

21st CENTURY COMMERCIAL SPEECH: A MIX OF BUZZ MARKETING, IMMUNITY, AND DECEPTIVE TRADE PRACTICES

by

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Introduction

Commercial speech is afforded only limited constitutional protection, yet the U.S. Supreme Court has never adequately defined commercial speech. 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. The emergence of information sharing platforms on the Internet (particularly social networking sites) have allowed buzz marketing to flourish. This new form of marketing, coupled with new forms of communications media, create an environment in which commercial and editorial speech are intermingled, blurring the distinction between commercial and noncommercial speech. This is also occurring at the same time the courts appear to be expanding the scope of the commercial speech doctrine.

This paper 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, developing trends in marketing and social communications, particularly on the Internet, are examined. What is observed is that new communications media are developing which blend commercial and noncommercial speech. With an expansive view of what constitutes commercial speech, this paper concludes that 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 U.S. Supreme Court has established with certainty that commercial speech is afforded limited protection under the First Amendment to the Constitution.¹ It was not until 1980 that the Supreme 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[,]”² 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 governmental interest asserted; and (4) is the regulation not more extensive than is necessary to serve that interest?³ 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.⁴

This so-called *Central Hudson* test established an intermediate standard of review for lawful, non-misleading commercial speech.⁵ There need only be a reasonable fit between the government

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interest and the regulation imposed to accomplish that regulation.⁶ 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.”⁷

The *Central Hudson* test remains the law regarding regulation of commercial speech.⁸ For example, in *Lorillard Tobacco Co. v. Reilly*,⁹ applying the *Central Hudson* test, 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);¹⁰ 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);¹¹ 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.¹²

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,¹³ as well as an “expression related solely to the economic interests of the speaker and its audience.”¹⁴ And when the Court has attempted to establish a framework for determining whether speech is commercial, the framework 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.¹⁵ Even though each of these three factors alone appear to constitute commercial speech, the Court stated that it 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.”¹⁶ Ultimately, however, the Court has consistently reiterated that “the test for identifying commercial speech”¹⁷ is whether a commercial transaction is proposed.¹⁸

The reason identifying commercial speech is so challenging is that often the speech in question is mixed—containing both commercial and noncommercial (informational) components. Any regulation restricting noncommercial speech is subject to strict scrutiny,¹⁹ while, as noted above, regulations restricting commercial speech are subject to the lesser intermediate scrutiny.²⁰ Determining whether the speech is commercial or noncommercial will determine the level of protection afforded by the First Amendment.²¹

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 concerned that commercial speech not be afforded any additional First Amendment protection just because it happens to occur alongside noncommercial speech. In particular, 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.²² 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.²³ Chrestensen was still prohibited from distributing his handbills.²⁴ In *Valentine*, the Supreme Court noted that the lower court had difficulty apportioning between content “of public interest” versus content “for private profit.”²⁵ 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.”²⁶

The Supreme Court continued this theme in *Bolger v. Youngs Drug Corp.*, in which pamphlets containing commercial speech (promoting particular contraceptives) also contained noncommercial information (regarding the prevention of venereal disease and family planning).²⁷ The *Bolger* Court concluded the pamphlets were commercial speech despite the inclusion of noncommercial information.²⁸ 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.”²⁹

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),³⁰ 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.”³¹ 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.”³² Further, 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).³³ 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.”³⁴

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.³⁵ 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.³⁶

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.³⁷ 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.³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴²

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.⁴³

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[,]”⁴⁴ as well as his admonition that the economic motivation of a speaker should not qualify the level of constitutional protection.⁴⁵ Although the United States Supreme Court initially granted a writ of certiorari to hear *Nike v. Kasky*,⁴⁶ it subsequently dismissed the writ as improvidently granted.⁴⁷ The case was later settled by the parties.⁴⁸

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.⁴⁹ 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.⁵⁰

Under either of these two tests, it is arguable that any communication by a commercial entity can ever 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.⁵¹ As courts continue to expand what constitutes commercial speech, such examples of traditionally noncommercial speech 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 Eastern District of Virginia district court concluded that emails describing the benefits of union representation may be subject to commercial speech restrictions.⁵² In *Aitken*, two agents of the Communications Workers of America (CWA) union allegedly sent pro-union, anti-Verizon email messages under Verizon managers' names.⁵³ The Verizon managers sued the CWA (and the two agents), claiming, in part, that the unauthorized use of their names in the e-mail messages violated the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the CAN-SPAM Act).⁵⁴ The district court denied the defendants' motion to dismiss the CAN-SPAM Act claim, in part by finding that the emails were “commercial electronic mail messages[,]” thereby subjecting such emails to regulation under the CAN-SPAM Act.⁵⁵

