Is Blogging Commercial Speech?

New Federal Trade Commission Guidelines and Social Media

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Introduction

When the Federal Trade Commission (FTC) issued its "Guides Concerning the Use of Endorsements and Testimonials in Advertising" in October of 2009[1], the social media world took notice. Whether applying to Facebook fan pages,[2] or blogs, the U.S. regulator sought to address how word-of-mouth marketing might lead to (or represent) misleading information for consumers.[3]

Though the bulk of the new regulations remain geared toward advertising, several revised sections include examples about consumers who might use social media to discuss products and services. The FTC, in essence, is redefining "endorser" and "endorsement," and applying its new definitions to the world of the Internet:

> An endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other indentifying personal characteristics of an individual or the name and seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsor advertiser, even the views expressed by that party are identical to those of the sponsoring advertiser.[4]

There are two main issues addressed in the changed regulations.

- Are user-generated endorsements commercial speech?
- Under what conditions must consumers disclose a material connection with an advertiser when publishing on a blog or other social media?

The FTC has placed restrictions on what you or I can say or must say when discussing business matters. Therefore, the answers to the two questions above give rise to further questions regarding the regulation of free speech, namely the free speech rights of those publishing user-generated content. This paper will examine commercial speech as it may apply to such content, which heretofore has been subject to no regulation at all.

What is Commercial Speech?

The U.S. Supreme Court has ruled many times on the regulation of speech in the commercial realm, usually with respect to advertising and the right of government to regulate it. [5] However, in *Bigelow v. Virginia* (1975), the Court held that such regulation did not mean commercial speech was without protection under the First Amendment. Justice Harry Blackmun's majority opinion leaves no doubt. "Our cases…clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form."[6]

The Court went further in the case of *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council* (1976). Mr. Justice Blackmun again wrote the majority opinion and seized the moment to declare that commercial speech is, indeed, protected: "the question whether there is a First Amendment exception for 'commercial speech' is squarely before us…" and he avers:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions,

> in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [7]

Moore, May and Collins (2011) call this case, "the high-water mark in the Court's meandering course toward ultimately establishing the level of First Amendment protection afforded commercial speech." [8]

In *Bolger v. Youngs Drug Corp.* (1983), "the Court specified three factors that would assist in analyzing speech as commercial or noncommercial…[the materials] were conceded to be advertisements, they referred to a specific product, and the company mailing the [materials] had a clear economic motivation for their distribution. Each of these factors, considered alone, the Court concluded, does not automatically compel a classification of commercial speech…"[9] but all three factors in combination, however, "provides strong support for the District Court's conclusion that the [materials] are properly characterized as commercial speech.[10]

In neither *Virginia State Board of Pharmacy*, *Bigelow*, nor *Bolger*, however, did the court cover how much regulation was proper. That step would come with *Central Hudson Gas and Electric Corp. v. Public Service Commission* (1980) [11] and its "four-step analysis to determine the scope of proper regulation of commercial speech." [12] Justice Lewis Powell wrote:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[13]

The assumption in *Central Hudson* was that the speech in question did more than merely "propose a commercial transaction," but also contributed to the common good of consumers through exchange of information.[14]

When the Supreme Court has recently had the opportunity to establish a more stringent definition, it has declined to do so. In *Kasky v. Nike* (2002) [15], which the U.S. Supreme Court first agreed to hear, then decided against hearing [16], Nike undertook a public relations campaign to combat negative publicity about the working conditions in its factories. The California State Supreme Court sought to create a test examining the commercial intention of the sender, the commercial nature of the audience and commercial content of the speech itself. [17] This test stems from the U.S. Supreme Court's three-part rough test articulated in *Bolger* to determine whether "speech that does not resemble traditional advertising should nonetheless be classified as commercial. If (1) the speech is conceded to be some sort of advertising, (2) the speech refers to a specific product, and (3) the speaker 'has an economic motivation,' then there is 'strong support' for the proposition that the speech is properly classified as commercial."[18]

As Marcantonio (2003) points out in her analysis of the California *Kasky* verdict, the State court finds that Nike's communications about its business are false and misleading, and thus outside the protection of the First Amendment according to the *Central Hudson* test. [19] So where does that leave us in terms of a close definition of commercial speech? In *Bolger*, on which California relies, Justice John Paul Stevens's concurrence includes:

> We must be wary of unnecessary insistence on rigid classifications, lest speech entitled to "constitutional protection be inadvertently suppressed…"[20] I have not yet been persuaded

> that the commercial motivation of an author is sufficient to alter the state's power to regulate speech.[21]

Perhaps that's the best we can do as we examine social media and the FTC's new regulations.

Blogging requires disclosure – if it's paid

Until the FTC action, the world of blogs, Facebook, and Twitter seemed to be playing by different rules than other media. It's assumed that false information will be corrected by the "wisdom of crowds," the collaborative efforts of the many, holding individuals accountable. A *New York Times* op-ed was critical of that approach.

