

Editorial: Who Is Afraid to Give Freedom of Speech to Marketing Folks?

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Despite the invaluable contribution of marketing folks (e.g., making markets work), they fail to enjoy the same freedom of speech as others. This fact is particularly egregious because unlike other groups that can use threats, force, or coercion, marketing folks rely only on speech. Although the U.S. Constitution never mentions commercial speech, the courts invented the concept to censor marketing folks. The cloudy rationale was that consumers need special protection from marketing folks (e.g., advertising). Naturally, censorship leads to abuse. Powerful incumbents use censorship covertly against new entrants. Politicians use censorship surreptitiously to promote their own political goals. If consumers need protection, it is certainly from the misleading statements of those with freedom of speech—politicians, attorneys, the news media, and the censors.

Key words: freedom of speech; commercial speech; censorship; advertising; marketing; regulation; branding

1. Marketing Folks Represent Buyers Within Every Organization

Marketing folks facilitate the trade, exchange, or selling of goods and services. Nontrivial marketing activities are necessary for different traders to find each other. If sellers fail to expend funds on marketing activities, then buyers must incur greater search costs. Sometimes marketing by a seller provides the buyer with generic information about the market that helps the buyer find a competitor. For example, many research studies (Bass et al. 2005, Dubé and Manchanda 2005) find that advertising often helps buyers discover attributes of the product category rather than those of a particular seller. There is no free lunch. Someone must pay the price of maintaining the market, and often it is marketing folks.

In theory, all of the parties participating in an exchange could engage in market-making activities (Shugan 2005b). However, sellers usually do the heavy lifting. They engage in marketing activities to manage the interface between the customers (i.e., buyers) and the seller's products, services, and their delivery (Moorman and Rust 1999). Within that context, marketing folks are the voice of the buyer within the seller's organization (Hauser 2002) and, perhaps, within society itself (Stidsen and Schutte 1972).

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Buyers can certainly find marketing folks annoying as they either ask time-consuming survey questions (e.g., Haman 1994) or try to sell them things that they do not want (e.g., Chu et al. 1995, Tylee 2003, Stone 2002). However, marketing folks have precisely the opposite objective (Wernerfelt 1996). Market researchers, for example, only want to hear from buyers who are unhappy or potentially unhappy with their current choices and want more choices. Marketing researchers want to provide buyers with better choices (Hauser 2002). Moreover, advertisers certainly want to avoid annoying customers (Christian 2006). Marketing folks only want to speak to buyers who are potentially interested in new choices (Hauser and Klein 1988). If they could, marketers would completely avoid marketing to anyone outside of their target market. It is an inefficient use of marketing resources to target others (Elsner et al. 2004, Iyer et al. 2005).

Without marketing folks, the different preferences of different buyers would have no voice within most organizations (Hauser 2002). In most organizations, marketing people are the only folks advocating the buyer's viewpoint (i.e., improved designs, better service, better value for the consumer, more customer support, and so on). Marketing folks are the voice of the consumer within the organization and they communicate the different preferences of different buyers (e.g., Liechty et al. 2005, Evgeniou et al. 2005, Hauser and Toubia 2005). Operations folks might understand the value of lowering user prices or standardizing output, but marketing folks understand the creation of value, determining what the market values and discovering what the organization can efficiently produce (Stidsen and Schutte 1972).

Marketing folks advocate a long-term perspective focusing on repeat purchases and stimulating positive word-of-mouth communication (Mittal et al. 2005, Rust and Verhoef 2005) rather than short-term profit maximization. Marketing folks communicate buyer wants to R&D, operations, and anyone else who will listen. Marketing folks translate consumer wants into a language that other parts of the organization can understand. Marketing folks argue against cost cutting that might result in unhappy customers. Although many organizations are unresponsive to the pleas of the marketing folks, most successful organizations in competitive free markets understand marketing. Of course, organizations in noncompetitive markets often succeed by removing buyer choice by means discussed later.

