MAD MEN POSING AS ORDINARY CONSUMERS: THE ESSENTIAL ROLE OF SELF-REGULATION AND INDUSTRY ETHICS ON DECREASING DECEPTIVE ONLINE CONSUMER RATINGS AND REVIEWS

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ABSTRACT

Technology provides consumers with new ways to avoid advertisements, such as fast forwarding through TV commercials and using filtering software to block pop-up ads. Accordingly brand sponsors and their advertising marketing firms have sought alternative methods to pierce through consumer resistance to ads. Social media offers an optimal platform to reach millions of consumers on a nearly daily basis who interact and often rely heavily on the reviews and rankings of fellow consumers. However, many of today’s branding campaigns now mask sponsored ads as ordinary consumer reviews or “Like” and “Don’t Like” responses to a service or product. Unbeknownst to the average consumer, these reviewers may have received compensation for their feedback, been paid to disparage a competitor, or may even be automated software programs, and not human at all. The FTC has attempted to regulate this aspect of the consumer blogosphere by revising its Endorsement Guides in 2009. This article espouses that these Revised Guides fall short of being a comprehensive solution, and in some respects, are even in conflict with existing precedent, statutory law and standards of fairness. This article examines these new branding approaches to online marketing and advertising, the FTC’s response, and how the Endorsement Guides could be revised to be more effective in combating various forms of deception. This article also proposes a greater reliance on self-regulatory measures aimed at lessening the corrosive effects of fake or deceptive online ratings and reviews and at improving the robust exchange of ideas and opinions between ordinary consumers on the Web.
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INTRODUCTION

In the past few years, the television program, Mad Men, has been showered with awards and critical acclaim for its quality writing, acting, and production values. Set in the 1960s, this stylish, noir program follows the personal and professional relationships of a fictional character, Don Draper, a creative director for an advertising firm in the early days of Madison Avenue marketing campaigns during an era of rapid social change. Despite admiration from critics and numerous awards, the program has consistently struggled to move beyond cult status into the top echelon of television ratings. In some ways, this period show’s battle for viewership reflects what is happening in today’s advertising field.

Over the past decade, brand sponsors and their advertising marketing firms have had to fight to capture the increasingly fragmented attention of the consuming public. Deluged with media options, consumers have grown more blasé about, and

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in some cases, hostile to a wide array of advertisements. The public flips past print ads, fast forwards through TV commercials, ignores banner ads, and swats away annoying pop-ups with blocking filters. As marketers search for ways to draw more eyeballs of potential purchasers, numerous studies show consumers are becoming less and less reliant on ads and brand marketing efforts in making their buying choices. Despite well-honed and expensive branding strategies, today’s consumers are much more likely to trust recommendations from family, friends, neighbors, and

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[t]oday’s consumers are aware that brands are trying to seduce them. Because of the vast number of messages bombarding consumers, companies need to find innovative ways to get through the advertising clutter. Some believe that companies who are willing to take big risks are doing the right thing in order to “overcome[] consumers’ defenses to [their] brand. . . . [T]he more advertisements consumers are exposed to, the more their persuasion knowledge develops, and the more resistant they become . . . . According to this law of diminishing returns, the more advertising is out there (and there is always more, because of this law), the more aggressively brands must market to stand out. . . . David Lubars, a senior ad executive in the Omnicom Group, explains the industry’s guiding principle with more candor than most. Consumers, he says, “are like roaches—you spray them and spray them and they get immune after a while.”

Matos, supra note 4, at 1319–20; Goodman, supra note 4, at 110 (contending that the main purpose of stealth marketing “is to bypass audience resistance to promotional messages”).

7 Goodman supra note 4, at 87–88; Tushnet, supra note 4, at 722–23. Professor Ellen Goodman states:

Digital innovations substantially affect both reactive and proactive media policy objectives. Existing media policies are premised on the mid-twentieth century reality of scarce content and abundant audience attention. But in the digital era, it is attention that is scarce and content that is abundant.


8 Consumers Turn to Online Ratings and Reviews, as Sites Respond to Concerns, PRWEB (Feb. 28, 2008), http://www.prweb.com/releases/2008-02-28/ratings/prweb729043.htm. Various surveys have found that a majority of online shoppers look to consumer comments and rankings in their purchasing decisions. Id. In addition, many customers claimed a willingness to pay more for products that earned top marks from fellow consumers. Id.

9 Katyal, supra note 6, at 795–96, 803–04. Professor Katyal notes that “branding strategies make up a significant portion of general corporate strategy; financial analysts claim that brand equity makes up a tremendous amount of company value. At times, a company’s brand equity has been more important than the book value ascribed to a particular product.” Id. at 804.
even casual acquaintances to inform their purchasing decisions.\textsuperscript{10} So, when a neighbor leans over the proverbial backyard fence to chat about that great or terrible experience she had at a hotel, restaurant, day care center, or hospital, consumers listen.\textsuperscript{11} Increasingly, it is social connection that counts, not a clever jingle or funny commercial, in the branding wars.\textsuperscript{12}

In our age of social media, these connections often extend beyond our immediate social circle to acquaintances that consumers meet, chat with, and learn from online.\textsuperscript{13} In unprecedented ways, online consumers can share information, offer feedback, and rate their experiences with their peers\textsuperscript{14} on everything from the latest movies\textsuperscript{15} and books\textsuperscript{16} to medical care\textsuperscript{17} and legal services.\textsuperscript{18} Clearly, empowering

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\textsuperscript{11} See Sprague & Wells, \textit{supra} note 5, at 417 (“Personal recommendations are considered the strongest of all consumer triggers, primarily because they come from a trusted source rather than a corporate third party.”); Tushnet, \textit{supra} note 4, at 746.

\textsuperscript{12} See Katyal, \textit{supra} note 6, at 828–29; Sprague & Wells, \textit{supra} note 5, at 417–19. Professors Sprague and Wells state that “[i]t was only a matter of time before buzz marketing moved to the Internet, transforming word of mouth to ‘word of mouse.’ What better place to engage consumers than within a medium that fosters conversation—blogs, microblogs, and social networking sites.” Sprague & Wells, \textit{supra} note 5, at 419.

\textsuperscript{13} See Carolyn Elefant, \textit{The “Power” of Social Media: Legal Issues and Best Practices for Utilities Engaging Social Media}, 32 ENERGY L.J. 1, 4 (2011); Paul W. Garrity, \textit{Advertising Regulation in the Web 2.0 World}, METROPOLITAN CORP. COUNS., Nov. 2010, at 35, 35; Sprague & Wells, \textit{supra} note 5, at 418–19. According to a 2010 Nielsen report, Internet users spend about twenty-five percent of their online time at social media sites. Elefant, \textit{supra}, at 4. It was estimated that approximately seventy-three percent of teenagers and about seventy-two percent of young adults used social media sites in 2010. Garrity, \textit{supra} at 35. Although often associated with teens and young adults, the number of social media users between the ages of fifty to sixty-four jumped eighty-eight percent in 2010. Elefant, \textit{supra}, at 4.


\textsuperscript{16} See, e.g., \textit{Books}, \textit{AMAZON PRIME}, \url{http://www.amazon.com/books} (last visited May 10, 2013); \textit{GOODREADS}, \url{http://www.goodreads.com} (last visited May 10, 2010). A recent Harvard Review study found that consumer reviews were often similar in the aggregate to professional reviews of books on Amazon.com. Lorette I. Dobrescu et al., \textit{What Makes a Critic Tick? Connected Authors and the Determinants of Book Reviews} 4–5, 13 (Harvard Bus. Sch., Working Paper No. 12-080, 2012), \url{available at} \url{http://www.hbs.edu/faculty/Publication%20Files/12-080.pdf}. In general, the report also indicated that critics were more likely to review books from “connected” authors, such as writers with greater media coverage, writers for media outlets, or writers who were recipients of book
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consumers and promoting a vigorous online consumer dialogue between everyday people is one of the free speech benefits of the Internet and the explosion of user-generated content sites.\textsuperscript{19} It allows people across the country and across the globe to interact, to argue, and to make their opinions known on a variety of topics, including their satisfaction or disapproval of different consumer experiences. In the blogosphere, consumers may click on “Like” or “Don’t Like,” give one star or five stars, give thumbs up or down, or give a rotten tomato or a fresh one. These ratings are not just to our intimate social circle, but to a global online audience. Ordinary individuals have now become critics or cheerleaders on a thicket of blogs, microblogs, vlogs, discussion boards, personal profile pages, web sites, and Twitter feeds.\textsuperscript{20} Consumers who might shun traditional advertising will often readily seek out the opinions of other “ordinary consumers” on a host of online customer ranking and review web sites.\textsuperscript{21} Rightly or wrongly, online consumers often give greater credence

\textsuperscript{19} See, e.g., HEALTHGRADES, http://www.healthgrades.com/ (last visited May 10, 2013); RATEMDS.COM, http://www.ratemds.com/ (last visited May 10, 2013) (providing an example a site with searchable doctor services by location and specialty, which also provides ratings for the doctors in the search results).

\textsuperscript{20} Daniel Kahn warns that these new levels of online communication are also leading to greater harms from globally-transmitted speech and from the dangers of low-value online discourse from individuals and automated software programs called “bots.” Daniel H. Kahn, Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms, 11 COLUM. SCI. & TECH. L. REV. 176, 187–89 (2010). He opines that,

[a] great deal of user-generated content on the Web is inane and petty, and it often runs the risk of drowning out more valuable speech. In addition to genuine user-generated content, “spambots” spew out advertisements disguised as blog comments and message board postings. Tools including search engines, social bookmarking, and link-sharing features on social networks are designed to help Web users separate the wheat from the chaff. Yet the quantity of low-value discourse creates real costs in effort for consumers looking for higher-quality content. It also discourages participation by those who fear their contributions might be lost amid the cacophony.

\textsuperscript{21} See Randy L. Dryer, Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, YouTube, & Wikis, UTAH B.J., May–June 2010, at 16, 16. In 2010, there are estimated to be over 200 million online blogs, 450 million Facebook users, 27 million tweets, and 1.2 billion YouTube views daily. \textit{Id.}

\textsuperscript{21} Katyal, supra note 6, at 828–29, 832; Sprague & Wells, supra note 5, at 415–17.
to these peer evaluations. They tend to view them as being neither influenced by, nor connected to, any particular sponsoring business or merchant.  

Even before the Web, word-of-mouth marketing or “buzz” marketing has always been advertising gold. Brand sponsors and marketing firms have long tried to capture the benefits of word-of-mouth advertising to build their brand recognition and reputation with spotty, limited success. Companies spend billions of dollars every year to bolster consumer recognition of, and positive response to, their brands. Social media has become an excellent channel for expanding and targeting brand investments at a low cost. Sponsors are striving to break through consumer aversion to advertising by developing marketing campaigns that do not look like traditional advertising.

In their chase for consumer interest and resources, some Mad Men have not only sought to benefit from buzz marketing, but have actually created it for their brands by pretending to be “ordinary consumers” in fake or sponsored online customer ratings and reviews or generating faux “likes” and “zombie” followers to

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23 Sprague & Wells, supra note 5, at 417–18. The authors note:

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. 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. This “commercialization of chitchat” is most effective when consumers do not even notice the commercial message.

Id. at 417–18.
24 Sprague & Wells, supra note 5, at 417; Tushnet, supra note 4, at 739; see also Katyal, supra note 6, at 824–25 (explaining the efforts some advertising agencies put forth to get to the consumers).
25 Garrity, supra note 13, at 35.
26 Id.; see also Sprague & Wells, supra note 5, at 417–18.
27 Goodman, supra note 4, at 110–12; Matos, supra note 4, at 1334; Sprague & Wells, supra note 5, at 420–24; see also Katyal, supra note 6, at 796, 830–31, 835 (raising concerns about growth of product placement and branding in society, including blurring between brands and anti-brands and brand encroachment on public space and public engagement).
28 Katyal, supra note 6, at 833–34; Sprague & Wells, supra note 5, at 420–24.; David Streitfeld, The Best Book Reviews Money Can Buy, N.Y. TIMES, Aug. 26, 2012, at BU1. Mr. Streitfeld wrote:

Reviews by ordinary people have become an essential mechanism for selling almost anything online; they are used for resorts, dermatologists, neighborhood restaurants, high-fashion boutiques, churches, parks, astrologers and healers—not to mention products like garbage pails, tweezers, spa slippers and cases for tablet computers. In many situations, these reviews are supplanting the marketing department, the press agent, advertisements, word of mouth and the professional critique.

But not just any kind of review will do. They have to be somewhere between enthusiastic and ecstatic.

“The wheels of online commerce run on positive reviews,” said Bing Liu, a data-mining expert at the University of Illinois, Chicago, whose 2008 research showed
misrepresent one’s popularity on Facebook and Twitter. Soccer. Sometimes referred to as “stealth marketing” or “astroturfing,” efforts to mask advertising in social media has led to an explosion of web content farms, pay-per-post bloggers, reputation management companies, and hidden online shill mills to feed content into social media networks. Soon, a gaggle of Don Drapers became cruise passengers whose postings bubbled with enthusiasm about Royal Caribbean cruises, bloggers who adored the summer collection from Ann Taylor Loft, and football fans who enthusiastically encouraged everyone to check out an online Hyundai video before

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that 60 percent of the millions of product reviews on Amazon are five stars and an additional 20 percent are four stars. “But almost no one wants to write five-star reviews, so many of them have to be created.”

Consumer reviews are powerful because, unlike old-style advertising and marketing, they offer the illusion of truth. They purport to be testimonials of real people, even though some are bought and sold just like everything else on the commercial Internet.

