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Commercial Speech

SUNY OGC First Amendment Conference
Albany, New York
April 11-12, 2018

What is Commercial Speech?

Commercial speech is afforded less protection than other constitutionally protected speech.

“Commercial speech” is speech that *proposes* a commercial transaction (*Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989). [w]here the facts present a close question, ‘strong support’ that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation.” *Hunt v. City of L.A.*, 683 F.3d 703, 715 (9th Cir. 2011) (quoting *Bolger*, 463 U.S. at 66-67)



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When Can Commercial Speech be Banned?

Commercial speech may be banned if it is false or misleading or if it advertises an illegal product or services.

***Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U. S. 557 (1980)**





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How Can Commercial Speech be Regulated?

If speech is found to be commercial and not false or misleading, it can be regulated. In *Central Hudson*, the Supreme Court established a four prong test to determine if a governmental regulation of commercial speech is constitutional. These are:

Is the speech commercial (concerns a lawful activity and is not false or misleading)?

Is the asserted governmental interest in restricting it substantial?

If answer to both is "yes," the restriction must:

Directly advance the governmental interest asserted and

Not be more extensive than is necessary to serve that interest (447 U.S. at 567).





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Application to SUNY

**Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989)**

1979 Policy reviewed: “No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.”

SUNY Policy was changed in 2012





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Application to SUNY

**2014 New York State Bill banning alcohol
advertisements at SUNY sporting events**





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Application to SUNY

Regulation by Campuses

- **Advertising**
- **Banners and Signs**





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Current Developments

***First Resort, Inc. v. Dennis
J. Herrera, Board of
Supervisors of the City and
County of San Francisco***





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Commercial Speech and Social Media

Summary:

- i. The Four Part Test in *Central Hudson Gas & Electric v. PSC*
- ii. Protecting Commercial Speech On The Internet
- iii. User Generated Commercial Content
- iv. Protecting Intellectual Property Rights





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Campus-Managed Social Media Sites

- **Protection of Commercial Speech**
 - Accorded less protection than other constitutionally protected speech.
- **Four Part Test In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U. S. 557 (1980).** The US Supreme Court established the basic test used to determine whether the government regulation passes 1st Amendment muster:
 - Truthful and not misleading
 - Legitimate government policy
 - A restriction must support government policy
 - Restriction must be reasonable





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User-Generated Content

- In 1996, the Supreme Court *in Reno v. ACLU*, unanimously extended the First Amendment to visual and spoken expression on the Internet.
 - Whether certain provisions of the 1996 Communications Decency Act violate the First Amendment by being overly broad and vague in their definitions of the types of internet communications which they criminalized?
 - Yes. The Court held that the Act violated the First Amendment because its regulations amounted to a content-based blanket restriction of free speech.





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User-Generated Content

- **Many campuses encourage students and employees social media engagement**
 - **To what extent should such expression be curtailed or restricted?**
 - **Central Hudson Analysis will still apply**
 - **Truthful and not misleading**
 - **Legitimate government policy**
 - **A restriction must support government policy**
 - **Restriction must be reasonable**





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User-Generated Content

- **Campus Specific Issues**
 - **Personal Use of Social Media**
 - Statements that violate applicable law or university policy
 - **Personal Use of Social Media on State Time**
 - SUNY acceptable use policy, POL etc.
 - **Official Use of Social Media**
 - Official authorization to create presence on behalf of SUNY
 - **Copyright Issues**
 - Licensing to use university marks or image
 - Fair Use Principles





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Real-Life Scenarios

Is this Commercial Speech?

If Yes,

Is this Protected Commercial Speech?

If Yes,

Is the Proposed Regulation of this Commercial Speech Proper?



Scenario #1 “Tupperware” Party in Dorm

A sales consultant holds a demonstration party in a SUNY dorm.

- Student Room vs. Lounge**
- Student Consultant**
- Fundraiser for a student group**
- Tuba Lessons? Tutor?**



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Test Your Knowledge

Scenario # 2 Vice Advertising

A local shop sells e-cigarettes and provides a vaping lounge for its customers. The shop owner wants to promote on campus.

- School Newspaper vs. Game Program vs. JumboTron
- Free Product Samples
- Smoke Free SUNY Campus





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Test Your Knowledge

Scenario #3 Classroom “Clicker” Service

**Interactive Q&A with Real Time Results. Student cost: \$20/year.
Professor given free account.**

- Students paid to post flyers around campus**
- Sales rep stands outside classroom – pitch to professor**
- Professors offered free tablet to try it in one class**



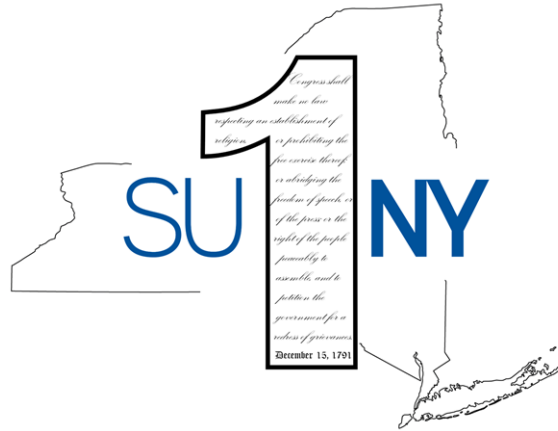


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Office of General Counsel

Presenters:

- Jean A. Sampson
- Kingsley Osei
- Kelly Lester



Commercial Speech: What is it and How is it Protected?

We would be happy to answer any questions.

