REGULATING ONLINE COMMERCIAL SPEECH: OH, WHAT A TANGLED WEB

by

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Abstract

New forms of marketing, in which companies attempt to minimize or hide their involvement, coupled with new forms of communications media, create an environment in which commercial and noncommercial speech are intermingled, blurring their distinction. While it is clear that commercial speech is afforded only limited constitutional protection, the U.S. Supreme Court has never adequately defined what constitutes commercial speech. And courts appear to be expanding the scope of the commercial speech doctrine. Contemporaneously, the Federal Trade Commission is attempting to revise its regulations to incorporate the use of new technologies by marketers, potentially holding them liable for deceptive practices resulting from the buzz they create on the Internet. Yet, at the same time, existing federal law may provide marketers immunity for online content. After a discussion and analysis of these issues, this paper concludes that: new communications media are developing which blend commercial and noncommercial speech; Internet communications media present a new and complex platform for communications which current laws and regulations are having difficulty managing, and which may even be contradictory; and, most importantly, with an expansive view of what constitutes commercial speech, some noncommercial speech contained in these developing communications media will be unnecessarily restricted because of the lack of a precise judicial definition of commercial speech.

Introduction

During the past 15 years the Internet has swelled into a cacophony of commentary, opinion, criticism, news, music, videos, gaming, role playing, shopping, banking and finance, and digital commerce. Nearly 25% of the world’s population, and 75% of North Americans, use the Internet in some form.1 A substantial amount of content published on the Internet is, in the United States, fully protected speech. And, because e-commerce is such a large part of the Internet, a significant amount of Internet content is commercial speech.2 One of the benefits of shopping online is the ability to read product reviews from other customers. And millions of Americans are willing to share their own thoughts and experiences regarding products, services, and companies on their own blogs or in comments responding to blog postings.3

In recent years, companies have begun to rely more heavily on word-of-mouth marketing, often referred to as “buzz marketing”, a technique that incorporates direct communications with current and potential customers. And some marketers have begun to engage in “stealth marketing”, a method of communicating with potential customers in a way that disguises the originator of the communication. The emergence of information sharing platforms on the Internet, particularly blogs and social networking sites,4 have allowed buzz and stealth marketing to flourish; marketers have discovered the Internet is an excellent interactive medium to promote goods and services. This new form of marketing, coupled with new forms of communications media, create an environment in which commercial and noncommercial speech are intermingled, blurring their distinction. While it is clear that commercial speech is afforded only limited constitutional protection, the U.S. Supreme Court has never adequately defined what constitutes commercial speech. And courts appear to be expanding the scope of the commercial speech doctrine. Contemporaneously, the Federal Trade Commission (FTC) is attempting to revise its regulations to incorporate the use of new technologies by marketers, potentially holding them liable for deceptive practices resulting from the buzz they create on the Internet. Yet, at the same time, existing federal law may provide marketers immunity for online content.

This paper addresses the extent to which speech on the Internet is regulated when it pertains to products and services. This paper first reviews the development of the commercial speech doctrine, highlighting its principal drawback—the lack of a clear distinction between commercial and noncommercial speech. Recent developments which portend an expansion of the commercial speech doctrine to different forms of speech are then analyzed. Next, trends in Internet-based marketing and social communications are examined. The FTC is attempting to update its regulations regarding deceptive practices to incorporate evolving Internet communications, and these proposed revisions are reviewed and analyzed. And while marketers are concerned about potential liabilities associated with promotional communications they foster on the Internet, this paper discusses immunities that may be available. This paper concludes by observing that: new communications media are developing which blend commercial and noncommercial speech; Internet communications media

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present a new and complex platform for communications which current laws and regulations are having difficulty managing, and which may even be contradictory; and, most importantly, with an expansive view of what constitutes commercial speech, some noncommercial speech contained in these developing communications media will be unnecessarily restricted because of the lack of a precise judicial definition of commercial speech.

The Commercial Speech Doctrine

The United States Supreme Court has established with certainty that commercial speech is afforded limited protection under the First Amendment to the Constitution; though it was not until 1980 that the Court specified the extent to which commercial speech could be regulated. Holding that "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech," the Court crafted a four-part analysis to determine the scope of proper regulation of commercial speech: (1) does the speech concern lawful activity and not mislead; (2) is the asserted government interest substantial; (3) does the regulation directly advance the government interest asserted; and (4) is the regulation not more extensive than is necessary to serve that interest? If all four parts are answered in the affirmative, then the regulation restricting the speech is considered constitutionally acceptable. If the speech fails the first part, it is afforded no protection at all.

This so-called Central Hudson test established an intermediate standard of review for lawful, non-misleading commercial speech. There need only be a reasonable fit between the government interest and the regulation imposed to accomplish that regulation. The Central Hudson test remains the law regarding the extent to which the state may regulate commercial speech.

While the Supreme Court fashioned a test to determine the constitutionality of commercial speech regulations, it has never adequately defined commercial speech itself. The Court has described commercial speech as language which does no more than propose a commercial transaction, as well as an “expression related solely to the economic interests of the speaker and its audience.” And when the Court has attempted to establish a framework for determining whether speech is commercial, it has been limited to specific forms of advertising. For example, in trying to determine whether certain informational pamphlets should be classified as commercial speech, the Court considered the following factors: the pamphlets were conceded to be advertisements; they referred to a specific product; and the company mailing the pamphlets had a clear economic motivation for their distribution. Even though each of these three factors alone appear to constitute commercial speech, the Court stated that, individually, each would not automatically compel a classification of commercial speech. It was the combination of all these characteristics that compelled the court to conclude “that the informational pamphlets are properly characterized as commercial speech.” Ultimately, however, the Supreme Court and most lower courts have consistently reiterated that the test for identifying commercial speech is whether a commercial transaction is proposed.

The reason identifying commercial speech is so challenging is that often the speech in question is mixed—containing both commercial (informational) and noncommercial (opinion) components. Any regulation restricting noncommercial speech is subject to strict scrutiny, while, as noted above, regulations restricting commercial speech are subject to a lesser, intermediate scrutiny. Determining whether the speech is commercial or noncommercial will determine the level of protection afforded by the First Amendment.

This distinction has been problematic for the courts. Not only do the courts not want to unduly restrict noncommercial speech which happens to be associated with commercial speech, but the courts have seemed equally, or even more concerned that commercial speech not be afforded any additional First Amendment protection just because it happens to occur alongside noncommercial speech. From the very beginning, courts have been “on guard” against advertisers slipping noncommercial speech into their message to try to avoid restrictions.

Indeed, the first recognized Supreme Court commercial speech case dealt with those very circumstances. In Valentine v. Chrestensen, Chrestensen had wanted to distribute handbills advertising the opportunity to tour, for a fee, a vintage submarine Chrestensen had purchased. When informed that distribution of the handbill would violate a city ordinance prohibiting distribution in the streets of commercial and business advertising matter, Chrestensen added noncommercial information (a protest against the city regarding problems he had encountered in obtaining permission to dock his submarine) on the back of the handbill. Chrestensen was still prohibited from distributing his handbills. In Valentine, the Supreme Court noted that the lower court had difficulty apportioning between content “of public interest” versus content “for private profit.” The Supreme Court had no such difficulty. In enforcing the city ordinance, the Court concluded “that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance.”

