

# Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation

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## INTRODUCTION

Today's attention economy drives ads to become quicksilver, moving ever faster. It is harder and harder to attract audience eyeballs, especially to content that looks like advertising, so advertisers will go to any extreme to overcome audiences' perceptual resistance. Conventional false advertising law will attempt to follow ads wherever they go, no matter how unusual the format. But where ads don't necessarily look like ads, a different kind of consumer deception can be at issue: deception about the independence of a source, where consumers might give a message a different measure of credibility if they knew its actual sponsorship. Non-ad-like ads arguably straddle the line between commercial and noncommercial speech, which is important because the First Amendment presently tolerates much less regulation of the latter. Ads are subject to relatively stringent regulation of their truth compared to non-ads. If those two categories can no longer be distinguished, advertising law will have to be substantially rewritten. Despite changes in ad presentation, however, regulation is not impossible. We have the tools to ensure that new forms of advertising do not destroy advertising law as we know it.

This Article examines the dynamics that drive advertisers to push into new formats, and the law's ability to regulate them. Part I discusses the ever-expanding scope of advertising and connects this phenomenon to First

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Amendment debates over commercial speech. I argue that it will remain possible, and constitutional, to identify advertising and subject it to prohibitions on false and misleading claims, even for ads in unconventional formats.

Part II then addresses the ways in which regulators were caught off-guard by these developments. Section 230 of the Communications Decency Act, which frees online service providers and users from liability for content generated by other users, poses some unanticipated barriers to regulating advertising. We might ultimately want to amend the law to apply conventional false advertising principles to advertiser adoption of pure user-generated promotional material. If not, we will have to live with the arbitrage opportunity section 230 allows.

Despite section 230's provisions, regulators retain flexibility in many situations. Part III takes up the Federal Trade Commission's ("FTC") recent revisions of its guides on testimonials and endorsements. The guidelines apply to bloggers and others who receive substantial benefits from advertisers in return for their endorsements. It has been argued that section 230 prevents the FTC from holding advertisers liable for paid bloggers' false and misleading claims or failure to disclose a sponsorship relation. After exploring the First Amendment challenges posed by such situations, including questions that go to the heart of the justification for regulating commercial speech, I contend that neither section 230 nor sound policy require the FTC to ignore these new forms of communicating with potential purchasers.

## I. CONTROLLING ADVERTISING AT THE MARGINS

### A. *Extreme Speech and Advertising Creep*

The "market" for speech faces problems of access (or supply) intimately tied to problems of attention (or demand), especially as modern technology has made more salient the fact that we are all producers as well as consumers of information. Jerome Barron's classic article on access to the press identifies dynamics that encourage speech to become ever more intrusive, as a method of

catching audiences' attention.<sup>1</sup> But just because speech can attract attention—and even provide new and useful information—does not mean that it merits First Amendment protection. In fact, Barron would not have granted any constitutional protection to commercial speech. Yet his preferred constitutional regime is directly contrary to prevailing First Amendment law in recent decades which protects truthful commercial speech against many restraints. Despite their differences, both Barron and modern commercial speech doctrine justify their conclusions with claims about audience needs and rights: what the audience wants, or doesn't know that it wants but would if it heard the right pitch. This Part briefly explores new practices of attention-getting and their relation to commercial speech theory.

Given the proliferation of options—from hundreds of cable channels to billions of webpages—attracting some fraction of the world's attention can be a daunting task.<sup>2</sup> Even speakers who have access to media that can theoretically reach the world will often want to go further and find actual listeners.<sup>3</sup> Search engines have aggravated the problem because many people are satisfied with the first search result they find, leading to a winner-take-all effect.<sup>4</sup> Predictably, some individuals will misbehave, often as an attention-getting device. It is a person sitting in the crowd, after all, whom we imagine falsely shouting “fire” in a crowded theater, not the well-orchestrated performers who already command our attention by default.

Audiences are hard to predict. We often don't even know ourselves what we'll want.<sup>5</sup> We like novelty and we like

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1. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647 (1967).

2. See, e.g., Seth F. Kreimer, *Censorship By Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 17 & n.13 (2006).

3. See generally RICHARD A. LANHAM, *THE ECONOMICS OF ATTENTION* xi-xii, 233 (2006) (discussing attention as the limiting resource in the modern information economy).

4. See Kreimer, *supra* note 2, at 40 & n.84.

5. See Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1170, 1173-74 (2006) [hereinafter *Coasean Marketing*] (arguing that whether particular audience members would want to receive particular advertising messages is often unknowable before the fact, especially as many

familiarity; we want the same thing, only different.<sup>6</sup> Our desires do not so much conflict as reinforce one another, and this paradox is part of what makes audiences so unpredictable.

One way to get attention is to turn up the volume, either literally or metaphorically, with shock and surprise. Barron addressed this tactic as used by radical protestors to break down the smug safety of everyday life:

By the bizarre and unsettling nature of his technique the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message. But attention-getting devices so abound in the modern world that new ones soon become tiresome. The dissenter must look for ever more unsettling assaults on the mass mind if he is to have continuing impact. Thus, as critics of protest are eager and in a sense correct to say, the prayer-singing student demonstration is the prelude to Watts. But the difficulty with this criticism is that it wishes to throttle protest rather than to recognize that protest has taken these forms because it has had nowhere else to go.<sup>7</sup>

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preferences may be latent, that is, unknown before exposure to some external stimulus such as an ad); Eric Goldman, *Data Mining and Attention Consumption*, in *PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION* 225, 232 (Katherine Strandburg & Daniela Stan Raicu eds., 2005) (“In practice, [a calculation of the social welfare effects of marketing] cannot be made on an ex ante basis because the recipients’ interests are heterogeneous but undisclosed. No one—not the government, not the marketer, perhaps not even recipients themselves—precisely knows the recipients’ substantive interests, tolerance of attention consumption or reaction to receiving a communication. Indeed, a recipient’s utility may vary from day to day.”).

6. This accounts for the continuing appeal of the sequel. See Marjorie Garber, *I’ll Be Back*, 21 *LONDON REV. BOOKS* 3 (1999) (“There is a paradox implicit in the very concept of the sequel. In experiential terms, a sequel is a highly conservative genre that supplies the comfort of familiarity together with the small frisson of difference.”) (reviewing *PART TWO: REFLECTIONS ON THE SEQUEL* (Paul Budra & Betty Schellenberg eds., 1998), available at <http://www.lrb.co.uk/v21/n16/marjorie-garber/ill-be-back>). As Garber notes, literary theorizing about sequels has been profoundly influenced by Terry Castle’s claim that “sequels are always disappointing,” because audiences simultaneously hope that the sequel will be different, and that it will be exactly the same; those hopes cannot both be realized. TERRY CASTLE, *MASQUERADE AND CIVILIZATION* 133 (1986).

7. Barron, *supra* note 1, at 1647.

As with protest, so with pornography: theorists of many stripes agree that, as society tolerates more sexual activity and display, pornography has to become more extreme to excite its consumers.<sup>8</sup> If oral sex is no longer taboo, pornography will show more anal sex. Pornography thrives on flouting boundaries, so it will follow to the edge of those boundaries no matter how widely they are drawn.<sup>9</sup>

This dynamic also occurs with sellers of goods and services in general. As we are exposed to more and more, it becomes harder to get our attention, so promoters are forced to further extremes. Advertising clutter drives marketers to put messages on fire hydrants and potholes,<sup>10</sup> on eggs, in urinals, on the bellies of pregnant women, and anywhere else that might surprise us out of our willful disregard.<sup>11</sup> But the very barrage of sales pitches prompts us to raise our threshold for attention, until each ad is almost meaningless.<sup>12</sup> We work hard to avoid ads, often enlisting

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8. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 200 (1989) (“Greater efforts of brutality have become necessary to eroticize the taboo—each taboo being a hierarchy in disguise—since the frontier of the taboo keeps vanishing as one crosses it. Put another way, more and more violence has become necessary to keep the progressively desensitized consumer aroused to the illusion that sex (and he) is daring and dangerous.”); RICHARD A. POSNER, SEX AND REASON 364 (1992) (stating that the more pornography circulates, “the more the demand for pornography will shift (not entirely, of course) toward aspects of sexual depiction that remain tabooed.”).

9. Cf. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 247 (2001) (arguing that people regularly desire to transgress sexual boundaries and experience sexuality as forbidden).

10. Bruce Schreiner & Emily Fredrix, *Newest Fast Food Ad Space: Indiana Fire Hydrants*, SALON, Jan. 6, 2010, [http://www.salon.com/food/2010/01/06/us\\_kfc\\_ads\\_on\\_hydrants/](http://www.salon.com/food/2010/01/06/us_kfc_ads_on_hydrants/).

11. See, e.g., Laura Petrecca, *Product Placement—You Can’t Escape It*, USA TODAY, Oct. 10, 2006, at 1B, available at [http://www.usatoday.com/money/advertising/2006-10-10-ad-nauseum-usat\\_x.htm](http://www.usatoday.com/money/advertising/2006-10-10-ad-nauseum-usat_x.htm); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 144 (2006).

12. See, e.g., KEN SACHARIN, ATTENTION! HOW TO INTERRUPT, YELL, WHISPER, AND TOUCH CONSUMERS 3 (2001) (“[T]he power of marketing . . . is eroding from lack of attention.”); Gerald Zaltman & Robin Higie Coulter, *Seeing the Voice of the Consumer: Metaphor-Based Advertising Research*, 35 J. ADVERTISING RES. 35, 36 (1995) (“[T]ime famine [makes it] increasingly difficult for advertisers to capture consumers’ attention and information-processing time.”).

technology to aid us.<sup>13</sup> Many ads are functionally invisible, triggering no reaction at all in our brains because we've prescreened them, never allowing them to impinge on our thoughts.<sup>14</sup>

Barron suggested that greater access to mainstream channels of communication would help solve the problem of the rioting dissenter, but that doesn't seem likely. As his own reference to the plethora of modern "attention-getting devices" indicated, there are many more speakers who want our attention than we have attention, not to mention desire to listen. The scarcity is not in our stars—or star reporters—but in ourselves.<sup>15</sup> Barron's escalation argument, taken seriously, is deeply unsettling. There doesn't seem to be a way backwards, other than to abandon modern society and technology. Perhaps we will all develop near-impenetrable filters, armor-plating our attention.<sup>16</sup> But those filters are likely to screen out plenty of useful information as well, thus avoiding the tragedy of the mental commons only by preventing many productive encounters. Because people react unpredictably and often creatively to

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13. Fred von Lohmann, *It's My Browser, and I'll Auto-Click if I Want To*, ELECTRONIC FRONTIER FOUND., Oct. 9, 2009, <http://www EFF.ORG/deeplinks/2009/10/its-my-browser-and-ill-auto-click-if-i-want>.

14. See Rebecca Tushnet, *Gone in 60 Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 547 (2008) ("[N]ew neuroscience studies provide evidence for advertisers' long-held belief that much advertising is completely useless. In MRI studies, 'a third to a half of commercials do not generate any brain reaction at all.'") (footnote omitted).

15. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for The Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004) ("The digital revolution made a different kind of scarcity salient. It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention. . . . [A]s the costs of distribution of speech are lowered, and more and more people can reach each other easily and cheaply, the competition for audience attention has grown ever more fervent.") (footnote omitted).

16. Cf. Goldman, *Coasean Marketing*, *supra* note 5, at 1202-09 (discussing the possibility of personalized technology that allows through only ads of interest to the recipient). Goldman's proposal is intriguing, but it has problems (as most accounts of choices to seek out or receive information do) with preference formation, as discussed *infra* Section III.B.3. When people don't know what they will want, they are likely to make blanket choices such as screening out all ads, to the great dismay of advertisers. See Noam Cohen, *Whiting Out the Ads, but at What Cost?*, N.Y. TIMES, Sept. 3, 2007, at C3.

their cultural environments, assembling bits and pieces of information from various sources,<sup>17</sup> it is hard to predict what a world of successful attention self-defense would look like, or even how to value it.

What I want to focus on is not Barron's proposal to allow dissenters greater access to the means of publication and even a right of reply to mainstream speakers<sup>18</sup>—arguably, the Internet has accomplished much of what he could hope for on that front—but what Barron left out. Crucially, Barron omitted advertising from his class of constitutionally relevant speech. Coke would have no right to reply to a Pepsi ad specifically targeting it, nor to an editorial condemning soda's role in promoting obesity. Writing as he was before the Supreme Court granted more than minimal protection to commercial speech, Barron analogized from ads to mass media in a way now far outside the mainstream of constitutional argument: because the mass media is profit-oriented and largely content-indifferent, even its editorial aspects should be treated as commercial speech and subjected to extensive government regulation, at least about topic choice.<sup>19</sup>

Barron's treatment of commercial speech is of particular interest because his theory is based on listeners' interests in hearing all that is worthy of being said, and that is also the core justification for modern commercial speech doctrine.<sup>20</sup>

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17. See Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1189 (2007).

18. See Barron, *supra* note 1, at 1660.

19. See *id.* at 1660-63; see also *id.* at 1668 (“Indeed, it has long been held that commercial advertising is not the type of speech protected by the first amendment, and hence even an abandonment of the romantic view of the first amendment and adoption of a purposive approach would not entitle an individual to require publication of commercial material.”) (footnote omitted).

20. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”) (citation omitted); see also Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage In Non-Commercial Speech?*, 39 CONN. L. REV. 379 (2006) (arguing in favor of the original audience-based rationale for commercial speech doctrine); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989) (promoting a “hearer-centered” concept of the First Amendment); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14-15 (2000) [hereinafter Post, *Constitutional Status*] (“[The Court has] focused its

In *Virginia Pharmacy*, the Supreme Court appealed to consumer-citizens' interests in receiving relevant information to justify striking down a state rule that barred price advertising for prescription drugs.<sup>21</sup> Even if the pharmacies had no right to speak, consumers had the right to hear what they had to say. In this view, commercial and corporate speakers may provide information and perspectives that the audience would not otherwise receive.<sup>22</sup> At the same time, because the right to speak is dependent on the audience's interest (both in the sense of desire and in the sense of entitlement) in receiving useful information, this theory does not protect commercial speech as strongly as political speech. For example, commercial speakers can be forced to disclose relevant information to avoid consumer deception, a topic to which I will return in Part II.<sup>23</sup>

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[commercial speech] analysis on the need to receive information, rather than on the rights of speakers."); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353-60 (1991) (arguing that the concept of listener autonomy explains much First Amendment law); cf. Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555 *passim* (2006) (discussing the Supreme Court's recent shift towards more speaker-focused justifications for protecting commercial speech, and the doctrinal problems created thereby).

21. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976); see also, e.g., *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion) ("[T]he same interest that supports regulation of potentially misleading advertising, namely, the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages."); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (explaining that commercial speech receives constitutional protection because of its informational function).

22. Cf. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986).

23. See, e.g., *Zauderer*, 471 U.S. at 651 ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [an advertiser's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.") (citation omitted). As product placement and other forms of stealth advertising become more common, the line between commercial speech and mass media productions in general becomes more blurred, in ways that support Barron's contention that mass media are

Audience-focused theories can produce such diametrically opposed results—nonexistent or robust protection for advertising—because the audience’s interests can be defined in multiple ways. The audience doesn’t necessarily know what it wants. Worse, it might want different things depending on what it hears. The same might theoretically be true of speakers, but First Amendment theorists have generally been satisfied with assuming that speakers know, when they start to talk, what they want to say. Thus, speakers’ interests can simply be defined as interests in communicating their selected messages. At most, speakers may be understood to have an additional interest in being heard, as Barron emphasized, but it has always seemed obvious that speakers know what they want to say.

By contrast, the question of what audiences want, or deserve, to see and hear offers much more room for debate. In a reversal of Barron’s critique, Cass Sunstein has drawn on the audience-interest tradition to argue for forced exposure to competing views. In a world where mass media are *not* especially powerful, he contends, audiences should be exposed to multiple competing viewpoints, so that they do not get lost in an echo chamber that only reinforces their preexisting prejudices.<sup>24</sup> Regardless of the merits of Sunstein’s proposal, participants in modern information environments can’t possibly consume all the information available to them, or even a tiny subset of it. Access alone will never be enough. Speakers will always have incentives to seek more attention than audiences want to give them.

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essentially profit-seeking and indifferent to content and therefore can be regulated in the service of democratic self-government. See Goodman, *supra* note 11, at 89-96, 152 (arguing for mandatory disclosure of commercial sponsorship in nontraditional promotional contexts such as product placement, news story placement, and “astroturf” grass-roots word-of-mouth marketing campaigns). Evoking the same audience-focused justifications as Barron did, Goodman writes that “[m]andated source disclosure is the kind of government intervention in speech markets that the public rights theory of the First Amendment supports.” *Id.* at 131.

24. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* 110-20 (2007). Others criticize Sunstein’s argument on various grounds and point out that audience members may seek out different perspectives on their own initiative. *E.g.*, YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 238-39 (2006).

Given an audience-focused justification for commercial speech doctrine, audiences' dogged attempts to evade or ignore advertising suggest that even if audiences have rights to receive *desired* information that the state would prefer to suppress, such rights can't support an advertiser's claim of a right to provide information in which consumers have expressed no interest.<sup>25</sup> An audience-focused theory might then propose limits on speech designed simply to attract attention the audience doesn't want to give but (perhaps for cognitive/perceptual reasons) can't avoid. These limits would be analogous to conventional volume restrictions—the classic ban on loudspeaker trucks in residential neighborhoods.<sup>26</sup> The theory would be that attempts to change the audience's preferences through ambush or camouflage are illegitimate even if they are ultimately successful in selling products.<sup>27</sup> This underlies proposals to help audiences identify advertiser-sponsored speech and, if they choose, avoid or discount it.

Such proposals react to a classic problem of imperfect information. In practice, we manage our attention grossly, unable or unwilling to discriminate on content before we've already been exposed to a particular advertising message. We are vulnerable to attempts to evade our existing rules of thumb for avoiding ads. As a result, advertisers are attracted to methods that don't let audiences know an ad is coming, such as sponsored product placement in traditional forms of entertainment and surprising ad formats or content.

Just as our filters can be defeated by new forms of advertising, so too can First Amendment doctrine. Commercial speech regulation requires reshaping in the new world where new forms of ads compete for our

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25. See Bennigson, *supra* note 20, at 422-23.

26. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding prohibitions against loudspeakers in residential areas).

27. *Cf. Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 389 (1965) ("In each [case of prohibited false advertising or trademark infringement] the seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public . . . . In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and . . . a misrepresentation for such an end is not permitted.").

attention, focusing not just on the truth or falsity of advertising claims but also on whether consumers are aware of their exposure to advertising. Recently, legal scholarship has begun to address topics such as product placement in entertainment, proposing various ways to deal with advertising claims communicated through movies, television shows, and other forms traditionally understood as noncommercial speech, but there is little actual law on the subject.<sup>28</sup> The next section considers existing doctrine on nontraditional advertising formats, which suggests that new formats will not defeat regulation.

B. *Regulating Unusual Advertising Formats as They Become Usual*

In broad strokes, devoting regulatory attention to new types of ads should not be hugely difficult under commercial speech doctrine. So far, courts have found commercial speech doctrine applicable to new ad formats, where the alternative would be to allow false and misleading commercial claims to be virtually immune from regulation.

