sales.[10] Advertisements, then, do not form a distinct protectable interest, but are seen as a manifestation of other interests. Taken as a whole, advertisements are simply invisible to the law.

This invisibility has several consequences. First, advertisements are generally treated as lesser forms of creative expression, meaning that advertisements can only create or receive protection based on the underlying intellectual property component found within the advertisement. But even then, these component parts are not considered full manifestations of normal artistic expression. Thus, the commercial element of advertisements debases the underlying intellectual property rights of their creative components and gives advertisements subordinate protection as

compared to normal creative works. In the end, this forces advertisers to accept a lower standard of protection irrespective of the particular creative expression manifested in an ad.

III. Protected Expression

The Enlightenment concept that creativity and scientific development should not be impeded by any person or government has been part of the US Constitution since its inception.[11] Broadly stated, Congress is authorized to regulate science and the useful arts to help improve humanity.[12] The result of these broad grants of exclusive rights is copyright and patent law. While patent law has been tied to functional improvements, copyright law has developed into a concept that any person who expresses an idea in a fixed medium is granted exclusive rights. Advertisements, as a form of commercial speech, are not provided any statutorily granted rights or powers. Rather, protection from unauthorized copying comes from the underlying intellectual property elements of ads. The fact that there is no express law relating to advertisements produces some odd results. Theoretically, advertisements are manifestations of their underlying intellectual property and should receive equal protection as creative works. However, the Supreme Court has added a new element to advertisements by categorizing them as manifestations of commercial speech.

Advertisements, as commercial speech, are generally viewed as lesser forms of creative works. Since there is less concern for nurturing creativity or helping the progress of humanity, less protection is granted to works created for direct commercial benefit. At first blush, this argument would result in lessening rights to any creative work produced directly for profit versus a non-commercial work.[13] But this has not occurred.

While this issue this never been directly resolved, it appears that courts are willing to ignore the commercial purposes of artistic works because they can be non-commercial in nature. Following this reasoning, advertisements, being solely commercial in purpose, are less complete works and deserve less protection. Indeed, the courts are split on what aspects of commercial speech should receive protection.[14] The resulting confusion leaves three key areas that form of copyright law ill-defined for advertisements. These categories are: limited expressions, fair use defenses, and First Amendment protections.

A. Limited Expression

The concept that ideas cannot be copyrighted is a well-established rule of copyright law articulated by the Supreme Court in *Baker v. Seldon*.[15] Following *Baker*, court decisions have further expanded the idea-expression dichotomy to include *scenes à faire* and the merger doctrine. The concept of *scenes à faire* is relatively simple: all creative works are based on fundamental premises or themes. While these themes are normally copyrightable, courts have granted limited protection to expressions that are so fundamental to creating works that allowing protection would chill creativity.

The merger doctrine is based on a concept similar to *scenes à faire*. According to the merger doctrine, some expressions are so fundamental to the understanding of a concept or there are a very limited number of ways to express a concept, that public policy requires that copyright protection not be granted.[16] In a commercial context, *scenes à faire* and the merger doctrine

are very important issues because advertisements have a short period of time (often a minute or less) to achieve comprehension by consumers.[17] This short period of time requires that certain themes and contexts be used repeatedly and this, in turn means that certain repetitious expressions are not protected to preserve future creativity.[18]

B. Fair Use

The next area of interest to advertisers is fair use. Originating from copyright law and continuing into trademark law, fair use is one of the most significant affirmative defenses against alleged infringement. The scope of protection varies case by case, but fair use allows infringers to copy, use or display/perform works under certain conditions.[19] The Supreme Court has also granted copyrighted works broad fair use protection from infringement if some degree of parody exists in the copy. The underlying theory of fair use is that certain uses (especially those that further creativity) should receive individualized protection.[20]