The Supreme Court continued this theme in Bolger v. Young’s Drug Corp., in which pamphlets containing commercial speech (promoting particular contraceptives) also contained noncommercial information (regarding the prevention of venereal disease and family planning). The Bolger Court concluded the pamphlets were commercial speech despite the inclusion of noncommercial information. What concerns the Court is that commercial entities would be able to circumvent commercial speech regulations, particularly relating to false and deceptive advertising, by elevating their speech
to noncommercial speech afforded full First Amendment protection. “Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.”

This approach creates two significant challenges: (1) the necessity to distinguish commercial from noncommercial speech; and (2) the risk that legitimate noncommercial speech is subjected to commercial-speech regulations just because there may be commercial overtones in the speech. When speech does no more than propose a commercial transaction (e.g., I will sell you X product at Y price), the classification as commercial is quite straightforward. However, Justice Stevens recognized the dilemma posed by mixed speech in his concurrence in Bolger. First, he believed, the Court expressed an unwarranted “impression that ‘commercial speech’ is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech.”

Justice Stevens recognized that “advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation; conversely, the commercial element does not necessarily provide a valid basis for noncommercial censorship.” Second, the exact same message (e.g., the alcohol content of a bottle of beer) may be commercial when published by one author (such as the beer’s manufacturer), and completely noncommercial when published by a different author (such as a consumer protection magazine).

The result, as expressed by the Second Circuit Court of Appeals, is that “Supreme Court decisions from which the modern commercial speech doctrine has evolved … have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content.”

Unfortunately, the U.S. Supreme Court recently passed on an opportunity to clarify the commercial/noncommercial categorization. In the late 1990’s, Nike, Inc. began a public relations campaign to counter growing criticism of the working conditions of overseas workers who produced Nike’s goods. Responding to allegations that the working conditions amounted to sweatshops, Nike placed ads in newspapers and sent letters to athletic directors at major universities. Kasky, a private California citizen, sued Nike under California’s unfair competition and false advertising laws.

Nike moved to have Kasky’s claims dismissed on the basis that its statements were not commercial speech; that they were fully protected under the United States and California constitutions, and, therefore, not subject to the state’s unfair competition and false advertising laws. The California superior court agreed, dismissing Kasky’s complaint without leave to amend and the California Court of Appeal affirmed. The California Supreme Court accepted Kasky’s petition for review to address precisely whether Nike’s statements—not directly relating to its products, their quality, availability, or prices, but dealing with Nike’s overseas manufacturing practices—constituted commercial speech.

Noting that the United States Supreme Court “has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment,” the California Supreme Court declined to do so itself. The California Supreme Court did, however, fashion a limited-purpose test as to whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception. The test considers three elements: the speaker, the intended audience, and the content of the message. The California Supreme Court concluded that where there is a commercial speaker, an intended commercial audience, and commercial content in the message, the speech is commercial.

Specifically, the California Supreme Court held that Nike’s statements constituted commercial speech because: (1) Nike, since it is engaged in commerce, is a commercial speaker; (2) Nike’s statements were addressed directly to actual and potential purchasers of its products (a commercial audience); and (3) Nike’s representations of fact were of a commercial nature since it described its own labor policies, and the practices and working conditions in factories where its products are made.

The California Supreme Court recognized that Nike’s commercial speech was intermingled with what would otherwise be constitutionally protected noncommercial speech. Citing Bolger, however, the California Supreme Court held that Nike could not immunize itself simply by including references to public issues—particularly where the alleged false and misleading statements all related to the commercial portions of the speech in question.

The California Supreme Court therefore focused on the commercial aspect of not only the speech, but also the commercial aspect of the speaker and the audience—ignoring Justice Stevens’ concern over whether “the commercial motivation of an author [should be] sufficient to alter the state’s power to regulate speech[,]” as well as his admonition that the economic motivation of a speaker should not qualify the level of constitutional protection. Although the United States Supreme Court initially granted a writ of certiorari to hear Nike, Inc. v. Kasky, it subsequently dismissed the writ as improvidently granted.

As a result, there are two tests to determine whether speech is commercial. Within California (or any court that chooses to follow California’s approach), speech is commercial if there is a commercial speaker, an intended commercial audience, and commercial content in the message. Otherwise, courts following the Supreme Court’s approach will decide if speech is commercial after considering whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication.

Under either of these two tests, it is arguable that any communication by a commercial entity can never be anything but commercial speech. The raison d’être of a business is economic; one can always find a way to link its communications to commercial motivations. Even where a business has a strong commitment to social responsibility, the fact that it sponsors a non-profit event still creates a favorable image of the company in the public’s perception—which may, however indirectly, lead to a future commercial transaction.
speech traditionally considered noncommercial could be caught in the ever-expanding net of commercial speech classification.

Expansion of the Commercial Speech Doctrine

In Aitken v. Communications Workers of America, the District Court for the Eastern District of Virginia concluded that email messages describing the benefits of union representation may be subject to commercial speech restrictions. In Aitken, two agents of the Communications Workers of America (CWA) union allegedly sent pro-union, anti-Verizon email messages under Verizon managers’ names. The Verizon managers sued the CWA (and the two agents), claiming, in part, that the unauthorized use of their names in the email messages violated the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the CAN-SPAM Act). The district court denied the defendants’ motion to dismiss the CAN-SPAM Act claim, in part by finding that the email messages were “commercial electronic mail messages[,]” thereby subjecting such messages to regulation under the CAN-SPAM Act.

The CAN-SPAM Act defines “commercial electronic mail” as those “the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” FTC regulations clarifying the definition of “commercial electronic mail” provide that only email messages qualifying as commercial speech within the meaning of the First Amendment are “commercial” under the CAN-SPAM Act. The court’s analysis in Aitken continued the expansion of the definition of commercial speech by first finding that union representation may be a “commercial service” due to the fact that the services performed by the union on behalf of the employees are “performed for a fee in the marketplace” and in spite of the fact that union organization implicates First Amendment associational interests. The court then concluded that the email messages sent by this commercial entity were in fact promoting the service provided by the commercial entity, though it did not provide any guidance as to its definition of “promotion.”

In its finding, the Aitken court summarized First Amendment law, which makes it clear that the “commercial status of speech is not determined by the speaker’s profit motive[,]” but rather by whether it promotes a commercial transaction or promotes specific products or services. The court then concluded that since union representation itself could be a commercial activity, its organizational efforts could therefore be promoting commercial services. The court noted and dismissed the dual purpose of union organizing as both implicating First Amendment associational interests as well as performing “economically valuable services for its members in exchange for a fee, … which has all of the characteristics of a commercial transaction.” The court instead focused on the services for a fee aspect of union organizing and determined that solicitations to join such union organization may promote a commercial service within the meaning of the CAN-SPAM Act. Here we see a court not just refusing to delineate between purely commercial speech and dual purpose speech in order to enable full First Amendment protection for such speech, but one which also is refusing to even delineate between commercial and noncommercial purposes for an entity itself. It appears the Aitken court failed to acknowledge that revenue is distinguishable from profit motive. It is arguable that a labor union’s fee for service is designed more to sustain the union rather than to realize a profit, transforming a union’s motive from supposed profit to continuity of life. In Aitken, the association was a union, but it is possible the court’s analysis of commercial associations could be expanded to include trade associations or groups such as the Academy of Legal Studies in Business, all of which charge a fee for their services, thus potentially exposing all communication from such associations to commercial speech restrictions.