[Professor] Liu estimates that about one-third of all consumer reviews on the Internet are fake.

Streitfeld, supra.


James Wolcott, All that Twitter . . . , VANITY FAIR, Oct. 2012, at 155, available at http://www.vanityfair.com/culture/2012/10/twitter-personalities-most-followers. Moving beyond the commercial realm, it was reported that political campaigns for candidates in the presidential primary and general election races created fake or paid account holders to boost the perceived popularity of political candidates. Id.

See Anderson, supra note 6, at 3, 8–9; Goodman, supra note 4, at 88–89; Katyal, supra note 6, at 798–99, 826; Matos, supra note 4, at 1311; Sprague & Wells, supra note 5, at 419–20. Ms. Matos opines that sponsors are constantly trying to penetrate consumers’ “advertising bubble” and that faked consumer that stealth marketing allows for product promotion without direct advertising messages and “is an attempt to cater to the jaded consumer on whom blatant methods of advertising will not work.” Matos, supra note 4, at 1311–12.

Kahn, supra note 19, at 186. This term refers to fake grass roots movements in the online world. Id; Tushnet, supra note 4, at 764.


the Super Bowl. Each of these companies found themselves embroiled in controversies over undisclosed incentives distributed in hopes of garnering positive online posts about their brands that read more like personal consumer opinions than paid advertising. Faked consumer reviews or web content with undisclosed sponsorship are prime examples of “unbranding”—advertiser strategies that deceptively mask branding campaigns as seemingly ordinary consumer chatter online. In essence, unbranding has become the new form of branding in social media.

As the line between online advertising and online consumer opinions continued to blur, the Federal Trade Commission (“FTC”) stepped in and revised its existing Endorsement Guides to address social media communications in 2009. These


37 See Internet Polices Itself on Blogger Advertising Better Than the FTC Ever Could, U.S. NEWS (Sept. 15, 2009) [hereinafter Internet Polices Itself], http://www.usnews.com/opinion/articles/2009/09/15/internet-policies-itself-on-blogger-advertising-better-than-the-ftc-ever-could. Although more focused on the damage to online public discourse through stealth marketing, Professor Goodman states that “[t]he potential of stealth marketing to deceive audiences is . . . thus far the best[] justification for sponsorship disclosure law.” Goodman, supra note 4, at 108. It is estimated that about one-third of all online consumer reviews are fakes, created by sponsors and their marketing agencies, third-party review services, compensated consumers and even the party under review through pseudonyms. Streitfeld, supra note 28.

38 See Katyal, supra note 6, at 799; Matos, supra note 4, at 1308–09. Notions of unbranding seemed originally distinct from “anti-branding” which involves expressive efforts to incorporate brands as a way of offering a critique or social commentary on society’s overcommercialization. See Katyal, supra note 6, at 798–99. Professor Katyal raises concerns about the blurring between branding and anti-branding efforts as more branding efforts coopt the “self-mocking humor” and parodic tone of anti-branding to reach audiences. Id. at 798. She states:

A difficult set of legal issues stem from the crossover between stealth marketing and user generated content in both real and digital space. Today, branding opportunities can be cloaked within ordinary noncommercial expression, as corporate sponsorship extends further and further toward resembling user generated content, making it difficult to discern when content is sponsored and when it is not. Since many forms of stealth marketing often takes place within the nontraditional channels that antibranding occupies (public space, websites, and other forms of media and content), it becomes more difficult then for the consumer to distinguish between the brand and the antibrand, destabilizing the division between them.

Id. at 799. Furthermore, Professor Katyal adds that “antibranding demonstrates how a trademark can become transformed from a commodifiable property—part of the marketplace of goods—into a symbolic expression within the marketplace of speech.” Id. at 814.

39 Matos, supra note 4, at 1311; see also Sprague & Wells, supra note 5, at 424 (“[I]t is peers and their data, rather than brands, who will become the primary way we make decisions.”).  

40 16 C.F.R. § 255 (2013); see also FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255). See generally, Godell, supra note 4, at 212–23 (offering comparison of key changes between previous guides and 2009 Revised Guides); Michael J. Patterson, Experts, Celebrities and Bloggers Beware: The FTC Publishes Revised Guides Concerning the Use of Endorsements and Testimonials in...
revisions received mixed responses from the social media community. Some legal experts supported these revisions as long overdue to curb deceptive online advertising practices, to provide greater transparency that allows consumers to decide how much weight and credibility to give online commercial speech, and to promote free speech through a robust online debate that does not censor sponsored speech. Critics of the modified Endorsement Guides (“Revised Guides”) largely decried it as attacking First Amendment free speech rights through compelled speech and adding unfair and confusing burdens on new media outlets. Some commentators also contended that these new disclosure obligations would only lead to more meaningless disclaimers and undone disclosures that would do little to inform consumers and would unduly interfere with the consumer’s online experiences.

Advertising, 22 Loy. Consumer L. Rev. 497, 501–10 (2010) (discussing overview of key revisions and formal comments opposing these revisions); Brian D. Wright, Social Media and Marketing: Exploring the Legal Pitfalls of User-Generated Content, 96 U. Dayton L. Rev. 67, 7785 (providing an overview of basic provisions of FTC’s Revised Guides).


Goodman, supra note 4, at 86–87; Matos, supra note 4, at 1312–13; Tushnet, supra note 4, at 730, 750–51, 769–70, 792; Sprague & Wells, supra note 5, at 425–34 (outlining key aspects of the FTC Guides as combating “impressionistic deception”).

See Tushnet, supra note 4, at 750–51, 757.

See Goodman, supra note 4, at 86; Tushnet, supra note 4, at 722–23, 754–56, 760. Professor Goodman defends disclosure obligations in the broadcast as addressing market failures and improving the quality and transparency of public discourse. Goodman, supra note 4, at 86, 138–39. Although addressing Federal Communications Commission (“FCC”) disclosure rules for broadcast media, these concerns can readily be adapted to disclosure obligations under the FTC’s Endorsement Guides. Professor Goodman contends:

Stealth marketing harms by damaging the quality of public discourse and the integrity of media institutions that support and shape this discourse. Sponsorship disclosure requirements mitigate this harm by correcting failures of the market to inform audiences of marketing activities. The role of sponsorship disclosure law in enhancing discourse and generating valuable consumer information neutralizes the two strongest lines of attack against it: First Amendment and free market absolutism. In fact, disclosure requirements advance the First Amendment value of robust debate without burdening speech and further the market goal of informed consumers without imposing undue costs.

Id. at 86.

FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,129–31. But see Goodman, supra note 4, at 130–37 (arguing that disclosure protects free speech by protecting “public rights” of discourse and by not censoring sponsored speech); Tushnet, supra note 4, at 754–55, 760 (arguing that disclosure obligations do not censor speech, but avoid deception and “distortion of consumer decisions” when economic relationships are not disclosed).


See, e.g., Eric Goldman, Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman’s Stealth Marketing and Editorial Integrity 13–15 (Santa Clara Univ. Sch. Law, Working Paper No. 07-24, 2007). Some legal commentators have argued that there is a lack of empirical research to support efforts for legally-mandated disclosures or the value of such disclosures to
experiences, while adding tremendous costs for sponsors in monitoring efforts to avoid liability.

Certainly, there is room for improvement in the Revised Guides and the associated FTC enforcement efforts, but that does not mean that the FTC’s objectives should be discarded wholesale in favor of a pure caveat emptor regime. Yet, with millions of blogs and billions of tweets to police, FTC enforcement efforts alone will be unable to effectively monitor or substantially reduce fake consumer online reviews and ratings. While sponsors and advertising professionals have been quick to criticize the FTC, the online marketing industry, including sponsoring companies, advertising agencies, and intermediary consumer sites, has been slow to examine its own respective obligations to improve transparency in online communications and to promote consumer protection in social media postings.

Part I of this article will briefly offer an overview of the Revised Guides. In Part II, the benefits and shortcomings of the FTC’s Revised Guides will be examined. Part III will review the FTC’s mixed enforcement record, so far, while Part IV will address key proposed improvements to the Revised Guides. While amending and clarifying the Revised Guides may be helpful, it is essential that those who participate in, and benefit from, social media and online marketing step up their own sense of accountability and increase their focus on substantive self-regulation. Part V will propose self-regulatory measures aimed at lessening the corrosive effects of average consumers. Id.; Said, supra note 5, at 169–70. Critics have called for rolling back government-mandated disclosures which may put undue legal emphasis on the commercial nature of content while preventing consumers from receiving valuable information. Goldman, supra, at 12–14; see Said, supra note 5, at 103–04 (arguing that FCC disclosure laws presume that consumers value disclosure over their interest in media immersion and availability).

See Said, supra note 5, at 105–07, 115–16. Professor Said refers to the idea of the “venture consumer” who has a greater interest in media immersion and availability than FCC sponsorship issues in embedded or product placement advertising. Id. at 105–07. Professor Said notes that

Consumers today experience more advertising messages than they have likely ever experienced at any other time in history (even accounting for the advertisement-saturated, under-regulated commodity culture of the late nineteenth and early twentieth centuries). The phenomenon is known as “ad creep.” Advertisements are everywhere. They colonize every dimension of our physical world. Recently, eggshells began to feature advertisements for upcoming television programs. The physical world is clogged with advertisements, and the marketplace is increasingly cluttered with products. Brands struggle to pierce through the fog to reach a consumers’ consciousness, and once there, struggle to remain. The glut worsens when consumers “voluntarily expose themselves to advertising to obtain free entertainment, information, or services financed by advertising revenues.”

Id. at 115–16. All these factors require advertisers to think in aggressive and innovative ways about old problems like audience access and consumer recall of brands. Id. at 115–16. However, Professor Said does distinguish false advertising from embedded advertising issues recognizing the illegality of the former as supporting disclosure obligations. Id. at 107–08.


See supra note 20; Internet Polices Itself, supra note 37; Sprague & Wells, supra note 5, at 452, 454.
fake or deceptive online ratings and reviews and at improving the robust exchange of ideas and opinions between ordinary consumers on the Web.

I. OVERVIEW OF FTC’S REVISED ENDORSEMENT GUIDES

The FTC Endorsement Guides have been in existence since 1975 and were initially revised in 1980 and then updated in October 2009 to more explicitly capture online advertising messages and endorsements through social media. The Endorsement Guides are not law, but rather FTC interpretations of its authority to protect consumers under Section 5 of the FTC Act and to address competitors’ concerns with provisions of the Lanham Act. The FTC Act empowers the agency to enact regulation and undertake enforcement actions to shield consumers from unfair or deceptive trade practices, such as deceptive advertising, which is not protected speech under the First Amendment. In addition, the Lanham Act is intended to protect competitors from commercial harm from such unfair or deceptive trade practices.

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52 16 C.F.R. § 255.0(a); FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,126; Wright, supra note 40, at 70. Courts often rely on the FTC’s administrative interpretations when dealing with false advertising cases. See, e.g., B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 973 (7th Cir. 1999) (stating that the FTC’s “assessment of what constitutes deceptive advertising commands deference from the judiciary”). Some states have also modeled their own unfair and deceptive practices laws based on federal statutory laws and the FTC’s interpretations of these laws. Wright, supra note 40, at 71.


54 *Federal Trade Commission Act*, ch. 311, § 5, 38 Stat. 717, 719–21 (1914) (codified as amended at 15 U.S.C. § 45(a)); see also Goodman, supra note 4, at 108–09. In assessing FCC broadcast regulations, Professor Goodman argued that concerns about audience deception were a primary reason for FCC disclosure regulations. Goodman, supra note 4, at 112. However, she contends that FCC worries about deception may be unfounded because many skeptical consumers are not so easily deceived or because audiences might never be exposed to the deceptive content. Id. at 112. She asserted that sponsorship disclosure is much more justified by a desire to prevent damage to the quality of public discourse. Id. at 112–13. Professor Goodman states that,

The very skepticism that rescues the public from deception is what ultimately justifies sponsorship disclosure regulation. On this theory, stealth marketing harms by sowing skepticism as to the authenticity and truth of mediated communications. The result is damage to public discourse, which the media play such a large part in shaping. Of concern here are not only the false negatives, but also the false positives—the widespread belief that messages are promotional when they are not. Of concern is the suspicion that falls on the editor who makes an expressive choice of a commercial symbol or political position, but whose communication is systematically misunderstood. Caveat auditor helps to inoculate against deception, but too much caveat auditor degrades a communications environment in which participants are unnecessarily disbelieving.

Id.
practices. A consumer posting may be deceptive advertising when it is a sponsored ad that is masquerading as personal opinion or endorsement and not as sponsored speech.

The Revised Guides define an endorsement broadly as “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if [their views] are identical.” The Revised Guides mainly require that an endorser’s statements (whether an individual’s, group’s, or institution’s) must be honest beliefs or opinions based upon actual use or experience with a product or service.