Although ads are limited in the number of ways they can express an idea, advertisements receive less protection from creative use defenses. In the Supreme Court's view, advertisements lack the same compelling need to express creativity that is the hallmark of true creative works The difficultly for the advertising industry is that fair use is also the most important defense against any infringement suit. In some regards this limited protection encourages further creativity in advertisements in an attempt to avoid claims of copying via substantial similarity or heart-of-the-work.[21] This limited protection significantly impacts the use of humor and parody in advertisements, however under the court's reasoning, parody requires that parts of the original work be copied in order to create the humorous element of the later work.[22] Despite the fact that parody grants broad protection to regular copyrighted works, the Supreme Court has stated that this broad protection does not exist for advertisements.[23] Combining this view with the view that works of satire (borrowing an expression from a work, but not specifically making fun of the original work) are not part of the parody defense, advertisements are left with little safety when using humor.[24]

C. First Amendment

The final creative defense not generally provided to commercial speech is the First Amendment rights of freedom of speech and expression. For advertisements, First Amendment rights exist in two separate areas: direct claims of rights and subsidiary claims as part of traditional intellectual property defenses. Beginning in 1942, the US Supreme Court determined that commercial speech was fundamentally different from speech granted First Amendment rights.[25] More importantly, the court also ruled that in instances where commercial and non-commercial speech are combined, the First amendment power of the non-commercial aspects are voided.[26] This all-or-nothing approach has since been attenuated by subsequent decisions, however the Supreme Court continues to maintain that speech tied to commerce lacks the fundamental requirements for full First Amendment protection.[27]

Meanwhile, many courts have ruled that First Amendment rights are accounted for within the existing Copyright Act,[28] making a separate analysis of a work's speech rights largely unnecessary. While the exact degree of this subordination of the First Amendment into the Copyright Act is unclear, it appears that advertisements have few opportunities to claim the

typical protections granted to traditional creative works. The combined effect of nullifying primary and secondary claims of First Amendment rights effectively makes ads a second-class body of works.

D. The Impact

While the systematic lessening of each creative use defenses impact the creative expression of advertising, the cumulative effect significantly impacts the use and application of ads. Whether intending to or not, the result of these court decisions is that advertisements are treated as not fully creative works. It is this treatment that also places aspects of advertising outside of the law. To some degree this result is reasonable. Most ads are not considered by the public to be works of art. But in the current advertising and art environments, a growing body of ads and art have begun to transcend the traditional divides of art and commercial works.

For these works, the question of protection and respect by the law becomes more problematic. Is the repetitive use of Campbell's soup cans art just because it was not funded by Campbell's? Or conversely, can a MasterCard commercial that presents prices for several consumer goods and then ends by calling a non-commercial, human value (such as children), "priceless," become part of popular culture, and thus move beyond selling credit cards? At present, courts have taken a strict view of "high art" and "low art." But this view significantly harms the free expression that is protected by the US Constitution. The result of this strict divide allows art, no matter how commercial in nature, to receive the complete complement of creative use defenses, while advertisements receive far less protection. This approach fails to understand creative expression in a modern world.

IV. The Convergence of Advertisements and Creative Works

Turn on the TV or watch any recently released studio movie and you will see ads. Advertisements can be found in other places too: on the sides of buildings, buses, even people's foreheads.[29] Advertisements are everywhere. While the need for advertisements in marketing is undeniable, advertisers are faced with a difficult challenge. Many people do not like ads and thus ads may have little relevance.[30] As humans, we have an ability to block-out information that we do not wish to view.[31] Thus, ads simply become useless, faceless, meaningless items. They become clutter.

It is because of this clutter effect that advertisers must constantly develop new and creative ways to interest consumers. While sex and humor have remained constants in advertising, the particular expression of these simple concepts has changed over time. Advertisers are in a constant race to catch the eye of the finicky consumer.[32] Advertisements move beyond simple notification; they move into the world of persuasion by creating an emotional connection with their products.[33]

Advertisers are aware that emotions are deeply connected to buying patterns. People will buy SUVs, for example, because they believe SUVs are safer vehicles, even though crash test results present less conclusive assurances of protection.[34] Here, the feeling of being protected overrules any objective, rational analysis of an SUV's safety record. As advertisers struggle to create emotional connections with their products, the nature of advertising itself has changed to

meet these new needs.[35] This connection can be achieved in one of two ways: by commercializing pre-existing emotional connections in art or adding emotion to advertisements. While these dual concepts have dominated the advertising industry, the law has yet to fully appreciate the evolution that has occurred in both art and commerce.