The Aitken court determined that the email messages which noted that Verizon union employees had better job security, benefits and pay than non-union employees were providing information about the characteristics of a service and promoting that service and were therefore “commercial” under the Act. The court did not attempt to analyze the meaning of “promotion” or to determine whether a recitation of benefits of a particular service without a call to purchase such service constituted a promotion of a commercial transaction. As far as the court was concerned, a commercial entity mentioning its services was sufficient to constitute a “promotion”, which in turn made the email messages “commercial” under the CAN-SPAM Act, regardless of the fact that the email messages did not solicit membership in a union, and regardless of the defendants’ contention that the messages were not advertising or selling a product. With regard to the defendants’ contention that they were not soliciting membership in the email messages, the court determined that even if the defendants’ messages were not attempting to consummate a transaction immediately they were nonetheless commercial in nature since they advocated the benefits of the speaker’s commercial product or service in hopes of later “sealing the deal[,]” It is apparent from this line of analysis that this court concurs with the determination that any speech of a “commercial” enterprise is commercial speech without differentiating whether such speech is aimed at an immediate commercial transaction or simply outlining the benefits of membership in an association. The accepted definition of commercial speech, as language which does no more than propose a commercial transaction, appears to be mutating into a definition of commercial speech as any speech by an entity with any form of commercial overtones which creates a favorable impression of such entity, whether or not a commercial transaction is proposed at the time. This approach “gives government a powerful weapon to suppress or control speech by classifying it as merely commercial. If you think carefully enough, you can find a commercial aspect to almost any first amendment case. Today’s protected expression may become tomorrow’s commercial speech.”
Marketing on the Internet—From Buzz to Stealth

The average consumer is bombarded with marketing communications, most of which are either ignored or regarded with skepticism.69 It has long been a given in communication and marketing disciplines, however, that consumers are immensely susceptible to word-of-mouth communications.70 Personal recommendations are considered the strongest of all consumer triggers,71 primarily because they come from a trusted source rather than a corporate third party.72 Eventually, companies began to analyze customer interactions and how they influence each other to orchestrate marketing campaigns to generate “explosive self-generating demand,”73 resulting in consciously engineered buzz in relational networks.74 Buzz marketing, also more formally known as word-of-mouth marketing, is based on the premise that informal conversation and relational networks are especially influential.75 Buzz may be engineered through a network of consumers, who voluntarily promote products they like (often in return for coupons or discounts), or by hiring actors to pose as consumers in daily settings.76 This “commercialization of chitchat”77 is most effective when consumers do not even notice the commercial message.78

At the same time, the Internet, and particularly the World Wide Web, has established itself as a communications medium. There are approximately 70-100 million online Web logs—blogs—chronicling every conceivable topic, many with the capability for readers to post comments to entries.79 The two most popular social networking sites, MySpace and Facebook, which allow users to create online profiles and share information, photos, and videos with other users, together boast 300 million users worldwide.80 Twitter, an emerging social networking platform, allows participants to post (microblog) messages of up to 140 characters of text, and is widely considered the fastest growing tool of web influence.81 Twitter boasts between 5 and 6 million users and the number is growing monthly.82 The percentage of United States Internet users posting on Twitter increased eighty-three percent from May 2008 to December 2008.83 It was only a matter of time before buzz marketing moved to the Internet, transforming word-of-mouth to “word-of-mouse.”84

What better place to engage in conversations with consumers than within a medium that fosters conversations—blogs, microblogs, and social networking sites. Companies have embraced the online community in a variety of ways. Some companies, for example, have created “social-shopping” sites, a blend of social networking and e-commerce.85 These sites offer product recommendations, some by the site’s staff and some by users, and allow users to create wish lists, comment on products, and purchase products.86 But the dichotomy between the efficacy of personal recommendations versus the skepticism towards corporate marketing measures has caused buzz marketing to morph into stealth marketing—described by one commentator as advertisers pressing products and positions on audiences while masking their identities.87 Petty and Andrews differentiate between overt advertising, in which consumers know the communication originates directly from the seller, and covert advertising, in which “marketers hope to avoid both consumer disinterest and skepticism of marketing communications by communicating in ways that are perceived as not being marketing communications.”88

A classic example of this approach occurred in 2006, when Laura St. Claire and Jim Thresher began chronicling, on a blog called Wal-Marting Across America, their journey in an RV from Las Vegas to Georgia, parking overnight in Wal-Mart parking lots.89 Laura and Jim (as they were known on the blog), a couple living in Washington, D.C., originally came up with the idea to take advantage of Wal-Mart’s policy to allow RV travelers to park overnight in its parking lots for free as a way to travel from Washington D.C. to Pennsylvania and North Carolina to visit two of their children.90 Laura, a freelance writer, also planned to chronicle the trip for RV magazines.91 When Wal-Mart’s public relations firm, Edelman Worldwide, learned of the trip it decided to expand and sponsor the trip—flying the couple to Las Vegas (to serve as the starting point of the journey), providing the RV, paying for the gas, and paying Laura to chronicle the trip on a blog.92 According to one account, the blog entries looked “like a roll call of happy Wal-Mart workers” and nowhere on the blog was it disclosed that “Wal-Mart … paid for the flight [to Las Vegas], the RV, the gas, and the blog entries.”93 What is disturbing is that Richard Edelman, founder of Edelman Worldwide, is one of the founders of the Word-of-Mouth Marketing Association (WOMMA) and helped write the Association’s code of ethics,94 which includes “Honesty of Relationship: We practice openness about the relationship between consumers and marketers[,]” and “Honesty of Identity: Clear disclosure of identity is vital to establishing trust and credibility.”95

One of the strengths of MySpace is that obscure artists can expose their music to potentially millions of people. For example, Ingrid Michaelson, a 28-year-old singer-songwriter had her self-produced songs discovered on MySpace by a music licensing executive, who arranged for the songs to be used on “Grey’s Anatomy,” an ABC television series.96 As a result of that exposure, Ms. Michaelson’s album reached No. 2 on the iTunes (Apple Computer’s online music store) pop chart in 2007.97 Other companies though, along with Edelman, evidently ignore WOMMA’s code of ethics. At first glance, 24-year-old singer and guitarist Marié Digby has achieved notoriety similar to Ms. Michaelson. Ms. Digby has become quite well known as a result of her own MySpace page and YouTube (the online video repository)—homemade music videos of her performing her songs have been viewed more than 2.3 million times on YouTube.98 A 2007 press release from Walt Disney Co.’s Hollywood Records implied that Ms. Digby’s online popularity had led to her signing a record deal with Hollywood Records.99 What the press release did not disclose was that Ms. Digby had signed with Hollywood Records in 2005, and that Hollywood Records had helped devise her Internet strategy, consulted with her on the type of songs she posted online, and distributed a high-quality studio recording of one of her songs to iTunes and radio stations.100
One aspect of the online information sharing platforms that lends itself to stealth marketing is the fact that identities can easily be hidden or disguised on the Internet. For example, interns at record labels reportedly spend hours in online chat rooms trying to build buzz for their artists.101 This sort of activity may be the norm. An executive of a major public relations firm reported that in recent interviews with job candidates for its new media public-relations practice, many of the candidates “are boastful about how they go into blogs and post anonymously and have great success. These are thoughtful, smart people, but they thought this was OK.”105