The Supreme Court's last, failed attempt to engage the definition of commercial speech showed how new types of ads will either make commercial speech doctrine bend or break. In *Nike v. Kasky*,<sup>29</sup> Nike responded to a concerted campaign against its labor practices with a variety of statements, some made to reporters, others published as "advertorials," and still others included in letters to colleges attempting to dissuade them from severing sponsorship ties with Nike.<sup>30</sup> Nike argued that its speech was political speech, in part because it did not appear in conventional advertising formats. The unusual format didn't change the outcome: the California Supreme Court's finding that Nike's

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28. See, e.g., Goodman, *supra* note 11; William Benjamin Lackey, *Can Lois Lane Smoke Marlboros?: An Examination of the Constitutionality of Regulating Product Placement in Movies*, 1993 U. CHI. LEGAL F. 275 (1993); Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331 (2004); Raghu Seshadri, Note, "Did You Want Fries with That?" *The Unanswered Question of Federal Product Placement Regulation*, 9 VAND. J. ENT. & TECH. L. 467 (2006).

29. 539 U.S. 654 (2003) (per curiam).

30. *Id.* at 656 (Stevens, J., concurring).

statements constituted commercial speech was the final word in the case.<sup>31</sup> The Supreme Court ultimately dismissed certiorari as improvidently granted, perhaps because any decision in favor of Nike would have shaken the foundations of advertising law.<sup>32</sup>

Justice Breyer, dissenting from the Court's decision to dismiss, concluded that the materials at issue in *Nike* were not commercial speech.<sup>33</sup> He noted that they appeared outside of a traditional advertising format, focusing on a letter sent to numerous college presidents.<sup>34</sup> The letter was, as he pointed out, different from a newspaper or television ad.<sup>35</sup> But that was because the letter was directed to a much smaller audience than a newspaper or television show: people who controlled college athletic budgets. It sought the attention of exactly the people in a position to make significant purchasing decisions. False advertising law has had no difficulty finding similar letters to be commercial speech when they targeted small, specialized markets, and this makes perfect sense.<sup>36</sup> Indeed, press releases have

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31. *Id.* at 654.

32. See Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457, 1465 (2009).

33. *Nike*, 539 U.S. at 676 (Breyer, J., dissenting).

34. *Id.* at 676-77.

35. *Id.* at 677.

36. See, e.g., *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (holding that where the relevant market consists of only a limited number of potential purchasers, a promotional presentation to a single customer may qualify as false advertising); *Champion Labs. v. Parker-Hannifin Corp.*, 616 F. Supp. 2d 684 (E.D. Mich. 2009) (holding that a presentation to a single large client could be commercial advertising and promotion); *Mobius Mgmt. Sys., Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1019-20 (S.D.N.Y. 1995) (holding that a letter to a single customer may be commercial advertising); cf. *Birthright v. Birthright, Inc.*, 827 F. Supp. 1114, 1137-38 (D.N.J. 1993) (holding that a nonprofit organization's unlicensed use of trademark in fund-raising letters constituted false advertising). *But see* *Ultra-Temp Corp. v. Advanced Vacuum Sys., Inc.*, 27 F. Supp. 2d 86, 92-93 (D. Mass. 1998) (holding that a letter to a single customer is not advertising); *Garland Co. v. Ecology Roof Sys. Corp.*, 895 F. Supp. 274, 279 (D. Kan. 1995) (same); *Goldsmith v. Polygram Diversified Ventures, Inc.*, 37 U.S.P.Q.2d (BNA) 1321, 1326 (S.D.N.Y. 1995) (same); *Am. Needle & Novelty Inc. v. Drew Pearson Mktg., Inc.*, 27 U.S.P.Q.2d (BNA) 1059, 1062-63 (N.D. Ill. 1993) (same).

latterly become common targets in false advertising cases,<sup>37</sup> and have also played important roles in securities fraud cases.<sup>38</sup> Similarly, direct mail, distribution of article reprints,<sup>39</sup> business cards,<sup>40</sup> seminars,<sup>41</sup> statements to trade

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37. See, e.g., Porous Media Corp. v. Pall Corp., 201 F.3d 1058 (8th Cir. 2000); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); Star-Brite Distrib., Inc. v. Kop-Coat, Inc., No. 09-60812-CIV., 2010 WL 750353 (S.D. Fla. Mar. 4, 2010); Innovation Ventures, LLC v. Body Dynamics, Inc., No. 08-12711, 2009 WL 877640 (E.D. Mich. Mar. 30, 2009); Lawman Armor Corp. v. Master Lock Co., No. Civ. A. 02-6605, 2004 WL 362210 (E.D. Pa. Feb. 27, 2004); Enzo Life Scis., Inc. v. Digene Corp., 295 F. Supp. 2d 424 (D. Del. 2003); Fedders Corp. v. Elite Classics, 268 F. Supp. 2d 1051 (S.D. Ill. 2003); Carell v. Shubert Org., Inc., 104 F. Supp. 2d 236 (S.D.N.Y. 2000); First Health Group Corp. v. United Payors, No. 96 C 2518, 2000 WL 549723 (N.D. Ill. May 2, 2000); Ferrer v. Maychick, 69 F. Supp. 2d 495, 496 & n.2 (S.D.N.Y. 1999); Summit Tech., Inc. v. High-Line Med. Instruments, Co., 933 F. Supp. 918, 936 (C.D. Cal. 1996); Interactive Network, Inc. v. NTN Commc'ns, Inc., 875 F. Supp. 1398, 1410 (N.D. Cal. 1995); *In re Century 21-RE/MAX Real Estate Adver. Claims Litig.*, 882 F. Supp. 915, 929 (C.D. Cal. 1994); see also 21 C.F.R. § 202.1(l)(1)-(2) (2009) (treating press releases regarding FDA-approved drugs and devices as promotional labeling); Nancy L. Buc, *FDA Regulation of Food, Drug, Cosmetic, and Device Promotion*, in *ADVERTISING LAW IN THE NEW MEDIA AGE* 361, 366-67 (1999) (discussing FDA assertions of authority over press releases and fundraising letters featuring products in development). *But see* Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 634 (D. Utah 1998) (holding that statements about litigation in press releases were not closely enough connected to the sale of goods to constitute advertising or promotion within the meaning of the Lanham Act); Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1532-33 (S.D.N.Y. 1994) (finding that published surveys claiming that publisher's scientific journals were more heavily cited than other publishers' and press release about surveys did not constitute "commercial advertising or promotion" and underlying surveys were fully protected by the First Amendment). As *Procter & Gamble* and *Gordon & Breach* indicate, it is the substance of the claim and not the presence of the claim in a communication designated a "press release" that controls courts' resolution of false advertising issues.

38. See, e.g., Marsh Group v. Prime Retail, Inc., 46 F. App'x 140, 142-43, 145 (4th Cir. 2002); ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336, 342, 347-48 (5th Cir. 2002); Nathenson v. Zonagen, Inc., 267 F.3d 400, 418, 424-25 (5th Cir. 2001); Ganino v. Citizens Utils. Co., 228 F.3d 154, 159 (2d Cir. 2000); Semerenko v. Cendant Corp., 223 F.3d 165, 170-71 (3d Cir. 2000); Stevelman v. Alias Research Inc., 174 F.3d 79, 81 (2d Cir. 1999); *In re PLC Sys., Inc. Sec. Litig.*, 41 F. Supp. 2d 106, 108 (D. Mass. 1999); *In re Biogen Sec. Litig.*, 179 F.R.D. 25, 32-33, 36-37 (D. Mass. 1997).

39. See *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 113 (6th Cir. 1995) (reversing grant of summary judgment where article reprints containing false claims were distributed at trade shows); *Gordon & Breach Sci. Publishers S.A.*,

publications,<sup>42</sup> and individual presentations by salespeople<sup>43</sup> have been regulated under false advertising law. The FDA regulates everything it calls “labeling,” which includes calendars, films, and the Physicians’ Desk Reference,<sup>44</sup> and also regulates what researchers involved in clinical trials of

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859 F. Supp. at 1532-45 (finding that dissemination of reprints of comparative survey constituted commercial speech); *see also* Fed. Trade Comm’n, Informal Staff Advisory Op. 97-5 (July 31, 1997), <http://www.ftc.gov/bcp/franchise/advops/adv97-5.htm> (stating that reprints of media articles about franchisor’s earnings are likely to be subject to FTC’s franchise disclosure rules if franchisor gives them to potential franchisee); “By disseminating copies of the news article . . . the franchisor effectively ratifies the journalist’s words as its own and, in so doing, converts the article into an advertising piece . . .”. *Id.* *But see* Nat’l Life Ins. Co. v. Phillips Publ’g, Inc., 793 F. Supp. 627, 644-45 & n.33 (D. Md. 1992) (finding advertisements accurately reporting portions of a newsletter were not commercial speech because they were not included to aid in sale of product, but rather as a comment on public controversy).

40. *See* Avon Prods., Inc. v. S.C. Johnson & Son, Inc., 984 F. Supp. 768, 796 (S.D.N.Y. 1997) (finding that manufacturer’s dissemination of such things as business cards constituted advertising or promotion under the Lanham Act).

41. *See* Fed. Trade Comm’n v. Sage Seminars, Inc., No. C 95-2854 SBA, 1995 WL 798938, at \*5 (N.D. Cal. Nov. 2, 1995) (finding representations made at seminars given throughout U.S. were “in or affecting commerce” for purposes of FTC Act).

42. *See* Fuente Cigar, Ltd. v. Opus One, 985 F. Supp. 1448, 1456 (M.D. Fla. 1997) (finding that statement to trade publication, directed toward contested consumers, constituted advertising or promotion); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 594-95 (Ill. 1996) (finding a car manufacturer’s statement to *Car & Driver* magazine that manufacturer knew would appear as part of an automotive review could constitute consumer fraud under Illinois law); *see also Semco*, 52 F.3d at 113 (finding a trade journal article written by the defendant’s president primarily to tout the defendant’s goods was commercial speech).

43. *See* Avon Prods., 984 F. Supp. at 776-78, 795 (addressing product claims made by individual Avon sales representatives); *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 180 (S.D.N.Y. 1995) (finding that presentations addressed to relevant consumers were “advertising”); *Nat’l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1235 (S.D.N.Y. 1991) (denying a motion to dismiss a false advertising claim because telephone conversations with friends and colleagues can constitute advertising in particular industries).

44. *See* 21 C.F.R. § 202.1(l)(2) (2009) (“Brochures, booklets, mailing pieces, detailing pieces, file cards, bulletins, calendars, price lists, catalogs, house organs, letters, motion picture films, film strips, lantern slides, sound recordings, exhibits, literature . . . and references published (for example, the ‘Physicians Desk Reference’) for use by medical practitioners . . . are hereby determined to be labeling.”).

unapproved drugs can say to doctors and reporters.<sup>45</sup> Drug companies sponsor studies that they hope to have published in peer-reviewed journals, then use those studies for their own marketing purposes, drawing regulatory responses.<sup>46</sup>

In other words, accepting Justice Breyer's objection would have thrown into question a broad range of existing advertising regulation and case law. Justice Breyer offered no reason to have a small-market or press release exception to the law.<sup>47</sup> Nor was Justice Breyer's general attention to format appropriate, especially in a world in which advertising can take any form we can conceive and probably some we can't.<sup>48</sup> The press releases that formed part of the challenged materials in *Nike* are increasingly standard means of communicating directly with consumers, as companies know that material in their press releases will often be passed on without alteration by reporters<sup>49</sup> or read

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45. See Natasha Singer, *F.D.A. Aims at Doctors' Drug Pitches*, N.Y. TIMES, Feb. 1, 2010, at B1.

46. For an example of study manipulation that ultimately resulted in a false advertising lawsuit, see *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384 (D.N.J. 2009). While a study that was supposed to prove a product's superiority was ongoing, the product's advertiser took "secret and forbidden peeks at the data looking for trends, and even changed the study endpoints and stopped the study early in response." *Id.* at 409. When a *New England Journal of Medicine* ("NEJM") reviewer asked if there had been an interim analysis, the advertiser and the individual authors denied it, then amended the article to include their false denial. *Id.* The court was not impressed by the fact that the advertiser's marketing director "provided input to the NEJM article to try to make it misleading, and then celebrated the final version's obscuring of the limitation of the results of the study . . . and its overly broad and unsupportable conclusion." *Id.*

47. One might argue that targeted messages pose less of a risk of polluting the information commons. It's not amount of information but quality, however, with which false advertising law is concerned. *Cf. Post, Constitutional Status*, *supra* note 20, at 47-49 (arguing that private commercial speech should be more subject to regulation because it does not participate in public reason).

48. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 640-41, 643-44 (1990); Lynette Holloway, *Hip-Hop Sales Pop: Pass the Courvoisier and Count the Cash*, N.Y. TIMES, Sept. 2, 2002, <http://www.nytimes.com/2002/09/02/business/media-hip-hop-sales-pop-pass-the-courvoisier-and-count-the-cash.html?pagewanted=1> (reporting on the economic relationship between some rappers' music and videos and commercial products featured therein).

49. See "Picking Up" a Press Release Takes on New Meaning, PR NEWS, Aug. 26, 2002; Ned Steele, *Interactive Press Releases on Web Change PR, Media*

directly by consumers.<sup>50</sup> Nike's letter nominally to a newspaper editor included statements directed at readers in their capacity as purchasers, including "[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."<sup>51</sup> There is also a persuasive advantage to using non-ad formats: though ads are regularly screened by conventional publishers and broadcasters to ensure that they meet minimal standards, press releases and other promotional materials that are passed through untouched are *perceived* by consumers as having survived a vetting process, and thus as being credible.<sup>52</sup> It is therefore neither

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*Landscape*, O'Dwyer's PR Services Report, Feb. 2001, at 39 ("It's a commonly known 'dirty little secret' of journalism and PR that press releases too often get lifted whole, sometimes under a reporter's byline, and published with scant, if any, editing or fact-checking."); cf. Brooks Barnes, *Ad Budget Tight? Call the P.R. Machine*, N.Y. TIMES, Nov. 21, 2009, at BU7 (discussing the use of press releases and other public relations activity to market movies). "Paramount Pictures did not buy a single billboard to promote 'Paranormal Activity,' its recent horror film. The studio also saved tens of millions of dollars by forgoing a national television campaign. Instead, Paramount depended on its publicity arm to fan interest on blogs and in traditional media. The flack attack worked: the film, made for just \$10,000, has sold \$104 million in tickets." *Id.* I am indebted to Seth Oltman for his research on the use of press releases to communicate directly with consumers.

50. See Steele, *supra* note 49, at 39. Yahoo!, for example, now mixes in press releases with other news for general readers. And Sears' press release titled "Don't Miss Deals on Holiday Gifts for the Entire Family" is plainly addressed to customers, not reporters. See Press Release, Sears, Don't Miss Deals on Holiday Gifts for the Entire Family (Dec. 11, 2003), available at [http://www.prnewswire.com/cgi-bin/micro\\_stories.pl?ACCT=116376&TICK=SEARS&STORY=/www/story/12-11-2003/0002074155&EDATE=Dec+11,+2003](http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=116376&TICK=SEARS&STORY=/www/story/12-11-2003/0002074155&EDATE=Dec+11,+2003). A similar press release, "Practical Meets Romance: Think Outside of the Candy Box This Valentine's Day," uses phrases such as "You'll feel the love," "Wow your significant other, your mom or your daughter," and "Put a little power in your man's hand." Press Release, Sears, Practical Meets Romance: Think Outside of the Candy Box This Valentine's Day (Feb. 6, 2004), available at [http://www.prnewswire.com/cgi-bin/micro\\_stories.pl?ACCT=116376&TICK=SEARS&STORY=/www/story/02-06-2004/0002104638&EDATE=Feb+6,+2004](http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=116376&TICK=SEARS&STORY=/www/story/02-06-2004/0002104638&EDATE=Feb+6,+2004).

51. *Kasky v. Nike*, 45 P.3d 243, 258 (Cal. 2002).

52. See Barnes, *supra* note 49 ("At least with publicity—placed stories—there is a feeling that the message has gone through a filter," said Paul Pflug, the co-owner of Principal Communications, a public relations firm that specializes in entertainment. "Journalists and their editors had to consider the pitch worthy of space. The message has been vetted in some way." He said an

unsurprising nor unfair that false advertising law as it stands applies commercial speech rules to multiple advertising formats.

The rise of product placement is likely to lead to further disputes about what communications to the public can legitimately be regulated by consumer protection law. To date, courts have correctly rejected several trademark infringement lawsuits by manufacturers who didn't pay for placement in a movie. The manufacturers alleged that consumers would be confused and their brand images harmed by negative portrayals in the movies.<sup>53</sup> But when a product is lauded because the advertiser paid for the encomium and consumers are deceived about some characteristic of that product, courts will either have to subject entertainment media to advertising law under the aegis of the Lanham Act and state consumer protection law, or open up a fairly substantial loophole in advertising regulation.<sup>54</sup> As the developing case law on press releases indicates, it is both likely and desirable that the First Amendment will not pose a generalized barrier to pursuing false advertising wherever it goes.

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article was more valuable to the studios because it is more credible to viewers than an ad.”).

53. See *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913, 919-20, 923 (C.D. Ill. 2003) (rejecting trademark infringement claim where there were no competing or inauthentic trademarks at issue); *WHAM-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp. 2d 1254, 1262-63 (N.D. Cal. 2003) (rejecting trademark infringement claim because the plaintiff did not demonstrate likely audience confusion). *But see Am. Dairy Queen Corp. v. New Line Prods., Inc.*, 35 F. Supp. 2d 727, 730-32, 735 (D. Minn. 1998) (enjoining film company from using Dairy Queen name because of potential customer confusion).

54. Deception about whether Coke paid for placement is another question, addressed further below. There is no sound justification for the claim that, when Coke didn't pay for placement but consumers think that it permitted the presence of its products in a movie, book, etc., Coke is harmed. See Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 434-36 (2010). Trademark owners would nonetheless like courts to believe that unauthorized portrayals of their marks cause actionable harm. This article's main focus is on undisclosed-but-extant economic connections, essentially the flipside of unauthorized uses. One side benefit of a robust disclosure rule, however, would be to make trademark owners' claims against expressive unauthorized uses even less persuasive by making it even more unreasonable for consumers to assume that mere mention or portrayal of a trademark, without explicit sponsorship information, indicates any relationship between the speaker and the trademark owner. See generally *id.*

II. THE DEVIL'S IN THE DETAILS (AND IN THE COMMUNICATIONS DECENCY ACT): VOLUNTEERS AND THE CHALLENGE THEY POSE TO ADVERTISING REGULATION

Product placement, letters to the editor, and press releases involve nontraditional uses of mass media to disseminate promotional messages. But there are many other emerging marketing tactics. Volunteers from the audience can also serve as shills. This has happened accidentally—fans create works that advertisers then adopt, as with the immensely popular short films showing two men creating elaborate fountains powered by the chemical interactions caused by Mentos dropped into bottles of Diet Coke. These films were first disavowed, then embraced, by the manufacturers of the candy and soda.<sup>55</sup>

Volunteer salespeople have also emerged by design, with traditional marketers soliciting user-generated ads for their products and showcasing the most persuasive ones in various ways. Ellen Goodman explains how this unsettles traditional false advertising law:

The regulation of false advertising . . . was designed to manage information flows in relatively controlled environments where few speakers were capable of mass communication. . . . [F]alse advertising law assumes a model in which authorship is singular or several, not massively composite. In the environment of peer production, by contrast, all are capable of mass communication and authorship is frequently cumulative as users remix and mash up information provided by others.<sup>56</sup>

Uncertainty about whether an advertiser or an unaffiliated individual is speaking is particularly problematic on a doctrinal level because individual speakers can generally make false claims about products, as long as they are not defamatory and do not otherwise present a clear and present danger of harm. Traditional advertisers are governed by quite different rules holding them strictly liable for falsehoods and requiring them to possess substantiation for any material claims.<sup>57</sup>

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55. See Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 684 (2007) (“[T]he power to disseminate brand-related messages is now widely distributed.”).

56. *Id.* at 685 (citation omitted).