A. Pulp Art

In reaction to the ubiquity of advertiser's persuasive manipulations, most consumers quickly reject explicit attempts by retailers to encourage the purchasing of goods: consumers have simply become more circumspect and discerning. Consumers will no longer accept advertisements that artlessly encourage people to buy. Modern consumers simply block-out these naked persuasive attempts. Modern technology has made this blocking effect even easier—in fact, VCRs, TIVO, and other DVD-Rs now allow consumers to stop listening to ads at all. For a society and economy based on the interaction between products and consumers via advertisements, the ability of consumers to skip commercials effectively eliminates the persuasive power of the traditional 30-second commercial.

One solution to this conundrum is surprisingly simple: advertisers have made their products part of the work that consumers are viewing. That is, traditional copyrighted works, such as movies or TV programs, are blended with advertisements. This alliance between advertisements and creative works has resulted in clearly identifiable product placements within a variety of media. This concept, that products used in a movie or TV show may actually mean something beyond telling a story fundamentally challenges the judicial divide between commercial and creative works.

The Supreme Court has spoken on the rights of advertisers about a half-dozen times and each resulting decision has produced different tests for determining the commercial nature of a work.[36] The resulting application of these tests shows that courts have difficulty dealing with creative works that have commercial purposes. In all of these cases, the courts have agreed that speech produced directly for commercial purposes is provided less protection than normal creative works. The difficultly with this standard is that most, if not all, creative works are produced for commercial purposes. In fact, very successful authors such as Tom Clancy, Steven King, and Amy Tan live solely by commercializing their creative works. That said, no court would likely accept an argument that a work produced by an author for commercial benefit is commercial speech.

In a similar vein, many post-modern developments in the art world are attempting to bridge the gap between functionality and art. In the case of ***Brandir v. Cascade Pacific,*** the Supreme Court was faced with the dilemma of defining a sculptural work that also had a functional use as a bike rack.[37] After a detailed analysis, the Court concluded that because the artist, Brandir, made a singular effort to modify his original artistic work to be more functional, he has moved outside of copyrightable subject-matter.[38] This substantial-step test is nearly identical to *Fox* and *Chrestensen* and thus it is reasonable to assume that this standard reflects the Supreme Court's view of differentiating between overlapping intellectual property interests.[39] While this argument does make logical sense, it presents numerous problems in application. The biggest of these problems is that this standard effectively provides full protection for works that are once-

removed from commercial activities. Conversely, works that are creative but are directly commercial in nature are provided less protection.

Arguably the creative aspect of some works is impacted by the addition of name-brand products, but there is no indication that such works are commercial speech. Also artists, such as the musician Moby, have popularized the concept that creative works can be both expressive and commercial. For example, Moby's 1999 album, "Play," has been licensed-out for numerous commercials.[40] Arguably the songs produced by Moby are fully protected copyrighted works. Yet, the 30-second clips of his songs used in commercials are not fully protected, because they were selectively changed to accommodate commercials. This result is illogical, as the selections are still part of the fully-protected underlying work. Under ***Brandir*** and *Fox*, Moby should lose his full protection when he specifically marketed his creative works for non-expressive purposes.[41] While this argument is plausible, much like product placement, there is no indication that any court will lower protection of a work because of later commercial uses.

B. Buying a Feeling, Not a Product

The converse of increasingly commercial artistic expressions is the increased emotional aspect of many advertisements. This shift in the presentation of advertisements is less a result of the law than a realization by advertisers that the simple notification function of traditional ads no longer produce sales. That is, handbills and posters do not persuade consumers to buy products. Consumers need an emotional reason to purchase products. This realization has brought Madison Avenue to produce fundamentally different advertisements.[42]

In the past, most advertisements extolled the virtues of a product or showed a products' advantages over its competitors. As consumers became aware of this technique, these types of presentation lost their persuasive effect. But some advertisers realized that if a product has an emotional resonance with its consumers, people will buy it.[43] For advertisers, the difficult aspect was finding this emotional connection. It was at this point that psychology began impacting advertisements. No longer were consumers buying ice cream, they were buying a "pure" and "reassuring" product. In fact, recent Häagen-Dazs commercials never showed ice cream; instead they ran videos of exotic and relaxing vacation spots. Häagen-Dazs was creating an idea in consumer's minds that their ice cream possesses the same relaxing and reassuring qualities of a lush island paradise.