And now there is blogging for dollars. Many bloggers have discovered they can subsidize their blogging hobby by placing advertisements on their sites—some can even support themselves with the advertising.103 New advertising agencies go beyond just placing ads on blogs, however. They also place ads on blogs that correspond to reviews the bloggers have written about the advertised product.104 Other companies directly pay bloggers (in cash or in kind) for reviews.105 Blogging mothers have been particularly targeted because “[r]eaders flock to these blogs for real opinions from real moms whose lives appear to resemble their own.”106 However, many of these bloggers have “relationships” with companies in which the bloggers receive perks, such as free samples, gifts and trips, in exchange for reviewing the companies’ products.107 In many cases, these relationships are not disclosed.108 As a result, it can be difficult to discern “which impromptu post about lunch with toddlers is also a carefully crafted sales pitch.”109 In some cases, individuals are recruited specifically to post favorable online reviews. Belkin, a company that provides computer and consumer electronics products, was discovered evidently offering to pay individuals to post favorable reviews of Belkin products on Amazon.com.110 Individuals were instructed to not only “[w]rite as if you own the product and are using it[,]” but also to “[m]ark any other negative reviews as ‘not helpful’ once you post yours.”111

A further outgrowth of blogging for dollars is the inception of “micro-blogging for dollars”. Twitter has been adopted by various companies to spread the word about its products, and recently Land Rover launched a Twitter campaign which involved payments to “Tweeters” (those who have a Twitter account and post messages) to enhance its marketing efforts for new Land Rover models being shown at the New York Auto Show.112 Although the Tweeters weren’t paid significant amounts—one Tweeter reported having been paid $2.50 for Land Rover’s sponsorship of his Twitter profile page for seven days—others with large Twitter followings have been paid amounts reportedly totaling hundreds of dollars.113 The significance of this effort is that individual Tweeters are reaching hundreds and thousands of their contacts with product recommendations cost the advertising company only pennies. As one business forecaster remarked “it is peers and their data, rather than brands, who will become the primary way we make decisions.”114 A court’s determination of where personal commentary stops and commercial speech begins, as well as the converse, promises to become even more difficult to ascertain as the lines of speech become further blurred in this evolving social networking environment.

**Updating FTC Regulations to Address Internet-Based Deceptive Practices**

When companies overtly sponsor a blog or social networking profile, they are simply taking advantage of an emerging medium to promote their products or services. However, when companies disguise their sponsorship of a blog or profile, they may be deceiving the public—what are perceived to be comments and activities of an individual may actually be a marketing or public relations campaign of a company. In these circumstances, it is quite arguable that the sponsored speech in question is commercial—it’s ultimate aim is to lead readers to a commercial transaction. As such, the speech is subject to reasonable regulation, including laws prohibiting deceptive trade practices.

In December 2006, the FTC responded to a petition requesting the FTC to investigate buzz (word-of-mouth) marketing, specifically addressing the issue of whether “it is deceptive in violation of Section 5 of the FTC Act to fail to disclose that a marketer is paying a sponsored consumer to make claims to other consumers about the marketer’s product.”115 The FTC declined to issue specific guidelines regarding word-of-mouth marketing, concluding instead to determine on a case-by-case basis whether enforcement action is needed.116

The FTC “will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”117 However, the representation or omission must be material.118 To be material, the act or practice must be likely to affect the consumer’s conduct or decision with regard to a product or service.119

The lack of disclosure of a connection between the marketer and an endorser can be deceptive. “When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed.”120 The FTC Guidelines on Endorsements explain whether a connection is reasonably expected by the audience. For example, if an endorser is an expert or well known personality, a connection is ordinarily expected by viewers and a payment or promise of payment need not be disclosed, as long as the advertiser does not represent that the endorsement was given without compensation.121 In contrast, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, such as real or supposed fellow consumers, “then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement …”122 This standard also applies to opinions. “Claims phrased as opinions are actionable … if they misrepresent the qualifications of the holder or the basis of his opinion …”123
The reader may note that the FTC Guidelines on Endorsements refer to “advertisers” and “advertisements.” At issue in this article are comments and endorsements, stealth or otherwise, encouraging the use or touting the praises of a product or service; not formal, overt advertisements by a marketer. However, the FTC cites In re TrendMark International, Inc. as an example where a lack of disclosure of a connection was deceptive. In TrendMark, the marketer was accused of deceptive acts by not disclosing connections between purported endorsers of its products and the company. The endorsements in question were published on the marketer’s Web page. One can therefore infer that statements published by a company on its Web site (at least regarding its products or services) qualify as “advertisements” by an “advertiser” for purposes of Section 5 of the FTC Act. In TrendMark, the FTC concluded the marketer had engaged in deceptive acts or practices because it did not disclose that the endorsers were either independent distributors or spouses of independent distributors of the marketer’s product.

The FTC also recognizes that informal, sponsored consumer statements about products or services can materially affect a consumer’s decision to purchase a product or service, and can thus be deceptive. In particular, “in some word of mouth marketing contexts, it would appear that consumers may reasonably give more weight to statements that sponsored consumers make about their opinions or experiences with a product based on their assumed independence from the marketer.” For example, according to the FTC, if a sponsored consumer tells his or her friends about the quality of a cell phone speaker or about the performance of a dishwasher, the friends may give greater weight or credibility to the statements than they otherwise would if it was disclosed, or clear from the context, that the consumer was being paid by the marketer to communicate about the product in question. In these examples, the FTC believes “the failure to disclose the relationship between the marketer and consumer would be deceptive unless the relationship were otherwise clear from the context.”

The FTC Guidelines on Endorsements define an “endorsement” as “any advertising message (including verbal statements… or depictions of the name, … likeness or other identifying personal characteristics of an individual …) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.” It is arguable that marketers’ use of consumers to blog about specific products or services, such as the mommy bloggers, or even the creation or support of a blog or social networking profile to promote a company or its products, such as the Wal-Marting Across America blog, are deceptive practices without a disclosure of sponsorship.

As noted above, the FTC has declined to adopt any specific guidelines for determining when buzz (word-of-mouth) marketing may be deceptive, instead electing to make decisions on a case-by-case basis. The FTC has, however, begun a review of its Guidelines on Endorsements. As part of its review of its Guidelines on Endorsement, the FTC is attempting to specifically address online marketing activities.

There are three principal issues associated with online buzz and stealth marketing activities: (1) an advertisement employing a consumer endorsement on a central or key attribute of a product will be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve; (2) advertisements presenting endorsements by what are represented to be “actual consumers” should utilize actual consumers, or clearly and conspicuously disclose that the persons are not actual consumers; and (3) when there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. The FTC also proposes to clarify that an advertiser who uses consumer endorsements must possess and rely upon adequate substantiation to support efficacy claims made through endorsements, just as the advertiser would be required to do if it had made the representation directly. As for the first issue listed above, the FTC is proposing to qualify the unequivocal language so that an advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. The FTC is not proposing any changes to its Guidelines on Endorsements relating to the second issue, requiring that “consumer” endorsements be made by actual consumers.

As for the third issue, the disclosure of material connections, while the proposed amendments relate primarily to celebrity endorsements, the FTC is proposing to add three new examples specifically addressing buzz (word-of-mouth) and online marketing activities. In the first of these three new examples:

A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. According to the FTC, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge because readers of his blog are unlikely to expect that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact would likely materially affect the credibility they attach to his endorsement.