2. Unlike Other Professions, Marketing Folks Only Want to Speak

Remember that, unlike many other professionals, marketing folks usually try to encourage voluntary purchases using only verbal arguments without the use of threats, force, or coercion. In contrast, many other professions enjoy or seek some special powers well beyond simple persuasion. Unlike journalists who sometimes claim privileged, confidential sources (Moscou 1999) and report assertions with no documented evidence, marketing folks must have evidence for their claims and reveal that evidence (Richards and Preston 1992, Montgomery et al. 1978). Unlike attorneys who need not reveal their work product or confidential discussions with clients (Snyder 2002), all market research is subject to discovery and scrutiny (except when employed by politicians).

The governing state grants many other professions unique and special powers (e.g., physicians, optometrists, dentists, pharmacists, nurses, and in some states well diggers) including the ability to self-certify (i.e., license) and eliminate competitors. The dubious rationale for special powers is usually the claim that these special powers raise quality. However, legislation preventing competition and advertising usually raises buyer costs and restricts buyer choices (Miller 2004, Graham-Walker 2001).

For example, legislation shields Boston taxicabs from competition from fully licensed Cambridge taxicabs by making it illegal (enforced by Boston Police) for Cambridge cabs to pick up fares at Boston's Logan airport when making drop-offs. Although it seems sensible to certify only qualified professionals so that buyers can make informed decisions, it does seem perverse to let the monopolists certify themselves. It is more logical for independent third parties to accept that role—but that is another topic. In any case,

marketing folks enjoy no such protection from competition. Anyone can engage in marketing activities and, hence, marketing folks must earn every customer in a world of voluntary exchanges. Without special powers granted by the governing state, marketing professionals compete only based on their skills and dependence on free speech.

Marketing folks usually face relentless competition from both competitive incumbents and aggressive new entrants. This is very different from the limited competition faced by those like the United States Postal Service, the public school system, the airports, the Department of Public Works, the Federal Reserve System (i.e., requiring the exclusive use of government-produced paper money), the cable industry, and many others that persistently fight competition through legislation rather than consumer satisfaction. For example, federal law prohibits anyone but the Postal Service from delivering first-class mail (i.e., urgent mail) and potential competitors face incarceration (e.g., Grant 1976) and hundreds of thousands of dollars in fines (McAllister 1994).

Marketing folks not only provide free information to potential consumers about their products and services (as well as the entire product category itself), they also often compensate buyers for listening to their information by, for example, sponsoring broadcast television, radio, sporting events, public transit, and so on (Becker and Murphy 1993). Unlike most government monopolies that are oblivious to unhappy customers, marketing folks who are unsuccessful in persuading consumers, face certain extinction.

3. Marketing Folks Use Persuasion Rather Than Deadly Force

Marketing folks provide information to facilitate exchanges. In most cases, that information tends to put the exchange in the most favorable light from the seller's viewpoint. Fortunately, people and organizations are extremely familiar with biased information because virtually all freely supplied information (including most purchased information) is biased. In fact, most judicial systems depend on biased information where an advocacy system maximizes bias by presenting judges and jurors with bipolar extreme viewpoints.

One great advantage of a competitive free market is the ability to accommodate both imperfect decision makers with imperfect information (e.g., Friedman and Friedman 1980). While centralized economies might depend on very smart and perfectly informed decision makers, competitive free markets only depend on a few marginal buyers with sufficient knowledge and decision-making skills (e.g., Sowell 1987). Competitive markets provide myriad sources

of information including third-party reviewers (e.g., Eliashberg and Shugan 1997, Chen and Xie 2005) and word-of-mouth communication to supplement advertising (e.g., Godes and Mayzlin 2004). The long-term profit motive often encourages honesty because satisfied customers are a profitable asset (Shugan 2005a). Of course, buyers must beware of unbranded sellers and monopolistic sellers who lack the same long-term profit motivations.

Although unbiased information is preferable to biased information, the alternative is rarely unbiased information. The alternative is usually no information, limited buyer choice, or a lack of recourse for unsatisfied customers. Monopolies imposed by force usually coerce buyers into either buying their services or not buying. The governing state, for example, often forces exchanges with the threat of violence, sometimes lethal, or the threat of incarceration. Most groups in society are relentless in trying to take the power of choice away from the buyer (except, perhaps, marketing folks who stick to persuasion).