Advertisers have discovered that in the limited time available to sell a product, an ad must trigger pre-existing meanings in the consuming public.[44] In short, commercials must trigger emotions, emotions that move beyond rational thought and into the realm of human expression. At a visceral level, art is defined by the emotion or feeling that an artist conveys to the viewer. Art is, at its core, a relationship between the artist's expression and the viewer's impression of the work. Advertisers have discovered that the expressive relationship that art possesses can be emulated in commercial advertising.

Products are starting to convey a lifestyle, a feeling, and an outlook. Ikea carefully crafts its image in its employee manual that emphasizes efficiency, cost-effectiveness, and style; there is a distinctive Ikea style.[45] But as ads move beyond selling products by tapping into the expressive and emotional element of art, they functionally cease being strictly commercial

speech. These modern ads—if successfully done—become an interaction between a producer and the consumer. This interaction is just as indescribable and metaphysical as the distinctive feelings evoked by Picasso or Monet.

As exemplified in *Two Pesos v. Taco Cabana*, the Supreme Court is willing for grant protection to the general appearance and layout of a Mexican restaurant, but this protection does not appear to be similarly conveyed to advertisements.[46] Since advertisements are not separately protected under the law, any emotional connection or goodwill attached to an advertisement lacks legal value beyond that found in trademark law.[47] Moreover, the intangible emotional connection created by ads is neither protected nor considered in copyright or any other law. Simply put, the law does not acknowledge that advertisements can have any emotional or personal value. However, this restrictive view becomes less and less valid as advertisements become increasingly more emotive and art-like.

Even accepting the intended use argument, many emotional advertisements have a dual status. On the one hand, the ads are clearly trying to sell a product. But, at a deeper level, the ads are attempting to evoke an emotional reaction. In fact, many emotional ads intentionally downplay the commercial aspects. Some of these ads are released during the Christmas season. A Cheerios commercial, for example, shows a grandmother feeding Cheerios to her grandson while using the Cheerios as markers showing where other family members live. The Cheerios ad never says "buy Cheerios" and ends with a non-denominational statement wishing viewers "happy holidays from Cheerios." The commercial does not try to directly sell Cheerios, but tries instead to cultivate a warm feeling about families and love, a feeling that will hopefully be carried over to Cheerios at the supermarket.

While the Cheerios commercial is clearly an advertisement, the "commercial" aspect of the commercial is not expressed. The intent of the ad is mixed: the ad is trying to develop good feelings about Cheerios and thus encourage a purchase, but what is the intent? Is fostering a good feeling about a product a commercial intention? Or is it an artistic expression evoking fundamentally positive human values? These questions demonstrate how the line between ad and art becomes harder and harder to draw as art becomes more commercial and advertisements become more emotive.

V. Seeing Black and White in a World of Grey

Since existing precedents concerning commercial and non-commercial speech are premised upon an outdated intended use standard, this leaves advertisers and artists in a quandary. Most artists produce creative works with the intension of selling or commercializing their work. However, under current jurisprudence the commercial intent lessens the amount of protection available to a work. While no court has taken the extreme view that a commissioned artistic work is commercial, the existing precedent does not preclude such a view. The law in this area is vague and seems to be controlled by the unwritten and arbitrary belief that artists create creative expressions, while advertisers create commercial expressions.

This analysis fails to appreciate creative shifts found within the advertising industry in recent decades. Since the judicial interpretation of artistic or commercial speech is defined by the

creator, the intent and use of a work is not considered in a traditional analysis. The result is that artists gain full intellectual property protection for their works irrespective of how commercial a work becomes.

