

YouTube Schools PragerU on Lanham Act in Censorship Case

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The [Ninth Circuit recently affirmed](#) the district court's dismissal of an action brought against YouTube and Google by a non-profit educational and media organization alleging a violation of the First Amendment and false advertising under the Lanham Act, as well as various state law claims.

The lawsuit alleged that YouTube discriminates against the educational videos PragerU uploads to its YouTube platform by using filters meant to limit access to content deemed inappropriate ("Restricted Mode"). PragerU claimed that YouTube selectively restricted their videos in an effort to suppress conservative viewpoints, rather than to protect younger viewers from inappropriate content. This use of YouTube's filters, argued PragerU, runs afoul of the Lanham Act and amounts to a misrepresentation of the "nature, characteristics and qualities of YouTube's services and commercial activities as an equal and diverse public forum."

The Ninth Circuit rejected this characterization, finding that "YouTube's statements concerning its content moderation policies do not constitute 'commercial advertising or promotion' as the Lanham Act requires" because they were intended to explain to users how to navigate YouTube's filters and not for a promotional purpose. Rejecting the broad approach to the Lanham Act advocated by PragerU, the Court noted that not all commercial speech is promotional; rather, common sense suggests that representations such as terms of service, community guidelines, and restrictions are decidedly not advertisements or a promotional campaign.

Additionally, the Ninth Circuit found that tagging some of PragerU's videos as unavailable in Restricted Mode did not amount to a specific representation regarding the video itself. The Court reiterated that a false advertising claim may be based on an implied statement only if the statement is specific and communicated so as to deceive a significant number of recipients. This is clearly not the case when a viewer merely receives a message that a video is unavailable while in Restricted Mode. As the Court stated, "YouTube's braggadocio about its commitment to free speech constitutes opinions that are not subject to the Lanham Act," and YouTube's vague aspirational statements as to the ability of its platform to foster open dialogue constitute nothing more than "classic, non-actionable opinions or puffery."

The decision serves as a reminder that the definition of commercial advertising under the Lanham Act, while broad, is not limitless. For a discussion of the case's implications for online providers' immunity under the Communications Decency Act, visit the [Proskauer New Media and Technology Law Blog](#).

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