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.”⁵⁶ Federal Trade Commission (“FTC”) regulations clarifying the definition of “commercial electronic mail” provide that only emails qualifying as commercial speech within the meaning of the First Amendment are “commercial” under the CAN-SPAM Act.⁵⁷ 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.⁵⁸ The court then concluded that the emails 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.”⁵⁹

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”⁶⁰ but rather by whether it promotes a commercial transaction or promotes specific products or services.⁶¹ The court then concluded that since union representation itself could be a commercial activity, its organizational efforts could therefore be promoting commercial services.⁶² 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.”⁶³ 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 Act.⁶⁴ 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. In this particular case the association was a union, but it is not clear that a court’s analysis of commercial associations could not 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 emails 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.⁶⁵ 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 emails “commercial” under the Act, regardless of the fact that the emails did not solicit membership in a union, and regardless of the defendants’ contention that the emails were not advertising or selling a product. With regard to the defendants’ contention that they were not soliciting membership in the emails, the court determined that even if the defendants’ email 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[.]”⁶⁶ 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 transaction⁶⁷ appears to be mutating into a definition of commercial speech as any speech by a commercial entity which creates a favorable impression of such commercial entity whether or not a commercial transaction is proposed at the time.

Commercial Speech on the Internet

If one adopts the approach that “[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues[.]”⁶⁸ then many forms of non-traditional advertising can be categorized as commercial speech. While courts claim that the test for commercial speech is whether a commercial transaction is

proposed,⁶⁹ the application of this test covers speech well outside of what would be considered a “traditional” advertisement (I will sell you X product at Y price).⁷⁰ For example, the following types of speech have been classified as commercial: the alcohol content of a bottle of beer printed on the bottle’s label;⁷¹ banners containing a company’s logo displayed at a non-profit charity event to show financial or material support for the event;⁷² and a certification statement on an attorney’s letterhead.⁷³

In this environment, one could easily categorize a shoe retailer’s blog⁷⁴ 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.⁷⁵

The fact that a blog accepts advertising does not automatically make the content of the blog postings commercial speech.⁷⁶ However, “editorial judgments in connection with an advertisement take on the character of the advertisement,” and may result in limited constitutional protection.⁷⁷ Where there may be a commingling of editorial content and product promotion (such as when a blogger is paid to review a product or tailors 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.

Buzz Marketing and the Internet

Buzz marketing, also more formally known as word-of-mouth marketing (as well as sometimes referred to as viral or stealth marketing), is based on the premise that informal conversation and relational networks are especially influential.⁷⁸ It has long been a given in communication and marketing disciplines that consumers are immensely susceptible to word-of-mouth.⁷⁹ Personal recommendations are considered the strongest of all consumer triggers.⁸⁰

Eventually, companies began to analyze customer interactions and how they influence each other to orchestrate marketing campaigns to generate “explosive self-generating demand,”⁸¹ resulting in consciously engineered buzz in relational networks.⁸² 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.⁸³ 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.”⁸⁴ This “commercialization of chitchat”⁸⁵ is most effective when consumers do not even notice the commercial message.⁸⁶

At the same time, the Internet, and particularly the World Wide Web, has established itself as a communications medium. There are over 100 million⁸⁷ online Web logs—blogs—chronicling every conceivable topic, many with the capability for readers to post comments to entries. 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 nearly 100 million users.⁸⁸ It was only a matter of time before buzz marketing moved to the Internet, transforming word-of-mouth to word-of mouse.⁸⁹

What better place to engage in conversations with consumers than within a medium that fosters conversations—blogs and social networking sites. Companies have embraced the online community in a variety of ways. Some companies have created “social-shopping” sites, a blend of social networking and e-commerce.⁹⁰ 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.⁹¹ Companies also sponsor community-oriented blogs related to their products. For example, New Balance Tampa, an independent retailer of New Balance products (mainly running shoes) sponsors a blog⁹² covering

marathons, foot races, even the Race for the Cure,⁹³ as well as New Balance product announcements.⁹⁴ Target Corporation solicits “Rounders,” “a group of influential and active college students 18-24 years old who help support Target’s marketing initiatives through fun, creative online and offline activities.”⁹⁵ Procter & Gamble has embraced online marketing by sponsoring MySpace pages for emerging artists.⁹⁶ On her MySpace page, Rihanna, a Barbados-born performer, thanks “the Secret Sparkle Girls for helping sponsor [her] Secret Body Spray Tour” and then encourages her readers to “check out” Procter & Gamble’s Secret brand body sprays.⁹⁷

Stealth Marketing

These are clearly interactive buzz marketing techniques sponsored by commercial entities. But this environment has also fostered a significant amount of stealth marketing—described by one commentator as advertisers pressing products and positions on audiences while masking their identities.⁹⁸ One Target Rounder reported receiving a message from Target (or possibly its public relations firm) reminding everyone to keep their Rounder affiliation a secret.⁹⁹ The Target Rounders Code of Conduct prohibits posting profane messages, spamming and fraudulently generating points—but does not address whether Rounders should disclose their affiliation with Target.¹⁰⁰