There is an obligation to disclose any material connections between the speaker and the sponsoring company and/or advertising agency. Through examples in the Revised Guides and recent FTC investigations, it is clear that a material connection or relationship means anything not disclosed to the general public that might impact or bias one’s opinion about a product of service, including free samples, goodie bags,

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57 16 C.F.R. § 255.0(b) (2013). The Revised Guides define endorsement as

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

Id. Although the definition could be read broadly enough to encompass negative attacks on a competitor’s products or services, the illustrative examples all suggest positive reviews in exchange for some material benefit. Id. § 255.2.
58 16 C.F.R. § 255.1(a).
59 Id. § 255.5. The Revised Guides provide nine examples of material connections, including an example of a video game blogger who has received a game system under review for free as well as employees of digital music devices posting as ordinary consumers on a discussion board for fans of MP3 players. Id.; see also Dryer, supra note 20, at 16; Matos, supra note 4, at 1342. Ms. Matos states that the FTC’s regulations are aimed squarely at preventing consumer deceit through unbranding efforts. Matos, supra note 4, at 1344. She raises concerns that sponsor efforts to use niche branding or sub-brands to hide the true source of the products or services is not effectively dealt with under existing disclosure regimes. Id. at 1321–22, 1327–29. She adds that

[b]y unbranding, companies are misleading and deceiving the consumer, but they are also moving, drastically and intentionally, away from the primary purpose of trademark law. Trademarks themselves are supposed to act as transparent indicators of source. Consumers should not have to dig through layers of branding to get to the actual source. Trademarks are protected by courts because of the goodwill that is generated by companies who invest in and build them. But what goodwill can discarding your trademark generate? We are at risk of losing touch with the primary goal of trademark law if this trend continues.

Id. at 1347.
cash, and commissions. Social media participants are still able to express their views about a product or service, but need to let consumers know about connections with sponsors and let readers decide what impact that information will have upon their view of the value of sponsored speech.

Aside from endorsers, advertisers and their marketing firms may be liable for false or unsubstantiated claims made by endorsers or for failures to disclose any “material connections,” especially if the connection is not one reasonably expected by a consumer audience. Consumers may expect that a celebrity is endorsing a product for compensation and weigh their credibility accordingly. But consumers may not expect that Wal-Mart sponsored the comments on a couple’s blog about traveling cross-country in an RV or that Royal Caribbean provided free cruise tickets and access to cruise ship enthusiasts who post on travel sites. The FTC’s view is that disclosure is necessary so that consumers may distinguish between a sponsored ad and an ordinary consumer’s uncompensated review or rating. Any

60 16 C.F.R. § 255.5; see also supra note 59 and accompanying text.

61 16 C.F.R. § 255.5; see also Tushnet, supra note 4, at 759–60 (“In the absence of a disclosure requirement, a consumer can’t reasonably distinguish the bloggers who are promoting products and services because they like them from the ones who are doing so because they are being paid.”); FTC Policy Statement on Deception, Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, to Honorable John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983), available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm. The FTC stated that

The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances. The test is whether the consumer’s interpretation or reaction is reasonable. When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.

Id.

62 16 C.F.R. § 255.1(c) (2013).

63 16 C.F.R. § 255.5 (illustrating this scenario in Example 3).

64 Katyal, supra note 6, at 832. Favoring blogger disclosure and transparency, Mr. Rand, WOMMA’s CEO, stated that:

The FTC guidelines will reinforce and possibly even expand upon what has been a clear and credible guide for marketers and bloggers to date. Still, the Word of Mouth and even FTC guidelines aren’t enough on their own. This is where the unforgiving self-policing ways of the online world come into play.

Bloggers and brands have learned firsthand that they’ll not only be called out but very likely be vilified for trying to deceive online readers. Remember the Working Families for Wal-Mart blogging fiasco? The Wal-Marting Across America blog was shut down in 2006 and the retailer tarnished after it was revealed that the company was behind the supposed fan-based site. Today, Wal-Mart has not only learned its lesson but is showing other companies and bloggers how to do things right.

Internet Polices Itself, supra note 37.

65 See supra note 34 and accompanying text.

66 See 16 C.F.R. § 255.5.
disclosure should be clear and conspicuous so that we, as consumers, know who is really behind the online comment, review, or post. In an effort to promote transparency, the FTC has also expressly stated that advertisers and their marketing firms should (1) adopt a disclosure policy that complies with the law, (2) make sure people who work for or with them are trained and know what the FTC rules are, and (3) monitor what these parties are communicating on the sponsor’s behalf. Otherwise, the sponsor and marketing firm may be held liable for deceptive advertising.

II. MAJOR CRITICISMS OF FTC’S REVISED GUIDES

During the comment period and after their publication, there was a firestorm of controversy over the Revised Guides and the FTC’s efforts to deter deceptive advertising in social media and promote greater transparency in ratings and reviews. In the consumer blogosphere, the Revised Guides were attacked as both underinclusive and overinclusive of the FTC’s stated objectives. Commenters raised issues about bias against new media, lack of clarity in the language and enforcement that chills blogger speech, failure to combat other pernicious speech suppression efforts, and the possible erosion of third party immunity under the Communications Decency Act ("CDA").

A. Claimed Bias Against Free Speech Rights of New Media Outlets

A main criticism of the FTC’s Revised Guides concerns regulatory encroachments on purportedly noncommercial speech, such as bloggers’ personal opinions about certain products and services. At present, the courts have not viewed individual bloggers unassociated with traditional media outlets as journalists.

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67 Id.
68 Id. § 255.1.
69 Id.; see also Dryer, supra note 20, at 16–18 (discussing importance of adopting company social media policies that address disclosure and monitoring obligations under Revised Guides for employer, employee and other sponsored speech); James B. Astrachan, Social Media Marketing: Testimonials and Endorsements, Md. B.J., Nov.–Dec. 2012, at 12, 19.
70 16 C.F.R. § 255.1 (2013); Astrachan, supra note 69, at 19.
71 16 C.F.R. § 255.1(d); Astrachan, supra note 69, at 19.
72 See infra Part II.A.
73 See infra Part II.
74 FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255); see also Tushnet, supra note 4, at 721 (asserting that endorsements may “straddle the line between commercial and noncommercial speech”). Major advertising organizations argued that the Revised Guides would stunt the growth of social media channels and cause sponsors to reject the utilization of these marketing options. FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,125; see also Obsidian Fin. Grp., LLC v. Cox, 812 F. Supp. 2d 1220, 1234–35 (D. Or. 2011) (determining that “investigative blogger” could be held liable for defamation for untruthful facts, but not personal opinions).
with the attendant First Amendment protections.\textsuperscript{75} The Revised Guides similarly disadvantage new media participants by requiring them to disclose “material connections,” while traditional media journalists do not have to do the same.\textsuperscript{76} In addition, social media site’s technical limitations that are outside of a posting party’s control, such as the “Like” option in Facebook and the limited characters in Twitter’s tweet function, may also make it difficult for proper disclosures to be made.\textsuperscript{77}

However, under its disclosure regime, the FTC has asserted that it is not banning or censoring personal opinions or commercial speech,\textsuperscript{78} but rather, it is requiring endorsers to disclose any material connection they may have to a sponsor or media relations firm and their associated brands.\textsuperscript{79} Although endorsers may chafe at this required disclosure, this requirement does not focus on the content of the critique, but on whether or not that speech may be influenced by sponsors and is, therefore, commercial speech subject to regulatory mandates.\textsuperscript{80} The online speech of

\begin{quote}
[T]here is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting “the other side” to get both sides of a story. Without evidence of this nature, defendant is not “media.”

\textit{Id.} at *13.
\end{quote}

Moreover to the extent that consumers’ willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a beneficial, not a detrimental, effect. And although industry self-regulation certainly can play an important role in protecting consumers as these new forms of marketing continue to evolve and new ones are developed, self-regulation works best when it is backed up by a strong law enforcement presence.

\textit{Id.} at 53,126.

\textsuperscript{75} See Obsidian Fin. Grp., LLC v. Cox, No. CV-11-57-HZ, 2011 U.S. Dist. LEXIS 137548, at *12–13 (D. Or. Nov. 30, 2011). In a defamation case, the court determined that an “investigative blogger” was not a member of the “media” for whom a negligence standard would be applied to the claim. \textit{Id.} at *12–13. To determine if the blogger could be considered a journalist, the court found:

\begin{quote}
[T]here is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting “the other side” to get both sides of a story. Without evidence of this nature, defendant is not “media.”

\textit{Id.} at *13.
\end{quote}

\textsuperscript{76} FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,136. The FTC recognized this disparity in treatment but noted that:

Moreover to the extent that consumers’ willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a beneficial, not a detrimental, effect. And although industry self-regulation certainly can play an important role in protecting consumers as these new forms of marketing continue to evolve and new ones are developed, self-regulation works best when it is backed up by a strong law enforcement presence.

\textit{Id.} at 53,126.

\textsuperscript{77} Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 797, 814 (N.D. Cal. 2011) (holding that Facebook was unlawfully profiting from Plaintiff’s personal endorsement of advertisers’ products via the “like” feature); see also Sprague & Wells, supra note 5, at 444 (noting that it may be hard for Twitter users to comply with the disclosure of sponsorship requirement when it is out of the users’ control that they are limited to 140 characters per Tweet message).

\textsuperscript{78} See Goodman, supra note 4, at 135; Tushnet, supra note 4, at 760–61.

\textsuperscript{79} 16 C.F.R. § 255.5 (2013).

\textsuperscript{80} Goodman, supra note 4, at 135–37. Professor Goodman asserts that disclosure laws are not impermissibly content-based under the First Amendment. \textit{Id.} at 137. She contends that:

\begin{quote}
Sponsorship disclosure law does not implicate particular viewpoints. Sponsors and editors choose what views to express without governmental interference.
\end{quote}
bloggers and other social media participants is not prevented, whether it is personal opinion or sponsored speech, and their views can still be heard in lively online exchanges. However, with greater transparency on sponsored speech, online consumers receive more information about any material connections and may use this information to determine how much weight and credibility to give that commercial speech.

But if transparency is the objective, the Revised Guides are clearly underinclusive because they do not require traditional media outlets, such as newspapers and TV, to make these same disclosures. Some commentators asserted that the FTC showed its own free speech bias by favoring traditional media and censoring or chilling online speech in the Revised Guides. While online bloggers

The law merely requires that the sponsors of these viewpoints disclose their payments. In a fairly recent compelled speech case, Justice Stevens has noted that compelling persons to engage in “political” or “ideological” speech involves constitutional concerns that simply are not present for other kinds of speech. Indeed, so attenuated are the First Amendment interests in the concealment of sponsorship that a reviewing court might well find such disclosures to be the kind of speech that lacks constitutional significance.

Anderson, supra note 6, at 9.

82 See Anderson, supra note 6, at 8; Cohen, supra note 81, at 1, 2–3, 44–45; Ortiz, supra note 41, at 964–65; Shannon, supra note, 10 at 477–78. Professor Anderson adds that:

By definition, stealth marketing is designed to mislead; it is employed for the purpose of preventing the recipient from realizing that what he or she is getting is advertising. A newspaper restaurant critic who writes that Pascal’s is the best French restaurant in town is representing that as an independent judgment. If it is not—the restaurant purchased it by the restaurant—the implicit representation of independence is false. Perhaps speech that pollutes public discourse ought to be more generally condemnable, but for purposes of combating stealth marketing, it is enough to say that it is commercial speech that will be misleading unless its sponsorship is disclosed. That the First Amendment permits the state to require disclosure under those circumstances is clear to all except those who insist (unsuccessfully, so far) that commercial speech must be protected as fully as other speech even when it’s false.

Anderson, supra note 6, at 9.

83 See Anderson, supra note 6, at 8; Cohen, supra note 81, at 1, 2–3, 44–45; Ortiz, supra note 41, at 964–65; Shannon, supra note, 10 at 477–78. Professor Tushnet argues that the Guides apply consistently to both new and traditional media because disclosure obligations are based on whether or not the audience has an understanding of the relationship between a reviewer and the product or service being reviewed. She states that:

The Guides apply across the board. The issue is—and always has been—whether the audience understands the reviewer’s relationship to the company whose products are being reviewed. If the audience gets the relationship, a disclosure isn’t needed. For a review in a newspaper, on TV, or on a website with similar content, it’s usually clear to the audience that the reviewer didn’t buy the product being reviewed. It’s the reviewer’s job to write his or her opinion and no one thinks they bought the product—for example, a book or movie ticket—they themselves.

But on a personal blog, a social networking page, or in similar media, the reader
and vloggers have to disclose a free product or service they received and subsequently reviewed, their print and TV media counterparts do not have this same legal obligation under the Revised Guides.\textsuperscript{85} In addition, there has been a blurring of traditional and new media when print and broadcast outlets also create or reproduce print content on the Web and are permitted to follow different rules.\textsuperscript{86}

The FTC contends that, unlike most bloggers and social media participants, there is an editorial staff assigning and reviewing content in traditional media who will filter out biased perspectives that might violate journalistic ethics.\textsuperscript{87} The agency also opined that a TV station or newspaper, not the journalists, owns the sponsored property provided for review and keeps these free materials.\textsuperscript{88} On the other hand, bloggers may personally receive and retain free items under review.\textsuperscript{89} It is problematic whether this assertion is accurate or not, but clearly, new media is may not expect the reviewer to have a relationship with the company whose products are mentioned. Disclosure of that relationship helps readers decide how much weight to give the review.

\textit{Id.} at 757.

\textsuperscript{85} One might also argue that under journalistic codes of ethics, journalists are supposed to refuse any third party obligations, such as compensation or offers of free goods and services, to avoid actual or perceived conflicts in their primary duty to pursue the “public’s right to know” in their writings. Goodman, \textit{supra} note 4, at 123–24.

\textsuperscript{86} FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,136 n.101 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255). The FTC indicated that employees of Internet news sites serving under the traditional editorial model would also not be considered endorsers when writing reviews. \textit{Id.}

\textsuperscript{87} See Cohen, \textit{supra} note 81, at 80.