57. Tushnet, *supra* note 32, at 1465-66, 1470.

Individuals have always been able to say things about unrelated companies, but the growing regulatory problem is one posed by the increasing visibility and potential reach of such speech. Riffing off popular cultural artifacts is a classic way to get attention. Before cheap streaming Internet video, it was difficult to get one's fifteen minutes of fame by creating an ad; now, as the Mentos/Diet Coke films reveal, it is a reasonable path to acclaim. New media structures thus encourage and allow for wide distribution of a variety of user-created promotional messages, though only a few become hits.

As a result, volunteers may now be able to disseminate misleading claims about products to millions, subject to minimal or no regulation. In order to mitigate some of the harm, we might conclude that advertisers should not be allowed to boost the volunteer signal unless the message follows the rules to which advertisers themselves are subject. Ellen Goodman thus argues that advertisers should be subject to ordinary advertising regulation when they adopt user-generated promotional material as their own.<sup>58</sup>

I am sympathetic to this argument, but it would likely require a change in the law. Section 230 of the Communications Decency Act, designed to protect Internet service providers against massive potential liability for users' defamatory speech, apparently immunizes advertisers against false advertising claims when they adopt and promote user-generated ads online. Section 230 reads in relevant part, "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."<sup>59</sup>

Section 230 has mainly been used in non-advertising cases, and it is still unclear how it will affect user-generated

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58. See Goodman, *supra* note 55, at 703 ("Once a brand owner adopts the peer promotion as its own, featuring the promotion on its web site or distributing it by other means, this speech should be considered the brand owner's advertisement. That the sponsor has chosen to use an amateur instead of an agency to produce its advertisements should not change the analysis. Moreover, under the Lanham Act case law, it should not make a difference whether the brand owner initially solicited the ads or simply adopted them later. In either case, the brand owner is sponsoring speech for promotional purposes.") (footnote omitted).

59. 47 U.S.C § 230(c)(1) (2006).

advertising. In one case, Quiznos ran a contest for homemade ads, and the rules required “a comparison between Quiznos and Subway with Quiznos being superior.”<sup>60</sup> Quiznos posted its favorite ads online. Subway sued, and Quiznos argued that it was just facilitating consumer-generated ads, which was protected by section 230. The court first treated section 230 as an affirmative defense, ruling that Quiznos’ claim couldn’t be decided on a motion to dismiss,<sup>61</sup> then denied summary judgment on the ground that it was still uncertain whether Quiznos was “actively responsible for the creation and development of disparaging representations about Subway contained in the contestant videos.”<sup>62</sup> However, immunity from posting user-generated ads on a website or YouTube channel should follow as a matter of statutory interpretation if the advertisers are not the source of false claims but only disseminated claims made by another.<sup>63</sup>

It’s true that Congress didn’t contemplate advertiser selection of others’ content for commercial benefit. The model was AOL the web host, not AOL the advertiser holding a contest for the best user-generated ad for AOL services. Nonetheless, the user appears to be a separate information provider, triggering section 230 in both cases, because the language of the law distinguishes based on the identity of the information provider, not on the motive for its dissemination.

Another attempt to regulate advertiser adoption of others’ speech comes from a recent opinion of the South Carolina Ethics Bar. State bars have been struggling to deal with lawyers’ Internet advertising, which can reach potential clients in new ways. Anything on the Internet, not just a banner ad, might in theory count as advertising. And new intermediaries have sprung up to help potential clients

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60. Louise Story, *Can a Sandwich Be Slandered?*, N.Y. TIMES, Jan. 29, 2008, at C1.

61. *Doctor’s Assocs., Inc. v. QIP Holders, LLC*, No. 3:06-cv-1710, 2007 WL 1186026, at \*2 (D. Conn. Apr. 19, 2007).

62. *Doctor’s Assocs., Inc. v. QIP Holder LLC*, No. 3:06-cv-1710, 2010 WL 669870, at \*23 (D. Conn. Feb. 19, 2010).

63. If the advertiser only selects the best ads, it should be entitled to section 230 immunity. *Cf. Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007) (finding section 230 immunity from secondary liability for ISPs for state-law false advertising claims).

find lawyers, including lawyer rating services that offer profiles of lawyers. Sometimes for a fee, lawyers can “claim” their profiles and add extra information to make themselves more attractive. The South Carolina ethics body ruled that, when a lawyer claims a profile on such a service, she becomes responsible for its entire content.<sup>64</sup> But section 230 by its terms prevents states from such attributions unless the user herself—here, the lawyer—provides the content at issue. The ethics body specifically stated that it was relying on the opposite rule, holding the lawyer responsible for statements of others,<sup>65</sup> including peer endorsements, the service’s ratings, and client comments.<sup>66</sup> Unless the provider

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64. See South Carolina Bar, Ethics Advisory Op. 09-10, [http://www.sbar.org/member\\_resources/ethics\\_advisory\\_opinions/&id=678](http://www.sbar.org/member_resources/ethics_advisory_opinions/&id=678) (analogizing the situation to one in which a client had, without the lawyer’s knowledge, created an ad for the lawyer; once the lawyer became aware of the ad, it was required to make sure that the ad conformed to the ethics rules) [hereinafter *Ethics Advisory Op.*]; *When Lawyers ‘Claim’ Online Profiles, Rules on Communications, Advertising Apply*, 14 Electronic Com. & L. Rep. (BNA) 1668 (Nov. 18, 2009) (“According to the committee, ‘to “claim” one’s website listing is to “place or disseminate” all communications made at or through that listing after the time the listing is claimed.’ That step makes the lawyer responsible for the information in the listing, it said. ‘Likewise, a lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer’s listing to the Rules of Professional Conduct,’ the committee stated . . . [A] lawyer assumes responsibility for the content by requesting access to and updating it, beyond merely making corrections to directory information.”) [hereinafter *When Lawyers ‘Claim’ Online Profiles*].

65. See *When Lawyers ‘Claim’ Online Profiles*, *supra* note 64 (“[The committee] reminded lawyers to adhere to Rule 8.4(a), which prohibits lawyers from violating professional conduct rules through the acts of another. ‘Therefore, a lawyer should monitor a “claimed” listing to keep all comments in conformity with the Rules,’ the opinion states. If any part of the listing is improper and cannot be removed, the lawyer should remove her entire listing, the committee said.”).

66. The committee analyzed each of these elements separately and held that the ethics rules applied to all of them, even though the lawyer did not provide them. See *Ethics Advisory Op.*, *supra* note 64 (“[A] lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing. . . . A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but . . . the lawyer is responsible for their content.”); *When Lawyers ‘Claim’ Online Profiles*, *supra* note 64 (“The committee cautioned . . . that client comments may violate Rule 7.1 depending on their content. Rule

of the content is the lawyer's agent, the ethics rules are preempted by federal law.<sup>67</sup>

These conflicts are an example of the unanticipated consequences of new technologies and a very explicit demonstration of the way that background property and liability rules structure speech and speakers. Here the gap between created and adopted speech is especially large. In practice,

the general population has more leeway to make [ads] that cross into murky territory. Consumer ads are sometimes offensive and crude, and they often exaggerate the benefits of the products made by the company that dangles the prize money. The sponsor can try to distance itself from the provocative content, while at the same time benefiting from the attention the videos draw to the brand.<sup>68</sup>

This difference is then amplified by the legal regimes applied to advertiser speech versus those applied to consumer speech. Suppose a purely consumer-generated ad says false things about a major competitor. Section 230 protects the manufacturer who hosts the ad on its website. In theory, the competitor can still go after the original consumer.<sup>69</sup> But the competitor can't take advantage of strict liability for simple falsity under the Lanham Act, the major source of private false advertising litigation, because the Lanham Act only applies to false advertising by parties in commercial competition with one another. The competitor will have to use state tort law, which generally has higher, defamation-like standards for liability. The consumer's statement will likely be treated as fully protected

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7.1(d) prohibits a communication that 'contains a testimonial,' which the committee defined as a statement by a client about an experience with the lawyer. A lawyer should not solicit or allow publication of testimonials, the committee declared. Furthermore, the opinion states that [the rules] usually prohibit a client endorsement, which the committee characterized as 'a more general recommendation or statement of approval of the lawyer.'").

67. See *infra* Part III.C. It is possible that an appropriately tailored regulation might provide that, if a lawyer offered financial incentives for favorable client comments, the ethics rules would apply without interference by section 230, but that is a small subset of what the current rules purport to cover.

68. Story, *supra* note 60.

69. Even if the competitor wins a claim against the original speaker, however, there is no obvious legal mechanism to compel the section 230-immunized manufacturer to remove the ad.

noncommercial speech, actionable only on a showing of actual malice. And if the claim does not disparage the competitor but simply falsely lauds the manufacturer, the competitor may have no recourse at all.

Under such circumstances, advertisers have every incentive to arbitrage the regulatory regime by burying their promotional speech within user-generated speech.<sup>70</sup> If we simply equalized treatment, however, that would seem to sound the death knell for most advertising regulation, since it is unlikely that economically unrelated entities engaged in noncommercial speech can constitutionally be held strictly liable for falsity and required to substantiate product claims.

The potential of user-generated ads to degrade (further) the integrity of information is illustrated by the remarks of one amateur filmmaker who submitted a video to the Quiznos contest: “Quiznos led you to believe it was O.K. to do it,’ [he] said. ‘It’s like mudslinging, in a sense. Like politicians slinging mud back and forth at each other. I took it that it was all fair in business.’”<sup>71</sup> Effective advertising

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70. See Goodman, *supra* note 55, at 686-87 (“Where brand owners sponsor peer promotions but conceal their involvement, the resulting communication mixes the commercial speech of the sponsor with the noncommercial speech of the peer.”); *id.* at 699 (“[P]eer promotions engage consumers in new ways by linking commercial and noncommercial speech.”); *id.* (“Peer promotions hide speaker identity. The determination of ‘commercialness’ requires examination not only of the content and context of speech, but also who is speaking and why. In other words, . . . the identity of the speaker[] becomes a matter of interpretation and investigation.”).

71. Story, *supra* note 60. One might speculate that the online environment also removes the inhibitions against defamatory behavior that speakers might otherwise have felt. Many people have observed the disinhibiting effects of online communication, which may also affect speakers’ willingness to engage in undisclosed marketing. Cf. Ken D. Kumayama, *A Right to Pseudonymity*, 51 ARIZ. L. REV. 427, 448-49 (2009) (discussing ways in which online environments can facilitate antisocial behavior, including deception, and have both good and bad disinhibiting effects on individual expression); Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1575 (2007) (“[T]he Internet has come to exacerbate this dark side of anonymity due to its ‘disinhibiting effect’ on many speakers. Studies show that even when an Internet user is *not* anonymous and knows the recipient of his e-mail message, the speaker is more likely to be disinhibited when engaged in “computer mediated communication” than in other types of communications. The technology separates the speaker from the immediate consequences of her speech, perhaps (falsely) lulling her to believe that there

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.<sup>72</sup>

### III. SPEAK FOR YOURSELF: ENDORSEMENT, PAYMENT AND DISCLOSURE IN NEW MEDIA

#### A. *The FTC Draws Lines Between Paid and Volunteer Content*

A related issue surrounding user-generated, advertiser-friendly content recently arose when the FTC updated its endorsement and testimonial guidelines, which are consolidated administrative statutory interpretations intended to provide a basis for voluntary compliance. Along with other significant changes, the revised guidelines addressed social networking and other Internet media for the first time. The basic question was how to apply the FTC's traditional disclosure and substantiation

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will be no consequences. Since the Internet magnifies the number of anonymous speakers, it also magnifies the likelihood of false and abusive speech.”) (footnote omitted); John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321-22 (2004) (setting forth arguments that the Internet decreases inhibitions on socially disapproved behavior).

72. There is already an analogy, though not a reassuring one, in pharmaceutical companies' use of studies, journal articles, and lectures to “educate” doctors and thereby promote off-label use of FDA-approved drugs. Finding that companies have First Amendment rights to distribute others' speech, several court decisions have proved extremely hostile to FDA regulations that limit such off-label promotions. *See* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 60-65 (D.D.C. 1998), *further proceedings* 36 F. Supp. 2d 16 (D.D.C. 1999), *further proceedings sub nom.* Washington Legal Found. v. Henney, 56 F. Supp. 2d 81 (D.D.C. 1999), *vacated*, 202 F.3d 331 (D.C. Cir. 2000). Such practices show how sellers can engage in arbitrage to defeat restrictions on what they can say directly. And arbitrage tends to break down; the maker of Botox has now filed suit to invalidate the regulations preventing it from engaging in off-label promotion directly. *See* Allergan v. United States, No. 1:09-cv-01879 (D.D.C. filed Oct. 1, 2009); Brief for the National Spasmodic Torticollis Assoc. et al. as Amici Curiae Supporting Plaintiff, Allergan v. United States, No. 1:09-cv-01879 (D.D.C. filed Oct. 1, 2009), *available at* [http://www.wlf.org/Upload/litigation/briefs/112509Allergan\\_US\\_Amicus.pdf](http://www.wlf.org/Upload/litigation/briefs/112509Allergan_US_Amicus.pdf); Natasha Singer, *Botox Maker's Suit Cites Free Speech*, N.Y. TIMES, Oct. 3, 2009, at B3.

requirements to new media and new forms of endorsement. Applying already existing principles,<sup>73</sup> the revised guidelines require: (1) substantiation for ad claims made by endorsers, even in new media, and (2) disclosure of any endorsement relationship that wouldn't be obvious from context (as it is obvious when a spokesperson appears in a traditional 30-second TV ad). When a relationship between a blogger and an advertiser is of sufficient economic significance, the blogger is an endorser and that relationship needs to be disclosed.<sup>74</sup> In addition, the advertiser could be held liable for unsubstantiated claims made by an endorser.<sup>75</sup>

The FTC was very concerned with practices in which companies pay people to promote a product or service by praising it or using it as part of a seemingly noncommercial interaction in ordinary settings. A typical example:

In Spring 2009, Royal Caribbean was criticized for posting positive reviews on travel review sites with a viral marketing team, the 'Royal Champions,' which was comprised of fans who posted positive comments on various sites such as Cruise

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73. See, e.g., FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255) [hereinafter *FTC Endorsement Guides*] ("The Guides have always defined 'endorsements' by focusing on the message consumers take from the speech at issue.") (citation omitted); *id.* at 53,126 ("The Guides merely elucidate the Commission's interpretation . . . but do not expand (or limit) its application to various forms of marketing."). The FTC had already applied the principles of its earlier Guides Concerning Use of Endorsements and Testimonials in Advertising, which were issued in 1980, to online situations. See, e.g., *In re TrendMark Inc.*, 126 F.T.C. 375 (1998), available at <http://www.ftc.gov/os/1998/06/9723255.pkg.htm> (consent order arising from failure to adequately disclose in email and on website that endorsers of Neuro-Thin and Lipo-Thin had a material connection with the sellers); Letter from Jodie Bernstein, Director, Bureau of Consumer Protection, to Kathryn C. Montgomery, President, and Jeffrey A. Chester, Executive Director of the Center for Media Education (July 15, 1997), available at <http://ftc.gov/os/1997/07/cenmed.htm> (responding to its petition requesting investigation of and enforcement action based on nondisclosure of sponsorships of the Web site KidsCom).

74. *FTC Endorsement Guides*, *supra* note 73, at 53,142-43 (§ 255.5 & Examples 7 & 8).

75. *Id.* at 53,139 (Example 5).

Critic. In return for positive postings, the Royal Champions were rewarded with free cruises and other perks.<sup>76</sup>

Short-form social networking services like Twitter offer an especially promising opportunity for sponsored ads. As the *New York Times* reported,

[i]t is perhaps the last frontier in advertising —getting regular people to send a sentence or two of text, on behalf of paying advertisers, to their friends and admirers. The idea . . . is that people trust recommendations from those they know and respect, while they increasingly ignore nearly ever[y] other kind of ad message in print, on television and online.<sup>77</sup>

Large companies like Amazon are getting into the business, with the hopes of being able to target small, special interest groups through their friends as readily as advertisers already address the mass market.<sup>78</sup> One marketer explained that “[a]ll we are trying to do is get consumers to become marketers for us.”<sup>79</sup>

Consumers trust commercial messages less than noncommercial ones, creating incentives for undisclosed promotion and resulting harms to consumers. Fake blogs and similar user-imitating content are unfortunately common, and are covered by the disclosure requirements.<sup>80</sup>

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76. Gregory J. Hessinger et al., *Advertising & Marketing, in NETWORK INTERFERENCE: A LEGAL GUIDE TO THE COMMERCIAL RISKS AND REWARDS OF THE SOCIAL MEDIA PHENOMENON* 3, 6 (Douglas J. Wood et al. eds., 2009), [http://www.reedsmith.com/\\_db/\\_documents/social\\_media\\_e-version.pdf](http://www.reedsmith.com/_db/_documents/social_media_e-version.pdf).

77. Brad Stone, *A Friend's Tweet Could Be an Ad*, N.Y. TIMES, Nov. 22, 2009, at BU4.

78. *See id.*

79. *Id.*

80. Candida Harty & Amy Mudge, *FTC + Fake Blogs = Advertisers Might Get a Flogging*, CONSUMER ADVER. LAW BLOG, Nov. 6, 2009, <http://www.consumeradvertisinglawblog.com/2009/11/ftc-fake-blogs-advertisers-might-get-a-flogging.html> (“[M]any flogs [fake blogs] are carefully crafted to look exactly like a real blog complete with user comments and lively chat. The flogs will even include a few somewhat negative or skeptical comments regarding the product or service for sale to increase credibility. . . . Mary Engle, Director of the FTC’s Division of Advertising Practices says that the agency is targeting floggers, telling MSNBC that ‘[a]dvertising always has to be clear that it’s advertising’ and ‘[a]n ad disguised as a blog, or a blog where companies get people to pose as satisfied customers and write reviews, both are deceptive.”); Bob Sullivan, *“Fakeosphere” Latest Web Trap for Consumers*, THE RED TAPE CHRONICLES, Nov. 4, 2009, <http://redtape.msnbc.com/2009/11/latest-web-trap>

The problem of deception may be even worse, however, when a source that is sometimes independent accepts compensation for positive reviews without disclosing the underlying business relationship. Unlike the explicitly advertiser-adopted content discussed in the previous section, hidden relationships may give advertisers excessive credibility by using apparently independent sources to confirm the advertiser's message.<sup>81</sup> The social science evidence is persuasive that source matters. Helen Norton summarizes:

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for-consumers-the-fakeosphere.html ("Internet marketing veteran and analyst Jay Weintraub says fake blogs—or flogs—fake news sites and manufactured testimonials are the fastest-growing segment of Internet advertising. He thinks it's a \$500 million-a-year industry— and he compares it to the explosive growth of spam a decade ago. 'I don't think people realize how big this has become, and how quickly,' said Weintraub, adding that a popular top flog campaign can generate 10,000 daily sales.").