In 2006, 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.¹⁰¹ 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.¹⁰² Laura, a freelance writer, also planned to chronicle the trip for RV magazines.¹⁰³ 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.¹⁰⁴ 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.”¹⁰⁵ What is disturbing is that Richard Edelman, founder of Edelman Worldwide, and one of the founders of the Word-of-Mouth Marketing Association (WOMMA), helped write the Association’s code of ethics,¹⁰⁶ which includes “Honesty of Relationship: You say who you’re speaking for” and “Honesty of Identity: You never obscure your identity.”¹⁰⁷ Edelman has also been accused of sponsoring additional Wal-Mart-related “flogs” (a cross between a real and a fake blog).¹⁰⁸

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.¹⁰⁹ 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 2007.¹¹⁰ 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.¹¹¹ 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.¹¹² 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.¹¹³

Some stealth marketing ploys are bit more nefarious. In September 2006, Ruckus Networks, the owner of a fledgling site that provides legal downloads of music and videos, created a phony college student named Brody Ruckus on Facebook in an attempt to attract the attention of college-age students.¹¹⁴ Ruckus, the phony student, implored Facebook users to “friend” him (members share information among designated “friends”), claiming that if he made 100,000 Facebook friends his girlfriend would acquiesce to certain of his sexual desires.¹¹⁵ When Facebook learned of the phony Ruckus, it deleted the profile, but by then Ruckus, the company, had collected e-mail addresses (through the friend linkage) of 300,000 Facebook users, who then began to receive unsolicited e-mails promoting Ruckus products.¹¹⁶ Also in 2006, a Web site called iDont.com appeared that criticized owners of Apple Computer’s iPod as conformist drones, trying to create an anti-iPod groundswell.¹¹⁷ The site was established by SanDisk Corporation to promote its own digital music player, a rival to the iPod.¹¹⁸

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.¹¹⁹ This sort of activity may be the norm. An executive of a major public relations firm reported that in recent interviews with 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.”¹²⁰

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.¹²¹ 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.¹²² Other companies directly pay bloggers (in cash or in kind) for reviews.¹²³

When companies overtly sponsor a blog or social networking profile, they are simply taking advantage of an emerging medium to promote their products. 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 an unidentified company.¹²⁴ In these circumstances, it is quite arguable that the sponsored speech in question is commercial—its ultimate aim is to lead readers to a commercial transaction. As such, the speech is subject to reasonable regulation,¹²⁵ 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.”¹²⁶ 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.¹²⁷

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.”¹²⁸ However, the representation or omission must be material.¹²⁹ 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.¹³⁰

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.”¹³¹ 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.¹³² 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”¹³³ 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”¹³⁴

The reader may note that the FTC’s 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 advertisements by a marketer. However, the FTC cites *In re TrendMark International, Inc.*¹³⁵ as an example where a lack of disclosure of a connection was deceptive.¹³⁶ 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.¹³⁷ 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.¹³⁸

The FTC also appears to recognize that informal, sponsored consumer statements about products or services can be deceptive, and thus ultimately materially affecting a consumer’s decision to purchase a product or service. 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.”¹³⁹ 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.¹⁴⁰ 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.”¹⁴¹

The FTC’s guidelines on endorsement 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.”¹⁴² It is arguable the marketers’ use of consumers to blog about specific products or services (such as Target’s Rounders),¹⁴³ or even the creation of a blog or social networking profile to promote a company or its products (such as the Wal-Marting Across America blog,¹⁴⁴ or Marié Digby’s MySpace profile),¹⁴⁵ 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.¹⁴⁶ The organization that filed the petition requesting action by the FTC regarding word-of-mouth marketing, Commercial Alert,¹⁴⁷ paraphrased the FTC’s refusal to issue guidelines as a “Christmas present” to the word-of-mouth industry.¹⁴⁸ If, as Commercial Alert claims, “millions of people—and especially teens—[are being tricked by companies] with word of mouth marketing[.]”¹⁴⁹ Congress could apply the same “endorsement” restrictions on Web sites that are applied to radio broadcasters and newspapers. Whenever a radio station broadcasts material for which it has received a payment, the sponsor of that material must be disclosed.¹⁵⁰ 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.¹⁵¹ There is currently no similar requirement in the digital world.¹⁵²

One advantage of amending federal statutes to require endorsement disclosures for online word-of-mouth marketing is that such a requirement, if modeled on current law, is not dependent upon a finding of a material deception.¹⁵³ While endorsements, without disclosure of the sponsorship, are

prohibited,¹⁵⁴ as Goodman points out, stealth marketing content more likely contains consumer impressions as opposed to outright statements of fact.¹⁵⁵ Without a federal word-of-mouth endorsement disclosure requirement, the FTC would have to decide whether consumer impressions, without disclosure of sponsorship, are materially deceptive. The fact that many online marketing initiatives contain a mix of expressive (noncommercial) and promotional (commercial) speech could further complicate the FTC's decision process.