\textsuperscript{89} See FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,196. The FTC stated that:

The Commission acknowledges that bloggers may be subject to different disclosure requirements than reviewers in traditional media. In general, under usual circumstances, the Commission does not consider reviews published in traditional media (i.e., where a newspaper, magazine, or television or radio station with independent editorial responsibility assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews) to be sponsored advertising messages. Accordingly, such reviews are not “endorsements” within the meaning of the Guides. Under these circumstances, the Commission believes, knowing whether the media entity that published the review paid for the item in question would not affect the weight consumers give to the reviewer’s statements.

\textit{Id.} In an interview, Richard Cleland of the FTC’s Bureau of Consumer Protection, is quoted as stating that:

“We are distinguishing between who receives the compensation and who does the review . . . In the case where the newspaper receives the book and it allows the reviewer to review it, it’s still the property of the newspaper. Most of the newspapers have very strict rules about that and on what happens to those products.”

Champion, \textit{supra} note 88.
burdened with a disclosure obligation not required of traditional media, either on or off the Web.

B. Uncertainty Over Enforcement Boundaries and FTC Targets Chills Speech

The issue of FTC enforcement of the Revised Guides has also come under attack. Some bloggers and legal experts complained that the Revised Guides would chill speech because individual bloggers, not just experienced advertisers and marketing firms, can be held liable as endorsers for failing to comply with the Revised Guides. Most blogs, be they commercial or personal, have shoe string or nonexistent budgets, and defending against or fearing an FTC investigation would force many of them to stop posting and reduce online speech overall. Unlike most sponsors and marketing firms or savvy celebrities, many individual bloggers are not advertising industry experts and do not have the financial resources to retain attorneys to respond effectively to FTC investigations and enforcement actions. Many bloggers would not be able to afford to operate if they had to defend against an enforcement threat.

In light of their limited time and financial resources, some bloggers have expressed concerns that the boundaries of a “material connection” are not clearly defined as to either dollar amount or frequency. While direct compensation instances may be easy to recognize and disclose, in-kind compensation presents greater challenges. Some bloggers may receive many unsolicited product samples for low value items sent expressly for their review, and it is unclear how regularly they must receive these items in order to be accountable for making disclosures under the Revised Guides. In some instances, they may have already purchased an

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90 Sprague & Wells, supra note 5, at 438.
91 See id.
92 Id. The authors comment that:

[I]t is arguable that this 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 could very well be hesitant to comment on any product if there is any connection, however tenuous, between the blogger and the marketer. For example, on blogging mother has expressed concern that even a casual mention of an all-natural cold remedy she bought—and believes worked well for her family—could be the subject of an FTC probe. Some bloggers have complained that, with FTC oversight, they are worried that innocent posts will get them into trouble—so they may simply quit or post less frequently.

Id.

93 Id.; see also Jeff Kosseff, Defending Section 230: The Value of Intermediary Immunity, 15 J. TECH. L. & POL’Y 123, 151 (2010).
95 See FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,126.
96 Id.; Champion, supra note 88. In Mr. Champion’s interview, the FTC’s Richard Cleland stated that a book blogger need not disclose a material connection if the blogger returned the book after the review and did not allow a paid ad on the blogger’s site to the book. Champion, supra note
item to review and then receive an unsolicited free sample, like an e-book or video game from a sponsor, and may have to expend additional time and money to return unsolicited items to avoid disclosure obligations.\textsuperscript{97}

Furthermore, the FTC does not mandate the text of adequate disclosures, so there is a lack of clarity at what would be considered “clear and conspicuous” disclosures.\textsuperscript{98} Previously, the FTC provided further guidance to online marketers about what it meant by clear and conspicuous disclosures.\textsuperscript{99} While not mandating any specific type or text in disclosures, the FTC indicated that sponsors should consider the following in drafting endorsement disclosures: the placement of the disclosure, its proximity to the endorsement claim, its prominence in the advertisement; any message elements that may distract attention away from a disclosure; the need for possible repetition of a disclosure statement in lengthy messages; appropriate volume, pace, and visual clues in audio advertisements; and the use of comprehensible language for the ad’s intended audience.\textsuperscript{100} The FTC also provided examples of mock ads and discussion board comments to illustrate its points on appropriate disclosures.\textsuperscript{101}

Although this information is likely well known by advertising professionals, few individual bloggers may understand how best to handle their disclosure obligations.\textsuperscript{102} Some bloggers offering their honest beliefs worry about becoming entangled in a costly FTC enforcement action over these disclosure issues.\textsuperscript{103} However, the FTC has publicly stated that it has no intention of going after

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\textsuperscript{88} Retaining the book or allowing a paid ad would be considered “compensation” requiring the blogger to make a disclosure under the Revised Guides. Id. He added that “[i]f a blogger received enough books, . . . he could open up a used bookstore.” Id.
\textsuperscript{97} See FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. at 53,126; Champion, supra note 88.
\textsuperscript{99} See FTC DOT COM DISCLOSURES, supra note 98, at 1–2.
\textsuperscript{100} Id. at 1–2.
\textsuperscript{101} Id. app.
\textsuperscript{102} See Sprague & Wells, supra note 5, at 444. Professors Sprague and Wells express concern about the challenges of regulating social media based on cultural obstacles. Id. They note that
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[a] potentially more intractable problem regulating the content of blogs, social networking profiles, and Twitter messages is the very nature of that content. People generally think of blogs “as personal, informal, off the cuff and coming from the heart—unfiltered, uncensored and unplanned.” Many bloggers believe they have a near-absolute right to express their opinion. The culture of the blogosphere may therefore be very resistant to formal guides on what can and cannot be said online.

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individual bloggers.\footnote{104} Part of this is purely practical, with millions of blogs and personal pages and billions of tweets, the agency does not have the staff, time, or budget to police the entire Web.\footnote{105} In this “catch me if you can” environment, the FTC is largely limited to going after a small number of larger companies or egregious offenders.\footnote{106} Some sponsors and marketing firms correctly assume that they will never be caught in this thicket of real and faked online consumer commentary, similar to downloaders involved with online piracy.\footnote{107} One need only access online marketplaces and freelance writing websites to find many ads seeking pay-per-blog posts without any disclosures or seeming compliance with FTC regulatory mandates.\footnote{108} However, unlike the Recording Industry Association of America (“RIAA”) or Motion Picture Association of America (“MPAA”), the FTC has already told individual freelancers that they will not come looking for them.\footnote{109} But the threat of enforcement still looms because the Revised Guides do allow FTC actions to be brought against individual endorsers.\footnote{110}

\textbf{C. Failure to Address Other Speech Suppression Efforts}

Other commentators also assert that the Revised Guides are underinclusive because they fail to capture other creative efforts to evade these rules, including search engine and automated software manipulation of ratings, the use of negative reviews rather than endorsements, and speech suppression contracts. For example, a growing reputation management industry will continue to use various forms of link farming, sponsored links, and other proprietary programs that flood search engine results with good news about their clients and pushing down negative commentary.\footnote{111} Because most people never click past the first page of search engine results, these reputation management efforts will help suppress ordinary consumer reviews.\footnote{112}

Certain firms will also try to manipulate online reviews and rankings using automated software programs, known as “bots.”\footnote{113} Some bots are constructed to crawl through the Web clicking “Like” and “Very Helpful” every time something

\footnotesize
\begin{itemize}
  \item See supra notes 20 & 77 and accompanying text.
  \item See infra Part III.
  \item See Goodman, supra note 4, at 143 (noting that piracy increases audience size and could be viewed as marketing opportunities for sponsors).
  \item See supra notes 28–39 and accompanying text.
  \item See Goldman, supra note 35 (“This is consistent with the FTC’s repeated assurances . . . that the FTC will be pursuing advertisers and not individual bloggers.”)
  \item See 16 C.F.R. § 255.0(b) (2013) (“The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.”)
  \item See Kahn, supra note 19, at 184–86.
  \item See id. at 184–86.
\end{itemize}
positive is posted about a marketer’s clients online. Conversely, these bots also fire off multiple “Don’t Like” or “Not Helpful” to overwhelm and undermine the credibility of opposing or negative reviews. In these situations, sponsors defend their actions by claiming that the Revised Guides do not prohibit their conduct and that there is no opportunity to make any disclosures because the design of these third party options is outside of their control. Similarly, some agencies or sponsors, asserting that the Revised Guides only apply to positive endorsements, not disapproving remarks, will hire pay-per-post bloggers to write negative reviews about competitors. Although the definition of endorsement could be read broadly enough to encompass negative attacks on a competitor’s products or services, the Revised Guides’ illustrative examples all address situations in which positive reviews are being made about a sponsored product or service, and disclosure is only mandated when a material connection is involved.

Furthermore, certain businesses and professionals are going on the offensive trying to suppress any negative reviews or ratings with “gag” contracts and litigation. Under these agreements, consumers are only provided service if they agree not to post any negative reviews, regardless of the quality of the product or service. In some instances, these contracts subject consumers to liquidated damages if they post any negative remarks or feedback. Other firms, unhappy with their rankings, are filing or threatening to file lawsuits demanding the removal of negative feedback—even in instances where pure opinion is clearly involved. These forms of speech suppression are just starting to make headlines and do not fit neatly under the Revised Guides.

D. Section 230 Immunity Under the Communications Decency Act (“CDA”)

In the early days of the popularized Internet, the courts tried to define immunity from third-party content based on whether or not a site had exercised editorial

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115 See Tynan, supra note 113; Gaskell, supra note 114.
117 Id.
118 See Anita Ramasastry, A Patient Sues His Dentist Over a Contractual Ban on His Posting Negative Online Reviews of Her Work: Why His Class Action Appears to Have Merit, VERDICT (Dec. 6, 2011), http://verdict.justia.com/2011/12/06/a-patient-sues-his-dentist-over-a-contractual-ban-on-his-posting-negative-online-reviews-of-her-work.
119 See id.
control over its content. Those sites that exercised editorial control would be viewed like newspapers and held liable for their content. Those websites that behaved more like a library or newsstand, allowing others to display their content without exercising editorial control, were not liable for third-party content. However, this approach quickly became untenable as user-generated content grew explosively over the Web, and websites were unable to keep up with the deluge of postings.

Under the CDA, Congress moved away from the judicial distinctions based on editorial control with an eye towards spurring the development of online spaces for robust online discussions across the Web, as well as promoting self-regulation of discussion boards without fear of legal liability for postings either taken down or left up on these sites. Congress deliberately chose to provide broad immunity from third-party liability under Section 230 in order to achieve these goals. Instead of looking at editorial control, the CDA defines potential liability as based upon whether or not a site is viewed as an “interactive computer service” or an “information content provider.”

An information content provider, such as a blogger, is liable for the content she creates and posts online. However, if that same blogger allows third parties to post comments on her site, she is not liable for their content because she is acting as

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124 See Cubby, 776 F. Supp. at 140–41; Smith v. California, 361 U.S. 147, 152–54 (1959) (striking down a state law holding booksellers liable for the sale of obscene material, even absent knowledge of the obscene material).


126 47 U.S.C. § 230(c)(1) ("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."). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Id. § 230(e)(3). Some commentators have argued that courts have too broadly interpreted the immunity under this provision, which was intended to promote self-monitoring in order to retain immunity under the Communications Decency Act ("CDA"). DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: Gossip, Rumor, and Privacy on the Internet 152–54 (2007) (arguing that websites should be liable if they refuse to remove third party defamatory material once notified).

127 47 U.S.C. § 230(f)(2) ("The term ‘interactive computer service’ means 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.").

128 47 U.S.C. § 230(f)(3) ("The term ‘information content provider’ means 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.").

an interactive computer service.130 Under the CDA, interactive computer services such as ISPs, blogs, chat rooms, and web sites cannot be held liable for content or speech that they did not create or participate in creating under Section 230.131 Only information content providers, such as individual posters or bloggers who created and posted the content, can be held liable for their own speech.132 Courts have broadly interpreted the immunity provisions of the CDA because Congress intended to promote a robust exchange of ideas and remove the chilling effect of potential tort liability in the online world.133 Citing Section 230, some legal commentators have contended that the FTC lacks the legal authority to hold brand sponsors and their marketing firms liable for other’s online content under the CDA’s immunity provisions.134 Therefore, sponsors and advertising agencies could not be held accountable for content created by bloggers because they neither created nor posted the online content under the terms of the CDA.

For example, Amazon.com is generally not liable for product comments created and posted by users about products purchased on the site. Only the individual who created and posted the comment may be liable for her speech if it goes beyond mere opinion and ends up amounting to defamation or deceptive advertising. Similarly, a sponsor or advertising firm might offer free merchandise samples to a select group of influential bloggers who then decide to post positive reviews about those products on their blogs. Under the CDA, the sponsors and advertising agencies cannot be held accountable for content created by third party bloggers who express their personal views about products or services, even if these postings are supportive of a particular sponsor. However, according to the Revised Guides, the sponsors and advertising agencies would be liable for this third party content, creating a conflict with Section 230.

130 See supra note 127 and accompanying text; Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (determining that the site was not an interactive computer service and, therefore, not liable for third party content that may violate fair housing laws); Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008) (affirming dismissal of a negligence action for sexual assault of a minor brought against a website under CDA immunity, finding that the site was not liable for false third party content in a user profile); Zeran, 129 F.3d at 332 (affirming the District Court’s finding that an interactive computer service was not liable for defamatory content or the refusal to print a retraction regarding the third party posting); Blumenthal v. Drudge, 992 F. Supp. 44, 50–51 (D.D.C. 1998).

It is undisputed that the Blumenthal story was written by Drudge without any substantive or editorial involvement by AOL. AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a “publisher or speaker” and therefore may not be held liable in tort.