81. See Goodman, *supra* note 55, at 705 ("Marketing theory predicts . . . that consumers will be more inclined to believe promotions when they are not clearly sourced by the brand owner. Marketing authorities instruct sponsors to keep a low profile in Web 2.0 promotions because speech that is or seems to be pure peer is more credible. If this is true, then peer promotions would seem to be highly credible and therefore potentially harmful if misrepresenting the facts. Even more so than traditional advertising, consumers would be at risk of 'uninformed acquiescence' to the advertiser's promotional scheme.") (footnotes omitted). *But see* Memorandum from John P. Feldman, Reed Smith, LLP, at 3 (Dec. 1, 2009), available at [http://www.adlawbyrequest.com/uploads/file/Feldman%20Memorandum%20December%201%20on%20FTC%20Guides\\_d oc.pdf](http://www.adlawbyrequest.com/uploads/file/Feldman%20Memorandum%20December%201%20on%20FTC%20Guides_d oc.pdf) ("The FTC has presented no evidence that consumers are being deceived by bloggers who review products and services on the Internet."). On the general power of word of mouth marketing, see, e.g., Richard W. Easley, *Virtual Communities . . . The Power of Word-of-Mouth Transmission Via the Internet*, J. INTERNET MKTG., Mar. 2002, <http://www.arraydev.com/commerce/jim/0203-04.htm>; Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY 404, 409-10 (Graeme B. Dinwoodie & Mark D. Janis, eds. 2008) ("For some industries . . . [consumer] word of mouth can make or break businesses. . . . Due to their sociability or expertise, some consumers (sometimes called 'brand advocates') are more influential than other consumers."); Eric Goldman, *Twitter, Email and Brand Engagement*, TECH. & MKTG. LAW BLOG, June 17, 2009, [http://blog.ericgoldman.org/archives/2009/06/twitter\\_email\\_a.htm](http://blog.ericgoldman.org/archives/2009/06/twitter_email_a.htm) ("Twitter has [a] really important benefit for brands. Folks are often willing to retweet a message—even a commercial message—thereby sharing it to their entire follower base in ways that these same folks would *never* forward a commercial email to hundreds of their friends. And this type of word-of-mouth marketing is the holy grail of marketing because of the extra imprimatur of having the message validated by someone in the reader's social network.").

[E]vidence from cognitive psychology and related fields reveals that individuals often use a message's source as a mental shortcut, or heuristic, for evaluating its quality. Studies confirm that the more credible a speaker, the more likely her message will be effective, regardless of its content. Because speakers perceived as unpopular and/or unreliable will have more difficulty persuading listeners, they may be wise to seek the imprimatur of more trustworthy sources . . . . Moreover, the perception that a message is endorsed by such sources can help dispel onlookers' suspicion of perspectives understood to be in the speaker's own interest.<sup>82</sup>

The appearance of voluntariness makes consumer speech more persuasive than the advertiser's own obviously self-interested speech.<sup>83</sup> Studies of Internet use in particular replicate this result. To take one significant example, consumers seek out and trust health information from other people (apparently) like them much more than they seek out and trust information from pharmaceutical companies.<sup>84</sup>

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82. Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 592-93 (2008) (footnotes omitted); see also Shelly Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 460, 464 (1994) (finding that, under many circumstances, product evaluations supposedly from *Consumer Reports* were more persuasive than the identical evaluations supposedly from a retailer); Roobina Ohanian, *The Impact of Celebrity Spokespersons' Perceived Image on Consumers' Intention to Purchase*, 31 J. ADVERTISING RES. 46, 47, 52 (1991) (noting that friends are perceived as more trustworthy than sales personnel because of the potential conflict of interest, and that the consumer "does not associate a high level of trustworthiness with individuals [such as celebrity endorsers] who get paid handsomely to promote a product"); Elaine Walster et al., *On Increasing the Persuasiveness of a Low Prestige Communicator*, 2 J. EXPERIMENTAL SOC. PSYCHOL. 325, 327 (1966) available at <http://www2.hawaii.edu/~elaine/14.pdf> (stating that perceived self-interest decreases the credibility of a source, while perceived altruism increases it, whether the source is generally low in credibility (a criminal) or high in credibility (a prosecutor)).

83. See Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 8 (arguing that consumers are wary of, and thus likely to discount, claims made by advertisers out of the advertisers' self-interest).

84. Noah Elkin, *How America Searches: Health and Wellness*, ICROSSING 15, Jan. 2008, available at <http://www.icrossing.com/articles/How%20America%20Searches%20%20Health%20and%20Wellness.pdf> (showing substantial use of user-generated content and online social communities for health and wellness).

Advertisers can also take advantage of the phenomenon of social proof: people have a powerful tendency to put faith in the wisdom of crowds, which viral marketing can simulate.<sup>85</sup> Multiple sources endorsing the same product are more persuasive than a single source repeated multiple times.<sup>86</sup> Using apparently different sources is especially useful for strengthening initially less-plausible claims. Even better from the marketer's perspective, people don't understand why they find the repeated, multiple-source claim plausible. They attribute it to the inherent truth value of the claim rather than to the repetition, making them particularly vulnerable to manipulation of this type.<sup>87</sup>

With a wide swath of user-generated content, in the absence of disclosure a consumer can't tell whether a reviewer was compensated for the review or was simply sharing her opinion because she believed everyone is entitled to it.<sup>88</sup> As Mark Bartholomew's piece in this volume

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information); *id.* at 16 ("Consumers rank pharmaceutical companies and television as the two least trusted sources for information about health-related issues and questions, and place them in the bottom tier in terms of sources that influence their medication choices.").

85. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 99-102 (5th ed. Pearson 2009) (1985); Norton, *supra* note 82, at 593 ("Some onlookers also rely on the public's reaction to a message as a shortcut for evaluating its content, using widespread acceptance or audience enthusiasm to gauge a message's quality.").

86. Anne L. Roggeveen & Gita Venkataramani Johar, *Perceived Source Variability Versus Familiarity: Testing Competing Explanations for the Truth Effect*, 12 J. CONSUMER PSYCHOL. 81, 87 (2002) ("[B]elief in a claim is greater when it is perceived as coming from two different sources (vs. a single source)."); *id.* at 90 ("When claims are less plausible, feelings of familiarity engendered by repetition alone are not sufficient to enhance belief in the claim. However, exposure to the less plausible claim multiple times, each time from a different source, does enhance belief in repeated versus new claims.").

87. *Id.* at 90 ("[T]he truth effect does occur for seemingly less plausible statements; however this occurs only under conditions where the multiple repetitions can be attributed to multiple sources. . . . [S]ubjects had no access to their use of number of sources in rating the truth value. Instead, subjects seized on the most likely explanation for their ratings—the plausibility of the claim. It appears that the use of source variability is an automatic process.").

88. See *FTC Endorsement Guides*, *supra* note 73, at 53,136. Press Release, FTC, *FTC Facts for Business, The FTC's Revised Endorsement Guides: What People Are Asking* 2 (June 2010), <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.pdf> [hereinafter *What People Are Asking*] (justifying disclosure requirements for bloggers who act as endorsers). "[M]any bloggers

explains, people routinely use brands and brand claims to establish their own identities and social positioning, and are understood as doing so by their audiences. Even the most cynical observer doesn't expect that everyone she sees has been paid to use, wear, praise, etc. the things they are using, wearing, praising, and so on. Given that companies exist to sell their products and services, the default expectation is that the money has flowed from consumer to seller by the consumer's choice, and not the reverse. As a result, in the absence of disclosure, consumers will not assume that an apparently independent endorsement is in fact sponsored.

The FTC's announced intent is not to change traditional product reviews, but to ensure that marketing on social networks and (apparently) personal blogs is disclosed.<sup>89</sup> Some claim infringement on free speech, while others see FTC attention toward bloggers as a sign of their maturity and perhaps growing professionalism. If bloggers who are compensated for touting products tell their readers so, that may increase the level of trustworthiness both of their own posts and of posts where no disclosure is made, because

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who mention products don't receive anything for their reviews and don't get a commission if readers click on a link to buy a product". *Id.* at 2.

89. See Amy E. Bivens, *Endorsements Guides Not Meant to Address Traditional Reviews Online*, *FTC Official Says*, 15 *Electronic Com. & L. Rep.* (BNA) 1516 (Oct. 21, 2009) (quoting Mary Engle, the FTC's associate director for advertising practices: "We are concerned that if an advertiser pays or provides other incentives to an individual in exchange for writing about a product on MySpace or a personal blog, there is nothing there to suggest how an individual got a product or a mechanism for consumers to evaluate connections between reviewers and advertisers"; "[t]hat concern is less prevalent among websites that resemble offline product reviews, [she] elaborated, because consumers understand the connection between traditional reviewers and brands."); Fawn Johnson, *FTC to Target Advertisers, Not Bloggers, in New Guidelines*, *NASDAQ*, Oct. 14, 2009, <http://www.nasdaq.com/aspx/stock-market-news-story.aspx?storyid=200910141225dowjonesdjonline000606&title=ftc-to-target-advertisersnot-bloggersin-new-guidelines> ("We will be focusing any enforcements on advertisers, not on individual endorsers," Engle said . . . [T]he FTC's focus has always been on 'bad actor' advertisers. 'If a marketing company is paying people per blog or per tweet and not disclosing that in a large marketing scheme, then we can bring an investigation and that can lead to a lawsuit against the company,' Engle said. Bloggers are expected to post whether they are paid for a positive post or if they received free products to review, 'but the primary obligation is on the advertiser to tell the blogger to do it,' Engle said.").

readers will be more able to determine when an opinion is truly based on an independent assessment.<sup>90</sup> Without regulation, a market for lemons will develop—a deterioration in the credibility of public discourse, because audiences won't be able to trust that a stated opinion is independent and sincerely held.<sup>91</sup>

B. *Theoretical Concerns Relating to Disclosure and Substantiation*

Debates over speech labeled “commercial” for purposes of First Amendment analysis often focus on the content of such speech, not its source, but source is also a puzzle. Underlying both the specific set of regulations at issue here and the divide in the constitutional status of commercial and noncommercial speech is the idea that there is something different about selling as the objective of speech. It naturally follows that we have to be prepared to decide what counts as selling. With respect to endorsements, the theory is that he who pays the piper calls the tune—even if the piper has license to improvise. This section explores in further detail the challenge that new forms of endorsement pose to commercial speech doctrine.

1. *Can Money Buy Noncommercial Speech?* The new guidelines offer opportunities to consider what is different about commercial speech. People paid to speak well of a product might lack an autonomy interest in expressing this preference, as Robert Post has argued, thus falling within conventional definitions of commercial speakers.<sup>92</sup> It is

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90. See, e.g., Kayleen Schaefer, *Fessing Up About Freebies*, N.Y. TIMES, Oct. 15, 2009, at E6.

91. George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, in EXPLORATIONS IN PRAGMATIC ECONOMICS: SELECTED PAPERS OF GEORGE A. AKERLOF (AND CO-AUTHORS) 27, 33-34 (2005).

92. Post, *Constitutional Status*, *supra* note 20, at 12 (“[W]e most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the nation. . . . [T]his is not ultimately a judgment about the motivations of particular persons, but instead about the social significance of a certain kind of speech.”). One might argue that newspapers, too, are careful not to anger advertisers. Still, the advertiser’s degree of influence over both topic choice and perspective, as well as consumer reactions, may justify disclosure-specific regulations. See *infra* Part III.B.2.

therefore important to ask whether the new guidelines truly cover commercial speech or noncommercial speech.

The activities of the advertiser, if they are speech, appear to be commercial speech: designed to promote a product. Perhaps they are even less than that. Providing a free sample, or a hotel stay or other goodwill-inducing amenities, doesn't seem like speech at all even if these acts have effects on the ultimate composition and balance of speech in the marketplace of ideas. After all, taxes and many other government policies affect the composition and balance of speech, but that doesn't make every government act a speech regulation.<sup>93</sup> One could argue that the FTC guidelines are different in that they are *designed* to affect the content of speech (that is, whether the speech contains a disclosure of affiliation and follows substantiation requirements), but that focuses analysis on the effects of the guideline on bloggers' speech—considered next—and does not require the conclusion that the advertiser's goodwill-seeking behavior is itself speech.

What about directly paying for a positive blog review? Money can be speech, or at least can be treated like speech, when it's used to buy speech.<sup>94</sup> In this context, the

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93. But if money is speech, why isn't a car (also worth money) speech? The problem, ultimately, is with the equation of money with speech, as has been noted many times before.

94. Even in the campaign finance reform context—involving heavily protected political speech—the Supreme Court has so far upheld restrictions on the amount of money donors can give directly to candidates and, crucially, it has also upheld disclosure requirements, on the theory that such requirements have important democratic discourse benefits without interfering with the free flow of the substance of the speech. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914-16 (2010) (rejecting a constitutional challenge to disclosure requirements). “[T]he public has an interest in knowing who is speaking about a candidate shortly before an election,” making “the informational interest alone . . . sufficient to justify application” of disclosure requirements to ads promoting a political film. *Id.* at 915-16. *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 96 (2003) (upholding requirement of disclosure of identities of anyone who contributed substantially to making electioneering ads); *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976) (holding that although disclosure of contributor identities might deter some political contributions, the justifications were sufficient to satisfy “exacting scrutiny” under the First Amendment); *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995) (“Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender’s political views. Nonetheless, even though

advertiser's money would be commercial speech, designed to promote a commercial transaction. Given that commercial speech doctrine favors disclosure and that substantiation is already required for ad claims, the new guidelines don't seem problematic from the perspective of the advertiser.

What, then, of the blogger's speech? If the blogger were a copywriter, it would seem obvious that her speech was commercial even if the transaction it promoted wouldn't provide any further benefit to her. She would be an agent of the advertiser for commercial speech purposes and could claim no greater speech rights than the advertiser itself, just as an ad-supported newspaper couldn't assert greater rights to run ads than the advertiser could.<sup>95</sup> At most, the blogger might be able to claim that the FTC could not enforce its regulation directly against her without satisfying the more exacting standards for requiring disclosures on noncommercial speech. But if the FTC can penalize an advertiser whose compensated promoters make unsubstantiated claims or fail to disclose the existence of compensation, then it can achieve much the same result, in terms of advertiser incentives and deterrence, as if it regulated bloggers directly. Indeed, the FTC has announced its intention to focus enforcement on advertisers themselves. And this result is not shocking: we already accept that noncommercial speakers like traditional newspapers can be held liable for the commercial speech they facilitate in certain circumstances, such as when a

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money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill . . ."). Campaign finance laws do not necessarily require on-ad disclosure, but the greater burden of on-ad disclosure is balanced by the greater benefit to the audience. *See* *Majors v. Abell*, 361 F.3d 349, 353 (7th Cir. 2004) ("[T]he very thing that makes reporting less inhibiting than notice in the ad itself—fewer people are likely to see the report than the notice—makes reporting a less effective method of conveying information that by hypothesis the voting public values.").

95. *See, e.g., Kasky v. Nike, Inc.*, 45 P.3d 243, 256 (Cal. 2002) ("[C]ommercial speech generally or typically is directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting.") (emphasis added); *id.* ("Economic motivation likewise implies that the speech is intended to lead to commercial transactions, which in turn assumes that the speaker and the target audience are persons who will engage in those transactions, or their agents or intermediaries.") (emphasis added).

newspaper runs an ad for housing or employment that discriminates on the basis of race or sex.<sup>96</sup>

Ellen Goodman argues that the paid blogger is engaging in “mixed” speech, making determination of whether her speech is commercial a difficult proposition.<sup>97</sup> By contrast, I would argue that a significant economic benefit—whether past or expected—conferred by the subject of the speech is enough to make the blogger’s speech commercial for purposes of First Amendment analysis, at least when the issue is whether the economic relationship between the blogger and the advertiser should be disclosed.<sup>98</sup> That is, not all portions of a particular post might be commercial speech, and not all regulations on that post might be constitutional,<sup>99</sup> but a disclosure requirement focused on the

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96. Congress made it unlawful to “make, print, or publish, or cause to be made, printed, or published” discriminatory ads for housing. 42 U.S.C. § 3604(c) (2006). Specifically, Congress did not exempt ads run by individuals who were exempt from the underlying antidiscrimination requirement; such individuals are required to find ways to discriminate without the assistance of publishers, 42 U.S.C. § 3603(b) (2006); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 386-89 (1973); Nicholas Pedriana & Amanda Abraham, *Now You See Them, Now You Don’t: The Legal Field and Newspaper Desegregation of Sex-Segregated Help Wanted Ads 1965-75*, 31 LAW & SOC. INQUIRY 905, 911-17 (2006). See generally Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women’s Movement, and the Battle over Sex-Segregated Job Advertisements*, 51 SOC. PROBS. 182 (2004) (detailing the events leading up to the *Pittsburgh Press* decision).

97. Goodman, *supra* note 55, at 699.

98. Cf. *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (“[I]t does not resolve where the line shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech and free assembly are claimed is one ‘engaged in business activities’ or that the individual who leads it in exercising these rights receives compensation for doing so. . . . These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests . . .”).

99. The fact that some elements of a post constituted noncommercial speech—discussing, for example, a blogger’s political beliefs—would not prevent regulation of the commercial elements. When commercial and noncommercial elements are “inextricably intertwined,” treating the speech as noncommercial is appropriate, but the Supreme Court has limited this principle to cases in which there is practical or legal compulsion to combine the two types. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (“No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”).

potential for deception and distortion of consumer decisions based on the economic relationship between the underlying advertiser and the speaker is consistent with the justification for commercial speech doctrine.<sup>100</sup> As Justice Stevens wrote in advocating a functional definition of acceptable commercial speech regulations: “When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”<sup>101</sup>

Focusing on commercial harms and the preservation of a fair bargaining process can help explain why undisclosed sponsorship or unsubstantiated claims made by a party compensated for making those claims can be regulated.<sup>102</sup> I

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100. The FTC’s requirement that sponsored speech follow the same substantiation requirements that conventional advertising does is more interesting than the disclosure requirement, but follows from the same agency principles. See discussion *infra* Part III.C. If substantiation can be required at all, it can be required of statements made by an advertiser’s agents. See *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 309 (7th Cir. 1979) (“The [Federal Trade Commission Act] does not make mental state an element of violation and creates no exemption from liability for parties not involved in the creation of the false advertising or for unwitting disseminators of false advertising.”); *id.* (“[T]hat an advertiser made its representations in good or bad faith is not determinative of whether such statements are deceptive and misleading.”) (quoting *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968)); *cf.* Delcianna J. Winders, Note, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 469-70 (2006) (“[A] manufacturer that has verified that its ‘cruelty-free’ claims are accurate might bring suit [under the Lanham Act] against a company that claims its products are ‘cruelty-free’ while continuing to hire subcontractors to perform animal-based ingredient testing.”). See generally Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007) (explaining why a system that regulates false and misleading commercial speech without First Amendment scrutiny and with no heightened scienter requirement for fraud is desirable).

101. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (per curiam) (Stevens, J.).

102. *Id.* at 502 (Stevens, J.) (“It is the State’s interest in protecting consumers from ‘commercial harms’ that provides ‘the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.’” (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993))).

will take up the question of the blogger as the advertiser's representative, and the extent to which the common law of agency isn't the limit of appropriate regulation, further in the discussion of section 230 of the CDA in Section III.C below.

2. *Speaker-Based Discrimination?* A related issue is whether the regulation, though potentially acceptable, is unconstitutionally underinclusive because it does not require the same disclosures for mass media reviewers who also receive freebies or whose employers are paid for the endorsements.<sup>103</sup> The argument would be based on a principle embraced by the Supreme Court in *R.A.V. v. City of St. Paul*: even when an entire class of speech, such as fighting words, may constitutionally be regulated, constitutional infirmity may arise if the regulator chooses a subclass on the wrong basis.<sup>104</sup> The harm in *R.A.V.* was, the Court believed, viewpoint discrimination, because the law in that case barred racially discriminatory fighting words and not racially egalitarian fighting words, thus treating speakers with different viewpoints differently.<sup>105</sup>

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103. Pay-for-placement deals are growing in traditional media for many of the same reasons that advertising is creeping into user-generated content. See Goodman, *supra* note 11, at 142 (arguing that the increasing difficulty of capturing audience attention in a media-fragmented world make payola, product placement, and other advertiser-friendly but secretive practices more attractive as ways for advertisers to get attention and media producers to fund their productions while traditional ad revenues fall). Goodman argues that disclosure policies should be technology-neutral, though she does not suggest that variation is constitutionally infirm. See *id.* at 145, 151.