Mixed Speech

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 non-pecuniary 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.”¹⁵⁶

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.¹⁵⁷ However, the commercial speech was inextricably intertwined with noncommercial speech because state law required the commercial speech be included.¹⁵⁸ Where there is no requirement, “by law of man or of nature[,]” that the speech be combined, no special consideration is afforded the speech.¹⁵⁹

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? If so, then the same commercial speech regulations will apply in these circumstances.

Mixed Speech and Immunity

The Internet also provides opportunities for consumers to deliver powerful brand messages. “As consumers express their devotions to brands in blogs, wikis [accessible web pages available for modification by anyone], video-sharing sites like YouTube, and social networking sites like MySpace and Facebook, brand owners monitor, exploit, and sometimes imitate the genre.”¹⁶⁰ These “peer promotions” mix the consumers’ noncommercial speech with the brand owners’ commercial speech.¹⁶¹ And when the brand owners’ sponsorship is concealed, they “further entangle the promotional [commercial] and the expressive [noncommercial].”¹⁶² The Supreme Court has demonstrated a clear propensity to consider any speech that contains a commercial element to be commercial speech.¹⁶³ 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.

Online marketing that incorporates peer promotions raises a unique legal conundrum regarding the content of the overall message. Consider a recent promotion undertaken by the Quiznos sandwich chain in which it invited customers to submit video entries comparing a Quiznos sandwich to a Subway (a competing sandwich chain) sandwich. Quiznos then posted selected videos to the iFilm website.¹⁶⁴ Subway sued, alleging that the advertising statements encouraged and promoted by Quiznos were false and misleading in violation of the Lanham Act.¹⁶⁵ Quiznos moved to dismiss the claim on the basis that

its Internet postings were entitled to immunity under the Communications Decency Act, 47 U.S.C. § 230(c)(1) (2008).¹⁶⁶

The Communications Decency Act (“CDA”) provides immunity to Internet publishers of third-party content.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ The significance of this ruling is that it demonstrates the possibility that, despite the commercial speech doctrine, a company can potentially avoid deceptive trade practices regulation by using peer promotional content—provided, of course, the allegedly deceptive content originated from a third party.

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.”¹⁷⁰ 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.¹⁷¹ 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.¹⁷² The plaintiffs sued Roommates.com alleging its business violated the federal Fair Housing Act and California housing discrimination laws.¹⁷³ 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.¹⁷⁴ In other words, Roommates.com was directly involved with developing and enforcing a system that subjected users to allegedly discriminatory housing practices.¹⁷⁵

What is not settled is the degree of involvement required for an information content provider to lose 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.¹⁷⁶ 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.”¹⁷⁷ Ultimately, the question may be whether the “the website did absolutely nothing to encourage the posting of defamatory content....”¹⁷⁸

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 unwelcome result of all of this uncertainty may well be unnecessary restrictions on informational speech that is determined to be commercial in the courts’ ever expanding definition of such term.

¹ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that states and municipalities may appropriately regulate “purely commercial advertising”); and *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 387 (1973) (holding a commercial advertisement remains commercial in the hands of the media). However, “speech is not stripped of First Amendment protection merely because it appears ...” in the form of a commercial advertisement. *Bigelow v. Va.*, 421 U.S. 809, 818 (1975). See also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760-61 (1976) (holding the fact that speech is commercial does not, alone, deprive it of constitutional protection).

² *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 564 (1980).

³ See *id.* at 566.

⁴ See *id.* 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).

⁵ See *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

⁶ See *Greater New Orleans Broad. Ass’n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999).

⁷ *Central Hudson*, 447 U.S. 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).

⁸ See *Greater New Orleans Broad. Ass’n, Inc.*, 527 U.S. at 184.

⁹ 533 U.S. 525 (2001).

¹⁰ See *id.* at 561-65.

¹¹ See *id.* at 566-67.

¹² See *id.* at 568-69.

¹³ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976), quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

¹⁴ *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 561 (1980).

¹⁵ See *Bolger v. Youngs Drug Corp.*, 463 U.S. 60, 66-67 (1983).

¹⁶ *Id.* at 67 (footnote omitted).

¹⁷ *Bd. of Trustees of the State Univ. v. Fox*, 492 U.S. 469, 473-74 (1989).

¹⁸ See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993). See also *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F.Supp.2d 1200, 1207 (D. Colo. 2001) (“In all cases, the core question for determining whether speech is commercial is whether the speech proposes a commercial transaction.”).

¹⁹ 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).

²⁰ See *supra*, note 6 and accompanying text.