Id. (internal citations omitted).

131 See supra notes 126 & 127 and accompanying text.

132 See supra note 128 and accompanying text.

133 See Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003); Zeran, 129 F.3d at 330; Blumenthal, 992 F. Supp. at 50–51.

Perhaps more troubling to sponsors are those instances in which an interactive computer service loses CDA immunity and is viewed as a liable information content provider based upon their level or degree of involvement in the creation of challenged content.\textsuperscript{135} Sponsors and advertising agencies might be viewed as substantively aiding in or establishing the foundation for the creation of content by offering money or other forms of compensation with the implied expectation of positive reviews for their products and negative ones for their competitors.\textsuperscript{136} For example, in \textit{Doctor’s Associates, Inc. v. QIP Holders LLC}, Quiznos devised an online contest in which customers were asked to submit videos as to why Quiznos was better than Subway as part of its “Quiznos vs. Subway TV Ad Challenge.”\textsuperscript{137} Partnering with file-sharing site iFilm, Quiznos encouraged users to generate videos and post them on “meatnomeat.com” making comparisons between the two competitors’ sandwiches.\textsuperscript{138} To hone the context for the contest, Quiznos posted four sample videos that it had created to aid consumers in making their own ads that may have contained false claims that Subway sandwiches had less meat than Quiznos’ products.\textsuperscript{139} The court noted that Quiznos did not seek CDA immunity for the sample videos or for its registered domain name “meatnomeat.com.”\textsuperscript{140} In addition, the court found that it must leave it up to a fact-finder whether or not Quiznos had moved beyond being merely an interactive computer service into becoming an information content provider.\textsuperscript{141} A jury would need to decide if Quiznos had actively participated in soliciting the disparaging videos, shaping the context for these messages, and thereby, aiding in and being responsible for the development of these consumer videos.\textsuperscript{142} The case ultimately settled, so this issue was not explored further.\textsuperscript{143} Yet,  

\textsuperscript{135} Sprague & Wells, \textit{supra} note 5, at 445–49; see also, e.g., Fair Housing Council of San Fernando Valley \textit{v. Roommates.com, LLC}, 521 F.3d 1157, 1166, 1175 (9th Cir. 2008) (viewing a roommate matching website, which provided pull down menus that included protected classes under fair housing laws, as both an interactive computer service and an information content provider and therefore not immune from housing discrimination complaints under the CDA); \textit{Carafano}, 339 F.3d at 1124–25 (finding that, despite the site’s detailed dating questionnaire, the website was immune from liability because the site did not create or aid in the development of the third party’s false content in a dating profile, including defamatory material and information that allegedly constituted identity theft); MCW, Inc. v. Badbusinessbureau.com, LLC, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at *28–36 (N.D. Tex. Apr. 19, 2004) (finding that a consumer complaint site that drafted postings’ titles, headings, and comments on consumer complaint reports was not immune under the CDA because it created and/or aided in the creation of allegedly defamatory content).\textsuperscript{136} See \textit{supra} note 91 and accompanying text.\textsuperscript{137} \textit{Doctor’s Assoc., Inc. v. QIP Holder, LLC}, No. 3:06-cv-1710(VLB), 2010 U.S. Dist. LEXIS 14687, at *3 (D. Conn. Feb. 19, 2010). The winning video would be broadcast on VH1 and a Time Square billboard in New York City. \textit{Id.} at *65.\textsuperscript{138} \textit{Id.} at *3, *62. The court noted that the domain name alone arguably suggested a false claim about Subway sandwiches. \textit{Id.} at *64–65.\textsuperscript{139} \textit{Id.} at *62–63.\textsuperscript{140} \textit{Id.} at *66, n.4.\textsuperscript{141} \textit{Id.} at *68–69.\textsuperscript{142} \textit{Id.} at *70–71. The court noted that:
uncertainty persists for sponsors and advertising agencies about what level or degree of involvement may strip them of CDA immunity and lead to legal obligations to monitor consumer-generated content.144

III. MIXED ENFORCEMENT RECORD FOR REVISED GUIDES

Aside from imprecision in the language and breadth of the Revised Guides, there have also been concerns about how the FTC will enforce these modified provisions. As sponsors, agencies and content creators scramble to comply with the new disclosure obligations, the enforcement actions so far have been quite mixed and have illustrated the practical challenges of effective implementation of the Revised Guides. In addition, some state regulators have also entered the fray,145 which may heighten concerns about jurisdictional authority over these disclosure matters.

As of September 2012, the FTC has opened high-profile investigations against Ann Taylor146 and Hyundai under the Revised Guides.147 Yet the agency has only formally charged three lesser-known companies: Reverb, a public relations firm,148 Legacy Learning, a sponsor selling guitar-lesson DVDs,149 and Spokeo, an

the four “sample videos” designed by the Defendants to shape the Contest submissions arguably contain false representations because they depict the Subway sandwich as having no meat or less meat than a Quiznos sandwich. In these circumstances, the Court cannot conclude, as a matter of law, that the Defendants are not responsible for the creation and development of the contestant materials. Whether the Defendants are responsible for creating or developing the contestant videos is an issue of material fact, best submitted to the jury after viewing all the relevant evidence. A reasonable jury may well conclude that the Defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos.

Id. at *70–71.

144 Sprague & Wells, supra note 5, at 446–49, 454.
146 See supra note 35 and accompanying text.
147 See supra note 36 and accompanying text.
employment screening service. In addition, celebrities who violated the Revised Guides have skated past any investigatory actions. This mixed record of enforcement of the Revised Guides may have caused some confusion in the blogosphere and consternation among critics of the Revised Guides.

In August 2010, the FTC settled its first charges against Reverb, a public relations firm hired to promote certain video games and to receive a percentage on the sales made for their clients. Between November 2008 and May 2009, Reverb’s owner and employees, posing as everyday consumers, posted positive reviews of their client’s video games on iTunes review boards. The firm’s owner and employees never disclosed their paid status with Reverb or their marketing connection to the gaming applications lauded in their reviews. The FTC viewed their conduct as violating the Revised Guides and labeled it as a form of deceptive advertising because consumers were unaware of the material connection between Reverb and the video game developers. The agency indicated that these facts would be relevant to consumers who might be considering the postings in making buying choices about these game applications. Under the settlement order, Reverb was mandated to remove its prior endorsements that did not disclose the material connection and left the impressions that the authors were ordinary consumers. In addition, Reverb agreed not to post such reviews in the future without making the appropriate disclosures.

In March 2011, the FTC assessed its first fine of $250,000 against Legacy Learning when its online affiliate marketers falsely pretended to be independent reviewers and disinterested consumers in contravention of the Revised Guides. The FTC complaint stated that Legacy Learning utilized an online affiliate

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151 See infra notes 185–194 and accompanying text.

152 Reverb Press Release, supra note 148.

153 Reverb Complaint, supra note 148, at 2–3.

154 Id. at 4.

155 Id.; see also Reverb Press Release, supra note 148.

“Companies, including public relations firms involved in online marketing, need to abide by long-held principles of truth in advertising,” said Mary Engle, Director of the FTC’s Division of Advertising Practices. “Advertisers should not pass themselves off as ordinary consumers touting a product, and endorsers should make it clear when they have financial connections to sellers.”


156 Reverb Press Release, supra note 148.

157 Id.

158 Id.

marketing scheme offering substantial sales commissions on its Learn and Master Guitar program.\textsuperscript{160} Sales commissions would be awarded to those posting online content endorsements alongside links to Legacy’s website.\textsuperscript{161} The FTC determined that this online affiliate approach yielded $5 million in Legacy course sales.\textsuperscript{162} Once more, the FTC contended that these positive affiliate reviews were a form of deceptive advertising because consumers were not alerted to the direct financial connection between Legacy and the online endorsers.\textsuperscript{163} Aside from consenting to the fines, Legacy agreed to effectively monitor its affiliate marketers and provide monthly reports to the FTC regarding its top fifty revenue-generating affiliates, making certain that they made appropriate material disclosures about their commission incentives.\textsuperscript{164} The firm also had to file monthly reports about a random sample of an additional fifty affiliate endorsers’ compliance with the Revised Guides.\textsuperscript{165}

Similarly, in June 2012, the FTC announced that it had settled a dispute with Spokeo, Inc., in part, for misrepresenting fake comments as ordinary consumer reviews in violation of the FTC Act and for noncompliance with the Revised Guides.\textsuperscript{166} The primary thrust of the FTC action against Spokeo dealt with the firm’s creation of individual profiles by culling online and offline sources, such as social media profile information and photographs, and selling the information to employers for applicant screening purposes in violation of the Fair Credit Reporting Act (“FCRA”).\textsuperscript{167} The FTC had asserted that in order to market its services, Spokeo posted endorsements on a wide range of news and technology websites and blogs, claiming these reviews were independent customer evaluations.\textsuperscript{168} However, these postings were actually written and posted by Spokeo employees, which is clearly a deceptive trade practice in violation of statutory law and the Revised Guides.\textsuperscript{169}

These three cases illustrate egregious conduct, but other situations with more complicated or nuanced considerations have not been quite so simple to resolve. In 2010, the FTC’s first investigation of material connections involved free gifts given to fashion bloggers at a preview event for Ann Taylor LOFT’s Summer 2010 Collection.\textsuperscript{170} At the time of the fashion preview, Ann Taylor did not have a written policy on product endorsements, but had posted signs at the show advising bloggers to disclose their free gifts in any later postings.\textsuperscript{171} The agency noted that it was unclear if all of the bloggers noticed the signs or were made formally aware of their

\textsuperscript{160} Legacy Complaint, supra note 149, at 3–4.
\textsuperscript{161} Id. at 2.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 3.
\textsuperscript{164} Legacy Press Release, supra note 159.
\textsuperscript{165} Id.
\textsuperscript{167} Spokeo Press Release, supra note 150. This case was the first FTC action involving the misuse of social media personal data for employee screening purposes under FCRA. Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} See supra note 35 and accompanying text.
\textsuperscript{171} Letter from Engle to Plevan, supra note 35; see also Goldman, supra note 35.
Some bloggers did reveal that they received free gifts at the preview while others did not. Further, Ann Taylor did not follow up to insure that the invited bloggers disclosed their material connection to the retailer. During the FTC investigation, Ann Taylor created a written endorsement policy in February 2010 stating that the retailer would advise bloggers about their legal obligations and monitor blogger compliance with the company’s written policy. Ultimately, the FTC did not bring an enforcement action against Ann Taylor. In its April 22, 2010 closing letter, the FTC indicated that it decided not to bring charges because the retailer adopted a written endorsement policy along with the fact that only a few bloggers even posted about the fashion show without any similar preview events being held.

In a subsequent investigation, the FTC examined marketing efforts on behalf of Hyundai regarding its videos for upcoming Super Bowl spots. A marketing agency provided gift certificates to bloggers who posted content and included links to these Hyundai videos or subsequently commented on these clips on their blogs. Some endorsers were advised to reveal their connection while others were expressly told not to disclose their links to the marketing program. After its investigation, the FTC chose not to bring formal charges for reasons similar to its decision in the Ann Taylor case, noting that few bloggers ever received these gift certificates and some endorsers actually disclosed these incentives. Unlike the Ann Taylor situation, Hyundai already had adopted a written social media policy, did not have advance knowledge of these planned gift certificates, and none of its employees were directly involved with these incentives. The FTC reiterated that sponsors, like Hyundai, are legally liable for the actions of their media relations firms. However, this misconduct was in clear contrast to the written social media policies of both Hyundai and its marketing agency, and Hyundai acted quickly to handle the problem. Due to these factors and other undisclosed information, the FTC decided not to formally charge Hyundai under the terms of the Revised Guides.

Lastly, the Revised Guides may not be keeping pace with nontraditional sponsorship through the intersection of advertisers, celebrities, and social media. The FTC has not taken action against well-heeled celebrity endorsers, like Gwyneth Paltrow, who may not consistently make the required disclosures in their tweets and

172 Letter from Engle to Plevan, supra note 35.
173 Id.
174 Id.
175 Id.
176 Id.
177 Letter from Engle to Smith, supra note 36; see also Balasubramani, supra note 36.
178 Letter from Engle to Smith, supra note 36, see also Balasubramani, supra note 36.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
Celebrity endorsers often receive expensive gifts and free services from sponsors, while other celebrities receive substantial financial compensation from their pay-per-post or pay-per-tweet arrangements with sponsors. Aside from gifts and direct compensation, some celebrities have avoided their disclosure obligations by skirting the letter, but not the spirit, of the Revised Guides. For example, certain celebrities may welcome photographers to take pictures of them carrying their sponsors’ products or wearing certain advertiser’s designer goods. Without an explicit endorsement, celebrities have benefitted their sponsors while evading the Revised Guides’ disclosure obligations.

In response to these concerns, the FTC has indicated that most people reasonably assume that celebrities are being paid or lavished with gifts to shill for sponsors’ products and services, unlike ordinary consumer reviews and posts. The agency’s failure to act when celebrities do such things as send sponsored Twitter messages shows the agency’s tendency to pass on investigating or charging these celebrities for violating the Revised Guides. Unlike most individual bloggers, celebrities have parlayed their star power into hefty remuneration without the required disclosures. This uneven enforcement of the Revised Guides against celebrity promoters has enraged many individual bloggers who believe that the Revised Guides are vague, flawed, and biased against them.