Perhaps there *should* be a general disclosure requirement when, for example, an advertiser funds a novel. Given the constitutionality of disclosure requirements in political ads, there would seem to be no constitutional barrier, assuming that the government articulated a sufficient justification for novelistic disclosures. Product placement does exist in novels. See David D. Kirkpatrick, *Now, Many Words From Our Sponsor*, N.Y. TIMES, Sept. 3, 2001, at A1 (describing "marquee" author Fay Weldon's acceptance of an undisclosed sum of money to feature Italian jewelry company Bulgari in her 2001 novel THE BULGARI CONNECTION). Kirkpatrick explains that while this advertising arrangement was believed to be the first for the book industry, "the current crop of 'chick lit' novels and memoirs about the lives of young women offers potential for touting vodka, cigarettes, clothing and other brands, [Weldon's agent] said. 'The sky is the limit.'" *Id.*

104. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-84 (1991).

105. *Id.* at 391-92.

There does not seem to be viewpoint discrimination in the new FTC guides, but there is (arguably) speaker discrimination between old and new media, which often seems much like content discrimination and thus might seem to require some sort of credible justification.<sup>106</sup> An unsympathetic view of the new rule is that it treats non-traditional sources as less trustworthy than old media, even though consumers deceived by undisclosed connections between bloggers and advertisers may also be deceived about the ways in which undisclosed complimentary products and related perks influence newspaper and magazine writers.

The FTC, however, maintains that there is no difference at all in treatment. In response to the question, “Do the Guides hold online reviewers to a higher standard than reviewers for paper-and-ink publications?” the FTC states:

No. 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—themselves. But on a personal blog, a social networking page, or in similar media, the reader 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.<sup>107</sup>

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106. *But see* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005) (surveying the ways in which broadcast media have traditionally been treated differently than print media, as a perfectly acceptable speaker-based distinction at the core of modern First Amendment law).

107. *What People Are Asking*, *supra* note 88, at 3; *see also* *FTC Endorsement Guides*, *supra* note 73, at 53,136 (“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

Moreover, there is not a significant problem of newspapers and other traditional media getting paid to place favorable reviews without disclosure,<sup>108</sup> and there are in fact already some disclosure laws governing broadcast media.<sup>109</sup>

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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.") (footnotes omitted).

108. As Ellen Goodman points out, newspapers (and magazines) generally adhere to a convention of putting "advertisement" prominently on ads otherwise formatted to look like editorial content, in order to decrease the risks of deception. They do this to comply with a journalistic norm and with an admittedly underenforced law. Goodman, *supra* note 11, at 151. *But see* Josef Adalian, *NBC's 'Southland' Pushes Ad Limits in L.A. Times*, TELEVISION WEEK, Apr. 9, 2009, [http://www.tvweek.com/news/2009/04/nbcs\\_southland\\_pushes\\_ad\\_limit.php](http://www.tvweek.com/news/2009/04/nbcs_southland_pushes_ad_limit.php); Bob Steele, *L.A. Times Pitched NBC on 'Southland' Front Page Ad Concept*, POYNTERONLINE: EVERYDAY ETHICS, Apr. 10, 2009, <http://www.poynter.org/column.asp?id=67&aid=161630>. In tough economic times, the temptation to violate traditional newspaper norms may prove too great to resist. If newspaper publishers develop a problem with undisclosed advertiser-sponsored content, then they, too, should be prepared for the FTC's interest.

109. *See Endorsement Guides*, *supra* note 73, at 53,136 (noting that the FTC would take a different view of traditional media reviews if the reviewer received benefits directly from the manufacturer or its agent); Goodman, *supra* note 11, at 84 (federal law bars secret payments to radio stations to play music, and undisclosed payments to broadcasters to feature products or story lines). The Communications Act requires broadcasters to disclose sponsors who provide any type of valuable consideration, though free products or services are exempt if they have minimal value. *See* 47 U.S.C. § 317 (2006) (requiring broadcasters to disclose to their listeners or viewers if matter has been aired in exchange for money, services or other valuable consideration, though, subject to certain exceptions, no disclosure is necessary for "any service or property furnished without charge or at nominal charge for use on, or in connection with, a broadcast . . ."); 47 C.F.R. § 73.1212 (2008) (detailing broadcasters' responsibilities); *see also* 47 U.S.C. § 508 (payola disclosure provision requiring that, when anyone provides or promises to provide money, services or other consideration to someone to include program matter in a broadcast, that fact must be disclosed in advance of the broadcast); Sponsorship Identification Rules and Embedded Advertising, 23 F.C.C.R. 10682 (2008) (notice of inquiry and proposed rulemaking). The FCC has occasionally enforced its rules against failure to disclose the source of paid programming such as Department of Education-funded promotion of No Child Left Behind and company-generated video news releases that look like standard news reporting. *See, e.g.,* Comcast Corp., 07 D.A. 4005 (2007) (notice of apparent liability), *available at* <http://www.fcc.gov/eb/Orders/2007/DA-07-4005A1.html>; Sonshine Family Television, Inc., 07 F.C.C. 152 (2007) (notice of apparent liability), *available at*

This justification discounts the potentially distorting role of special access—the way that getting free movie tickets to a preview or other forms of special treatment might distort reporters’ reactions by generating goodwill in pretty much the same way that gifts directly to bloggers or reporters can. But that is just a more specific version of the general criticism that speech is influenced by all sorts of factors, such that commercial speech is no different than noncommercial speech. As long as the divide in constitutional status between the two types persists, it should be reasonable for the FTC to determine that direct gifts require disclosure.

The undisclosed sponsorship problem in new media is also more of a concern because of bloggers’ greater heterogeneity. 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.<sup>110</sup> Readers cannot tell which reviewers offering

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<http://www.fcc.gov/eb/Orders/2007/FCC-07-152A1.html>; Letter of Citation to the Graham Williams Group, 07 D.A. 3351 (2007), *available at* <http://www.fcc.gov/eb/Orders/2007/DA-07-3351A1.html>.

110. See *FTC Endorsement Guides*, *supra* note 73, at 53,135 (“[A] consumer-generated endorsement [on a blog] appears in a medium that does not make [the] association with the advertiser apparent to consumers.”); *id.* at 53,134 (“[O]ne factor in determining whether the connection between an advertiser and its endorsers should be disclosed is the type of vehicle being used to disseminate that endorsement—specifically, whether or not the nature of that medium is such that consumers are likely to recognize the statement as an advertisement (that is, as sponsored speech). Thus, although disclosure of compensation may not be required when a celebrity or expert appears in a conventional television advertisement, endorsements by these individuals in other media might warrant such disclosure.”); *What People Are Asking*, *supra* note 88, at 2 (“[T]he financial arrangements between some bloggers and advertisers may be apparent to industry insiders, but not to everyone else who reads a blog.... [E]ven if some readers are aware of these deals, many readers aren’t.”). Others agree with the FTC that consumers are not yet certain how to interpret social media and other Internet sources, and thus are vulnerable to deception from undisclosed connections. See Sullivan, *supra* note 81 (“Surprisingly, inserting an extra step into the process—fake testimonials and blogs—dramatically improves [responses to ads], [an Internet marketer] said. ‘Fifteen years people have been trying to market online, this proved to be key,’ he said. ‘The biggest difference is that somebody realized that blogging as a medium had seeped into consciousness and become like TV news, had become a trusted source. The average person doesn’t realize blogging can be easily manipulated.’”).

opinions on an auto-focused website have been compensated. They can more readily evaluate the more familiar role of the newspaper car columnist. One might argue that the risk of deception is lower with unfamiliar or new media, but the social science evidence suggests the contrary. People don't use old coping strategies as well against new forms of persuasion.<sup>111</sup> Moreover, even as the Internet ages, the problem of heterogeneity—the inability to figure out which ten out of every hundred reviewers are paid shills—will continue to be a problem not present in more traditional media, which cannot and do not present one hundred reviews of the same thing.

Even *R.A.V.* recognized that a regulator can legitimately target a subset of regulable speech, as long as that subset is of greater concern because of the reason the overall category is regulable in the first place.<sup>112</sup> So, if potential deception over sponsorship is a worse problem with user-generated content than with traditional commercial media, then the inequality argument loses force (though improved disclosure requirements for traditional media might also be justified). This conclusion may be particularly persuasive with respect to a disclosure requirement, given that it does not outright ban any speech and is not a significant burden on a speaker.

3. *The Benefits and Burdens of Disclosure.* Disclosure is, in fact, a constitutionally favored method of commercial speech regulation because it supposedly improves the quality of speech without necessarily interfering with the

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111. DAVID M. BOUSH, *DECEPTION IN THE MARKETPLACE: THE PSYCHOLOGY OF DECEPTIVE PERSUASION AND CONSUMER SELF-PROTECTION* 16-17, 189 (2009) (deception protection strategies are context-specific and do not transfer well across situations, especially in new media).

112. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (“When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity.”).

speaker's own legitimate interests in conveying truthful information.<sup>113</sup> As Seth Kreimer explains,

[some First Amendment] cases suggest that the same words from different sources should be accorded different weights, and perhaps different meanings. The ability to conceal this information from the public, in this view, is a means of manipulation by which speakers gain their objects without public consent. This emphasis on origin accords with our everyday experience as lawyers and citizens. Witnesses are impeached or accredited by showing their background, and the weight of opposing counsel's assurances may depend on counsel's character. Our reaction to a request to sign a petition

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113. In *Va. Bd. of Pharmacy, v. Va. Citizens Consumer Council*, the Court held that commercial speech could be required to "include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." 425 U.S. 748, 771 n.24 (1976). See also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985) ("In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. . . . [A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonable related to the State's interest in preventing deception of consumers."); cf. *Doe v. Reed*, 130 S.Ct. 2811 (2010) (upholding facial constitutionality of identity disclosure requirement in the context of political petitions in order to avoid fraud and foster government transparency and accountability); *Meese v. Keene*, 481 U.S. 465, 480-81 (1987) (upholding a law requiring disclosure of foreign origin for films attempting to alter American foreign policy because it was a valid method of enabling the public to better evaluate the film; in reality, to enjoin the mandatory disclosure of the film's origin actually "with[held] information from the public"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (holding that at least for "highly visible" political advertising, the government has a compelling interest in notifying voters of an advertisement's source); *Viereck v. United States*, 318 U.S. 236, 251 (1943) ("[T]he fundamental constitutional principle [is] that our people, adequately informed, may be trusted to distinguish between the true and the false . . . [and disclosure laws insure] that hearers and readers may not be deceived by the belief that the information comes from a disinterested source."); *id.* (holding that a federal source disclosure law for agents of foreign countries "implements rather than detracts from the prized freedoms guaranteed by the First Amendment"); *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004) (presuming that disclosure of the entities behind political ads will improve the information environment for citizens by providing useful information).

might well differ depending on whether it was circulated by Ralph Nader, Jerry Falwell, or Lyndon Larouche . . . .<sup>114</sup>

Depending on the circumstances, knowing the name of a speaker may not be enough. Audiences consider it relevant that an advertiser paid for a review,<sup>115</sup> and not just in the U.S.; the European Commission recently took the position that undisclosed sponsorship is unfair to consumers even if the factual message conveyed is true.<sup>116</sup> We generally believe that having a material interest in some outcome affects one's position in advocating for that outcome. Sponsorship disclosure, therefore, is a way of protecting

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114. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 82 (1991). In large part because of the risks of retaliation against members of unpopular political groups, Kreimer does not endorse this principle as sufficient to justify all disclosures in the case of political speech. Kreimer does not address commercial speech.

115. Cf. Malcolm A. Heinicke, *A Political Reformer's Guide to McIntyre and Source Disclosure Laws for Political Advertising*, 8 STAN. L. & POL'Y REV. 133, 139 (1997) ("The 1994 battle over Proposition 188 in California provides a good example of the need for source disclosure laws. Proposition 188 involved the tobacco industry's attempt to invalidate some of California's anti-tobacco laws. Knowing that it would have difficulty convincing the public to support its self-serving initiative, the industry disingenuously billed its measure as a tobacco control effort. Once voters realized that the tobacco industry had sponsored the initiative and its advertisements, however, the measure was doomed. Indeed, California voters overwhelmingly defeated the measure. Had the tobacco industry been able to remain anonymous (as it largely was during the signature drive which successfully put the measure on the ballot), the measure would likely have fared better. . . . [I]n discussing this article with a constitutional law professor, I asked her how she had voted on Proposition 188. She answered that she had voted *against the tobacco industry* after someone explained the measure to her. In other words, even for world-class legal scholars, the source of a campaign ad is a necessary tool for evaluation. Furthermore, not all voters have access to cogent explanations, and thus, may rely even more on the identity of the proponents and opponents of ballot measures for guidance.") (footnotes omitted).

116. See EUROPEAN COMM'N, GUIDANCE ON THE IMPLEMENTATION/APPLICATION OF DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES 8, 31 (2009), [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf) (explaining that commercial practices are misleading if they are untruthful in any way or if, in their "overall presentation, [they] deceive[ ] or [are] likely to deceive[ ] the average consumer, even if the information is factually correct"; marketing would be "unfair" if, for example, cosmetic companies paid bloggers to promote and advertise their products on a blog, unbeknownst to other users).

listeners' autonomy against manipulation.<sup>117</sup> As Eric Goldman notes, consumers "routinely say that they want to know when content is marketing."<sup>118</sup>

This problem has been recognized in other areas of the law, for example in the copyright case of *Ty v. PIL*, where Ty required its licensees who produced collector's guides to its Beanie Babies to disclaim affiliation. Judge Posner commented that this practice was misleading. Ty's licensees offered opinions about the value of Beanie Babies that were more credible because they appeared—but were not in fact—independent, thus allowing Ty to reap greater profits. The law intervened by allowing others to produce unauthorized guides, denying Ty control over the market it had been distorting.<sup>119</sup>

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117. See Kreimer, *supra* note 114, at 87 ("If anonymity can be invoked at will by the speaker . . . the speaker may use anonymity strategically to induce the listener to act in accord with the speaker's will. Selective silence can manipulate preferences as effectively as speech . . ."). Kreimer finds this insufficient to justify certain disclosures in the political arena, because the messages that benefit from anonymity or nondisclosure are those from culturally disfavored sources—politically unpopular groups like Communists—making forced disclosure a tool that is easily misused for political ends. See *id.* at 88. "The Surgeon General is unlikely to claim the benefits of anonymity, although the CIA may do so. Popular speakers need no shelter." *Id.* With respect to "astroturfed" speech by marketers, this dynamic is not present. Though consumers may be skeptical of ad claims, there is no reason to think that they are biased against Coca-Cola or General Motors generally, or that these entities are at risk of either governmental or popular oppression; they run plenty of ads, but also want "user-generated" endorsements that seem independent. Cf. R. George Wright, *Free Speech and the Mandated Disclosure of Information*, 25 U. RICH. L. REV. 475, 491-92 (1991) (arguing that discriminatory effect is an important consideration in evaluating claims that disclosure requirements are illegitimate). Kreimer also argues that marketing is not as efficacious as we once thought it was, so disclosure isn't as necessary—our "media-saturated electorate" won't be "duped into self-destruction by nefarious forces hiding behind 'institutes' or 'coalitions.'" Kreimer, *supra* note 114, at 88. Again, his concerns may be convincing with respect to political speech by misleadingly-named institutes and coalitions, but the rise of social media has created a new opportunity for exploitation of consumers' belief in the credibility of other consumers' individual experiences.

118. Goldman, *Coasean Marketing*, *supra* note 5, at 1189.

119. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 520 (7th Cir. 2002) ("Ty doesn't like criticism, and so the copyright licenses that it grants to those publishers whom it is willing to allow to publish Beanie Baby collectors' guides reserve to it the right to veto any text in the publishers' guides. It also forbids its licensees to

Just as disclosure has benefits, nondisclosure has costs. Without some indication of the terms on which a “user” is participating in a debate—as a fan, as a shill, or as some combination—audiences may lose trust in the medium, moving user reviews and blog posts from credible grassroots judgments to unbelievable “astroturf.”<sup>120</sup>

Eric Goldman contests the policy basis for disclosure requirements.<sup>121</sup> One obvious risk is that overly complex disclosure might contribute to information overload.<sup>122</sup> However, it is not clear that “disclosure: I received a free Playstation in return for this post” is too hard for consumers

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reveal that they are licensees of Ty. Its standard licensing agreement requires the licensee to print on the title page and back cover of its publication the following misleading statement: “This publication is not sponsored or endorsed by, or otherwise affiliated with Ty Inc. All Copyrights and Trademarks of Ty Inc. are used by permission. All rights reserved.”) (citations omitted).

120. See Akerlof, *supra* note 91; Schaefer, *supra* note 90, at E6; see also Ann Bartow, *Some Peer-to-Peer, Democratically, and Voluntarily-Produced Thoughts*, 5 J. TELECOMM. & HIGH TECH. L. 449, 458 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)) (“Astroturf subverts an informal norm of the Internet and of the blogosphere in particular, authenticity.”); Goodman, *supra* note 11, at 86-87 (arguing that stealth marketing causes epistemic harms to the quality of public discourse and the integrity of public institutions, and that sponsorship disclosure thus corrects market failures). Without disclosure requirements, “[d]oubt that an editor has an authentic voice leads to an overgeneralization of distrust as audiences come to believe that mediated speech is inauthentic or untrue even when it is not.” *Id.*; Posting of John D. to Making Light, <http://nielsenhayden.com/makinglight/archives/007947.html#141279> (Sept. 2, 2006, 9:09) (“The killing aspect of astroturf is that it poisons the well of discourse. Before this, you could at least have a degree of confidence that the stupid was *authentic* stupid. I’m not sure if I can deal with sorting out the fake stupid.”) (quoted in Bartow, *supra*, at 460)).

121. Eric Goldman, *Stealth Risks of Regulating Stealth Marketing*, 85 TEX. L. REV. SEE ALSO 11, 13-14 (2006), available at <http://www.texasrev.com/seealso/vol/85/responses/goldman> (expressing skepticism that consumers will evaluate disclosures in the ways policymakers hope); see also Omri Ben-Shahar, *Myths of Consumer Protection: Information, Litigation, and Access*, Address for the Ronald H. Coase Lecture in Law and Economics (Feb. 17, 2009) (video available at <http://www.law.uchicago.edu/node/426>) c. 17:55 (criticizing disclosure requirements in general as unlikely to be understood or properly evaluated).

122. Goldman, *supra* note 121, at 14. Disclosure requirements can arguably be hard to implement, especially in a rapid-fire medium. See *id.* at 13-14.

to process.<sup>123</sup> Even the extremely short-form messages on Twitter are getting by with “Ad:” or “Sponsored:” at the beginning.<sup>124</sup>

Goldman further notes that consumers have trouble distinguishing sponsored from organic search engine results. Moreover, users sometimes seem to trust sponsored search results more than organic results: “consumers regularly rate the utility of paid Internet search results (such as ‘sponsored links’) as equal to or better than unpaid search results generated by the search engine’s algorithms. In one survey, 75% of consumers felt this way.”<sup>125</sup> At the same time, the label “marketing” is a turnoff, leading consumers to disregard content even when it might be relevant to them had they encountered it without the label. That is, consumers like paid results, but apparently they like them more when they do not know or are not thinking about the fact that they are paid. Thus, Goldman concludes, disclosure may paradoxically end up with consumers getting less of the information they want.<sup>126</sup> Worse, the disclosure

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123. Eric Goldman pointed out that each additional requirement adds something for consumers to process, and given how little we know about what goes on in consumers’ highly variable brains, there might well be people who are distracted by this disclosure from other information they would prefer to have. Goldman, *supra* note 121, at 14. This is certainly a possibility, but I believe it comes down to a judgment about what people, reasoning before the fact, would want to know about promotional messages. Not all matters of relevance can be disclosed in every message, and no one is seriously proposing that such a regime be tried. But the sponsorship of a message is relevant across a large number of situations.