²¹ See *Transp. Alternatives, Inc. v. City of N.Y.*, 218 F.Supp.2d 423, 436 (S.D. N.Y. 2002).

²² See *Valentine v. Chrestensen*, 316 U.S. 52, 52-53 (1942). Some commentators consider *Valentine* to be the Court’s first commercial speech case. See, e.g., Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627-28 (1990) (referring to *Valentine* as the Court’s first commercial speech case). Kozinski & Banner assert that, in *Valentine*, “the Supreme Court plucked the commercial speech doctrine out of thin air.” *Id.* at 627. However, in a number of pre-*Valentine* cases involving local ordinances regulating the distribution of leaflets, the Supreme Court distinguished between commercial and non-commercial speech. For example, in *Schneider v. State*, 308 U.S. 147 (1939), a case involving the constitutionality of a local ordinance as applied to the distribution of religious literature, the Court noted in dictum that had the case involved only commercial soliciting, the constitutionality of the challenged ordinance might have been upheld. “We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires.” *Id.* at 165. See also EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH: FIRST AMENDMENT PROTECTION OF EXPRESSION IN BUSINESS 11-15 (1985) (reviewing the Supreme Court’s pre-*Valentine* commercial speech discussions).

²³ See *Valentine*, 316 U.S. at 53.

²⁴ See *id.*

²⁵ *Id.* at 55.

²⁶ *Id.*

²⁷ See *Bolger v. Youngs Drug Corp.*, 463 U.S. 60, 62 (1983).

²⁸ See *id.* at 67-68. See also *supra*, notes 15-16 and accompanying text.

²⁹ *Bolger*, 463 U.S. at 68.

³⁰ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976).

³¹ *Bolger*, 463 U.S. at 81 (Stevens, J., concurring).

³² *Id.* (citation omitted).

³³ See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (citation and footnotes omitted).

³⁴ *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998).

³⁵ See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

³⁶ CAL. BUS. & PROF. CODE § 17200, *et. seq.* (2005) (unfair competition); CAL. BUS. & PROF. CODE § 17500, *et. seq.* (2005) (false advertising). See *Kasky*, 45 P.3d at 249-50. California's unfair competition law contains a "public prosecutor" provision, allowing any person acting for the interests of the general public to bring an action for relief under the act. BUS. & PROF. CODE § 17204 (2005). See *Kasky*, 45 P.3d at 249.

³⁷ See *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854 (Cal. App. 2000).

³⁸ See *Kasky*, 45 P.3d at 258.

³⁹ *Id.* at 256.

⁴⁰ See *id.*

⁴¹ See *id.* at 256-58.

⁴² See *id.* at 258.

⁴³ See *id.* at 260, *citing* *Bolger v. Youngs Drug Corp.*, 463 U.S. 60, 68 (1983).

⁴⁴ *Bolger*, 463 U.S. at 82 (Stevens, J., concurring).

⁴⁵ See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 580 (1980) (Stevens, J. concurring).

⁴⁶ 537 U.S. 1099 (2003).

⁴⁷ See *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

⁴⁸ See *Nike Settles Suit by California Activist over Statements on Working Conditions*, 72 U.S.L.W. (BNA), Sept. 23, 2003, at 2160.

⁴⁹ See *Kasky v. Nike, Inc.*, 45 P.3d 243, 256-58 (Cal. 2002).

⁵⁰ See *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94, 97 (2d Cir. 1998).

⁵¹ See *Kasky*, 45 P.3d at 262 ("Speech is commercial in its content if it is likely to influence consumers in their commercial decisions.").

⁵² 496 F. Supp.2d 653 (E.D. Va. 2007).

⁵³ See *id.* at 655-56.

⁵⁴ 15 U.S.C. § 7701 *et seq.* (2007).

⁵⁵ *Aitken*, 496 F. Supp. 2d at 662-666.

⁵⁶ 15 U.S.C. §7702(2)(C).

⁵⁷ *Aitken*, 496 F. Supp. 2d at 662, *citing* 16 C.F.R. § 316.3 n1 (2008).

⁵⁸ *Id.* at 665.

⁵⁹ *Id.* at 668.

⁶⁰ *Id.* at 663.

⁶¹ See *id.* 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).

⁶² See *Aitken*, 496 F. Supp. 2d at 664. However, 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 v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 576 (1988), (holding that union-distributed handbills were not commercial speech; though not meaning to suggest that communications by labor unions may never be commercial speech), *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 long before current commercial speech doctrine and therefore may not be controlling on this issue.

⁶³ *Aitken*, 496 F. Supp. 2d at 665.

⁶⁴ See *id.*

⁶⁵ *Id.* 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.

⁶⁶ *Aitken*, 496 F. Supp. 2d at 666, *citing* *Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1043 (E.D. Wis. 1997).

⁶⁷ See *supra*, note 13 and accompanying text.