For advertisements, however, the current trends in the law present a far bleaker picture. Under American law, advertisements, no matter how creative or expressive, are not art and will never become art. But commercial speech can be art, and commercial art can be just as emotionally profound as high art. Since there is no indication that courts will relax the division between high and low art, advertisers wishing to receive greater creative use protection must transform their works from advertisements into art. There are effectively three ways that this can be achieved: subordinating an ad to art; tying an ad to artistic expression; or making an ads a derivative work of artistic expression. Each of these three methods could grant advertisers greater protection.

A. Subordinating an Ad to Art

The first and most obvious way to grant commercial speech greater protection is through product placement. While no one is exactly sure when the first product placement occurred, product placement is a permanent fixture of most movies and television shows.[48] Few courts have become interested in the commercial aspect of product placement, and thus it appears that this type of subordination of advertisements could increase protection. The one significant downside of this approach is that a product is fundamentally tied to the creative work. Thus, if the creative work is not popular, the placement will not be successful. It is also unclear whether courts will take a different view of product placement if there is evidence that the commercial nature of the advertisement has significantly impacted the artistic expression.[49]

While no court has made a determination whether a modified creative expression will lose some or all of its rights, it seems reasonable that this may occur at some point. This is especially true as advertisers are increasingly making placements more prominent in artistic expressions. The unresolved issue is whether courts will begin reviewing the artistic merits of works to piece-out "art" and "ad." Despite being loathe to enter into debates about artistic merit *Brandir*, the Supreme Court in *Valentine* did rule that the First Amendment freedom of expression elements of a handbill can be spatially separated from an advertisement.[50] If this is the case, then full protection will likely be granted to product placement only if the use is "seamless" or non-obvious to consumers.[51] Conversely, if courts refuse to review the merits of artistic expression, any ad that is imbedded in "art" avoids the problem of advertisements receiving less legal protection.

This approach also appears to be consistent with what consumers are willing to accept in their creative works. That is, few people will willingly watch an advertisement that is dressed-up as a creative work. The difficulty in being "seamless" is that there is a very fine line between showing a product in a creative work and harming the creative work by placement. Since this requires a delicate balance between the commercial and creative aspects, few, if any, placements are truly seamless.

B. Product Tying

The second approach to achieving greater protection is tying a product to an artistic expression. In a sense, this is the secondary commercial aspect of product placement. Advertisers can create subsequent advertisements after product placement that sells both an artistic expression and a product. A prominent example of this is Sting's use of Jaguar cars in his music video "Desert Rose." On the one hand, Jaguar placed its car prominently in Sting's music video, but Jaguar also created TV ads that showed their cars while playing "Desert Rose" and discussed the use of the car by Sting.

In essence, the TV commercial was a dual ad; it sold cars and sold Sting's newly released album. The advantages of dual ads is that it helps to reduce the costs, as two separate entities can fund the same ad for mutual benefit. The interesting, and unresolved, legal aspect is what is this kind of work? Court decisions have provided advertisements that are selling a creative work increased protection because the underlying work is fully protected.[52] Dual ads should have the same result. That is, an ad that sells cars and equally sells a creative work should gain greater protection because the ad involves an independent creative work. Under most court interpretations, the car element of the advertisement is fundamentally tied to a musical album. Thus, the car element is subsumed under the music aspect of the advertisement and thus greater protection is achieved. Dual ads can also be particularly helpful for advertisers who wish to use parody, humor, and possibility product disparagement to sell a product.

C. Derivative Works

The third and largely untested approach to blending advertising with creative works to increase protection is to make a commercial a derivate work of a created work funded by the advertiser. The unique aspect of this approach is that an advertiser uses its advertising dollars to create an independent creative work. After this work is completed, advertisers can use elements of the creative work to make a derivate that then functions as an advertisement.

An example of this is the BMW movie ads.[53] The movies are full-functioning audio-visual works that use a BMW car in the movie, but do not expressly try to sell the car. BMW ran television ads to tell consumers that the movies were available, but never tried to sell a car. The movies all prominently displayed the desirable features of the cars: speed, celebrity, and coolness, but the movie and the television ads were selling an image and not a product. Under traditional commercial/non-commercial legal analysis, the two works will arguably receive greater protection than a regular advertisement for BMW.