124. The FTC takes the position that if a particular format makes disclosure impossible, the advertiser must avoid that format to prevent deception. There are things one can and can’t articulate in 140 characters. If the message is so incomplete that it becomes misleading when it’s that compressed, then Twitter isn’t an appropriate ad medium for that message. Caroline McCarthy, *Yes, New FTC Guidelines Extend to Facebook Fan Pages*, CNET NEWS, Oct. 5, 2009, [http://news.cnet.com/8301-13577\\_3-10368064-36.html?tag=mncol;mlt\\_related](http://news.cnet.com/8301-13577_3-10368064-36.html?tag=mncol;mlt_related) (“‘There are ways to abbreviate a disclosure that fit within 140 characters,’ [the associate director of the FTC’s advertising division] said. ‘You may have to say a little bit of something else, but if you can’t make the disclosure, you can’t make the ad.’”). As long as it is constitutional to ban misleading commercial speech, the FTC’s conclusion seems unobjectionable.

125. Goldman, *supra* note 121, at 12 (footnotes omitted).

126. *See id.* at 13 (“The ‘advertising’ label is a powerful disclosure; it can single-handedly cause consumers to overlook content they would have otherwise

requirements may convince consumers that the relationship between the advertiser and the speaker *matters*, when they might not otherwise care.<sup>127</sup>

Judges have expressed this overdeterrence concern in other circumstances, suggesting that disclosure interferes with an audience's ability to evaluate a claim on its own merits.<sup>128</sup> The legal argument, however, is generally tied to *anonymity* rather than failure to disclose a connection. The reasoning continues that readers are able to factor in anonymity (or pseudonymity) as part of their overall evaluation of the message's credibility. But by definition, readers can't factor in an undisclosed connection. At most, they can discount all claims because of the possibility of an undisclosed connection with the advertiser, which brings us back to the classic problem of the market for lemons: information generally becomes unreliable, as consumers discount independent information too much and sponsored

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found meritorious. A 2005 study . . . illustrates this risk. Consumers were shown multiple sets of Internet search results, some of which were labeled advertising. Although the search results substantively were the same, consumers rated the unlabeled search results as more relevant than the labeled results. In other words, the advertising label single-handedly degraded the consumers' relevancy assessment even though the search results had the same level of relevancy." (footnotes omitted); *see also* Feldman, *supra* note 81, at 3 ("[T]he FTC has infused confusion into the marketplace and will undoubtedly encourage disclosure of 'material terms' that are probably more likely to confuse consumers than help them.").

127. *See* Goldman, *supra* note 121, at 14-15 ("By mandating sponsorship disclosures, the government communicates to consumers that they should care about the distinctions between editorial and marketing content. . . . When the government makes disclosures louder, it may simply be ratcheting up the communicative import of the message, heightening consumer sensitivity to the sponsorship disclosure and magnifying the risk of erroneous consumer reactions to the disclosure.").

128. *See* *Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., concurring dubitante) ("[W]e must consider the possibility that anonymity promotes a focus on the strength of the argument rather than the identity of the speaker; this is a reason why Madison, Hamilton, and Jay chose to publish *The Federalist* anonymously. Instead of having to persuade New Yorkers that his roots in Virginia should be overlooked, Madison could present the arguments and let the reader evaluate them on merit."); *ACLU of Nev. v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004) ("[F]ar from enhancing the reader's evaluation of a message, identifying the publisher can interfere with that evaluation by requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message.").

information too little. Ultimately, anonymity and pseudonymity are distinguishable from the misrepresentation that accompanies puppetry.<sup>129</sup>

In light of consumers' discounting for uncertainty, the studies on which Goldman relies can be read multiple ways. In the one he cites most heavily, for example, there was a ten percent gap in perceived relevancy of the same result depending on whether it was presented to respondents as paid or organic, but that might simply reflect a useful heuristic, especially as searchers were generally able to find relevant results in the organic list.<sup>130</sup> At the very least, the

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129. The Supreme Court has generally considered anonymity and pseudonymity the same for constitutional purposes. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995) (equating anonymous speech with "authors writing under assumed names"). In *McIntyre*, the pseudonym used was arguably misleading, in that it claimed to speak for a group of citizens ("CONCERNED PARENTS AND TAXPAYERS") but was in fact produced only by one individual. *See id.* at 337. The Supreme Court nonetheless found that the First Amendment still barred a law requiring the individual to disclose her identity in order to engage in political speech. But a law targeted at impersonation would be quite different than that at stake in *McIntyre*. It seems likely that a law targeted at commercial sock-puppetry—borrowing a different consumer identity in order to avoid the credibility deficits of the commercial speaker's real identity—would at least warrant more judicial deference. *See McIntyre*, 514 U.S. at 354 n. 18 (distinguishing *McIntyre*'s independent individual speech from corporate speech on the ground that identification of the source of corporate advertising ". . .") (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978)); *cf.* VILI LEHDONVIRTA, TURKU SCHOOL OF ECON., VIRTUAL CONSUMPTION 45 (2009), [http://info.tse.fi/julkaisut/vk/Ae11\\_2009.pdf](http://info.tse.fi/julkaisut/vk/Ae11_2009.pdf) (summarizing work on effects of pseudonymity); Kumayama, *supra* note 71, at 444 ("With a name comes the ability to accrue reputational capital. This permits the actor to receive the same protections afforded by anonymity, but with the additional benefits that come with reputation—most notably, the ability to form enduring relationships.") (footnotes omitted). If the Supreme Court adheres to this position, *McIntyre* is thus unlikely to pose a barrier to commercial disclosure requirements. *See Meredith Hattendorf, Theoretical Splits and Consistent Results on Anonymous Political Speech: Majors v. Abell and ACLU of Nev. v. Heller*, 50 ST. LOUIS U. L.J. 925, 933-34 (2006).

130. *See* Bernard J. Jansen & Marc Resnick, Pa. State Univ., *Examining Searcher Perceptions of and Interactions with Sponsored Results* 4 (2005), [http://www.ist.psu.edu/faculty\\_pages/jjansen/academic/pubs/jansen\\_ecommerce\\_workshop.pdf](http://www.ist.psu.edu/faculty_pages/jjansen/academic/pubs/jansen_ecommerce_workshop.pdf) ("[P]articipants rated 52% of the organic listings as relevant compared to only 42% of the sponsored listings."). Participants rated pages they had accessed via "sponsored"-labeled links as about equally relevant to pages accessed via "organic"-labeled links, but because what was presented as "organic" and what was presented as "sponsored" had been manipulated, it is not clear how to interpret this finding: that is, they might have perceived

survey authors' conclusion that search engine advertising won't be a viable business without changes in consumer attitudes<sup>131</sup> is a little odd, given that search engine advertising is practically the only profitable business model on the Web. More generally, outcomes in search engine studies suggest that labeled, sponsored ads can be quite useful to consumers. The label "paid" is not a major deterrent to following links, even if (or perhaps because) consumers apply a credibility discount to ads compared to organic results.<sup>132</sup> Thus, disclosure seems unlikely to hamper welfare-enhancing uses of ads.

What consumers hate even more than marketing, though, is late-discovered marketing: "Search engines that were less transparent about paid search results lost credibility. . . ."<sup>133</sup> This last result supports the market-for-lemons concern: consumers dislike stealth marketing enough to punish its (suspected or discovered) purveyors. We return to the point that the alternative to labeling rules is pervasive uncertainty.

The negative consequences of nondisclosure for the trustworthy flow of information can also be seen by examining the flipside: the legal status of non-sponsored references and reviews. An unregulated regime would risk expanding trademark law even further to control expression about trademarked goods and services. If consumers must

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equality because, half the sponsored results having been relabeled as organic and vice versa, the relevance was equal. *See id.* at 5, figs. 3 & 4.

131. See Margaret Hopkins & Charles DuBois, *Consumers Suspicious of Sponsored Links*, PA. STATE LIVE, June 8, 2005, <http://live.psu.edu/story/12348>.

132. See Sha Yang & Anindya Ghose, *Analyzing the Relationship Between Organic and Sponsored Search Advertising: Positive, Negative or Zero Interdependence?* 3 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1491315](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491315). It appears that firms do best when their results appear as both organic and sponsored. *See id.* (manuscript at 4-5). Perhaps consumers use sponsored and organic results as relevancy checks on each other. *See id.* (manuscript at 25); see generally ICROSSING, SEARCH SYNERGY: NATURAL & PAID SEARCH SYMBIOSIS 3,5 (Mar. 1, 2007), <http://www.icrossing.com/research/icrossing-search-synergy-report.php> (reporting that organic and paid results synergistically reinforce one another); IPROSPECT, SEARCH ENGINE USER ATTITUDES 15-16 (Apr.-May 2004), <http://www.iprospect.com/premiumPDFs/iProspectSurveyComplete.pdf> (consumers tend to prefer organic results, but they also make significant use of sponsored results).

133. Jansen & Resnick, *supra* note 130, at 2.

expect an association between a trademark owner and a person who reviews that product (or even just when the review is positive), then trademark owners can argue actionable confusion when reviews are not to their taste. There are many plausible scenarios in which a rational trademark owner would object to a review, even one that wasn't a vicious attack: positive but profane, racist, or otherwise untoward reviews; mixed reviews; or reviews appearing alongside content of which the trademark owner does not approve. If the law holds that consumers must reasonably expect anyone's message to be associated with an undisclosed sponsor, then trademark owners will have firmer ground to make these extremely broad and speech-suppressive claims.<sup>134</sup>

Setting this problem aside, we are left with the difficult question of whether (possibly unwarranted) discounting of a sponsored message is better than (possibly unwarranted) credence given to an apparently unsponsored message. The real problem is that the very ideology of consumer competence which prompts calls for limiting the government's power to regulate commercial speech is inconsistent with the pragmatic objection to disclosure: if consumers discount information once they know it is marketing, perhaps they were overvaluing it—using their own valuation schemes—beforehand. If the state can't ban true information just because people might be convinced by it, then private parties also shouldn't be able to conceal true information just because people might be convinced by it.<sup>135</sup>

As a doctrinal matter, even in the context of political speech, courts have not required empirical evidence that identity disclosure improves decisionmaking. They have allowed regulators to rely on the strong intuition that such information is useful to citizens.<sup>136</sup> In essence, given that

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134. See Lemley & McKenna, *supra* note 54, at 414-15, 428, 444-45 (describing similar assertions and arguing that they should be rejected).

135. There is little reason to think that the market will provide the optimal level of disclosure, especially since efficient market theory itself assumes perfect information, and collapses in tangles when information is instead assessed as a cost. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 35-41 (1996).

136. See, e.g., Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225,

information regularly changes our preferences, a disclosure requirement is a precommitment to caring about source and sponsorship. It expresses a metapreference about how we want to make decisions and weigh information. This sort of precommitment strategy is a classic use of government to, in essence, tie ourselves to the mast.<sup>137</sup> The widespread and intense hatred for intrusive and undisclosed marketing, which Goldman catalogs,<sup>138</sup> is evidence that we consumers, acting as citizens, want to affect our own future decisions by providing ourselves with certain information that we might not otherwise have at the time we're being sold a particular product. No matter how seductive a particular pitch sounds when we hear it, and no matter how much we would want to believe, after we were convinced by it, that we would have been equally convinced had we known the pitch was sponsored, we want to avoid that situation. We want to be reminded that we're being approached for commercial gain at the time of the approach, so we can remember the reasons that we distrust ads in general.<sup>139</sup>

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251, 274, 289 (2003) (recognizing, though criticizing, this absence of empirical underpinning).

137. See, e.g., JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000); THOMAS C. SCHELLING, *Ethics, Law, and the Exercise of Self-Command*, in *CHOICE AND CONSEQUENCE* 83, 96-112 (1984) (examining legal frameworks for precommitment); Steven Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 *TEX. L. REV.* 2055, 2057 (2003) ("The theory of precommitment offers a framework for understanding the reasons that, and the methods by which, individuals and communities seek to bind themselves in the sense of preventing themselves from having full liberty of action at a time in the future."); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 *VA. L. REV.* 519, 522-25 (1988) (defending precommitment as an acceptable kind of self-paternalism).

138. *Coasean Marketing*, *supra* note 5, at 1152-54.

139. This argument does have perhaps disturbing scope. It could, for example, be used to justify disclosure of attempts to buy popularity, such as paying consumers to watch videos so that they'll make the list of "most watched," link farming to improve a website's position in search results, or buying books in bulk to help propel them to the top of best-seller lists. Most attempts to buy popularity—massive advertising campaigns—are self-evidently massive advertising campaigns and need no further disclosure. Nonetheless, if it becomes common to attempt to buy popularity in some other misleading way, and if self-defense by ranking entities fails (since Google, the *New York Times*, and other reporters on popularity generally try to filter out such manipulations), additional disclosure requirements could well be justified.

Goldman's policy argument nonetheless has a constitutional dimension. In *Riley v. National Federation of the Blind*,<sup>140</sup> the Supreme Court held that mandatory disclosure by fundraisers of the percentage of donated dollars spent on fundraising was an undue burden, in part because it might be misleading.<sup>141</sup> People might not understand that a high fundraising cost for a small charity with limited appeal could be perfectly consistent with a true charitable purpose and function; they might hang up on the fundraiser as soon as they heard the high percentage of receipts retained by the fundraiser.<sup>142</sup> Notably, the Supreme Court in *Riley* hypothesized that donors would be deterred from contributing by the disclosures, but did not have evidence of this.<sup>143</sup>

*Riley's* concern for disclosures that are in themselves misleading is a difficult argument for the regulatory position. Rather than positing careful and linguistically competent listeners, this criticism of disclosure engages with deceptiveness theory on its own terms, asking how

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140. 487 U.S. 781 (1988).

141. The Court did not use the term "misleading," but in presuming that disclosure would be "unfavorable," *id.* at 799, it recalled its earlier discussion of valid reasons for devoting a high percentage of revenues to fundraising—if the cause is unpopular or the charity's efforts involve education of listeners about the charity's issue as part of fundraising appeals. *See id.* at 793-94.

142. *Id.* at 799-800 ("[C]ompelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. First, this provision necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. . . . Second, in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone."). *But see id.* at 811 (Rehnquist, C.J., dissenting) ("[I]t seems to me that even in cases where the solicitation involves dissemination of a 'message' by the charity (through the fundraiser), the disclosure required by the statute at issue here will have little, if any, effect on the message itself, though it may have an effect on the potential donor's desire to contribute financially to the cause.").

143. *See id.* at 811-12 (Rehnquist, C.J., dissenting); *cf.* Wright, *supra* note 117, at 476, 484 (suggesting that *Riley* is, at base, about the clash of two views of a well-functioning marketplace, one of which requires some government intervention to facilitate informed transactions and the other which trusts the market over government).

truthful (but arguably incomplete) information is actually processed by consumers.<sup>144</sup> In other words, the concern for misapprehension might fairly be described as a paternalistic concern: people will receive truthful information and not know what to do with it.<sup>145</sup> If the disclosure distorts consumers' decisions more than nondisclosure does, then *Riley* suggests a First Amendment problem.

Because *Riley* involved noncommercial speech and the Court was careful to limit its holding to such speech,<sup>146</sup> the appropriate doctrinal answer might be that courts should defer to the FTC's judgment that particular commercial

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144. See generally Kreimer, *supra* note 114, at 79-82 (exploring the tension between the utility of disclosure to listeners and its ability to divert them from the speaker's message); Tushnet, *supra* note 100, at 237, 250-51 (canvassing situations in which disclosure of truthful information might change preferences and/or generate further factual inferences about the meaning of the disclosed information); cf. *Riley*, 487 U.S. at 798 (“[W]e would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate’s recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.”).

145. Cf. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (“There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”). Courts have since disfavored regulations that restrict information based on similar fears of how people will react to the message. See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 789-92 (1978) (“[Citizens] are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced[,] . . . it is a danger contemplated by the Framers of the First Amendment.”) (footnote omitted); *Geary v. Renne*, 911 F.2d 280, 283 (9th Cir. 1990) (invalidating on First Amendment grounds regulations that prevented political parties from telling voters which nonpartisan candidates the parties supported), *vacated as moot*, 501 U.S. 312 (1991).

146. *Riley*, 487 U.S. at 796 & n.9 (explicitly distinguishing securities disclosure requirements because securities law regulates commercial speech); cf. Securities Exchange Act of 1934 § 14, 15 U.S.C. § 78n(c) (1994) (governing disclosure).

speech is misleading. Other accepted legal regimes are also relevant, such as informed consent requirements. Legislatures and courts applying common law can require doctors and other professionals to disclose information because they conclude that patients and clients are entitled to additional information and may make better choices with it.<sup>147</sup> Likewise, pharmaceutical companies are required to disclose drug side effects; clothes merchants are required to disclose the composition of the fabric they sell; manufacturers generally are required to disclose the country of origin of their goods; and so on.<sup>148</sup> Turning these assessments into battles of the experts, such that mistakes about the net utility of the required information would result in First Amendment violations, would be a major, and unwarranted, change in constitutional law. The core issue is whether the government is allowed to find facts about deceptiveness. If it can (as would be required even for a basic ban on fraud), then its determinations, if made in procedurally reliable ways, deserve judicial deference.

The issue of who decides what's deceptive may explain why *Riley* was, from inception, sharply limited in its holding. *Riley* specifically stated that an identity disclosure

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147. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 968-72, 978-80 (2007) ("The state can require doctors to disclose accurate information, and it can equally prohibit doctors from providing misleading information.").

148. See, e.g., *United States v. Wenger*, 292 F. Supp. 2d 1296, 1305-07 (D. Utah 2003) (upholding compelled disclosure under securities laws). "[S]upporting this conclusion are the wealth of federal and state regulatory programs which require disclosure of product or other commercial information," including tobacco labeling, nutritional labeling, disclosures in prescription drug advertisements, disclosures of workplace hazards, and mandatory labeling of light bulbs to indicate if they contain mercury. *Id.* at 1307 (footnotes omitted); see also *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 373-74 (D.C. Cir. 1988) ("In areas of extensive federal regulation—like securities dealing—we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme. We note, however, that even if we were so required, disclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that 'absent the required disclosure, [the speech would be false or deceptive] or that the disclosure requirement serves some substantial government interest other than preventing deception' . . . Stock Market Magazine's failure to disclose consideration received in return for publication is then, in principle, constitutionally proscribable."); Tushnet, *supra* note 100, at 249-50 & n.104.

requirement—including a requirement that the fundraiser disclose his or her professional, which is to say paid, status—was constitutional notwithstanding that the law regulated fully protected noncommercial speech.<sup>149</sup> This seems quite similar to the disclosure requirement as stated by the FTC. The policy basis for disclosure is generally contestable, but given the demonstrated relevance of source to evaluations of information's credibility, source disclosure should be constitutionally permissible even if other mandatory disclosures would require more evidence on the state's part.<sup>150</sup>

This conclusion returns us to the idea of precommitment. Sponsorship disclosure can affect decisionmaking, in that a person who hears “this is an ad” may well discount the underlying claim more than she would have in the absence of the disclosure. But she is also likely to express a metapreference for knowing when she's hearing ads. This preference puts source disclosure in a somewhat better position, even from an anti-paternalistic standpoint, than certain other types of disclosure, as to which consumers are likely to have much less well-formed desires for precommitment (e.g., it is unlikely that consumers give much thought to the appropriate amount they want charities to spend on fundraising).