IV. RECOMMENDED REVISIONS TO REVISED GUIDES AND EXISTING LAWS

The 2009 revisions to the FTC Revised Guides were an initial effort to try to confront issues of deceptive advertising and to promote transparency in consumer reviews and rating sites. While there are flaws to their approach, it does not mean that the hidden Don Drapers should be let off the regulatory hook and that individuals seeking honest, transparent information from fellow consumers automatically lose. Nor does it require the online world to merely revert back to caveat emptor, although a healthy dose of common sense would not hurt. Rather, the FTC’s goals could be furthered by some key changes to its Revised Guides, limited amendments to CDA immunity, and educational efforts aimed at bringing greater clarity and fairness to its disclosure regime.

186 Id.
188 16 C.F.R. at § 255.5 (2013).
189 Id.
190 Id.
191 Bercovici, supra note 185.
192 Rick Alcantara, It’s Time for the FTC to Regulate Celebrity Tweeting, SOCIALMEDIA TODAY (Mar. 2, 2010), http://socialmediatoday.com/SMC/178898. Celebrities generally can earn from $5,000 to $10,000 per tweet or posting as endorsers. Id. But the FTC has not brought any disclosure compliance actions against them under the Revised Guides as of February 2013. Id.
193 See supra note 192 and accompanying text.
194 See supra Parts II.A, II.B.
A. Level Out Disclosure Obligations Between Media Participants

First, the Revised Guides should balance the disclosure rules between traditional media and new media. Regardless of whether you are a noted critic for an established newspaper or an individual blogging in your pajamas from your home computer, the Revised Guides should require disclosures about any material connections from reviewers. If the FTC’s goal is to provide transparency and clamp down on deceptive practices, there is no reason to differentiate between these two publishing spheres.\(^{195}\) A traditional media reviewer should indicate whether a free product or service has been provided in return for their review, just as this disclosure is required of online bloggers.\(^{196}\) Under the Revised Guides, these disclosure

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\(^{195}\) See Anderson, supra note 6, at 3–4. Professor Anderson notes that the erosion of professional norms in journalism and artistic spheres are under stress due to economic demands. Id. at 3. He states that:

The erosion of professional norms is difficult to resist because it is presented as a financial imperative. Newspapers, magazines, over-the-air television, and radio are all under enormous pressure to cut costs and raise revenues. Competition for advertising dollars has never been more intense. The media choices available to advertisers are multiplying rapidly, and that has two effects: it requires the advertiser to constantly re-evaluate its spending allocations lest its competitors find more effective media, and it gives advertisers a great deal of leverage over the media who seek those allocations.

Now add to this mix the Internet, which offers countless new ways to reach consumers and thousands of new competitors for advertising dollars. Most of the Internet options are unencumbered by professional norms or established audience expectations of independence. Advertisers who are frustrated by “old media” insistence on identifying advertising as advertising now have vast new opportunities to avoid such constraints. . . . Never has the demand for stealth marketing been so strong, and never have the media been so ill-equipped to resist. An editor faced with massive newsroom layoffs isn’t in a strong position to resist demands to cozy up to advertisers.

Id. at 3–4.

\(^{196}\) See Cohen, supra note 81, at 78–79. Professor Cohen noted that even within the same media ownership structure, journalists may take differing views on their disclosure obligations.

AllThingsD.com, a technology website owned by Dow Jones, provides individual disclosure statements for each of its staff members, stating in detail the speaking engagements they accept, the stocks they own, how they handle free products sent for review, and other information relating to potential biases and conflicts. The Wall Street Journal, which is also a unit of Dow Jones, does not make similar disclosures about its reporters. The technology blogger Timothy B. Lee includes prominently on his blog a detailed list of all of his sources of income going back several years. Transparency of this kind allows readers to make their own assessments about whether one of the AllThingsD.com journalists or Lee has a conflict on a particular story.

Id. at 79.
obligations can and should be neutral about the nature of the communication or technological platform.197

In addition, although the Revised Guides clearly apply to celebrity endorsers, the FTC needs to do a better job of enforcing its mandated disclosure requirement in these cases. As the line between celebrity endorsement and daily activities continues to blur, the FTC should not simply ignore these violations of their own Revised Guides. A celebrity’s star power should not provide a basis for justifying their failures to disclose material connections when they blog, speak, or tweet about sponsored products and services. If the FTC is serious about transparency, celebrity endorsers should be more effectively policed as to their disclosure duties.

Some commentators have suggested that the FTC define, through specific dollar values or frequency cycles, the notion of material connections for in-kind compensation and spell out the specific disclosures required.198 However, if specific dollar amounts or frequencies are provided, some sponsors and bloggers may try to game the system to avoid disclosure obligations under the Revised Guides. If a specific text for disclosure is mandated, then free speech experts will decry the heavy hand of government-mandated texts. It is a no-win situation for the FTC if it tries to define these obligations in further detail.

If endorsers seek certainty, then they can simply disclose direct compensation or in-kind free samples not provided to the general public, regardless of the frequency or dollar amounts. The costs for such disclosures are relatively low.199 Reviewers who receive cash or in-kind goods should simply state that fact in the text of their reviews or their oral or written comments on a given product or service. Rather than mandate the text of the speech, the reviewer should clearly state it in their own words or style. Lady GaGa may have a different approach to her audience than a political blogger for the Huffington Post. Any approach should be sufficient, as long as it is clear to their audience that they were paid or received something for free that was not available to the general public.

Alternatively, to reduce concerns about government-mandated speech, social media sites may want to create their own conventions to advise visitors about sponsored commentaries, such as font changes, color-coding text, specialized icons,200 or agreed-upon disclosure tags or labels.201 If the venue makes it difficult to disclose direct or in-kind compensation, such as “like” or “helpful/not helpful” icons, then endorsers should not utilize those methods in making their views known to others about a product or service. In either the online or bricks-and-mortar world, reliable reviewers will still retain their audiences, and blatant shills will soon lose the confidence of their audience if their reviews fail to reflect their actual product or

197 See Goodman, supra note 4, at 145–46, 148. Professor Goodman notes that sponsorship disclosure obligations started with print media, so extending disclosure laws, in general, to newspapers and magazines would not be new or harmful. Id. at 148. She stated that “if ABC has to disclose sponsorship over the air, there is no reason it should not have to disclose sponsorship over the Internet.” Id. at 150. She added that once bloggers became involved in sponsored commercial speech that they would also likely fall under similar disclosure rules. Id. at 151.

198 See Sprague & Wells, supra note 5, at 453.

199 See Goodman, supra note 4, at 141 (noting that disclosure costs in broadcasting have been quantified and have proven to be “relatively meager”).

200 Godell, supra note 4, at 27.

201 Cohen, supra note 81, at 80–81.
service experiences. In addition, a blogger may want to stand out in the blogosphere by prominently posting or espousing a policy of not accepting any compensation or free samples or items and taking the time and effort to send back items received from sponsors to uphold this policy.

B. Expressly Include Negative Feedback in Endorsement Definition and Examples

Secondly, in its definition of endorsement, the Revised Guides should explicitly include marketing campaigns grounded in intentional criticisms or negative feedback aimed at another’s products or services. Currently, the definition is couched in terms of positive feedback offered to shore up the public’s view of a particular brand and its associated product or service. Applying the duty to disclose to clandestine negative marketing efforts will make it very difficult for such campaigns, orchestrated by competitors and their marketing firms, to be effective in the marketplace. Consumers will be much more skeptical, if not dismissive, of negative posts or feedback that trashes certain products and services if they know competitors are behind the online content.

For example, best-selling crime author, R.J. Ellory recently became embroiled in an embarrassing scandal when it was discovered that he had been writing positive reviews of his own books while secretly writing poor reviews of his peers’ works under various pseudonyms on online discussion boards and social media sites202 for over ten years.203 Public and author outrage over the deceptions was immediate.204 An open letter from forty-nine respected British authors denounced his conduct,205


204 Id.

205 Authors Condemn Fake Internet Reviews, supra note 202. In their open letter to The Telegraph, the prestigious British authors wrote in part that:

More and more books are bought, sold, and recommended online, and the health of this exciting ecosystem depends on free and honest conversation among readers. But some writers are misusing these channels in ways that are fraudulent and damaging to publishing at large.

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We condemn this behaviour, and commit never to use such tactics. But the only lasting solution is for readers to take possession of the process. The internet belongs to us all. Honest and heartfelt reviews, good or bad, enthusiastic or disapproving, can drown out the phony voices, and underhand tactics will be marginalised to the point of irrelevance. No single author, however devious, can compete with the whole community.
and the Crime Writers Association condemned his behavior, calling for the creation of a membership code of ethics to prevent future abuses.\textsuperscript{206} Subsequently, Ellory’s faked postings were removed from book discussion boards, including Amazon.com,\textsuperscript{207} and he made a public apology for his acts.\textsuperscript{208}

The Revised Guides should clearly and explicitly include attack or negative marketing campaigns in its definition of endorsements. In addition, examples should be provided of negative strategies that are sponsored feedback, as well as examples of the duty to disclose such sponsorships to aid transparency.

\textbf{C. Amend CDA’s Section 230 to More Clearly Identify Immune Parties}

It has been nearly fourteen years since the passage of the CDA, and the Web has flourished under its immunity provisions. Retaining these provisions is a key part of the democratization of speech found in the online world. The more precise question becomes how “information content provider” is defined in determining the limits on possible legal liability. Additionally, the immunity provisions could be revised to exclude those who materially sponsor commercial speech, leaving them open to potential legal liability, similar to a newspaper, rather than a library or newsstand. In any effort to redefine these terms, one needs to be mindful not to rework these definitions in a way that contravenes the important policy goals behind broad immunity. To deal with new efforts to mask advertisements as unbiased, uncompensated consumer speech, it may require revisions to the CDA to address these concerns.\textsuperscript{209}

One approach is to broaden the meaning of an information content provider to capture sponsors and advertising agencies with material connections to the party posting the content.\textsuperscript{210} For example, the language could be modestly changed to state that an information content provider is “any person or entity that sponsors through material connections or is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” As information content providers, sponsoring companies would no longer fall under the immunity provisions of the CDA for content when they have material connections to bloggers, vloggers, and other social media posters.\textsuperscript{211} This proposed revision makes it clear that sponsors creating commercial speech with material connections to information content providers are not immune from potential liability. Alternatively, the immunity provisions could be revised to expressly

\textit{Id.} Several established American authors, such as Anne Rice, Karin Slaughter, and Michael Connelly, also supported their British peers in decrying the use of faked book reviews. Hough, \textit{supra} note 203.

\textsuperscript{206} Rooney, \textit{supra} note 202.

\textsuperscript{207} Streitfeld, \textit{supra} note 28.

\textsuperscript{208} Hough, \textit{supra} note 203; Rooney, \textit{supra} note 202; Streitfeld, \textit{supra} note 28.

\textsuperscript{209} Tushnet, \textit{supra} note 4, at 743–44 (“Effective advertising regulation requires specific attention to new attention-getting techniques, and might eventually require a revision of the CDA’s immunity provisions, at least for user-generated promotional messages explicitly adopted or further disseminated by commercial sellers.”).

\textsuperscript{210} See \textit{supra} note 128 and accompanying text.

\textsuperscript{211} See \textit{supra} notes 126, 130–132 and accompanying text.
exclude sponsoring advertisers with material connections to information content providers from the definition of interactive computer service. These changes might encourage sponsors and advertising agencies to more actively monitor employees, agents, and independent contractors in their marketing campaigns to help insure compliance with FTC disclosure obligations and to protect the public from deceptive consumer reviews and rankings.

V. PROPOSALS TO INCREASE INDUSTRY SELF-REGULATORY EFFORTS

Modifying the Revised Guides and making changes to existing law are only starting points for promoting greater transparency online. In light of the immense growth of social media, the FTC has neither the staff nor the resources to police every blog, vlog, and consumer rating site or the vast array of traditional media outlets if the Revised Guides are changed to encompass them. If transparency in endorsements and access to accurate consumer information are the key goals, there must not only be FTC regulatory effort, but greater industry self-regulation by brand sponsors, marketers, and their agents, along with the social media industry that benefits from user-generated content and customer ratings to attract Web surfers to their sites.

A. Expanding Traditional Advertising Ethical Codes to Address Social Media

Advertising ethical codes have long been in place within a self-regulatory framework. In 1971, three major advertising organizations, the Association of National Advertisers, the American Association of Advertising Agencies (“AAAA”), and the American Advertising Federation (“AAF”) teamed up with the Council of Better Business Bureaus (“CBBB”) to create the National Advertising Review Council (“NARC”). Through the years, NARC developed a self-regulatory advertising ethics code and a variety of review boards to enforce advertising ethics of its participating members, including the National Advertising Division (“NAD”). The Better Business Bureau’s (“BBB”) Code of Advertising primarily focused on truth and accuracy in advertising found in traditional media outlets. In 2012, NARC’s

212 See supra note 126 accompanying text.
213 Godell, supra note 4, at 216.
215 Id. Id. The Council of Better Business Bureaus (“CBBB”) administers these review boards in which industry professionals review and decide the outcome of peer and consumer complaints against member advertisers as an alternative to litigation. Id.
216 Id.
217 Id.
218 Code of Advertising, BETTER BUS. BUREAU, http://www.bbb.org/us/bbb-code-of-advertising/ (last visited May 10, 2013). In 2008, with the growth of online brand marketing, the Direct Marketing Association, Electronic Retailing Association and Interactive Advertising Bureau joined ASRC and created the Advertising Accountability Program which looks at consumer choice and
unfortunate moniker was updated to Advertising Self-Regulatory Council (“ASRC”) as it scrambled to keep up with an ever-expanding range of advertising legal and ethical obligations in the offline and online world.\textsuperscript{219} There are a number of different self-regulatory organizations that spider web from this main body including two of the most important entities dealing with the issue of faked marketing campaigns: the National Advertising Division (“NAD”) and the Electronic Retailing Self-Regulation Program (“ERSP”).