VI. Conclusion

For better or worse, the law has taken a strict view that there is a fundamental difference between art and commercial speech. Yet, these same courts have encountered great difficulty in defining what aspects of a work are art or not. In some regards, this division stems from Enlightenment concepts embedded in the Constitution, that some works benefit society and thus should receive greater protection while others do not. Despite the commercialization of art and the emotional expressive quality of advertisements, the law has not fundamentally altered its view that advertisements are lesser creative works.

While the view that advertisements are lesser artistic works is a common societal assumption, the impact of the lowered creative use defenses significantly impacts advertising law. Advertising does not hold an independent and identifiable position in the law. But there are solutions to the near-universal dampening of protection of commercial speech. Oddly enough, these approaches utilize the law's black-and-white approach to creative expression to the advertisers' advantage.

In a fundamental sense, advertisements need to be redefined as creative works. While this ideological shift has already occurred in the advertising world, this transition needs to be carried-over into the law. Advertisers need to focus first on developing a fully protected creative expression and then pursuing commercialization of the creative expression. This approach does not reject the traditional emphasis in advertising of selling. It is just a redefinition made for legal reasons.

While the redefinition is simple, the legal impact is great. Advertisements will receive greater protection from suit. This protection is beneficial in that it creates peace of mind, but it also greatly expands the opportunities of advertisers to use previously high liability areas of expression, such as parody. This approach is not compete, in that advertisements will still remain lesser forms of art, but the subordination of commerce to expression helps to make advertisements more than invisible tools to sell products.

---

* Mr. Kenyon-Schultz is a concurrent J.D.-LL.M. candidate (class of 2007) at the University of Washington School of Law and a 2006-2007 Intellectual Property Fellow.

[1] See ***Valentine v. Chrestensen,*** 62 S.Ct. 920, 921 (1942).

[2] Id. at 922.

[3] John Locke, Elements of Natural Philosophy. By John Locke, Esq; to Which is Added, Some Thoughts Concerning Reading and Study For A Gentleman, By The Same Author**,** *microformed (*1754).

[4] See ***Baker v. Selden,*** 101 U.S. 99, 100-2 (1879).

[5] Locke, Elements of Natural Philosophy (1754).

[6] Frank Schechter, *The Historical Foundation of the Law Relating to Trademarks* (1925).

[7] Id. at 90-4.

[8] Federal Trade Commission official website, *available at* http://www.referenceforbusiness.com/small/Eq-Inc/Federal-Trade-Commission-FTC.html (last visited June 27, 2006).

[30] Kevin Roberts, Lovemarks: The Future Beyond Brands (. 2004).

[31] Naomi Klein, No Logo: No Space, No Choice, No Jobs (. 2002).

[32] Frontline: The Persuaders (Frontline/PBS, 11/9/2004).

[33] Kathleen Kelley Reardon, Persuasion in Practice (. 1991).

[34] The SUV Info Link, "SUVs: Escalating Risks on the Highway," *available at* http://www.suv.org/safety.html (last visited June 27, 2006).

[35] Roberts, Lovemarks (2004).

[36] See ***Fox,*** 492 U.S. 469 (1989), ***Chrestensen,*** 62 S.Ct. 920, 921-2 (1942), ***Virginia Citizens Consumer*** *Council*, 425 U.S. 748 (1976), ***Bolger v. Youngs Drug Products Corp.,*** 463 U.S. 60, 103 S.Ct. 2875 (U.S.Dist.Col.,1983), and ***Brandir Intern., Inc. v. Cascade Pacific Lumber Co.,*** 834 F.2d 1142 (1987).

[37]**See *Brandir,*** 834 F.2d 1142, 1150 (1987).

[38] Id. at 1152.

[39] See ***Fox,*** 492 U.S. 469 (1989) and ***Chrestensen,*** 62 S.Ct. 920, 921-2 (1942).

[40] See:

[41] See ***Brandir,*** 834 F.2d 1142, 1150 (1987).

[42] Reardon, Persuasion in Practice (1991).

[43] Roberts, Lovemarks (2004).

[44] Id.

[45] Ikea official website, *available at* http://www.ikea-group.ikea.com/about_ikea/business_idea.html (last visited June 27, 2006).