4. *Endorsements as Facts.* A final matter of significant theoretical interest is the question of what, exactly, is false or misleading about undisclosed endorsement relationships. In the U.S., the law has rarely attempted to regulate “image” advertising—advertising that does not make factual representations but attempts to create a “warm fuzzy glow”

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149. *Riley*, 487 U.S. at 799 n.11 (“[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.”); cf. Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. CAL. L. REV. 605, 627-29 (1991) (arguing that allowing mandated disclosure of professional fundraising status is not consistent with the Court's own reasoning rejecting mandated disclosure of percentage of money spent on fundraising; both will have similar effects on targets' decisionmaking and thus on charities).

150. Cf. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”).

or other feeling about a product or service.<sup>151</sup> From a classic commercial speech perspective, regulation of image ads would be difficult to justify because such ads are not falsifiable.<sup>152</sup> In false advertising doctrine, such claims are considered nonactionable puffery on which no reasonable consumer would rely.<sup>153</sup> The law has, in other words, equated nonfalsifiability with unreliability, and irrebuttably presumed that consumers do not rely on that which is objectively unreliable.

But what about an endorser paid to puff? The regulatory theory is that an undisclosed sponsorship relationship could distort consumer decisionmaking. Yet

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151. Aside from initiatives to suppress cigarette marketing, the major exception might be dilution law, which regulates the creation of negative emotions about others' brands. See Tushnet, *supra* note 14, at 522-24, 551-52.

152. Goodman, *supra* note 55, at 693; Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 119-21 & n.442-44 (1999) ("While the propositions that 'America is turning 7-Up' and that Burger King sells tastier hamburgers than McDonalds may elude scientific determination, presumably the television commercials containing these claims have not been the target of official censorship. And even if the FCC were to descend on sponsors or broadcasters of these sorts of boasts, it is difficult to construct a rationale that would sustain this suppression under current commercial speech doctrine.") (footnotes omitted).

153. "There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his [own] credulity." *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (Hand, J.); see also *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 496-97 (5th Cir. 2000) ("[N]on-actionable 'puffery' comes in at least two possible forms: (1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion."); *In re General Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1531 (E.D. Mo. 1997) (plaintiffs alleged they had detrimentally relied on claims that anti-lock brakes were 99% more effective, and 100 times more likely to benefit drivers, than air bags, but such claims were puffery because consumers could not reasonably believe that there was a test supporting them), *aff'd*, 172 F.3d 623 (8th Cir. 1999); *Tylka v. Gerber Prods. Co.*, No. 96 C 1647, 1999 WL 495126, at \*8 (N.D. Ill. July 1, 1999) (nutrition claims "add[ed] little to the daily informational barrage to which consumers are exposed," and a reasonable consumer should have seen that they were meaningless sales patter); *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 130 (D. Mass. 1996) (explaining the concept of puffery); *Avon Prods. Inc. v. S.C. Johnson & Son, Inc.*, 32 U.S.P.Q.2d 1001, 1007 (S.D.N.Y. 1994) ("Off! Skintastic is just a hundred times better!" was too exaggerated to be believed and, therefore, puffery).

how could there be material deception if the endorser's positive but detail-free message was puffery? The endorsement guidelines implicitly recognize that, as advertising scholars have long maintained, image ads *do* affect consumer decisions—puffery *works*, which is why advertisers use it.<sup>154</sup> Nonetheless, in the U.S., we usually do not try to regulate puffery because of the falsifiability problem. It is only when there is an undisclosed financial relationship that we can identify a specific element of the message that's deceptive.<sup>155</sup>

It is still important to recognize that in an undisclosed sponsorship case where the speaker simply puffs, the deception can only be material if vague, fact-free claims made by a sufficiently credible source affect purchase decisions.<sup>156</sup> And, it should be emphasized, this paradox of material puffery is equally true in traditional ads, where the FTC has long required disclosure by endorsers where the endorsement relationship is not clear from context, regardless of whether an ad makes falsifiable factual claims.<sup>157</sup>

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154. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 662 (1985); Ivan L. Preston, *Puffery and Other "Loophole" Claims: How the Law's "Don't Ask, Don't Tell" Policy Condone Fraudulent Falsity In Advertising*, 18 J.L. & COM. 49, 80-98 (1998).

155. *Cf.* SEC v. Curshen, Fed. Sec. & L. Rep. (BNA) ¶ 95,718, 2010 WL 1444910, at \*6 (10th Cir. 2010) (observing that vague optimistic predictions from someone known to be associated with the company don't violate the securities laws because they are easily understood as self-interested puffery, and holding that the court did not need to reach the question of whether the same statements would be nonactionable puffery if consumers weren't aware of the self-interested nature of such positive statements).

156. *Cf.* People *ex rel.* Hartigan v. Maclean Hunter Publ'g Corp., 457 N.E.2d 480, 487 (Ill. Ct. App. 1983) ("[I]t is true that a bare and naked statement as to value is ordinarily deemed the opinion of the party making the representation . . . [but] such statement may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact . . .") (citations omitted). *But see* Goodman, *supra* note 55, at 704-05 (arguing that regulation of undisclosed sponsorship may not be justified if the claims are immaterial to consumers).

157. *See* Disclosure of Material Connections, 16 C.F.R. § 255.5 ("When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the

The cool kid who tells her friends that a product is really awesome can get them to buy it. The cool kid's endorsement might even be performative, in that the endorsement *makes* the product cool. This is related to the problem of the placebo effect, where claiming that a product produces certain effects leads consumers to believe in (and even experience) those effects. The law has had little trouble finding that products that only work because of the placebo effect are falsely advertised.<sup>158</sup> Regardless of how coolness is produced, it matters whether the cool kid is telling her friends voluntarily or for pay. This conclusion requires us to take even nonfalsifiable claims seriously as claims that can distort a consumer's decisions.

C. *Statutory Interpretation: Does Section 230 Invalidate the FTC's Guidance?*

Assuming that all these conceptual issues can, as I have argued, be resolved in favor of requiring disclosure and substantiation, section 230 appears again as a potential statutory barrier. Eric Goldman argued that the FTC's new guidelines clearly targeted specific business models such as that of PayPerPost, which offers advertisers and bloggers pretty much what its name promises: matching, for pay,

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endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed.”)

158. See Fed. Trade Comm'n v. QT, Inc. 512 F.3d 858, 862-63 (7th Cir. 2008) (“[T]he Federal Trade Commission Act condemns material falsehoods in promoting consumer products; the statute lacks an exception for ‘beneficial deceit.’ . . . [T]he placebo effect cannot justify fraud in promoting a product.”); Fed. Trade Comm'n v. Pantron I Corp., 33 F.3d 1088, 1100 (9th Cir. 1994) (“[A]llowing advertisers to rely on the placebo effect would not only harm those individuals who were deceived; it would create a substantial economic cost as well, by allowing sellers to fleece large numbers of consumers who, unable to evaluate the efficacy of an inherently useless product, make repeat purchases of that product.”); United States v. An Article . . . Acu-Dot . . . , 483 F. Supp. 1311, 1315 (N.D. Ohio 1980) (claims of efficacy from placebo effect are “‘misleading’ because the [product] is not *inherently* effective, its results being attributable to the psychosomatic effect produced by the advertising and marketing of the [product]”); *In re Bristol-Myers Co.*, 102 F.T.C. 21, 336 (1983) (“The Commission cannot accept as proof of a product's efficacy a psychological reaction stemming from a belief which, to a substantial degree, was caused by respondent's deceptions. Indeed, were we to hold otherwise, advertisers would be encouraged to foist unsubstantiated claims on an unsuspecting public in the hope that consumers would believe the ads and the claims would be self-fulfilling.”) (citation omitted).

those who have products to tout with those who'd like to be paid for touting them.<sup>159</sup> The FTC used the following example:

A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. *The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement.*<sup>160</sup>

The advertiser's responsibilities are a bit different from those it bears in conventional advertising, where the advertiser generally can exercise direct control over the content of the ad.<sup>161</sup> To avoid liability, it must provide proper direction to endorsers on making clear and conspicuous disclosures about compensation and on avoiding misleading or unsubstantiated representations. And, if the blogger nonetheless makes misleading or unsubstantiated representations, the advertiser has to take reasonable steps to correct them. The advertiser should monitor the results of its promotional schemes (as one would hope it would monitor any advertising carried out on its behalf) and take reasonable steps to ensure that the guidelines are being followed.<sup>162</sup> If the blogger refuses to

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159. Posting of Eric Goldman to Technology & Marketing Blog, [http://blog.ericgoldman.org/archives/2009/10/do\\_the\\_ftcs\\_new.htm](http://blog.ericgoldman.org/archives/2009/10/do_the_ftcs_new.htm) (Oct. 6, 2009, 10:04).

160. *FTC Endorsement Guides*, *supra* note 73, at 53,139 (emphasis added).

161. This is unsurprising; different forms of advertising have always been assessed based on advertiser control. Thus, while an advertiser may be required to stop an ongoing ad campaign on television, the FTC does not, so far as I am aware, order an advertiser to retrieve disseminated copies of a magazine to remove a misleading ad. In the Internet context, control simply plays out in different ways.

162. *See FTC Endorsement Guides*, *supra* note 73, at 53,139 ("In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure

disclose sponsorship, or to correct unsubstantiated or misleading statements, then the advertiser should sever relations with the blogger and not provide further compensation.<sup>163</sup>

But does section 230 cover these promotional relationships, making this careful regulatory scheme impossible? Recall section 230's mandates that "[n]o 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."<sup>164</sup> Eric Goldman argued that, when PayPerPost makes a match with a blogger, "[t]here is no employment or agency relationship between the advertiser or the blogger; this is an ordinary customer-vendor relationship, mediated by PayPerPost."<sup>165</sup> If, without the advertiser's further input, the blogger then made a truthful<sup>166</sup> statement about her experience with the product that would be impermissible if made by the advertiser, the FTC might still hold the advertiser responsible for the statement. This, he continued, was a classic section 230 situation: "the advertiser is the user of an interactive computer service, the blog post is content provided by another information content provider, and the FTC's theory that the advertiser adopts or endorses the blog post treats the advertiser as the publisher or speaker of the third party blogger's blog post."<sup>167</sup>

The key point here is that the advertiser must be a "user" of an interactive computer service to qualify for section 230 protection, and Goldman offered two arguments for why this is so: "First, PayPerPost provides an interactive computer service, and the advertiser uses PayPerPost.

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that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.").

163. *See id.* at 53,135-36.

164. 47 U.S.C. § 230 (2006) (emphasis added).

165. Posting of Eric Goldman to Technology & Marketing Law Blog, [http://blog.ericgoldman.org/archives/2009/10/a\\_fuller\\_defens.htm](http://blog.ericgoldman.org/archives/2009/10/a_fuller_defens.htm) (Oct. 12, 2009, 11:55).

166. In fact, under Goldman's theory, even if the blogger deliberately lied about her experience, the advertiser would not be liable.

167. Goldman, *supra* note 165.

Second, the advertiser is a ‘user’ of some Internet connectivity provider just by getting online.”<sup>168</sup> He admitted that his second theory was “perhaps disconcertingly” expansive: anyone online is entitled to section 230 immunity.<sup>169</sup> On this theory, for example, a newspaper would no longer be liable for the defamatory statements of its reporters, at least if the newspaper publishes online. Still, Goldman defended his result as consistent with section 230’s broad scope: “unless the plaintiff’s claim fits into one of the statutory exclusions[,] . . . A isn’t liable for third party B’s online content or actions. Period.”<sup>170</sup> If A is the advertiser and B is the blogger, A simply can’t be liable for B’s posts.

In fact, Goldman’s logic goes further than that: Section 230 states that “[n]o 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.”<sup>171</sup> The statute does not by its terms specify that the “information” provided by the content provider has to be provided *online*, or *in its role as online information content provider*, in order for immunity to attach. Barnes & Noble has a website and is therefore a provider of an interactive computer service. If we are determined to read section 230 expansively, Barnes & Noble should be immune from liability for defamatory content in a book it sold in its physical stores, because the book’s publisher would be another information content provider. In addition, it should be immune if it contracted to distribute the book via email, thus making its use of the Internet a but-for cause of the harm, even if Barnes & Noble knew about the defamatory content and otherwise satisfied the conditions for defamation liability for a distributor.

Because Goldman identifies section 230 as an Internet exceptionalist statute,<sup>172</sup> he would likely not endorse the

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168. *Id.*

169. *Id.* Goldman contended that the leading section 230 cases treat “user” just this expansively. *See id.* (citing *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006)).

170. Goldman, *supra* note 165.

171. 47 U.S.C. § 230(c)(1) (2006) (emphasis added).

172. Posting of Eric Goldman to Technology & Marketing Law Blog, [http://blog.ericgoldman.org/archives/2008/04/roommatescom\\_de\\_1.htm](http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm) (Apr. 3, 2008, 8:05).

offline reading. Furthermore, courts have required that the information at issue be provided to an online service provider in its role as online service provider.<sup>173</sup> But if we imply a requirement that the information at issue must be provided online for the immunity to attach, it is not clear why we cannot impose liability based on offline/non-information-based elements of a relationship.

So what about *A*'s payment to *B*? Goldman argued that this was irrelevant. He pointed out that in the early case of *Blumenthal v. Drudge*,<sup>174</sup> AOL won a section 230 defense against liability for Matt Drudge's allegedly defamatory content, even though AOL both paid Drudge to produce content and retained editorial control over that content.<sup>175</sup> Nor, Goldman argued, did the payment in the PayPerPost example create a respondeat superior or employer-employee relationship between the parties<sup>176</sup> (apparently conceding

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173. See, for example, *Batzel v. Smith*, where the court explained:

[Section 230] is concerned with providing special immunity for individuals who would otherwise be publishers or speakers, because of Congress's concern with assuring a free market in ideas and information on the Internet. If information is provided to those individuals in a capacity unrelated to their function as a provider or user of interactive computer services, then there is no reason to protect them with the special statutory immunity.

333 F.3d 1018, 1033 (9th Cir. 2003); *cf.* *Avery v. Idleaire Techs. Corp.*, No. 3:04-CV-312, 2007 WL 1574269, at \*20 (E.D. Tenn. May 29, 2007) (rejecting a section 230 defense that an employer was not responsible for the creation of a hostile work environment based in part on the presence in the workplace of pornography downloaded from the Internet by employees). The *Avery* court did not explain its reasoning, but the intuition that the harassment was unrelated to the employer's role as Internet user may have been a part of its conclusion.

174. 992 F. Supp. 44, 49-53 (D.D.C. 1998).

175. Goldman, *supra* note 165.

176. Goldman stated:

I don't think the example indicates an agency relationship because the advertiser lacks the requisite control over the blogger. PayPerPost's mediation of the advertiser-blogger relationship further reinforces the lack of agency; indeed, the advertiser may not even be communicating directly with the blogger. And even if the blogger were the advertiser's employee or agent, 230 still might apply for the blogger's statements that exceed the advertiser's authorization.

that section 230 would not protect an online newspaper against defamation based on its employee-reporters' statements).<sup>177</sup> Unlike Quiznos, with its user-generated advertising, the skin cream maker in the FTC's example "never republished the blog post or even signaled any adoption of or agreement with the post." Given the "tenuous" relationship between the advertiser and the blogger, he concluded, the FTC was simply overreaching.<sup>178</sup>

I think Goldman reads "user" too broadly in either version of his argument.<sup>179</sup> A more natural reading of the function of the term "user" in the statute is that a Blogspot blogger is a user of Google's services, and is not responsible for content in his comments section, which is provided by other users of Google's services. In the PayPerPost case, the advertiser is not a "user" in the conventional sense of

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*Id.* (citing *Delfino v. Agilent Techs.*, 52 Cal. Rptr. 3d 376, 397-99 (Ct. App. 2006) and *Higher Balance, LLC v. Quantum Future Group, Inc.*, No. 08-233-HA, 2008 WL 5281487, at 6\*-7\* (D. Or. Dec. 18, 2008)).

177. Paul Alan Levy made the following criticism of Professor Goldman:

[Goldman] implicitly acknowledges that if the blogger were actually the in-house employee of the advertiser, action could be taken against the advertiser under the doctrine of respondeat superior, so long as the blog post was written within the scope of the blogger's employment. That is what the court said in the *Delfino* case that Professor Goldman mentions, although the court found that the posts in question there were outside the scope of employment.

Posting of Paul Alan Levy to CL&P Blog, <http://pubcit.typepad.com/clpblog/2009/10/do-the-ftcs-new-advertising-guidelines-run-afoul-of-section-230.html> (Oct. 16, 2009, 14:20 PST) (citation omitted).

178. Goldman, *supra* note 165. See also Posting of Eric Goldman to Technology and Marketing Law Blog, [http://blog.ericgoldman.org/archives/2009/10/craigslist\\_isnt.htm](http://blog.ericgoldman.org/archives/2009/10/craigslist_isnt.htm) (Oct. 21, 2009, 13:13 PST), where Goldman argues that a recent case involving Craigslist supports his interpretation. But the court in that case actually found that Craigslist did not create the unlawful content at issue, and thus could not be treated as the speaker. See *Dart v. Craigslist, Inc.*, No. 09 C 1385, 2009 WL 3416106, at \*5 (N.D. Ill. Oct. 20, 2009). It did not hold that Craigslist or any other entity could escape derivative liability regardless of the relationship between itself and another party posting content.

179. See also Levy, *supra* note 177 ("Professor Goldman has not taken adequate account of the fact that the FTC is regulating the advertiser, not in its capacity as the provider or user of an interactive computer service, but in its capacity as the employer (in a larger sense) of the blogger.").

providing content via the service provider.<sup>180</sup> In fact, the blogger does not “use” PayPerPost to post content either. Money, not content, flows through PayPerPost, even if it operates over the Internet and even if it relies on content posted on the Internet to determine when to pay that money.

Section 230, as an Internet exceptionalist statute, prevents treating Internet service providers as publishers, and even as distributors. Quiznos, when it hosted the allegedly false user-generated ads over which Subway sued, was acting as a service provider. Section 230 should have precluded liability, even though Quiznos suggested topics for submitted content, just as moderators of discussion boards do.<sup>181</sup> Likewise, I am persuaded by Goldman’s argument that the Securities & Exchange Commission is barred by section 230 from treating misstatements to which a company links on the Internet as the company’s own misstatements for purposes of enforcing the securities laws.<sup>182</sup>

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180. Section 230’s use of the term “provided” reinforces this interpretation; section 230 is not aimed at protecting parties to whom content is not provided. Compare *Batzel v. Smith*, where the court explained:

“[P]rovided” suggests, at least, some active role by the “provider” in supplying the material to a “provider or user of an interactive computer service.” One would not say, for example, that the author of a magazine article “provided” it to an interactive computer service provider or user by allowing the article to be published in hard copy off-line. Although such an article is available to anyone with access to a library or a newsstand, it is not ‘provided’ for use on the Internet.

The result in the foregoing example should not change if the interactive computer service provider or user has a subscription to the magazine. In that instance, the material in question is “provided” to the “provider or user of an interactive computer service,” but not *in its role as* a provider or user of a computer service.

333 F.3d 1018, 1032-33 (9th Cir. 2003) (emphasis added).

181. One might also conclude that the underlying logic of the Lanham Act does not support treating fans’ speech as Quiznos’ speech.

182. See Posting of Eric Goldman to Technology & Marketing Law Blog, [http://blog.ericgoldman.org/archives/2008/11/secs\\_proposed\\_g.htm](http://blog.ericgoldman.org/archives/2008/11/secs_proposed_g.htm) (Nov. 5, 2008, 20:58 PST); Posting of Eric Goldman to Technology & Marketing Law Blog, [http://blog.ericgoldman.org/archives/2008/08/sec\\_proposes\\_th.htm](http://blog.ericgoldman.org/archives/2008/08/sec_proposes_th.htm) (Aug. 28, 2008, 18:10 PST).