⁶⁸ *Bolger v. Youngs Drug Corp.*, 463 U.S. 60, 68 (1983).

⁶⁹ See *supra*, notes 17-18 and accompanying text.

⁷⁰ See *supra*, note 30 and accompanying text.

⁷¹ See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995).

⁷² See *Transp. Alternatives, Inc. v. City of N.Y.*, 218 F.Supp.2d 423, 437 (S.D. N.Y. 2002).

⁷³ See *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 99-100 (1990).

⁷⁴ See *infra*, note 87 and accompanying text (describing blogs).

⁷⁵ See *supra*, note 51 and accompanying text.

⁷⁶ 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); and *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)].”).

⁷⁷ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 386 (1973).

⁷⁸ See generally Walter J. Carl, *What’s All The Buzz about?: Everyday Communication and the Relational Basis of Word-of-Mouth and Buzz Marketing Practices*, 19 MGMT. COMM. Q. 601 (2006). 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. See Ravi S. Achrol & Philip Kotler, *Marketing in the Network Economy*, 63 J. MARKETING, 146, 160 (1999).

⁷⁹ See Johan Arndt, *Role of Product-Related Conversations in the Diffusion of a New Product*, 4 J. MARKETING RES. 291, 291 (1967).

⁸⁰ See Andrew M. Kaikati & Jack G. Kaikati, *Stealth Marketing: How to Reach Consumers Surreptitiously*, 46 CAL. MGMT. REV. 6, 9 (2004).

⁸¹ Renée Dye, *The Buzz on Buzz*, HARV. BUS. REV. 139-40 (Nov.-Dec. 2000).

⁸² See Carl, *supra* note 78, at 603.

⁸³ See *id.* See also Rob Walker, *The Hidden (in Plain Sight) Persuaders*, N.Y. TIMES MAG., Dec. 5, 2004; 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>.

⁸⁴ Walker, *supra* note 83. See also Vranica, *supra* note 83 (noting the actors were told to identify themselves only when asked directly).

⁸⁵ Walker, *supra* note 83.

⁸⁶ See Kaikati & Kaikati, *supra* note 80, at 9.

⁸⁷ See Adam Thierer, *Need Help... How Many Blogs Are There Out There?*, Mar. 6, 2008, at <http://techl liberation.com/2008/05/06/need-help-how-many-blogs-are-there-out-there/>; *Welcome to Technorati*, TECHNORATI, at <http://technorati.com/about/> (last visited May 22, 2008) (reporting over 175,000 new blogs every day). 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 running commentary on political events (see, e.g., *Talking Points Memo*, at <http://www.talkingpointsmemo.com>). The collection of blogs on the Internet is often referred to as the “blogosphere.” Blogs are run by “bloggers” who “post” (publish) message on the blog.

⁸⁸ See Brad Stone, *Facebook Goes Off the Campus*, N.Y. TIMES, May 25, 2007, at C1.

⁸⁹ See *id.*

⁹⁰ See Emily Steel, *Where E-Commerce Meets Chat, Social Retailing Gains Traction*, WALL ST. J., Nov. 27, 2007, at B8.

⁹¹ See *id.*

⁹² See NEW BALANCE TAMPA BLOG, at <http://www.newbalancetampa.com/blog> (last visited May 22, 2008).

⁹³ See *New Balance and Race For the Cure-A Perfect Partnership*, NEW BALANCE TAMPA BLOG, at <http://www.newbalancetampa.com/blog/ViewItem.asp?888> (last visited May 22, 2008).

⁹⁴ See *New Casual Women’s Line to be Added in ‘08*, NEW BALANCE TAMPA BLOG, at <http://www.newbalancetampa.com/blog/viewitem.asp?863> (last visited May 22, 2008).

⁹⁵ *Join Now*, TARGET ROUNDERS, at <http://www.targetrounders.com/index.php?action=screener> (last visited May 22, 2008).

⁹⁶ See, e.g., *Secret Rihanna*, MYSPACE.COM, at <http://www.myspace.com/secret> (last visited May 22, 2008).

⁹⁷ *Id.*

⁹⁸ See Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 83-84 (2006).

⁹⁹ See *Off Target*, SO THIS IS MASS COMMUNICATION?, at <http://www.kayesweetser.com/archives/58> (last visited May 22, 2008).

¹⁰⁰ See *Code of Conduct*, TARGET ROUNDERS, at <http://www.targetrounders.com/codeofconduct.htm> (last visited May 22, 2008).

¹⁰¹ See Pallavi Gogoi, *Wal-Mart's Jim and Laura: The Real Story*, BUSINESSWEEK, Oct. 8, 2006, at http://www.businessweek.com/bwdaily/dnflash/content/oct2006/db20061009_579137.htm; Mya Frazier, *Edelman Eats Humble Pie*, ADVERTISINGAGE, Oct. 19, 2006, at http://adage.com/print?article_id=112588.