4. Freedom of Speech Should Be a Fundamental Right

Many influential people consider freedom of speech (or more broadly, freedom of expression) to be the most essential freedom that a person can enjoy and an integral requisite to a free society. For example, U.S. President George W. Bush (2005, p. 451) states, “successful democracies are built on certain common foundations. . . . First, all successful democracies need freedom of speech. . . .” U.S. President William J. Clinton (1996, p. 712) states, “I believe in religious liberty. I believe in freedom of speech.” Former Vice President Al Gore (2006, p. 207) states, “freedom of communication is an essential prerequisite for the restoration of the health of American democracy.” Former Chairman of the Board of Governors of the Federal Reserve and noted economist, Alan Greenspan (1998, p. 420) states, “. . . freedom of speech and of the press, and an absence of discrimination are all essential to a fully effective, functioning market system.” Freedom of speech was one of Franklin Delano Roosevelt’s four basic freedoms (Mizuno 2003).

Parenthetically, it does seem to this editor that private property rights are far more essential than freedom of speech because when a governing state or other institution controls a person’s property, the state also controls their means to survival (e.g., air, food, water, shelter, transportation, ability to sell one’s personal skills, etc.). With that insurmountable coercive power, granting freedom of speech is, at best, illusory. Posch (1996, p. 76) eloquently states, “a nation without private property rights will eventually prove

unable to defend any other human rights whatsoever.” There is empirical evidence for that assertion (e.g., Hanke and Walters 1997). Nevertheless, many people, especially those who earn their emolument and fame from speech (e.g., attorneys, the news media, college faculty, and political commentators) consider freedom of speech to be the revered cornerstone of any free society.

Beyond the previously mentioned self-interest of those who earn their living from free speech, there are other benefits articulated for promoting free speech. One critical benefit of freedom of speech is protection of the citizenry against potential government tyranny (Nuechterlein 1997). The purpose of the U.S. Bill of Rights, the First Amendment included, is to prevent government interference with free speech (Nuechterlein 1997).

Many scholars find that freedom of speech creates a marketplace of ideas because free speech relentlessly scrutinizes incumbent ideas in light of new ideas and new observations. From an economic theory perspective, the competitive marketplace of ideas perspective suggests that competition between ideas leads to efficiency and consumer satisfaction (Napoli 1999). From a political theory perspective, the competitive marketplace of ideas perspective leads to better citizens who are better informed about more points of view and, consequently, better self-governance (Napoli 1999). Finally, despite the limited scope of this discussion, the exploration of this topic in an international setting might be more important than in a U.S. setting (for a general discussion of globalization and marketing, see Stremersch and Verhoef 2005).

5. Less Freedom of Speech for Marketing Folks

There are no full First Amendment rights for marketing folks. Although marketing folks might be the consumer’s best friend (barring the competitive free market itself), marketing folks are unable to freely express their views in the so-called marketplace of ideas. The news media can, with no evidence, make dubious assertions about products and services, but anyone involved in producing those goods and services is subject to government censorship. For example, the Food and Drug Administration has resolutely barred drug companies from providing physicians with peer-reviewed, scientific published research involving any drug use not approved by the FDA (Galloway 2003). The supreme court of California denied Nike Incorporated the right to respond freely to critics who charged Nike with unfair overseas labor practices, regardless of the validity of the charges against Nike (Lasky 2002).

Although there is nothing in the text of the First Amendment that creates a distinction between commercial and noncommercial speech (Kozinski and Banner 1990), the courts continue to allow the governing state to censor or prohibit commercial speech that it finds unacceptable (Kuhne 2004). Because there is no First Amendment or theoretical guidance, the definition of commercial speech changes from court decision to court decision (Boedecker et al. 1995, Petty 1993). Most recently, the California supreme court defined commercial speech to include speech by a person or organization “engaged in commerce” that conveys factual information “likely to influence consumers in their commercial decisions” (Greenhouse 2003, p. A17). Given that definition, those who attack commerce have unchallenged First Amendment protected access to the marketplace of ideas while those who defend commerce are muzzled (Gorney 2003). Moreover, “the commercial speech doctrine gives government a powerful weapon to suppress or control speech by classifying it as merely commercial” (Kozinski and Banner 1990, p. 627). For example, censorship might extend to a product review in a commercial magazine, a proposed boycott, a motion picture promoting a product, a financial analyst commenting on a new product, or a college professor promoting her own textbook.