In the second of these three new examples:
An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product.145

In this example, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board, since knowledge of the poster’s employment likely would affect the weight or credibility of her endorsement.146

In the third of these three new examples: “A young man signs up to be part of a ‘street team’ program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics.”147 The FTC states the incentives should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided, since the incentives would materially affect the weight or creditability of the team member’s endorsements.148

The FTC is also proposing to add a new liability standard for both advertisers and endorsers: “Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers …. Endorsers also may be liable for statements made in the course of their endorsements.”149 As part of this proposed revision, the FTC offers a new example:

A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser’s products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition.150

In this example, according to the FTC, the advertiser is subject to liability for false or unsubstantiated statements made through the blogger’s endorsement. The blogger also is subject to liability for representations made in the course of her endorsement,151 and if she fails to disclose clearly and conspicuously that she is being paid for her services.152 The FTC states that in order for the advertiser to limit its potential liability, it should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated.153 The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.154

In response to the proposed revisions to the FTC Guidelines on Endorsements, David Balter, CEO of BzzAgent, a word-of-mouth marketing company, summarizes the approach taken from the marketers’ perspective:

We are now at a new and critical moment in how marketers are beginning to engage with consumers, specifically because control in many cases is shifting into consumers’ hands.155 With consumers having a greater share of voice as a result of opinion-sharing media such as blogs, social networks and online review sites and further accelerated by the interest and ability for consumers to ‘tune out’ traditional messages, marketers have sought to engage naturally occurring consumer discussions more and more, by creating programs that engage consumers directly.156

On the one hand, consumers should be free to express their opinions about products, services, and companies. And one would not expect a marketer to have any control over, or consequent liability for, statements made spontaneously and independently by a consumer. However, as Balter notes, marketers are “engage[ing] naturally occurring consumer discussions more and more….”157 As such, the consumer statements are not spontaneous or independent, and both the consumer and the marketer benefit commercially.

Balter suggests that the FTC should distinguish between “consumer endorsers”, who are controlled by marketers to deliver a positive message of endorsement on a marketer’s behalf, and “actual consumers”, who are not controlled or required to deliver an endorsement or positive message.157 Balter argues that since “consumer endorsers” are extensions of the marketers, regulation is appropriate. However, since the marketer has no control of the “actual consumers”, regulation is not appropriate. Balter analogizes “actual consumers” to those who may receive a free sample at the store, and then subsequently talk about the product with friends.158 What Balter does not address, however, is that his “actual consumers” may be under a continuing, beneficial relationship with marketers (receiving multiple perks and gifts over time). It is understandable that under such an arrangement, the “actual consumers”’ opinions may be influenced by the gift-giving marketers.

Here lies the conundrum: consumers are bombarded by, skeptical of, and generally ignore overt commercial messages; but consumers are more likely to pay attention to—even seek out—and regard as credible, reviews and opinions by fellow consumers; marketers therefore hope to convey their advertising messages through consumer comments (endorsements/testimonials); however, if consumers know the comments are sponsored by a marketer, the comments are less likely to be viewed as credible; and if the marketers do not disclose the sponsorship, they are potentially deceiving the public. This is why marketers are tempted to engage in truly stealth marketing efforts, as exemplified by real-world events,159 and at least one of the FTC’s updated examples.160
The conflict arises between the FTC’s requirements for full disclosure while the evolving business model for online marketing is to hide or disguise sponsorships. There is precedent for disclosures in more traditional media. For example, whenever a radio station broadcasts material for which it has received a payment, the sponsor of that material must be disclosed. Similarly, newspapers must clearly mark as an “advertisement” any editorial or other reading matter for which it has been paid or promised a valuable consideration.

There are two significant problems with the FTC Guidelines on Endorsements, both current and as possibly revised. First, lack of disclosure of sponsorship is actionable only if it is material. As Goodman points out, stealth marketing content more likely contains consumer impressions as opposed to outright statements of fact. Under the current FTC Guidelines on Endorsements, the FTC will have to decide whether consumer impressions, without disclosure of sponsorship, are materially deceptive.

Second, the FTC is proposing to hold both marketers (sponsors) and sponsored consumers liable for not only failing to disclose their connection, but also for any unsubstantiated statements made through endorsements. This proposed liability could have a significant chilling effect on Internet communications. Marketers would have to provide to consumers specific disclaimer and disclosure language, as well as closely monitor communications by their sponsored consumers to ensure compliance. Word-of-mouth marketers are understandably concerned about this potential liability. In addition, it is arguable the proposed revision may require a lay consumer to understand the efficacy of a product from the marketer’s point of view, which is based on substantially more information than the consumer would normally possess. Facing such potential liability, consumer bloggers would understandably be hesitant to comment on any product if there is any connection, however tenuous, between the blogger and the marketer. This may result in a chilling effect on speech as a result of overly-broad regulation, as Senator Arlen Specter warned: “Supreme Court jurisprudence … requires that restrictions on advertising be no more extensive than necessary to achieve the FTC’s objectives in reducing deception.” Senator Specter and word-of-mouth marketers suggest that the FTC’s history of post-market, case-by-case enforcements have been effective, allowing “for a narrow targeting of violations and strike the proper balance between reducing deception and protecting First Amendment rights.” There is, therefore, the possibility that this particular proposed revision to the FTC Guidelines on Endorsement would not pass the Central Hudson test. Further, marketers may be immune from liability for the comments of their sponsored consumers, regardless of the degree of deception or whether the FTC revises its Guidelines on Endorsements.

Immunity for User Generated Content

One online marketing approach adopted by some companies is to provide the Internet forum in which consumer comments and participation are solicited. Consider, for example, a recent promotion undertaken by the Quiznos sandwich franchise in which it invited customers to submit video entries comparing a Quiznos sandwich to a Subway (a competing sandwich franchise) sandwich. Quiznos then posted selected videos to the iFilm website. Subway sued, alleging that the advertising statements encouraged and promoted by Quiznos were false and misleading in violation of the Lanham Act. Quiznos moved to dismiss the claim on the basis that its Internet postings were entitled to immunity under Section 230 of the Communications Decency Act (CDA), which provides immunity to Internet publishers of third-party (user generated) content.

Quiznos argued it was immune from liability because it was a provider or user of an interactive computer service that published information provided by another information content provider. Recognizing that “courts have generally interpreted Section 230 immunity broadly, so as to effectuate Congress’s policy choice … not to deter harmful online speech through the … route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages,” the court declined to decide whether Quiznos was entitled to immunity pending further discovery to determine whether Quiznos was, in fact, an information content provider. The significance of this ruling is that it demonstrates the possibility that, despite the commercial speech doctrine and FTC regulations (current or proposed), a company can potentially avoid deceptive trade practices liability by using “peer promotional” content—provided, of course, the allegedly deceptive content originated from a third party.

A close reading of Section 230 suggests that marketers do not even have to provide the “interactive computer service” to be immune; the immunity also applies to “users” of interactive computer services. Although Quiznos solicited and collected the videos in question, it then published them on an independent website. If Quiznos is found to qualify for immunity under Section 230, it could arguably expand the application of Section 230 to marketers who “use” sponsored consumers’ blogs, social networking profiles, and websites as publishing venues—allowing the consumers to generate the content while providing the marketers immunity from FTC regulations. The CDA does provide that this immunity has no effect on other laws—but those other laws are enumerated and do not include the FTC Act.