¹⁰² See Gogoi, *supra* note 101.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Frazier, *supra* note 101.

¹⁰⁷ *WOMMA's Practical Ethics Toolkit: Introduction*, WORD-OF-MOUTH MARKETING ASSOCIATION, at <http://www.womma.org/ethics/code> (last visited May 22, 2008).

¹⁰⁸ See *The Wal-Mart Fake Blog Controversy*, WALMARTWATCH.COM, at http://walmartwatch.com/images/uploads/flog_controversy.pdf (last visited May 22, 2008).

¹⁰⁹ See Devan Sipher, *On the Internet, Singing Her Way from Obscurity to Fame*, N.Y. TIMES, Dec. 18, 2007, at B2.

¹¹⁰ See *id.*

¹¹¹ See Ethan Smith & Peter Lattman, *Download This: YouTube Phenom Has a Big Secret*, WALL ST. J., Sept. 6, 2007, at A1. See also <http://www.myspace.com/mariedigby>.

¹¹² See Smith & Lattman, *supra* note 111.

¹¹³ See *id.*

¹¹⁴ See Frank Ahrens, *"Puppets" Emerge as Internet's Effective, and Deceptive, Salesmen*, WASH. POST, Oct. 7, 2006, at D1.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ Frazier, *supra* note 101.

¹²¹ See, e.g., *Make Money off Your Blog*, WASH. POST, Jan. 30, 2005, at M3. See also Heather Armstrong, DOOCE.COM, at <http://www.dooce.com/about> (noting that advertising on her personal blog supports her family) (last visited May 22, 2008).

¹²² See Sara Kehaulani Goo, *Product Reviews and Links Turn Pages into Profits*, WASH. POST, Jan. 11, 2007, at D1.

¹²³ See Katy McLaughlin, *The Price of a Four-Star Rating*, WALL ST. J., Oct. 6, 2007, at W1.

¹²⁴ See, e.g., 16 C.F.R. § 255.5 (2008) (“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.”)

¹²⁵ See *supra*, note 6 and accompanying text.

¹²⁶ Letter from Mary K. Engle, Assoc. Dir. For Adver. Practices, FTC, to Gary Ruskin, Executive Dir., Commercial Alert 2 (Dec. 7, 2006), at <http://www.ftc.gov/os/closings/staff/061211staffopinioncommercialalert.pdf> (footnotes omitted). The Federal Trade Commission Act (the “FTC Act”), Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58 (2008)), prohibits, through Section 5, “unfair methods of competition” as well as “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a)(1) (2008). In the letter, while the FTC acknowledged that some word-of-mouth marketers provide cash payments to consumers, and others provide instead product samples, coupons, or “inside information” regarding new products, the FTC did not specifically classify such non-pecuniary forms of compensation as cash payments. See Letter of Mary K. Engle, *supra*, at 2 n.4.

¹²⁷ See Letter from Mary K. Engle, *supra* note 126, at 1.

¹²⁸ FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (no pagination). See also Letter from Mary K. Engle, *supra* note 126, at 2; *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 314 (7th Cir. 1992) (applying FTC standards to deceptive advertising).

¹²⁹ See FTC Policy Statement on Deception, *supra* note 128; Letter from Mary K. Engle, *supra* note 126, at 2; *Kraft, Inc.*, 970 F.2d at 314.

¹³⁰ See FTC Policy Statement on Deception, *supra* note 128; Letter from Mary K. Engle, *supra* note 126, at 2; *Kraft, Inc.*, 970 F.2d at 314.

¹³¹ Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2008), available at <http://www.ftc.gov/bcp/guides/endorse.htm> (generally referred to hereinafter as the “FTC guidelines on endorsement”).

¹³² See *id.*

¹³³ *Id.*

¹³⁴ FTC Policy Statement on Deception, *supra* note 128. See also Letter from Mary K. Engle, *supra* note 126, at 4 n.9.

¹³⁵ 126 F.T.C. 375 (1998) (consent order), available at <http://www.ftc.gov/os/1998/10/9723255cmp.htm>.

¹³⁶ See Letter from Mary K. Engle, *supra* note 126, at 3.

¹³⁷ See *In re TrendMark Int'l, Inc.*, 126 F.T.C. at para. 6.

¹³⁸ See *id.* at paras. 12, 13. See also Letter from Mary K. Engle, *supra* note 126, at 3.

¹³⁹ Letter from Mary K. Engle, *supra* note 126, at 4 (footnote omitted).

¹⁴⁰ See *id.*

¹⁴¹ *Id.*

¹⁴² FTC guidelines on endorsements, 16 C.F.R. 255.0(b) (2008), available at <http://www.ftc.gov/bcp/guides/endorse.htm>.

¹⁴³ See *supra*, notes 95, 99-100 and accompanying text.

¹⁴⁴ See *supra*, notes 101-105 and accompanying text.