> …bloggers rarely disclose whether they are receiving money from the people or causes they write about…Defenders of the status quo argue that ethics rules are not necessary in the blogosphere because truth emerges through "collaboration," and that bias and conflicts of interest are rooted out by "transparency." But "collaboration" is a haphazard way of defending against dishonesty and slander, and blogs are actually not all that transparent. [22]

Goodman (2006) argued that once a blogger takes payment, it's hard to claim he or she is not an advertiser: "Once bloggers become the conduits for paid promotions, the extent to which they truly function outside the commercial media is questionable." [23]

How does that play out in practice? If a restaurant invited a blogger for a free meal in exchange for a review, the blogger had no requirement to disclose that the food was free. An electronics blogger could accept a trip to Las Vegas for the Consumer Electronics Show (CES) and write about the products there, without telling readers of the junket gift. [24] What was to stop

someone from writing an entirely false, deliberately misleading blog post, Facebook status update or Twitter posting?

In 2006, Microsoft (aided by public relations firm Edelman), sent laptop computers loaded with its Vista operating system to a selection of technology bloggers, asking them to review both the software and the computers. The laptops were expensive – they cost more than $2,000 each. New media strategist B.L. Ochman commented, "Nobody has reported turning down or planning to send back the gifts." [25] Brian Solis, who boasts more than 85,000 followers on Twitter, was concerned: "Consumers look to experts and trusted peers for guidance and insight when making decisions. Who's to say that the information they're receiving from their trusted sources is indeed truthful and honest, if they're unaware that these authorities are actually directly or indirectly compensated for their opinions and insights?"[26]

Tushnet (2010) argues that confusion over who is speaking presents a problem, "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."[27]

We simply have to have transparency in order to protect people against misleading claims. Tushnet finds great peril in the blogger who gets paid for writing positive posts, without revealing the financial connection. "Unlike…explicitly advertiser-adopted content …hidden relationships may give advertisers excessive credibility by using apparently independent sources to confirm the advertiser's message."[28] It's precisely because of the power of disinterested endorsement that advertisers might prefer to keep their paid blogging under the radar. Therefore,

Tushnet's call for strong regulation is persuasive: "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."[29]

Goodman (2006) notes that the Supreme Court says the source of advertising should be revealed to assist people in assessing the material they're hearing or seeing. "Even in the area of political advertising, where individual interests in anonymity are strongest and disclosure most likely to threaten political participation, sponsorship disclosure requirements have generally been upheld." [30]

Blogger rights are secondary to those of the reader

When applying these matters to blogging, blogger rights are secondary to the interest of the state to ensure that people are protected from misleading speech, according to Goodman (2006):

> [T]he sponsor's liberty interest in concealing its association with promotions does not approach the magnitude of the political speaker's interest in concealing her authorship of political speech…Sponsors, whether advertisers or propagandists, have no liberty interest in concealing the fact that they paid for their expression. Moreover, under the commercial speech doctrine, advertisers have minimal cognizable liberty interests in concealing their identities, especially when doing so constitutes misleading speech.[31]

If the government requires disclosure, how does that affect the right to be silent, to not face compulsion to speak? Tushnet finds no problem, citing precedents in past FTC regulation: "…in traditional ads…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." [32] The collision between clear advertising and stealth advertising represents just an unclear context. Nor does Goodman cavil on requiring disclosure: "Sponsorship disclosure, by contrast to governmental labeling, is not censorious. Nor is it an intervention that impermissibly privileges listener interests over speaker autonomy…the toll disclosure takes on speaker autonomy is simply not very high." [33]

So, we can conclude that if bloggers are paid to produce, the work material is commercial speech and is subject to lesser protection than non-commercial speech. The *Harvard Law Review* disagrees, but only because the FTC guides demand disclosure so broadly: "… [U]nder current Supreme Court doctrine, unpaid blogger endorsements should be classified and be given the same protection as noncommercial speech, just like product reviews found in traditional sources." [34] *Harvard's* objection is rooted in the idea that the guides now "hold bloggers to a higher standard than legacy media. Thus, in the name of protecting consumers, the guides would deprive consumers of information."[35]

However, *Harvard* finds the *Bolger* test helpful. "Courts have generally determined speech to be commercial only where a sufficiently direct economic motivation exists – that is, where the speaker's main goal is either to sell his own products or to get paid by the products manufacturer." [36] Surely a blogger being paid by an advertiser meets this criterion, despite *Harvard's* previous objections. *Harvard* assumes that because legacy media have no such disclosure requirement, the opportunity for misleading information is greater in that media than among the blogosphere. *Harvard* scoffs at the concept of "independent editorial responsibility," [37] which is the reason the FTC exempted mainstream media in the guides; *Harvard* sees a more serious conflict of interest between the editorial and advertising departments in media than between a paying advertiser and a blogger.