The ERSP has initiated some compliance actions against members about appropriate disclosures on their websites regarding consumer endorsements.\textsuperscript{220} In one instance, the ERSP found noncompliance with material connection obligations under the Endorsement Guides while in another case the sponsor was able to show that there were no material connections between itself and consumer ratings. Each case provides an example of how disclosure issues can be effectively handled through industry self-regulation.

For example, the ERSP investigated Urban Nutrition, which operated WeKnowDiets.com and other similar sites, when a competitor challenged purported independent consumer reviews on its websites of its own products.\textsuperscript{221} The ERSP recommended to Urban Nutrition that it more “clearly and conspicuously disclose that it is the owner of both the product-review Websites and several of the products that are reviewed on the sites”\textsuperscript{222} and to clearly and prominently identify that it had compensated persons who provided reviews on its dietary products.\textsuperscript{223} Urban Nutrition indicated that it would comply with the ERSP’s recommendations.\textsuperscript{224}

In another self-regulatory action, the ERSP raised several concerns about product claims and consumer testimonials regarding The Bean total body exerciser (“The Bean”) in television broadcasts and through content on a product website.\textsuperscript{225}
The product sponsor, Greenhouse International, Inc., was able to show that its consumer endorsers were neither compensated by, nor affiliated with, Greenhouse and that there was not any material connection between the customers and Greenhouse that would impact the credibility of the claims.\(^\text{226}\) Although the ERSP expressed some concerns about health claims made in the consumer testimonials under the Endorsement Guides and other product claims, it did not appear that Greenhouse had violated its disclosure obligations as to material connections with endorsers.\(^\text{227}\)

However, in more nuanced areas of social media, ASRC has appeared slow to grasp the potential for false or deceptive advertising through marketing abuses, such as the failure of “like-gated” promotions to comply with the disclosure requirements of the Revised Guides.\(^\text{228}\) A recent NAD decision illustrated this challenge and disappointed those who anticipated that ASRC might play a more active self-regulatory role in promoting compliance with the Revised Guides.\(^\text{229}\) In a matter of first impression, the NAD considered a peer complaint over the coupling of a “like” marketing effort with a free glasses offer for participating consumers, known as a “like-gated” promotion.\(^\text{230}\) In this dispute, 1-800 Contacts, Inc. claimed that a competitor, Coastal Contacts, had engaged in deceptive advertising when it offered free eyeglasses to consumers who hit “like” on the company’s page.\(^\text{231}\) Coastal Contacts touted its “like” popularity on its Facebook page and in press releases without disclosing that consumers had been offered free glasses in exchange for their “like” support.\(^\text{232}\) Appealing to the self-regulatory review board, 1-800 Contacts, Inc. sought an NAD’s recommendation invalidating the “like” campaign and removing the “likes” because of Coastal Contacts’ failure to make appropriate disclosures about the basis for its recent surge in popularity.\(^\text{233}\)

Taking a narrow view of the dispute, the NAD agreed that Coastal Contacts should have disclosed its free glasses deal more explicitly, but because actual

The marketer added that its consumer endorsers are not compensated and are not affiliated with the company. There is no material connection between the endorser and Greenhouse International which would affect the credibility of the endorsement.

\(^\text{226}\) Id.
\(^\text{227}\) Id. at 7–8.
\(^\text{229}\) Id. (noting that sponsors need to be aware of and comply with Facebook’s terms of use on promotions).
\(^\text{230}\) Id. It is important to note that NAD decisions are not publicly accessible without a subscription. Case Reports, ASRC, http://case-report.bbb.org/search/search.aspx?doctype=1&case type=1 (click on Adobe icon next to Case # to trigger subscription request) (last visited May 10, 2013). To promote transparency, NAD should make its decisions available in a free, searchable database, similar to ICANN domain name decisions. List of Proceedings Under Uniform Domain Name Dispute Resolution Policy, ICANN, http://archive.icann.org/en/udrp/Detail110.htm (click on blue hyperlink under status/panel decision to view decision) (last visited May 10, 2013).
\(^\text{231}\) O’Neill, supra note 228.
\(^\text{232}\) Id.
\(^\text{233}\) Id.
consumers hit the “like” button under the free glasses promotion, the company had not been untruthful or inaccurate in its representations.234 Although agreeing that a disclosure should have been made, the NAD declined to recommend removal of the “likes,” and Coastal Contacts was permitted to reap the benefits of a marketing campaign that ignored the Revised Guides’ disclosure requirements.235 The NAD bobbled an opportunity to take a firm stand on disclosure and to require disclosures in “like-gated” promotions.236 Even though Coastal Contacts does not control the “like” feature, the company could have easily disclosed its material connection on its Facebook page and in its press releases or required consumers to disclose their free glasses compensation on their individual Facebook pages.237 As social media becomes integral to brand promotions, the BBB will need to update its Code of Advertising to address more nuanced compliance and disclosure issues under the FTC Revised Guides in a database that is open to the public.238

Other new organizations have already stepped forward to bridge the ethical gap between social media and brand marketing, such as the Word of Mouth Marketing Association (“WOMMA”)239 and the Institute for Advertising Ethics.240 While the CBBA focused on traditional truth in advertising, WOMMA was one of the first to call for transparency and clear disclosures of sponsored advertisements masquerading as ordinary consumer posts, with a focus on sponsors and marketing entities.241 WOMMA’s ethics code calls upon its members to meet standards of trust, honesty, integrity, respect, responsibility, and privacy.242 In particular, this ethics

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234 Id.
235 Id.
236 Id.
237 Id. Some industry experts have suggested that marketers should not utilize ad campaigns where detailed disclosures are required, but are not technologically feasible. FEDEX TRADE COMM’N, IN SHORT: ADVERTISING AND PRIVACY DISCLOSURES IN A DIGITAL WORLD 136–37 (2012), available at http://www.ftc.gov/bcp/workshops/inshort/FinalWorkshopTranscriptAugust72012.pdf; Stuart P. Ingis et al., A Short History of the FTC’s “In short: Advertising and Privacy Disclosures in a Digital World” Workshop, ACC LEXOLOGY (June 1, 2012), http://www.lexology.com/library/detail.aspx?g=ca6b0c75-b55c-43b4-a1da-67b8dd250709.


242 Id. In part, the WOMMA Code of Ethics centers on several core values, listed below:

Trust: WOMMA members are committed to engaging in practices and policies that promote an environment of trust between the consumer and marketer.

Integrity: WOMMA members pledge to comply with the requirements of applicable laws, regulations, and rules concerning the prevention of unfair, deceptive or misleading advertising and marketing practices. In particular, WOMMA members promote honesty and transparency in their practices and methods, such that all forms of consumer manipulation are rejected. Indeed,
code specifically eschews dishonest efforts aimed at consumer manipulation and deception, and it calls for marketing strategies based on transparency and informed consumer decision-making. In its Federal Register notice updating its Revised Guides, the FTC cited to WOMMA’s Code of Ethics and Standard of Conduct numerous times to support its proposed changes to the original Guides.

Similar to the NAD, WOMMA has a Membership Ethics Advisory Panel (“MEAP”), made up of industry members in good standing who help monitor content, educate on best practices in marketing ethics, and investigate alleged Code violations. A WOMMA panel enforces its code of ethics and can admonish, suspend, or expel those who act contrary to the spirit and letter of the Code of Ethics and interpretive Standards of Conduct. As with other certification programs, WOMMA members may post their membership in WOMMA on their websites and marketing materials to illustrate their standards compliance to other businesses and consumers.

A relative newcomer, the Institute for Advertising Ethics (“IAE”), is a collaboration of the American Advertising Federation and the University of advertising is a creative enterprise that strives to convince the consumer that the advertiser’s product or service is necessary and valuable, but in the course of engaging with the consumers, WOMMA members are committed to avoiding consumer deception as an end result of their marketing practices. As a result, WOMMA members engage in practices that are designed to enable the reasonable consumer acting rationally to make better informed purchasing decisions.

Respect: WOMMA members promote and abide by practices that focus on consumer welfare. WOMMA members believe that the industry is best served by recognizing that the consumer, not the marketer, is fundamentally in charge and control, and that it is the consumer that defines the terms of the consumer-marketer relationship.

Honesty: WOMMA members believe that consumers should be free to form their own opinions and share them in their own words. Simply put, WOMMA members do not support any efforts that tell others what to say or how to say it.

Responsibility: WOMMA members believe that working with minors in marketing programs requires sensitivity and care, given their particular vulnerability to manipulation and deception.

Privacy: WOMMA members respect the privacy of consumers, and encourages practices that promote the most effective means to promote privacy, such as opt-in and permission standards.

Id.  


245 See WOMMA Code of Ethics, supra note 241.

246 Id.

247 Id.

Missouri School of Journalism’s Donald W. Reynolds Journalism Institute. Its code of ethics and associated commentary borrow extensively from other ethical codes, particularly recognized journalistic principles, and the BBB’s Code of Ethics. Its ethics code is built upon eight basic “Principles and Practices,” including specific standards requiring compliance with disclosure obligations for “material conditions” affecting endorsements and relevant federal, state, and local advertising laws. Unlike WOMMA, the IAE does not have an enforcement body, but recommends that participants utilize industry self-regulatory dispute resolution programs. This type of code, built on established journalism standards, may be particularly useful to individual bloggers working outside of traditional media outlets, seeking ethical guidance for their own journalistic endeavors.

While professional marketers and individual bloggers may have some distinct roles in social media, these organizations should work together to find some common agreed-upon principles, including compliance with FTC disclosure obligations to promote transparency. The organizations could work together to create seal or certification programs for complying members to display on their websites and police those members who may be falling out of compliance with these stated codes. Alternatively, these organizations could work together to help monitor and independently grade sites for their trustworthiness and compliance with their respective ethics codes and disclosure duties under the FTC’s Endorsement Guides. The BBB already grades different companies and individual merchants based on consumer complaints filed and resolved, and meeting these standards could become part of that existing program.

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251 Id. at 2.

252 Id. at 9.

253 See Cohen, supra note 81, at 76–80 (calling for adoption of a new “architecture of accountability” with new media adopting clear ethics policies). It is important to note that adherence to journalistic codes of ethics is one of the factors a court will consider in determining whether or not a blogger receives the First Amendment protections provided to traditional media. See, e.g., Obsidian Fin. Grp., LLC v. Cox, 2011 U.S. Dist. LEXIS 137548, at *12–13 (D. Or. Nov. 30, 2011) (rejecting defendant blogger’s First Amendment defense to defamation in part because she “fail[ed] to bring forth any evidence suggestive of her status as a journalist” such as “proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest”).

254 See generally Kahn, supra note 19, at 196–204 (discussing the role of norms as “soft” regulation of online behavior and their successes and failures on the Web).

255 See id. at 197. Mr. Kahn notes that “[n]orms require significant community investment in enforcement. If there are too many defectors and enforcement is lacking, it is hard to say that a norm exists . . . . While norms are powerful, they are far more chaotic and less subject to government control than legal regulation.” Id. at 197–98.

256 See id. at 224–25 (proposing “reputational scores” across social media platforms based on numerical algorithms).

257 See supra note 121 and accompanying text.
B. Improve Existing Professional Ethics Codes for Other Rated Professions

Aside from those marketers and bloggers, professionals who are often the subject of rankings and ratings, such as lawyers, and medical professionals, need to update their own ethics codes to deal explicitly with social media. Professional ethics codes need to keep up with the times and the growth of social media to explicitly address both disclosure issues and bad faith speech suppression efforts. For example, the South Carolina bar recently determined that its members who post information in online directories also have a duty to police what is being posted under their listings to insure compliance with ethical rules on lawyer advertising and compliance with other relevant laws and policies, such as the FTC disclosure rules. 

These types of issues need to be addressed directly in ethics codes rather than relying on case-by-case interpretations.

In addition, professional ethics codes should squarely address efforts to manipulate rankings through “gag” contracts for services and problematic lawsuits against ranking organizations. In 2011, Public Citizen brought a class action against a dental provider who required patients to sign mutual confidentiality agreements promising not to post negative feedback about their service experience before dental services would be provided, even in emergency instances. Under this form agreement, the patient was required to waive all rights to speak publicly about their treatment and assign the copyrights in their commentaries to the dental providers. In one case, when a patient began to post negative remarks about his dental experiences on ratings web sites, the dentist contacted the sites demanding removal of his comments citing copyright ownership of the patient’s comments. In addition, the

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261 See supra Section II.C. Currently, general provisions of the ABA Model Rules of Professional Conduct can be applied to attorneys using social media networks, such as the rules on competence, confidentiality, ex parte discussions and conflicts of interests when using social media networks. Dryer, supra note 20.
262 Tushnet, supra note 4, at 741; Ward, supra note 258; see also Joan C. Rogers, Truthfully Bashing Other Lawyers in Blogs Doesn’t Count as Conduct Harmful to Justice, 80 U.S.L.W. 1532 (2012) (reporting that, although urging civility, N.Y. State Bar Association found no violation of attorney ethics regarding lawyer’s truthful, public criticisms in blog of opposing counsel).
265 Lee v. Makhnevich, at 2–5; Golding, supra note 264.
266 Lee v. Makhnevich, at 7–8; Golding, supra note 264.
dental service sent invoices of $100 per day in liquidated damages to the patient claiming breach of contract, copyright infringement, and defamation in his posted remarks. These kinds of agreements seek to suppress free speech and squelch public criticism of professionals and are unfair to other potential patients and competing dentists because they manipulate patient postings and skew ratings towards positive reviews only. Professional ethics codes should expressly prohibit these kinds of gag contracts as unethical conduct. Legal actions in defamation already exist to address false statements of fact that injure an individual’s reputation or business.