Apparently, the free market for ideas should only include politicians, attorneys, artists, and others who apparently have no interest in power, money, or commercial gain. The free market for ideas must exclude those who honestly admit to selling goods or services. If an organization advocates war, racism, violent crimes, destructive behaviors, defaming celebrities (e.g., Weinstein 1998), or wild opinions, then false free speech is protected, at least by U.S. courts. For example, the Supreme Court ruled that Ohio must allow the Ku Klux Klan to promote racism in the Ohio capitol (Tushnet 1995). The Court ruled that Massachusetts must allow the promotion of homosexuality at the Boston St. Patrick’s Day parade (Tushnet 1995). The Court ruled that the University of Virginia must allow the promotion of religion using student fees. Regardless of the justice or injustice of these decisions, it seems blatantly inconsistent to inhibit soap sellers from freely promoting their soap. If buyers need protection from unscrupulous soap sellers, they certainly need protection from unscrupulous politicians and unscrupulous news people. In the real world, overwhelmed consumers need a competitive free market where competition hunts down and destroys inferior goods and services: “In a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature” (Kozinski and Banner 1990, p. 627).

Many scholars note that the arbitrary (and probably hypocritical) distinction between commercial and noncommercial speech is purely an idea invented in the courts without theoretical or rigorous foundation. Reed (1996, p. 35) argues: “The judiciary should protect speech not because it values free speech, but because the U.S. Constitution mandates free speech.” Feary (1992, p. 49) states, “taking the right to freedom of commercial communication seriously may be the best way to protect consumers.” Middleton (1991) argues that by restricting commercial speech and broadening the definition, the state might potentially restrict political speech by misclassifying it as commercial speech. Boedecker et al. (1995) note the inconsistent treatment of the court’s approach to commercial speech in their detailed history of the court’s view of commercial speech.

In sum, whether one supports more or less freedom of speech, it seems inconsistent to discriminate against the speech of those engaged in commercial activities as if their views are too dangerous to hear. Most noncommercial speech favors the views of the speaker. Most noncommercial speech is biased. Noncommercial speech is often misleading. Finally, given society’s limited resources to correct false impressions, it is far more important to focus on false statements involving war, human rights, education, religion, criminal statutes, property rights, discrimination, and so on, which are more deleterious than false statements about soap.

6. The Enemies of Free (Commercial) Speech

Sadly, for consumers, marketing folks continue to face extremely vocal, relentless, and powerful antagonists who want to silence them. These antagonists fall into two camps. First, there are antagonists who take the arguable position that all speech requires censorship. That is a legitimate position provided there is no special discrimination against speech by those with commercial ties.

The second, more nefarious antagonists are those antagonists who enjoy material gains and power from restricting freedom of commercial speech. As noted earlier, the most prevalent argument for censorship is the protection of consumers, without of course asking consumers if they desire that protection. At one time, laws prevented the advertising of prices supposedly to protect consumers from low-quality new entrants. The primary beneficiaries of those laws were, of course, high-priced incumbents firms. Ordinances ban or restrict the use of business signs to supposedly protect consumers from ugly signs. The biggest beneficiaries of these ordinances are well-known incumbent firms and intermediaries (e.g., realtors who inhibit

house sales directly by owners). Laws passed to prohibit advertising by professionals supposedly protect consumers from overly simplistic and potentially unethical claims. The big beneficiaries of those prohibitions are again the incumbent firms. Laws passed to standardize information supposedly help consumer analyze information, but they usually help bankrupt new entrants (e.g., Moorman et al. 2005).