In the case involving Quiznos the court left open the question of “whether or not Quiznos altered or was otherwise creatively involved with any part of the contestant videos.” This is an important distinction. Information content providers lose their immunity under the CDA if they become involved in the creation of the content published online. For example, in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, the court denied immunity to Roommates.com, an online roommate matching service. Before individuals can use the Roommates.com service, they must create profiles,
which require disclosures as to sex, sexual orientation and whether children would be brought into a household. The plaintiffs sued Roommates.com alleging its business violated the federal Fair Housing Act and California housing discrimination laws. The court refused to grant Roommates.com CDA immunity because it both elicited the allegedly illegal content and made aggressive use of it in conducting its business. In other words, Roommates.com was directly involved with developing and enforcing a system that subjected users to allegedly discriminatory housing practices.

What is not settled is the degree of involvement required to become an information content provider—and therefore not qualified for immunity. The Fair Housing Council of San Fernando Valley court did state that an editor’s minor changes to the spelling, grammar and length of third-party content would not remove CDA immunity. However, “if the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination[…]” and would thus be “deemed a developer and not entitled to CDA immunity.” Ultimately, the question may be whether the “the website did absolutely nothing to encourage the posting of defamatory [(illegal)] content….” For marketers to qualify for CDA immunity, the key will be the extent to which they encourage or manifest deceptive online comments and endorsements by their sponsored consumers.

If marketers are afforded CDA immunity for consumer messages they sponsor, none of the objectives of either FTC regulations or the CDA will be achieved. Marketers will be able to avoid liability for deceptive online statements, leaving the sponsored consumers to face liability themselves. As a result, consumers may be less willing to post comments online regarding a company’s products or services, chilling online speech that Section 230 of the CDA hoped to avoid.

As consumers are offered the opportunity to express their devotion to brands in blogs, microblogs, and social networking sites such as MySpace and Facebook, these “peer promotions” mix the consumers’ noncommercial speech with the brand owners’ commercial speech. And when the brand owners’ sponsorship is concealed, they “further entangle the promotional [commercial] and the expressive [noncommercial].”

**Mixed Speech on the Internet**

The Supreme Court has demonstrated a clear propensity to consider any speech that contains a commercial element to be commercial speech. As such, online activities that mix peer promotion with some level of commercial sponsorship will in all likelihood be considered commercial speech and subject to limited First Amendment protection, and, consequently, FTC regulations—but only to the extent they are not otherwise immune from liability under the CDA.

In this environment, one could easily categorize a shoe retailer’s blog covering running events as commercial—even if there is never a mention of specific products. If the retailer’s name is on the blog, that alone is arguably an attempt to favorably influence consumers who may someday purchase goods from the retailer. The fact that a blog accepts advertising does not automatically make the content of the blog postings commercial speech. However, “editorial judgments in connection with an advertisement take on the character of the advertisement,” and may result in limited constitutional protection. Where there may be a conglomeration of editorial content and product promotion—such as when a blogger is paid to review a product or tailor advertisements to content within the blog—there is a strong argument the content of the blog can be classified as commercial speech. As a result, any online communication, overt or stealth, which has any underlying commercial motivation will most likely be considered commercial speech and, therefore, subject to reasonable regulation, including prohibitions against unfair and deceptive acts. As society’s communications become increasingly intertwined with social networking sites that have caught the eye of businesses looking to enhance their image or promote their products, the amount of speech considered commercial due to underlying commercial ties or motivation is likely to increase exponentially.

The entire discussion of whether online word-of-mouth activities should require sponsorship disclosure assumes that such activities qualify as commercial speech. But the blogosphere and social networking sites offer more nuanced forms of speech. One may argue that messages discussing products or services published online by consumers at their own initiative, though motivated by nonpecuniary compensation (such as coupons or gifts), are noncommercial, because the speaker is not a commercial entity. Goodman argues that since commercial law receives less protection, “speakers will find it more attractive to mingle commercial and noncommercial speech—the very hybrid messages that are so common in stealth marketing—because hybrid messages resist classification as commercial speech.”

The U.S. Supreme Court has held that where noncommercial speech is inextricably intertwined with commercial speech, the speech should be afforded full protection—i.e., the speech as a whole should be treated as noncommercial. However, in that case, the commercial speech was inextricably intertwined with noncommercial speech because state law required the commercial speech be included. Where there is no requirement, “by law of man or of nature[,]” that the speech be combined, no special consideration is afforded the speech.

If a retail establishment maintains a blog primarily devoted to noncommercial but related subjects (e.g., a running shoe store maintaining a blog covering marathons), is that commercial speech, particularly if the blog contains the occasional post regarding branded shoes sold by the store? If a devoted audiophile maintains a hobbyist blog and is paid to occasionally review a related product, is that commercial speech? In the latter case, the FTC assumes so, as it assumes its Guidelines on Endorsements would apply. Even if one were to parse out the blogger’s specific sponsored posts and classify them as
commercial, how should the blogger’s remaining posts be classified? Particularly if they happen to contain honest, unsolicited negative reviews of other companies’ products? And, under an expansive reading of the CDA, the blogger could potentially face liability while the manufacturer would probably be immune.

Conclusion

The courts’ ill defined distinction between commercial and noncommercial speech will continue to generate confusion as the line between advertising and various relational networks continues to blur. Courts continue to expand the definition of what constitutes commercial speech as the venues for such speech expand into email and the Internet. The fact that there is tremendous growth in the area of buzz marketing and relational networks, complicated by the potential presence of stealth marketing, all in a climate of uncertainty as to the precise definition of commercial speech, does not bode well for clear consensus among the courts for upholding instances of noncommercial speech in these emerging technologies and communities. This is true even when such speech is made by someone with a very tenuous connection to potential economic benefit.

The state of online buzz marketing is further complicated by possibly conflicting federal law. While the FTC seeks to hold marketers liable for unsubstantiated claims or claims made without a disclosed relationship, those same marketers may be immune from liability if the claims are made by consumers rather than directly by the marketers themselves—leaving the consumers potentially liable. This potential for sole liability arising from a relationship with a marketer—however tenuous—could very well stifle online speech, contrary to the purpose of the law granting immunity in the first place. This leads to the paradoxical potential that while mixed speech by consumers on the Internet—not overt proposals to engage in a commercial transaction—may fall within the ever-expanding web of the commercial speech doctrine, the possible one-sided liability that may hinder speech could be considered overly extensive regulation, freeing online posters from liability. In the meantime, the unwelcome result of all of this uncertainty may well be unnecessary restrictions on editorial speech that is determined to be commercial in the courts’ ever expanding definition of the term.