Yet, there is also a growing trend of professionals bringing defamation claims to suppress negative feedback on rating sites. There is concern about improper efforts to deflect truthful professional criticism through defamation lawsuits based purely on personal opinions posted on ratings websites. Some legal commentators have criticized this trend as suppressing free speech and trying to hinder honest third party opinions in contradiction of section 230 of the CDA. Although attorney ethics codes already call upon lawyers to avoid frivolous lawsuits, other professional codes should specifically sanction members who abuse defamation and other legal actions to squash truthful personal opinions that are critical of professional services.

Alternatively, rather than trying to prevent criticism, professional groups could collaborate with independent third party review organizations to police their own professions and provide easy to understand rankings of fellow professionals. For example, the Society of Thoracic Surgeons (“STS”), a non-profit medical organization, teamed up with Consumer Reports Health Ratings Center to analyze 221 surgical groups performing standard heart bypass operations based on eleven objective, standardized measures. These surgical practices allowed STS and Consumer Reports to have access to their outcome data. The report, available online only to subscribers, awarded ratings from three to one stars with fifty surgical groups garnering three stars, 166 groups earning two stars, and five groups receiving one star.

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267 Lee v. Makheinich, at 2, 8; Golding, supra note 264.
269 See supra note 268 and accompanying text; Golding, supra note 281.
270 See EFF Press Release, supra note 268.
271 See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-4, DR 7-102(A)(1) (1980). Under the ABA Model Code of Professional Responsibility, attorneys are not to avoid undertaking frivolous actions under both the ethical canons and the disciplinary rules. Id.
273 See supra note 272 and accompanying text.
274 Id.
Subsequently, Consumer Reports generated ratings on primary care and pediatric care providers in a joint program with Massachusetts Health Quality Partners, a coalition of medical, insurance, governmental, academic, patient, and public representatives focused on improving the quality of health care services in Massachusetts. Surveys of patients resulted in ratings of one to four (lower to higher performance) on key experiential factors, such as effective patient communication, coordination of care, timeliness of appointments and information, and courteous and respectful interactions. The report was made publicly available online without a subscription, and some doctors found it useful in evaluating their own practices and thereby improving their ratings.

Similarly, other professional groups may wish to collaborate with independent review organizations to rate their own industry professionals in a straightforward manner. Making this type of information publicly available, without requiring a subscription, would offer even greater integrity and transparency to online ranking systems and encourage professionals to improve their individual practices and overall customer outcomes.

C. Intensify Self-Policing Efforts by Sites Hosting Consumer Comment Boards and Ratings Sites

It is clear from our earlier discussion of Section 230 that interactive service providers are immune from legal liability for third party postings on their comment boards and rating sites. Yet, despite this lack of legal liability, these sites know that consumer postings and ratings on their discussion boards are integral to promoting their site and improving brand awareness. E-commerce websites must do a better job policing their consumer comment boards and rankings. Many of the major e-commerce sites have automated analytics software to notice comment spam patterns for certain products and services and can do the follow-up effort to determine the validity of these posts. Secondly, these sites may need to do a better technological

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275 Andrews, supra note 259; Consumer Reports Health Ratings, supra note 272.


279 Streitfeld, supra note 28 (“Reviews by ordinary people have become an essential mechanism for selling almost anything online . . . .”); Streitfeld, supra note 22 (“As the collective wisdom of the crowd displaces traditional advertising, the roaring engines of e-commerce are being stoked by favorable reviews.”).

280 Streitfeld, supra note 28 (“Amazon’s “latest blow to the credibility of its reviews”).

281 Streitfeld, supra note 28 (discussing the use of mathematical models to help reveal “bogus endorsements”).
job of blocking bots that roam around clicking “Like” or “Helpful.” In August 2012, Facebook’s security team began using its own bots to detect and remove “likes” garnered illicitly through such tactics as automated software programs, malware, and hacked accounts.283

Other ratings sites, like Expedia, take a more hands-on approach and tout the fact that they check their records to make certain that commenters took the trip or visited the hotel before allowing any purported consumer comment or rating to be posted.284 Subscription-based sites, like Angie’s List, actually contact consumer members and interview them about their experiences to help the quality and integrity of product and service reviews.285

However, in monitoring their own customer postings, websites must be careful to avoid unfairly suppressing consumer speech. Recently, the credibility of Amazon.com’s comment boards was under attack after a series of scandals involving book authors with faked identities and purchased reviews.286 The site’s customer reviews, ratings, and comments on others’ reviews are an integral part of its social media structure.287 Amazon.com allows customers to check a box to add the caption, “Amazon Verified Purchase,” to their review postings.288

Once the site has verified

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283 See Improvements to Our Site Integrity System, FACEBOOK (Aug. 31, 2012, 9:00 AM), https://www.facebook.com/note/ce/facebook-security/improvements-to-our-site-integrity-systems/10151005934870766; Gross, supra note 29; Smallbiztrends, supra note 29. In its August announcement, Facebook stated that the primary reasons for its new automated system were to protect the veracity of brand connections and to uphold the site’s terms of use, stating:

A Like that doesn’t come from someone truly interested in connecting with a Page benefits no one. Real identity, for both users and brands on Facebook, is important to not only Facebook’s mission of helping the world share, but also the need for people and customers to authentically connect to the Pages they care about. When a Page and fan connect on Facebook, we want to ensure that connection involves a real person interested in hearing from a specific Page and engaging with that brand’s content. As such, we have recently increased our automated efforts to remove Likes on Pages that may have been gained by means that violate our Terms.


287 See Streitfeld, supra note 28 (“A reader hears about a book because an author is promoting it, and then checks it out on Amazon. The reader sees favorable reviews and is reassured that he is not wasting his time.”); Paul Laity, Are Amazon Reader Reviews Killing Off the Critic?, The GUARDIAN (Aug. 29, 2012, 5:59 PM), http://www.guardian.co.uk/books/booksblog/2012/au/29/amazon-reader-reviews-critic

the customer’s purchase, the posting will appear with this added label.\textsuperscript{289} The option does not block other reviews, but applies this label to help other customers to “gauge the quality and relevance of a product review.”\textsuperscript{290}

In December 2012, Amazon.com began removing reviews on books that appeared to be driven by friends and family or parties with a financial interest in either the product reviewed or its direct competitors.\textsuperscript{291} Its actions caused a furor amongst authors who believed that there was no established criteria and an inconsistent and inaccurate application of the deletion program,\textsuperscript{292} which raised concerns about unduly harsh enforcement and overly zealous monitoring.\textsuperscript{293}

In order to avoid unduly harsh enforcement and inequitable monitoring, ratings sites should establish clear criteria for their acceptance and removal of discussion board postings in their terms of use. Many user-generated ranking or comment sites already have language in their terms of use about complying with the law and disclosing affiliations, but most people never read them or do not understand them. To comport with the Endorsement Guides, it would be easier to include “yes” or “no” check boxes when parties want to post content that indicates whether the consumer (1) has used the product or service, (2) has received any free samples or other forms of compensation to write the review, or (3) has any affiliation with the purveyor or competitor of the reviewed product or service. Many individuals might not be aware of their disclosure obligations, so honest ones will likely click the appropriate boxes. Rather than blocking or removing their postings, their responses should be included in their postings to allow fellow consumers to decide how much weight to give their opinions. Dishonest responders will likely be exposed by other commentators and their posts will potentially be discounted by readers or removed for violating the FTC’s Endorsement Guides, or quite possibly a site’s terms of use.\textsuperscript{294}

In addition, mechanisms need to be put in place to allow unfair negative feedback to be reviewed and removed or adjusted if it is deceptive or part of a competitor’s marketing offensive.\textsuperscript{295} For example, eBay has long dealt with issue of feedback manipulation and unfair negative feedback through its Resolution Center.\textsuperscript{296} Other websites may need to follow its lead to help resolve disagreements over customer commentaries. It will take more time and effort to undertake these tasks, but the sites that do the best job of policing their consumer discussion boards are going to win more loyal consumer followings and improve their site’s reputation in the long run.\textsuperscript{297}

\textsuperscript{289} Id.

\textsuperscript{290} Id.

\textsuperscript{291} Streitfeld, supra note 22.


\textsuperscript{293} See Streitfeld, supra note 22.

\textsuperscript{294} Internet Polices Itself, supra note 37.

\textsuperscript{295} See Kahn, supra note 19, at 186–87, 198–99.


\textsuperscript{297} See Goodman, supra note 4, at 140–41 (“If consumers value disclosure highly, editors might have incentives to compete on their level of disclosure.”).
D. Increase Awareness of and Education About Revised Guides

Many individuals and even pay-per-post bloggers have little or no idea that these Revised Guides even exist or apply to them when they post their consumer reviews online. While the FTC has asserted that sponsors and their advertising agencies are supposed to train and monitor their employees and independent contractors, the FTC likely needs to do a better job of increasing awareness of, and education about, the Revised Guides.298 The educational outreach needs to include collaborative efforts between the FTC, brand sponsors, both professional and personal bloggers, and the public.299 The FTC might also reach out to major consumer rating sites and request an opportunity to prominently display a link to the FTC Guides or key disclosure obligations on these websites.300

To help impacted individuals and companies, the FTC should coordinate with professional organizations to offer educational videos, webinars, and workshops on social media ethics to help broaden awareness about the value of online integrity and transparency.301 In addition, annual awards could be given out to individuals and companies making outstanding efforts to promote online ethical behavior in order to encourage and provide positive models for others in the blogosphere.302

E. Encourage More Pro-Active Online Consumer Conduct

Consumers can also help compliment the FTC and industry efforts in rooting out faked reviews and ratings.303 Individual consumers who write or contribute to blogs must be aware of their duty to disclose material connections. Whether it is a personal or commercial blog, if a consumer participating in social media reviews receives any form of compensation from a sponsor, the consumer should disclose it. Readers will appreciate this forthright approach, and a blogger or poster can honestly build and interact with an online audience. Secondly, consumers can vote with their wallets. If consumers want to do business with those who are transparent in their social media marketing, then they need to patronize or visit sites that comply with applicable ethics codes. Consumers can also help sites by reporting abuses on comment boards and other efforts to manipulate consumer ratings to those e-commerce sites and other online watchdog groups for further handling.

For example, The Consumerist, in association with Consumer Reports, exposes companies that are failing to properly and fairly deal with consumers in person and

298 See Cohen, supra note 81, at 83–84 (recommending that government provide educational materials to the public, aimed at increasing critical evaluation of new media sources).

299 See id.

300 See sources cited supra notes 15–18.

301 See Cohen, supra note 81, at 83–84.


303 See Goodman, supra note 4, at 141 (noting that “regulators have utilized audience members to monitor compliance” with disclosure obligations).
online. Even before the FTC adopted its Revised Guides, The Consumerist was the first to report that Royal Caribbean had paid a group of fifty bloggers, called “Royal Champions,” to tout its brand through ordinary consumer postings. These “Royal Champions” received special access and free cruises in exchange for their stream of positive posts without ever disclosing their material relationship to Royal Caribbean. The Consumerist report went viral and the company was exposed for its unethical conduct and suffered a public relations nightmare. As consumers, we can offer helpful tips and information to online watchdog groups who seek to protect consumers from unethical and illegal activities.

Lastly, consumers need to apply a healthy dose of caveat emptor to consumer comments and rankings and take a more skeptical view of claims and endorsements from their fellow consumers. Consumers may also want to gather opinions from various sites and then decide how much weight will be given to these collected customer voices in making purchasing decisions.

**CONCLUSION**

So, will consumers ever be able to get completely rid of faked online reviews and ratings in the online blogosphere? Probably not. Those Don Draper wannabes are always going to be lurking around online. But that does not mean that there is little hope or future for honest, lively consumer exchanges online. The FTC can improve its Endorsement Guides through balancing disclosure obligations and regulatory enforcement efforts between traditional media, celebrities, and new media, explicitly dealing with negative feedback issues and clarifying its enforcement efforts. Secondly, Section 230 of the CDA may need to be amended to more clearly define which parties are immune from liability with content sponsors and clarify that their agents are excluded from these protections. But government alone cannot tame this growing problem.

At this point, it is time for the blogosphere and the e-commerce world to step up and intensify their own self-regulatory efforts and for online consumers—like you and I—to demand it. And not just demand self-regulatory efforts of marketing and advertising firms, where consumers might have little sway, but also of product and service sponsors who want us to buy and e-commerce websites worried about the credibility of consumer reviews. The expansion of traditional advertising and other professional ethics codes to expressly address social media issues, intensifying monitoring efforts by rating sites, increasing awareness of and education about the FTC’s Revised Guides, and promoting more pro-active online consumer conduct about faked reviews and rankings are all self-regulatory approaches to this growing problem. With the combined efforts of government, industry, and consumers, we can

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305 Consumeristcarey, supra note 34.
306 Id.
307 Id.
308 See Internet Polices Itself, supra note 37.
309 Said, supra note 5, at 166–67; Sprague & Wells, supra note 5, at 450.
decrease faked online commentaries, support transparency in online speech, and protect the vitality of a vibrant online consumer community.