¹⁴⁵ See *supra*, notes 111-113 and accompanying text.

¹⁴⁶ See Letter from Mary K. Engle, *supra* note 126, at 1.

¹⁴⁷ See Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Donald Clark, Sec., FTC (Oct. 18, 2005), at <http://www.commercialalert.org/buzzmarketing.pdf> (requesting an investigation into companies engaged in word-of-mouth marketing).

¹⁴⁸ *FTC Gives "Giant Christmas Present" to P&G, Word of Mouth Marketing Industry* (News Release), Commercial Alert, Dec. 11, 2006, at <http://www.commercialalert.org/issues/culture/buzz-marketing/ftc-gives-giant-christmas-present-to-pg-word-of-mouth-marketing-industry> (no pagination). The reference to "P&G" in the Commercial Alert News Release relates to Proctor & Gamble's Tremor campaign which involved over 250,000 teenagers. See *id.*

¹⁴⁹ *FTC Gives "Giant Christmas Present" to P&G*, *supra* note 148.

¹⁵⁰ See 47 U.S.C. § 317(a)(1) (2008); 47 C.F.R. § 73.1212 (2008).

¹⁵¹ See 18 U.S.C. § 1734 (2008).

¹⁵² See Goodman, *supra* note 98, at 84. Adding such a requirement may be easier said than done. In response to reports of widespread production and dissemination of "prepackaged news" segments by federal agencies without disclosure of their source, Congress attempted to amend the Communications Act of 1934 with the Truth in Broadcasting Act of 2005, which would require that any broadcast, over the air or distribution by a multichannel video programming distributor, of any prepackaged news story produced by or on behalf of a Federal agency would have to include a notice that the story was prepared or funded by the United States Government. See Janel Alania, *The "News" From the Feed Looks Like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005*, 24 CARDOZO ARTS & ENT. L.J. 229, 229 (2006); Report of the Committee on Commerce, Science, and Transportation on S. 967, Report 109-210, 109th Cong., 1st Sess., Dec. 20, 2005.

¹⁵³ See *supra*, notes 128-130 and accompanying text.

¹⁵⁴ See *supra*, note 141-142 and accompanying text.

¹⁵⁵ See Goodman, *supra* note 98, at 109.

¹⁵⁶ See *id.* at 107 (footnote omitted).

¹⁵⁷ See *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

¹⁵⁸ See *id.* at 786. See also *Bd. of Trustees of the State Univ. v. Fox*, 492 U.S. 469, 474 (1989).

¹⁵⁹ *Bd. of Trustees of the State Univ. v. Fox*, 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.").

¹⁶⁰ Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 684-85 (2007) (footnotes omitted).

¹⁶¹ See *id.* at 686.

¹⁶² *Id.* at 699.

¹⁶³ See Samuel A. Terilli et al., *Corporate Bloggers and the Commercial Speech Legal Bog*, 10 THINTERNATIONAL PUB. REL. RES. CONF. 556, available at http://www.instituteforpr.org/files/uploads/IPRRC10_Proceedings.pdf#page=542 (arguing that regardless of content, corporate-sponsored blogs are "candidate[s] for reduced constitutional protection under the First Amendment.").

¹⁶⁴ See *Doctor's Assocs., Inc. v. QIP Holders, LLC*, 2007 U.S. Dist. LEXIS 28811, *3-*4 (D.C. Conn. 2007).

¹⁶⁵ See *id.* at *4.

¹⁶⁶ See *id.* at *1-*2.

¹⁶⁷ "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2008). An "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access

by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2). An “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(2).

¹⁶⁸ See *Doctor’s Assocs.*, 2007 U.S. Dist. LEXIS 28811, at *5, citing *Universal Communication Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

¹⁶⁹ *Id.* at *5-*6 (internal quotations omitted), citing *Universal Communication Sys.*, 478 F.3d at 418. *But see* *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 U.S. Dist. LEXIS 77551, *5-*7 (D.C. Ariz. 2007) (holding application of the CDA is a question of law and not affected by discovery; “the CDA defeats the defamation claim.”).

¹⁷⁰ *Doctor’s Assocs.*, 2007 U.S. Dist. LEXIS 28811, at *7, n.3.

¹⁷¹ 521 F.3d 1157 (9th Cir. 2008).

¹⁷² See *id.* at *3.

¹⁷³ See *id.* at *4.

¹⁷⁴ See *id.* at *36.

¹⁷⁵ See *id.* at *37. “Roommate[s.com] does not merely provide a framework that could be utilized for proper or improper purposes; rather, Roommate[s.com]’s work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site.” *Id.* at *36. *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).

¹⁷⁶ See *Fair Housing Council of San Fernando Valley*, 521 F.3d at *31, citing *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

¹⁷⁷ *Id.* at *32.

¹⁷⁸ *Id.* at *35.