7. Why Not Make Lying Illegal

If people were extremely smart, perfectly informed, and superb information processors, free competitive markets would be unnecessary. When people are constrained on these dimensions, competitive markets allow the complex assimilation of the knowledge and expertise of many individuals with their own private knowledge who are willing to bet their own assets on their opinions (for a detailed explanation of this point, see Sowell 1987). The competition of ideas is most likely to produce the fastest route to the truth: “The market corrects the actions of fools much more reliably than any planning mechanism” Berger (1988, p. 1). Obviously, if people were perfect, we could quickly identify all untrue speech and expunge it. To be succinct, here are some reasons why censoring commercial speech is very dangerous in an imperfect world.

- Reasonable people may disagree about the truth. After all, ongoing scientific inquiry incessantly reveals new truths when we avoid censoring scientists.
- The inconsistencies and arbitrariness of censorship creates uncertainty, which hurts everyone including the consumer.
- Inhibiting commercial speech discourages competitive advertising and development of brand reputations because powerful incumbents can relentlessly question the speech of new entrants. Buyers get fewer choices.
- As teachers know, introductory courses must simplify the material and nuances come later. If the definition of deception includes omissions, statements that only some people might misunderstand, technical terms not defined in the message, and so on, every message will be deceptive in the eyes of some expert. Attempts to avoid deception could make communication overly complex and less understandable (e.g., see the average academic journal article).
- Ultimately, censorship raises the cost of providing information so the market will have less information from identified sources and buyers might make worse choices. Moreover, consumers might retain extant misconceptions aggravating incorrect beliefs.
- Powerful incumbents could pressure the state toward selective enforcements of the restraints on new entrants, again hurting consumers. Selective or unequal enforcement of laws and regulations is already

prevalent in numerous domains. For example, consider enforcement of antiloitering laws (Miller 2001; Chamlin and Cochran 2000), noise ordinance violations (Crawford 2000), traffic laws (Glantz 1997, LaFave 2004), immigration laws (Caretto 2005), drug laws (Erickson 1999), EPA regulations (Bock 2004), business permit requirements (Webster 2004), and other domains (Watson 2005, Anast 1995).

- Censorship creates an enormous potential for corruption and transfers power to those who censor.
 - Censorship of visible organizations might enhance the power of less-reliable anonymous information sources.
 - The cost of defending commercial claims, despite a successful defense, might discourage new entrants.
 - One-sided censorship inhibits debate and the salubrious consequences of debate (e.g., enlightenment).
 - Allowing censorship of commercial speech threatens all speech.
 - The governing state might give consumers the false confidence that all claims by sellers are true, when resources might allow the checking of only a minimal number of selective claims.
 - Consequences matter more than the accuracy of claims. For example, the seller of a low-fat food might overstate the health problems of obesity but still achieve socially desirable behavior.
 - Truthful messages can lead to undesirable outcomes. For example, consider the honest advertisements for condoms (Barron 1987).
 - It is dangerous for the governing state with its own self-interests to prohibit controversial speech. Beware of any legislation that exempts itself from the rules by which it finds everyone else should live. If deceptive commercial speech is deleterious, deceptive political speech is fatal.
 - Censorship increases the need for civil litigation, attorneys, and expert witnesses, putting a heavy burden on society’s resources. Micromanaged censorship will require precious public resources and encourage more censorship. For example, after lengthy legal litigation the California Supreme Court ruled that, consistent with California law, 75% of the grapes used in a wine must be from the Napa County of California for the word “Napa” to appear on the label (Moran 2003, Muskal 2006). Of course, one might expect that the quality of the wine should matter in the decision—it did not!
- In sum, without the right to free commercial speech, the threat of tyranny is too great.

8. Branding and a Self-Interest for Honesty

Among consumers and other people who have little knowledge of business, branding is probably the least

understood of all marketing activities. Some people complain that branding is a sham and that it is only an excuse for marketing folks to charge higher prices.

It is certainly possible for buyers to save money by buying, for example, unbranded soap that is chemically identical to branded soap. It is also possible that buyers could save money by not buying fire insurance and, then, not having a fire. It is also possible to save money by knowing the news rather than buying a newspaper. Moreover, if some reliable source of information (e.g., the government, an expert, a reseller) were to provide all required information, there is no reason to pay more for the information in the brand name.