Footnotes

2 Although U.S. Internet-based retail sales were just under $32 billion in the first quarter of 2009, this represents only 3.5% of total U.S. retail sales for the quarter. Quarterly Retail E-Commerce Sales, 1st Quarter 2009, U.S. CENSUS BUREAU, at http://www.census.gov/mrts/www/data/html/09Q1.html (last visited May 20, 2009).
3 See infra note 79 (discussing blogs).
4 See infra note 80 and accompanying text (discussing social networking sites).
7 Id. at 566.
8 See O. Lee Reed, Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence, 34 AM. BUS. L.J. 1, 13 (1996) (noting that since commercial speech is considered “more hardy” than political speech, less susceptible to discouragement, and more verifiable, it can be regulated upon the showing of a “substantial” state interest).
9 Central Hudson, 447 U.S. at 563-64 (“The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”) (citations and footnote omitted). In Central Hudson itself, the Court held that a total ban on advertising by utilities did not meet the fourth part of the test: “In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson’s advertising.” Id. at 571 (footnote omitted). See also Bolger v. Youngs Drug Corp., 463 U.S. 60, 75 (1983) (holding that a total prohibition on the mailing of unsolicited contraceptive advertisements was unconstitutional).
12 Id. at 184. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), provides a recent application of the Central Hudson test, in which the Supreme Court held: a ban on tobacco advertising within 1,000 feet of any school or playground failed the fourth part (i.e., it was not shown to be no more extensive than necessary to advance the state’s interest) (id. at 561-
65); regulations restricting point-of-sale advertising in stores within 1,000 feet of schools or playgrounds failed the third and fourth parts (i.e., they did not advance the state’s purposes and were too extensive) (id. at 566-67); but regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such products did pass all four parts (id. at 568-69). See also Robert Sprague, Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century, 44 Am. Bus. L.J. 127 (2007) (tracing the development of the commercial speech doctrine).


14 Central Hudson, 447 U.S. at 561.


16 Id. at 67 (footnote omitted).


18 See, e.g., Bolger, 463 U.S. at 65 (“With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances.”) (footnote omitted).

19 See supra, note 10 and accompanying text.


22 Id. at 53.

23 Id.

24 Id. at 55.

25 Id.


27 Id. at 67-68. See supra notes 15-16 and accompanying text.

28 Bolger, 463 U.S. at 68.


30 Bolger, 463 U.S. at 81 (Stevens, J., concurring).

31 Id. (citation omitted).


33 Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 94 (2d Cir. 1998).


37 Kasky, 45 P.3d at 258.

38 Id. at 256.

39 Id.

40 Id. at 256-58.

41 Id. at 258.

42 Id. at 260 (citing Bolger v. Youngs Drug Corp., 463 U.S. 60, 68 (1983)).

43 Bolger v. Youngs Drug Corp., 463 U.S. 60, 82 (Stevens, J., concurring).


48 Kasky, 45 P.3d at 256-58.

49 Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 94, 97 (2d Cir. 1998).
See generally Jim Hawkins, Papers, Petitions, and Parades: Free Expression’s Pivotal Function in the Early Labor Movement, 28 BERKELEY J. EMP. & LAB. L. 63, 78-88 (2007) (noting early labor union movements asserted that their free expression and right of association deserved constitutional protection prior to any judicial recognition of such concept and compared the defense of such right to the defense of our rights in the American Revolution; however, the early movement failed to develop constitutional theories to legitimize such assertions which may have led to the minimal First Amendment protection afforded by the courts to labor expression).

Aitken, 496 F. Supp. 2d at 668. The court did not address the privilege previously given to handbilling over picketing by the Supreme Court in DeBartolo v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 580 (1988), based upon the Court’s view that handbilling is less effective than picketing because it relies more on the persuasive force of its message, rather than upon conduct. See Aditi Bagchi, Deliberative Autonomy and Legitimate State Purpose Under the First Amendment, 68 ALB. L. REV. 815, 828 (2005) (noting that the Supreme Court privileged handbilling over picketing, recognizing that picketing exerts greater persuasive force than the more passive handbilling). Arguably, email is more analogous to handbilling with respect to its persuasive force as compared to face-to-face dissemination of information regarding the benefits of union membership. See also George Feldman, Unions, Solidarity, and Class: The Limits of Liberal Labor Law, 15 BERKELEY J. EMP. & LAB. L. 187, 269 (noting that the Court in DeBartolo held handbilling to be legal because there was no “coercion” involved in handbilling).

Aitken, 496 F. Supp. 2d at 665.

Aitken, 496 F. Supp. 2d at 664 (citing Bd. of Trustees of the State Univ. v. Fox, 492 U.S. 469, 473 (1989); Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 632 (1980)).

Aitken, 496 F. Supp. 2d at 664. Despite the court’s conclusion that the Supreme Court has “all but held that labor union speech may be commercial in nature” (id.), the matter may not yet be completely settled. Contrast DeBartolo, 485 U.S. 568, with Thomas v. Collins, 323 U.S. 516 (1945) (applying traditional first amendment protection to union-related speech). It should be noted, however, that Thomas was decided before the current commercial speech doctrine was established and therefore may not be controlling on this issue. It should also be noted that the speech in DeBartolo was aimed at the “community” rather than employees sought for union membership.

Aitken, 496 F. Supp. 2d at 665.

Aitken, 496 F. Supp. 2d at 664. But see DeBartolo, 485 U.S. at 576:

The handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace.

Aitken, 496 F. Supp. 2d at 666 (citing Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1043 (E.D. Wis. 1997)).

See supra, note 13 and accompanying text.


Andrew M. Kaikati & Jack G. Kaikati, Stealth Marketing: How to Reach Consumers Surr...


See generally id. Part of these relational networks are customer communities—a body of consumers who are involved with a company in a social relationship and who interact among themselves. Ravi S. Achrol & Philip Kotler, Marketing in the Network Economy, 63 J. MARKETING, 146, 160 (1999).

76 See generally Carl, supra note 74. See also Rob Walker, The Hidden (in Plain Sight) Persuaders, N.Y. TIMES MAG., Dec. 5, 2004, at 10; Suzanne Vranica, Getting Buzz Marketers to Fess Up, WALL ST. J. ONLINE, Feb. 9, 2005, at http://online.wsj.com/article/0,,SB110790837180449447,00.html. For example, in 2002 Sony Ericsson hired sixty actors in ten cities to pose as tourists, asking strangers to take their pictures with a Sony Ericsson camera-phone the actors were carrying—at the same time commenting on “what a cool gadget it was.” Id. (noting the actors were told to identify themselves only when asked directly).
77 Walker, supra note 76.
78 Kaikati & Kaikati, supra note 71, at 9.
79 See Adam Thierer, Need Help... How Many Blogs Are There Out There?, Mar. 6, 2008, at http://techliberation.com/2008/05/06/need-help-how-many-blogs-are-there-out-there (reporting over 110 million blogs); David Sifry, The State of the Live Web, April 2007, Apr. 5, 2007, at http://www.sifry.com/alerts/archives/000493.html (reporting over 70 million blogs). A blog generally consists of a series of messages (“posts”) listed in reverse chronological order. A blog may be a personal diary (see, e.g., DOOCE, at http://www.dooce.com) or a commercial, continuing commentary and reporting on political events (see, e.g., TALKING POINTS MEMO, at http://www.talkingpointsmemo.com), or may comment and report on financial issues (see, e.g., THE BIG PICTURE, at http://www.ritholtz.com/blog). The collection of blogs on the Internet is often referred to as the “blogosphere”. Blogs are run by “bloggers” who “post” (publish) messages on the blog. Many blogs also allow readers to post their own comments to specific blog postings. See Blogging Basics, at http://support.technorati.com/support/siteguide, for a general discussion of blogs.
81 Steve Matthews, Lawyer Marketing with Twitter, 71 TEX. BAR J. 450 (June 2008).
83 Id.
84 Kaikati & Kaikati, supra note 71, at 9.
86 Id.
87 Ellen P. Goodman, Stealth Marketing and Editorial Integrity, 85 TEX. L. REV. 83, 83-84 (2006). Stealth marketing “is considered to be a viable alternative to conventional advertising because it is perceived as softer and more personal than traditional advertising.” Kaikati & Kaikati, supra note 71, at 6.
88 Petty & Andrews, supra note 69, at 7 (citation omitted). Petty and Andrews further define “masked marketing” as “marketing communications that appear not to be marketing communications.” Id.
90 Gogoi, supra note 89.
91 Id.
92 Id.
93 Id.
94 Frazier, supra note 89.
97 Id.