Harvard's argument is incorrect. The Supreme Court has said the government need not treat all media alike, [38] and the specific rationale for making bloggers disclose in the guides themselves appear to adequately differentiate between commercial and noncommercial speech in this context. [39] Further, the Society of Professional Journalists *Code of Ethics* expressly stipulates that news and advertising be differentiated. [40]

What constitutes pay in blogging?

If a blogger specializing in family issues (commonly called a "mommy blogger") receives a sample of diapers to try, or a food blogger a bag of snacks, it would be difficult to cast them in the same vein as the bloggers who receive either a trip to the Consumer Electronics Show or a fancy computer. The FTC addresses this issue somewhat indirectly in its response to comments concerning the guides, saying that the value of the product given to a blogger and whether the blogger routinely gets such requests are important factors in determining whether a resulting post is an endorsement. The FTC goes on to declare that a blogger's participation in a network marketing or word-of-mouth marketing program, or the extent of their readership in a company's target market would dispose the FTC to consider him or her an endorser and therefore subject to the requirements of disclosure. [41] The FTC guides are demanding disclosure in any case other than where a blogger buys a product for him or herself and writes about it. [42]

Goodman (2007) foretold this debate. [43] In particular, regarding differentiation of paid and unpaid user-generated promotions:

> It is important to emphasize that most peer promotions, which are spontaneous commentary on a product with no connection to the brand owner, are not advertising at all…The story is quite different, however, where brand owners have themselves created

> "peer" promotions or adopted these communications for marketing purposes. In these cases, there is commercial speech which, depending on its content, may be regulated [44] […] That the sponsor has chosen to use an amateur instead of an agency to produce its advertisements should not change the analysis. Moreover…it should not make a difference whether the brand owner initially solicited the ads or simply adopted them later. [45] In either case, the brand owner is sponsoring speech for promotional purposes.[46]

Conclusions

Courts have held that for the most part, speech that results in a commercial transaction is for that purpose commercial speech. The heart of the matter is whether bloggers who are paid for endorsements are engaged in journalism or advertising – if the former, it's likely non-commercial as long as they haven't received goods or services of value in exchange for their speech. If the latter, clearly, it's commercial and should be judged in the same vein as advertising and subject to the same disclosures.

There's no controversy regarding the free speech of bloggers – they are free to write whatever they want within the law with no restraint. As we have seen from the foregoing discussion, there is a significant body of case law supporting the ability of the government to treat commercial speech differently than other speech.

We can apply at least two items from *Bolger* – reference to a product and an economic motivation for publication, even if we do not concede that the speech in question is an advertisement – and find a compelling argument that this is commercial speech. We can also claim that on the face of *Central Hudson's* initial test step – that the speech in question be neither false nor misleading – that failing to disclose sponsorship or payment to a blogger is misleading.

That, in essence, makes the FTC's case to privilege the rights of the audience of the speech over those of the sender. Not only are the disclosure requirements not burdensome, they also go a long way to helping consumers of commercial speech better weigh its veracity.

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Notes

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[11] *Central Hudson Gas and Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980)

[12] Sprague (2007), p. 141

[13] *Central Hudson* at http://supreme.justia.com/us/447/557/case.html#566

[14] *Central Hudson* at http://supreme.justia.com/us/447/557/case.html#561 "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."

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[29] Tushnet (2010), pp. 750-751

[30] Goodman (2006) p. 135. She points to *McConnell v. FEC*, 540 U.S. 93, 196-97, 201 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) to underscore these points.

[31] Goodman (2006), p. 135. She cites *Central Hudson* and *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 793 n.32 (1978) for justification of this perspective.

[32] Tushnet (2010), p. 775-776

[33] Goodman (2006) p. 133. See also several references throughout the article to *First Nat'l Bank of Boston v. Bellotti* and others for support. See especially Supra note 235 page 132 for a details

[34] The Harvard Law Review Association. (2010) Recent Regulation: Internet Law – Advertising and Consumer Protection – FTC Extends Endorsement and Testimonial Guides to Cover Bloggers. *Harvard Law Review*, 123(6). p. 1543

[35] *Harvard*, p 1546

[36] *Harvard*, p. 1544

[37] *Harvard*, p. 1547

[38] *Harvard*, p. 1547, see supra note 56 regarding different treatment for broadcasting, though the authors reject application of the same standard to the Internet.

[39] See Guides, section II, #2, pp. 53125-53126

[40] Society of Professional Journalists Code of Ethics, retrieved April 10, 2011, from http://www.spj.org/ethicscode.asp

[41] See Guides, p. 53126

[42] See Guides, the examples run from pages 53137-53143

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[45] Goodman, (2007), p. 703, supra note 109, noting the change in First Amendment protection when an organization sends copies of protected speech (an article) to others for commercial purposes.

[46] Goodman (2007), p. 703