However, marketing folks invented branding and trademarks precisely to create honesty in the market place. Branding identifies an organization, so it allows organizations to establish reputations. The market learns which organizations to trust and can punish untrustworthy organizations (Shugan 1989, Bergen et al. 1996). The market and most consumers understand the relationship between brand names and reputation (e.g., Milewicz and Herbig 1994). Branding is merely a mechanism for the buyer to identify the entity taking responsibility for the quality of the product or service.

Rather than being a sham, branding is a boon for consumers. Branding identifies the seller and creates a promise by the seller. Branding saves the consumer the cost of inspection. It allows efficient future purchases (e.g., Akçura et al. 2004). Branding often saves the consumer the full risk of trial. Branding gives the consumer a form of insurance or guarantee. Finally, branding also gives the consumer the power of retribution. The true value of branding is, and has always been, the claimed ownership of the brand by the seller. Sellers stake their reputations on the brand name and provide unhappy consumers with recourse. The brand name allows unhappy buyers to punish the seller by avoiding repeat purchases of that brand name and spreading negative word-of-mouth about the brand. Buyers can often also demand some form of restitution from the seller. Unlike most political candidates, marketing folks face the constant threat of recall as unhappy consumers can stop buying at any time. Also unlike political candidates where everyone shares the same representative, each buyer can choose a different seller. Branding is a far superior option to censorship.

9. Summary

Freedom of speech might be a relatively trivial right compared to the right to control private property. Certainly when a governing state controls a person's property, the state also controls their means to survival (e.g., air, food, water, shelter, transportation,

ability to sell one's personal skills, etc.). With that insurmountable coercive power, conferring freedom of speech is, at best, illusory.

Nevertheless, freedom of speech remains an important protection of the citizenry against creeping government tyranny (Nuechterlein 1997). It is daunting for citizens to fight a government, which can use the citizen's own resources against those citizens. Open debate can reveal injustice and falsehoods, and help to maintain individual freedoms.

Censorship is dangerous for numerous reasons. For example, there is a tendency for powerful organizations to control the censorship process. Censorship often conceals unpopular truths. Censorship tends to breed corruption. It can kill debate. The very existence of censorship discourages dissent of any kind as dissenters fear the consequences. Censorship has the penchant to reinforce existing misconceptions. It disrupts competitive free markets (e.g., yielding fewer consumer options, less competition).

Another serious danger is selective enforcement of speech prohibitions. The censor can exert an enormous deleterious coercion on the marketplace by selectively enforcing censorship against perceived enemies and overlooking violations by allies.

Analogously, consider the Gambling Prohibition Acts that give exemptions to horse racing, dog racing, state lotteries, and other selected special interest groups (Smith 2004).

Although there is nothing in the text of the First Amendment that creates a distinction between commercial and noncommercial speech, the courts continue to use that artificial distinction to allow the governing state to censor speech by those involved in commerce. This action is dangerous for all the same reasons we seek to protect noncommercial speech.

Empirical observation suggests that protection of consumers is not always the motive underlying the censorship of commercial speech. For example, the Food and Drug Administration has resolutely barred drug companies from providing physicians with peer-reviewed, scientific published research involving any drug use not approved by the FDA (Galloway 2003). The Supreme Court of California denied Nike Incorporated the right to respond freely to critics who charged Nike with unfair overseas labor practices, regardless of the validity of the charges against Nike (Lasky 2002). Although some people might not like what these companies say, it is very difficult to argue that censoring these companies helps consumers.

Hence, those who attack commerce have unchallenged First Amendment protected access to the marketplace of ideas, while those who defend commerce are muzzled (Gorney 2003). Moreover, "the commercial speech doctrine gives government a powerful

weapon to suppress or control speech by classifying it as merely commercial.” Finally, even employee statements can also be viewed as commercial speech (Zielinski 2005).

In sum, whether one supports more or less freedom of speech, it seems inconsistent to discriminate against the speech of those engaged in commercial activities as if their views are too dangerous to hear. Most noncommercial speech favors the views of the speaker. Most noncommercial speech is biased. Noncommercial speech is often wrong. Finally, given limited state resources for correcting misperceptions, it is far more likely that false statements involving war, human rights, education, religion, criminal statutes, discrimination, and so on are more damaging than false statements about soap.

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