Frazier, supra note 89.


Id.

Id.

Id.


Jeremy Mullman, Land Rover Taps Twitter as Campaign Cornerstone, 80 ADVERTISING AGE 14, 23-25 (Apr. 20, 2009).

Id.


See Letter from Mary K. Engle, supra note 115, at 1.


See FTC Policy Statement on Deception, supra note 117; Letter from Mary K. Engle, supra note 115, at 2; Kraft, Inc., 970 F.2d at 314.

See FTC Policy Statement on Deception, supra note 117; Letter from Mary K. Engle, supra note 115, at 2; Kraft, Inc., 970 F.2d at 314.


Id.; 16 C.F.R. § 255.5 (2009).

FTC Guidelines on Endorsements, supra note 120; 16 C.F.R. § 255.5.

FTC Policy Statement on Deception, supra note 117. See also Letter from Mary K. Engle, supra note 115, at 4 n.9.


Id. at paras. 12, 13. See also Letter from Mary K. Engle, supra note 115, at 3.

FTC Guidelines on Endorsements, supra note 120; 16 C.F.R. § 255.0(b).

See supra notes 106-109 and accompanying text.

See supra, notes 89-93 and accompanying text.

See supra, notes 98-100 and accompanying text.

See Letter from Mary K. Engle, supra note 115, at 1.


FTC Guidelines on Endorsements, supra note 120; 16 C.F.R. § 255.2(a).

FTC Guidelines on Endorsements, supra note 120; 16 C.F.R. § 255.2(b).

FTC Guidelines on Endorsements, supra note 120; 16 C.F.R. § 255.5.

73 Fed. Reg. at 72378 (proposing a new 16 C.F.R. § 255.2(a)). This is the corollary to the principle that endorsements may not contain representations that would be deceptive if made directly by the advertiser. 73 Fed. Reg. at 72378 n.16.

73 Fed. Reg. at 72378-79 (proposing an amended 16 C.F.R. § 225.2(a) renumbered as § 225.2(b)). The FTC is also proposing to revise the renumbered § 225.2(b) to require that when an advertiser does not possess adequate substantiation for the content of the testimonial representation, the advertiser should clearly and conspicuously disclose the generally expected performance in the depicted circumstances. Id. at 72387.

Though 16 C.F.R. § 255.2(b) is proposed to be renumbered to § 255.2(c) and the current § 255.2(c) would be eliminated. 73 Fed. Reg. at 72392.

See 73 Fed. Reg. at 72389.

73 Fed. Reg. at 72395 Example 7 (proposed addition to 16 C.F.R. § 255.5).

Id.

Id. Example 8 (proposed addition to 16 C.F.R. § 255.5).

Id.

Id. Example 9 (proposed addition to 16 C.F.R. § 255.5).

Id.

Id. at 72391 (proposed new 16 C.F.R. § 255.1(d)).

Id. at 72392 Example 5 (proposed addition to 16 C.F.R. § 255.1).

Id.

Id.

Id.

Id.

Id.


Id.

Id. at 5.

Id. at 7.

See supra notes 89-93, 98-100 & 110-111 and accompanying text.

See supra note 145 and accompanying text.


See supra notes 118-119 and accompanying text.

Goodman, supra note 87, at 109.

See supra note 149 and accompanying text.

See supra notes 153-154 and accompanying text.


Letter from Arlen Specter, U.S. Senator, to Donald S. Clark, Secretary of the FTC, July 31, 2007 (no pagination), at http://www.ftc.gov/os/comments/endorsementguides/527492-00028.pdf (commenting on the FTC’s first proposed revisions to its Guidelines on Endorsements). See also supra note 7 and accompanying text.

Id. See also, e.g., Comments on Behalf of the Word of Mouth Marketing Association, supra note 167.
Corporate Bog

whose benefits to consumers far outweigh any concerns about its shortcomings

provide


Lahey potentially liable for statements made in the course of endorsements).

undercover marketing

Practices

arising from Internet Publishers Should Worry

Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why

online classified ad provider because it did not "cause" any discriminatory statements to be made).

purposes; rather, Roommate[s.com]" work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site.” Id. Contrast with Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (upholding immunity for online classified ad provider because it did not “cause” any discriminatory statements to be made). See also Eric Weslander, Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry, 48 WASHBURN L.J. 267, 291-295 (2008) (discussing the extent of liability/immunity arising from a website’s “development” of content based on Fair Housing Council of San Fernando Valley).

Fair Housing Council of San Fernando Valley, 521 F.3d at 1170 (citing Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003)).

Id. at 1171.


See supra note 149 and accompanying text (discussing proposed FTC regulations holding consumer endorsers potentially liable for statements made in the course of endorsements).

See Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (holding that Congress’ intent in enacting Section 230 was to avoid the chilling effect on Internet speech resulting from potential tort liability); Mary Kay Finn, Karen Lahey & David Redle, Policies Underlying Congressional Approval of Criminal and Civil Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act Of 1996—Should E-Buyers Beware?, 31 U. TOL. L. REV. 347, 349 (2000) (noting that in passing the CDA, Congress was concerned “that imposing liability on providers and users of Internet services would foreclose free speech, and stifle the growth of a medium of interactive exchange whose benefits to consumers far outweigh any concerns about its shortcomings[


Id. at 699.

See supra, note 50 and accompanying text; Transp. Alternatives, Inc. v. City of N.Y., 218 F. Supp. 2d 423, 427 (S.D. N.Y. 2002) (holding that the use of a company’s trademarks, trade names or logos to show financial or material support of a public event constitutes commercial speech, even though the use could not be characterized merely as proposals to engage in commercial transactions).

See, e.g., Smith v. People of the State of Cal., 361 U.S. 147, 150 (1959) (holding publication and dissemination of books and other forms of the printed word are afforded full constitutional protection, despite taking place under commercial auspices); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding advertisement that “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern[,]” and that newspaper was paid for publishing the advertisement, were immaterial; advertisement was not commercial speech) (citation omitted); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976) (“[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is ‘sold’ for profit… [e.g., books, motion pictures, or religious literature].”).


See, e.g., supra, notes 104-107 and accompanying text.

Goodman, supra note 87, at 107 (footnote omitted).


Id. at 786. See also Bd. of Trustees of the State Univ. v. Fox, 492 U.S. 469, 474 (1989).

Bd. of Trustees of the State Univ., 492 U.S. at 474 (applying commercial speech doctrine to university regulation prohibiting commercial sales in dorm rooms, in which students claimed promotion of Tupperware was not commercial speech because presentations also included home economics techniques). “No law of man or of nature makes it impossible to sell house wares without teaching home economics, or to teach home economics without selling house wares.” Id. See also Kasky v. Nike, Inc., 45 P.3d 243, 260 (Cal. 2002) (“Nike’s speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech.”).

See supra, notes 143-144 and accompanying text.