adequate determination that it is unprotected by the First Amendment."[436] The prohibition on prior restraint, thus, is essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment. It is a limitation, for example, against temporary restraining orders and preliminary injunctions pending final judgment, not against permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.[437]

The Supreme Court has also written "that traditional prior restraint doctrine may not apply to [commercial speech],"[438] and "[t]he vast majority of [federal] circuits . . . do not apply the doctrine of prior restraint to commercial speech."[439] "Some circuits [however] have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech."[440] In addition, prior restraint is generally permitted, even in the form of preliminary injunctions, in intellectual property cases, such as those for infringements of copyright or trademark.[441]

Injunctions and the Press in Fair Trial Cases.—Confronting a claimed conflict between free press and fair trial guarantees,

---

The same issues were raised in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), in which the United States obtained an injunction prohibiting publication of an article it claimed would reveal information about nuclear weapons, thereby increasing the dangers of nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus there was no appellate review of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, *see* Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[436] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1973); *see also* Vance v. Universal Amusement Co., 445 U.S. 308, 315–316 (1980) ("the burden of supporting an injunction against a future exhibition [of allegedly obscene motion pictures] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication").

[437] *See* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147, 169–171 (1998).

[438] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980), citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

[439] Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004).

[440] New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123, 131 (2d Cir. 1998), *cert. denied*, 525 U.S. 824 (1998), citing Desert Outdoor Adver. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996); *In re* Search of Kitty's East, 905 F.2d 1367, 1371–72 & n.4 (10th Cir. 1990).

[441] *See* Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004). *See also* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147 (1998) (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions that other speech does).