But section 230 does not change every aspect of the law of blaming one entity for another's acts.<sup>183</sup> A corporation can only act through individuals.<sup>184</sup> If the idea that a corporation can be held liable for content it provides online is to have any meaning after section 230, then it must be the case that *some* kinds of relationships are sufficient to attribute one entity's content to another. At that point, we are arguing over the contours of agency liability, not over its existence, and the common law already provides for liability for non-employee agents in appropriate circumstances.

The Restatement (Third) of Agency recognizes that agency liability may be contracted or expanded by law.<sup>185</sup> Courts have a role in defining agency depending on the

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183. *Cf. Batzel*, 333 F.3d at 1035-36 (applying principal-agent law to decide a defamation claim rather than section 230, where defendant was alleged to be vicariously liable for content posted by another defendant).

184. *See* RESTATEMENT (THIRD) OF AGENCY § 7.01 cmt. b (2006) ("When an agent is an organization, such as a corporation or other legal entity, it can perform work only by deploying individuals to take action on its behalf as subagents.").

185. *See, e.g., id.* § 7.06 (2006) ("A principal required by contract *or otherwise by law* to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent.") (emphasis added); *id.* § 7.08 cmt. b (discussing statutory bases for liability in the absence of a principal-agent relationship); *id.* § 7.01 cmt. c (2006) (recognizing that statutes may change the common law, including whether an agent is responsible for wrongful conduct and whether liability is strict); *see also, e.g.,* U.C.C. § 8-318 (1977) (stating that an agent or bailee who deals with securities in good faith is not liable in conversion to a third party even though the principal had no right to deal with the securities, altering the common law rule that an agent has no greater title than her principal as set forth in RESTATEMENT (SECOND) OF AGENCY § 349 (1958)); 225 ILL. COMP. STAT. ANN. 455/1, 455/37.11, 455/10, 455/38.5(a) (West 1993 & Supp. 1997) (abrogating the common law of agency for real estate agents and replacing it with statutory duties on the grounds of public interest in avoiding misunderstandings); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (discussing Fair Labor Standards Act's expansion of "employment" beyond traditional agency law); UNIF. PROBATE CODE art. 5, pt. 5, prefatory n. (2006) (noting that the purpose of a statutory durable power is alteration of the common law, which terminated an agent's authority upon the principal's incapacity); Charles D. Tobin & Drew Shenkman, *Online and Off-Line Publisher Liability and the Independent Contractor Defense*, 26 COMM. LAWYER (ABA), Mar. 2009, at 1-2 (noting that common law immunity of hiring parties for independent contractors' torts has been changed under various circumstances, including "where a statute or regulation imposes particular responsibility on the principal, or where the duty is so integral to the principal's business that it is presumed to be 'non-delegable'").

circumstances.<sup>186</sup> Copyright is an example of an area of law which has, by common law judicial interpretive techniques, expanded vicarious liability far beyond its basis in respondeat superior.<sup>187</sup> Sexual harassment law, too, has adapted agency law to its particular purposes.<sup>188</sup> The contours of secondary liability are malleable depending on the perceived policy goals of the relevant cause of action.

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186. See, e.g., Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 348-49, 373-74, 377-78 (2007) (stating that courts routinely deviate from the common law of agency in assessing lawyer-client relationships, based on a preference for protecting clients over other policy considerations, and highlighting deviations from common law on the basis of a policy preference for protecting clients over all else).

187. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (“Vicarious copyright liability is an ‘outgrowth’ of respondeat superior.”) (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261-62 (9th Cir. 1996)); *Polygram Int’l Publ’g, Inc. v. Nev./TIG, Inc.*, 855 F. Supp. 1314, 1325-26 (D. Mass. 1994) (describing vicarious liability as a form of risk allocation). *Dixon v. Atl. Recording Corp.*, held that it was unnecessary to consider the intricacies of agency law, instead using a less formal approach:

[A] person who promotes or induces an infringement can be held liable as a “vicarious infringer,” even through [sic] he has no actual knowledge that a copyright is being violated, if (1) he has the right and ability to control or supervise the infringing activity, and (2) he has a direct financial interest in the exploitation of the copyrighted materials.

No. 85 Civ. 287, 1985 WL 3049, at \*2 (S.D.N.Y. Oct. 4, 1985); see also Robyn Axberg, *File-Sharing Tools and Copyright Law: A Study of In re Aimster Copyright Litigation and MGM Studios, Inc. v. Grokster, Ltd.*, 35 LOY. U. CHI. L.J. 389, 399 (2003) (“Vicarious liability emerged as a modification of the common-law tradition of respondeat superior, but in the realm of copyright infringement, it extends beyond the employment setting.”) (footnotes omitted).

188. See, e.g., *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (“In light of the perverse incentives that the Restatement’s ‘scope of employment’ rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII.”); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n. 3 (1998) (“[O]ur obligation here is not to . . . transplant [Restatement of Agency provisions] into Title VII. Rather, it is to adapt agency concepts to the practical objectives of Title VII.”); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (“[C]ommon-law principles may not be transferable in all their particulars to Title VII . . . .”); see also David B. Oppenheimer, *Employer Liability for Sexual Harassment by Supervisors*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 272, 278-79 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing the evolution of respondeat superior liability for sexual harassment under Title VII).

In fact, the Restatement (Third) of Agency allows vicarious liability for non-employee agents when actions taken with apparent authority constituted the tort or enabled the agent to conceal its commission.<sup>189</sup> Making a false or unsubstantiated factual claim, or failing to disclose the economic relationship between the parties, are the wrongs targeted by the Endorsement Guidelines, which would at least seem to be a close analogy to constituting the tort or enabling its concealment, respectively. Of course, in cases of nondisclosure, nothing at all is “apparent.” But at least when there is disclosure of sponsorship, that disclosure would seem to create apparent authority under the common law sufficient to allow the substantiation requirement to apply, since it signals to consumers that the advertiser is at least partly responsible for the content. And, though it does not appear that the law regarding undisclosed principals has addressed similar situations of nondisclosure, it seems unlikely that advertisers ought to be allowed to avoid a finding of an agency relationship simply by not disclosing that there is a relationship.

I readily accept that section 230 bars finding a respondeat superior or other agency relationship *based on* the fact that one party provides Internet access or some Internet service to the other, even when the second party gets payment as a condition of or consideration for access. Such was the basic relationship Congress contemplated when it decided to immunize access providers for users’ content. But that conclusion doesn’t put any barrier in place to finding an agency relationship based on other elements of a relationship.<sup>190</sup>

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189. RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006); *see also* Dennis A. Ferraro & Joseph A. Camarra, *Hospital Liability: Apparent Agency or Agency by Estoppel?*, 76 ILL. B.J. 364, 366, 368-70 (1988) (explaining that many jurisdictions hold hospitals liable for torts of independent contractor physicians based on actual or apparent authority); Giesel, *supra* note 186, at 357-58 (noting that both the Restatement (Second) and Restatement (Third) clearly contemplate agency liability for independent contractors based on actual or apparent authority).

190. Thus, in accomplishing its mission, the FTC is free to find a relevant agency relationship in the situation referenced by the Endorsement Guidelines, where the advertiser’s payment is not linked to provision of access for the blogger. This would be analogous to finding an agency relationship where the person qualifies as an employee or independent contractor according to background principles of agency law. *See, e.g.,* Whitney Info. Network, Inc. v.

There remains the precedent of *Drudge*, in which AOL paid Matt Drudge to provide content and yet still escaped liability because of section 230.<sup>191</sup> Under standard agency principles, as applied in defamation law, Drudge was not an agent or employee of AOL. If he had been, the Court's discussion implies that section 230 would not have immunized AOL.<sup>192</sup> The true limit, then, comes from the underlying law of defamation, the constitutional underpinnings of which shape courts' determinations of when parties can be liable for defamatory statements made by their independent contractors.

One might argue, drawing on other section 230 cases, that an advertiser cannot be held liable for users' false statements unless the advertiser specifically induces the *falsity*, rather than inducing the content generally. In a case involving Craigslist's alleged inducement of prostitution, the court held that Craigslist could not be held liable because its "adult" category was not inherently unlawful as compared to a site that required users to express unlawful preferences.<sup>193</sup> "Nothing in the service [C]raigslist offers induces anyone to post any *particular* listing . . . ."<sup>194</sup> Likewise, the Ninth Circuit, ruling on a challenge to

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Xcentric Venture, LLC, 199 F. App'x 738, 742-44 (11th Cir. 2006) (denying section 230 motion to dismiss based on allegation that defendant's employees had themselves written defamatory statements about the plaintiff); *Cornelius v. DeLuca*, No. CV-10-27-S-BLW, 2010 WL 1709928 (D. Idaho Apr. 26, 2010) (rejecting a motion to dismiss defamation claims against a website owner based on allegations that a forum moderator, allegedly acting as a representative of the website, made defamatory statements).

191. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

192. *Id.* at 50 & n.9. Compare to Paul Alan Levy's explanation that:

[In *Blumenthal v. Drudge*,] AOL was sued only as the publisher of content on its own interactive computer service, and Blumenthal had brought a defamation claim under a local law regime that presumably accepts the limits of respondeat superior-type liability to employers and employees. Admittedly, though, *Blumenthal v. Drudge* did not discuss the lack of liability in those terms.

Levy, *supra* note 177.

193. *Dart v. Craigslist, Inc.*, No. 09 C 1385, 2009 WL 3416106, at \*6 (N.D. Ill. Oct. 20, 2009).

194. *Id.* at \*5 (emphasis added) (quoting Chicago Lawyers' Comm. for Civil Rights v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008)).

racially, religiously, or otherwise discriminatory ads for roommates found on the Roommate.com website, found that the site could not be held liable for the open-ended essay portion of its form, because users had free rein to post whatever they liked, including discriminatory content.<sup>195</sup> As long as the advertiser doesn't require falsity or nondisclosure, the argument would go, it can't be liable for creating a structure that in practice encourages such behavior, the way that minimally moderated websites encourage people to express defamatory statements. But that does not answer the agency point. Courts' rejections of inducement theories as ways around section 230 mean only, and vitally, that being a seductive forum for unlawful content—an attractive nuisance, as it were—is protected by section 230. Other types of causation need not be shielded.

In short, even under section 230, if there is an agency relationship between two parties, that relationship can be used as the basis of liability.<sup>196</sup> Paul Alan Levy nicely makes the point that the FTC need not apply the common law of agency any more than its definition of falsity and misleadingness conforms exactly to the common law of fraud:

[G]iven the FTC's broad regulatory authority, the FTC is not obligated to accept the "scope of employment" limitation of respondeat superior, and it is not required to accept the limitation of respondeat superior to the actions of "employees." Its advertising guidelines have long held companies responsible for misleading advertisements published by independent contractors, and by the same token the FTC is not required to agree that a company can insulate itself from responsibility for the advertising

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195. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157, 1173-74 (9th Cir. 2008). However, the website operator could not claim section 230 immunity for discriminatory questions, which "don't magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Id.* at 1164; *see also id.* at 1172 & n.33 (explaining why section 230 is not applicable to discriminatory questions created by the service provider).

196. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) ("[C]ourts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability."); *see also Chicago Lawyers*, 519 F.3d at 671 (explaining that Craigslist could not be liable for users' discriminatory housing advertisements under §230(c)(1) because it was not the author of the ads and could not be treated as the "speaker" of posters' words).

that it purchases by contracting with one company that in turn contracts with an individual who publishes the misleading content.<sup>197</sup>

A recent administrative adjudication suggests that the pay-for-posting situation poses a genuinely new challenge to the question of advertiser liability, one that the FTC might reasonably resolve either way. *In re Gemtronics, Inc.*<sup>198</sup> began with the proposition that “liability [for false advertising] does not require proof that the respondent physically distributed advertisements . . . . Moreover, a respondent need not be the sole cause of dissemination of false advertisements, but can be held liable for participating with others in the creation and/or dissemination of false advertisements.”<sup>199</sup> The law holds advertisers liable when they cause the dissemination of false advertising, regardless of their intentions.<sup>200</sup> However, the party to be held liable must have participated in the creation or dissemination of the ads.<sup>201</sup> Thus, a manufacturer has been held liable for ads it provided to distributors, but not for ads prepared by its distributors.<sup>202</sup>

Applying these principles, the Administrative Law Judge (“ALJ”) found that a respondent was not liable for false ads on a website that had directed business to him when there was no agreement with the actual source of the website to direct business to him.<sup>203</sup> In fact, his name was used on the website without his permission and purchases made through the website went to other parties, not to him (though he did fulfill some small orders placed through the website as an unpaid courtesy to the website operator, with

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197. Levy, *supra* note 177.

198. No. 9330, F.T.C. (Sept. 16, 2009) (initial decision), *available at* <http://www.ftc.gov/os/adjpro/d9330/091002gemtronicsinitialdec.pdf>.

199. *Id.* at 5.

200. *See id.* at 51 (“[T]he phrase ‘cause to be disseminated’ in Section 12 of the FTC Act ‘is in the statute without qualification related to the advertiser’s state of mind’ and that ‘the statute holds him liable for the natural consequences of his act regardless of his intentions.’”) (quoting *Mueller v. United States*, 262 F.2d 443, 446 (5th Cir. 1958)).

201. *Id.* at 6.

202. *See id.* (citing *In re Dobbs Truss Co.*, 48 F.T.C. 1090 (1952), 1952 FTC LEXIS 49, at \*50-51).

203. *Id.* at 55.

whom he had a business relationship).<sup>204</sup> The ALJ pointed out that past cases involved active participation in creation or dissemination of advertisements.<sup>205</sup>

The key question is: what counts as active participation? In the case of user endorsements, does paying for the creation of the ad *without* exercising any creative control suffice? A manufacturer would be liable for a false ad produced by an ad agency to which it had delegated complete creative control, and it would be possible to extend the same reasoning to others paid to produce ads. In at least one prior case, the FTC has relied in part on the fact that a manufacturer did not pay any advertising allowance or other financial aid to its distributors to find that the manufacturer was not responsible for the distributors' false advertising.<sup>206</sup> Change that fact, and the result could readily change.

Even in the absence of section 230 protection, there are likely to be constitutional constraints on the types of relationships that can sustain liability, depending on the underlying cause of action. Defamation liability for intermediaries such as newspapers, for example, has been sharply limited in order to avoid chilling speech, even when the newspapers are paid to run allegedly defamatory ads.<sup>207</sup> Agency law has recognized these First Amendment constraints in its treatment of defamation.<sup>208</sup> Some baseline

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204. *Id.*

205. *See id.* at 53 ("An advertising agency may be held liable for deceptive advertising if the agency (1) was an active participant in the preparation of the advertisement, and (2) knew or had reason to know that the advertisement was deceptive.") (citations omitted).

206. *See In re Dobbs Truss Co.*, 1952 FTC LEXIS at \*49.

207. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1005-09 (2008).

208. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. d (2006). A reporter's note in the Restatement explained that because the credibility of a defamatory statement is affected by the credibility of the person who appears to endorse it, defamation liability can be tied to apparent authority. Despite this, "[m]any cases interpret *Sullivan* to incorporate an implicit requirement that the plaintiff establish actual malice independently against each defendant," except that malice is imputed from employee to employer. *Id.* § 7.08 reporter's n.d (citing *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1302 (D.C. Cir. 1996). The *McFarlane* court interpreted *Sullivan* as refusing "to impute to the individuals as principals any information in the minds of persons they authorized to act as

due process principle might also prevent certain kinds of agency attributions, such as holding advertisers liable for unsolicited, uncompensated statements made by simple fans of the product or service.<sup>209</sup> This is as yet a purely theoretical concern, because the FTC has not proposed to regulate nonsponsored posts even if they are made on advertiser-run discussion boards or forums. In such cases, a section 230 argument would also retain compelling force.<sup>210</sup>

### CONCLUSION

Advertising is protean where law is not. But advertising is not special that way; the problem of adapting to new variants of behavior, some shaped precisely to avoid regulation, is a typical one and need not defeat the law.

A theory of why people and entities choose to speak in particular ways helps us navigate the boundaries of commercial speech. The current debate over undisclosed endorsement deals reveals lacunae in our understanding and accommodation of how speech really works. For example, the way in which regulation of pay-for-posting schemes requires us to acknowledge that what is conventionally called puffery actually does influence consumers. Material puffery is an aspect of the infinite malleability of attention-getting strategies—nonfalsifiable claims may well persuade consumers—and highlights the

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their agents in the matter.” 74 F.3d at 1302. *See also* Cantrell v. Forest City Publ’g Co., 419 U.S. 245, 253–54 & n.6 (1974) (approving unchallenged jury instruction allowing plaintiff to use actual malice of employee to prove employer’s actual malice); Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350, 1370 (N.D. Cal. 1993) (“Indeed, the requirement that the defendant’s state of mind be proven is the cornerstone of the constitutional requisite that a plaintiff prove by clear and convincing evidence that the defendant acted with knowledge of or a reckless disregard of the truth.”), *aff’d*, 85 F.3d 1394 (9th Cir. 1996); Tobin & Shenkman, *supra* note 185.

209. Note, however, that product liability law is sometimes prepared to hold manufacturers liable for third-party uses that were sufficiently foreseeable. The intuition that there are limits on responsibility for other people’s statements made about products and services once they enter the stream of commerce draws on free speech principles, not just general due process considerations. I thank Mark Tushnet for discussion on this point.

210. Of course consumers might well expect fans to congregate on the sites run by their favored brands, so such sites do not pose much of an “astroturf” problem in the first place.

distance between consumer decisionmaking and abstract concepts of truth and falsity.<sup>211</sup> Given the effectiveness of endorsements, even those light on facts, disclosure is justified to allow consumers to apply their own preferred discount to advertiser-sponsored speech.

As with many speech controversies, new forms of advertising raise institutional competence questions. In this case, courts could allow the FTC to use agency law to fine-tune section 230 to deal with endorsements. The alternative would be to read section 230 aggressively, even perhaps to the point of eliminating liability based on agency or on nonemployee agency. This would force Congress to act if it concludes that the law sweeps too broadly. I have argued that nothing in free speech theory or doctrine counsels in favor of such a radical reading. Given that section 230 is a prophylactic, speech-protective measure designed to avoid over-policing of speech by service providers, it could be read to bar the FTC's guidelines, but it need not be to fulfill its purposes.

The uncertainty over section 230's scope is unsurprising. Congress did not anticipate how online speech would develop. The fear behind section 230 is that holding an intermediary liable seems compelling in individual cases but is cumulatively harmful to a valued endeavor, the cheap and open Internet. Given more experience with the law and with marketing practices developing online, we could consider making finer distinctions between types of content and providers' relationship to that content, as we do with respect to intellectual property.<sup>212</sup> Or we could conclude that ISP liability, like attention, should generally be managed in

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211. Cf. Amy J. Tindell, "Indecent" Deception: The Role of Communications Decency Act § 230 in Balancing Consumer and Marketer Interests Online, 2009 B.C. INTELL. PROP. & TECH. FORUM 071901 at \*29-30 (2009) ("The Internet has spawned novel marketing strategies for businesses, including the guerilla tactic of ads popping onto the screen of unsuspecting Internet users, paying search engines for placement near the top of search results, and using competitor names as metatags. Laws made today to combat these problems may prove ineffective tomorrow as marketers use technology to work around existing legal structures to change consumer behavior.").

212. *E.g.*, 17 U.S.C. § 512 (2006) (enumerating the detailed "safe harbor" provisions for online service providers); *Tiffany Inc. v. eBay*, 576 F. Supp. 2d 463, 468-70 (S.D.N.Y. 2008); *see also* Tindell, *supra* note 211, at \*28-29 (arguing that Congress should act specifically to deal with the relationship between advertising and section 230).

gross, without subtle distinctions that are difficult to navigate in practice. The only sure thing is that advertisers will invent new claims and methods of delivery that will require new responses.