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Do the New FTC Guidelines Go Too Far?

By Andrew Fulop

I. Introduction

My eyes widen and a feeling of excitement rushes through my body as I discover that a stay-at-home mother makes approximately \$9,000 a month working part-time from home. If she is able to make this, then certainly I can too. As I browse this legitimate news site, and look up the current weather forecast, I notice that the “Home Income System” that I am considering purchasing has been *seen* on news channel such as MSNBC, CNN, and ABC. In these tough economic times, I am intrigued and want to learn how I can be like Marie Thompson from Miami, Florida, who lost her job a few months ago, and is already making a few hundred dollars daily from using this online system. As I scroll down on the page, I read the testimonials of all of the online users that have successfully made money using this “Home Income System.” I fail to notice the word “advertisement” in tiny letters that is at the bottom of the screen. I click on the link, and I am taken to an attractive site that displays an oversized keyboard, which represents working online at home, and touts the success of users that sign up for this product. I think to myself...hmmm... a free trial offer that requires me to pay only \$2.95 for shipping does not seem so bad. After all, this product can completely change my lifestyle, and make me rich in no time. As the clock, continues to count down from 120 seconds, I rush to place my order before the free trial expires.

I receive the product, which consists of a CD with one short video on how to get rich online. I am frustrated after two weeks of no success. A couple of weeks later, I receive my monthly credit card statement, and see an extra charge of \$39.95. Certainly, I did not authorize this charge. As I brainstorm what this charge may be, I remember the website with all the success stories that offered to give me a free trial of its income generating product. I return to the website to look for a phone number to call to dispute this charge. Unfortunately, I just hear a message advertising the product, and am unable to get through to a person. I get frustrated, and hang up the phone. The next month, I am billed again \$39.95. While at the time I thought I was signing up for a free trial that could lead me to financial freedom, in reality what I receive is a monthly migraine that keeps returning as I am billed month-after-month for a product that I am unable to cancel.

While the representation that I have made regarding these type of websites is in no way reflective of all websites that advertise so-called “business opportunities,” or any other type of offers, it represents the practices of a growing trend of online advertisers who deceive consumers through fake news stories, fake testimonials, and leave them no way to cancel the subscription. “Many flogs 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.”¹ These flogs are created in a manner which purposefully deceives consumers into forming the impression that they are real. Flogs may be able to meet the new FTC guidelines by disclosing

¹ See Candida Harty, [FTC + Fake Blogs = Advertisers Might Get a Flogging](http://www.consumeradvertisinglawblog.com/2009/11/ftc-fake-blogs-advertisers-might-get-a-flogging.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+consumeradvertisinglawblog%2FLXlb+%28Consumer+Advertising+Law+Blog%29), Justia, Nov. 6, 2009, http://www.consumeradvertisinglawblog.com/2009/11/ftc-fake-blogs-advertisers-might-get-a-flogging.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+consumeradvertisinglawblog%2FLXlb+%28Consumer+Advertising+Law+Blog%29.

that they are flogs.² However, since flogs are inherently deceptive, the FTC scrutinizes them very carefully.³ Examining flogs from an international perspective, the EU's Directive on Unfair Business-to-Consumer Practices makes all these "online tricks" illegal.⁴ Flogs Illegal in U.K.

While people obviously do become wealthy online in legitimate ways, some by advertising an array of products that they are given access to by joining an affiliate program, such as "Neverblue," "Market Leverage," and "EWA," they must be especially careful not to deceive consumers in the process of doing so. For any online offer to sell a product, there are typically three distinct parties involved. The first party is the advertiser, which is the party that actually produces the product being sold. The next party is the affiliate marketer. The affiliate marketer normally signs up with an affiliate network, where it can choose an offer that it deems attractive. The affiliate marketer receives a commission from each product that he sells. The size of the commission can range from fifty cents to over one hundred dollars depending on the value of the product sold. However, the affiliate marketers do not receive the entire commission from their sales. Instead, the affiliate networks that act as middlemen, or brokers between the advertiser and the affiliate marketer, make money the same way that brokers do in any business, by taking a "cut" or "percentage" of each sale that the affiliate marketer makes. While many affiliate marketers advertise legitimate products, using legitimate landing pages, the growing number of scam artists, has provoked the FTC to take measures to combat this type of online fraud that many critics argue is too extreme, and in some cases impossible for the advertisers. While the surge in fake blogs and fake testimonials that deceive customers is a very real problem that must be dealt with, the new FTC guidelines that became effective in December 2009, are too strict and

² Id.

³ Id.

⁴ Martha Neil, "Flogs" Illegal in UK, Rest of EU, ABA Journal, May 22, 2008, http://www.abajournal.com/news/article/flogs_illegal_in_uk_rest_of_eu/.

too ambiguous to effectively guide online advertisers, affiliate marketers, and lawyers that advise their clients on how to comply with the new guidelines.

II. 1980 FTC Guidelines

Following approximately four and a half years after their proposal, the former Final Guides became effective on January 18, 1980.⁵

§ 255.2 titled “consumer endorsements” states that

An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose the limited applicability of the endorser’s experience *or clearly and conspicuously disclose the limited applicability of the endorser’s experience to what consumers generally expect to achieve. (emphasis added).*⁶

Interpreting the language of the regulations, if an advertiser is not relying on adequate substantiation, he is still given a safe harbor as long as he alerts consumers that the endorser’s experience is limited, and the results may therefore not apply to that specific individual. The regulations further state that “Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers, in both the audio and video or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised products.”⁷ In other words, those represented as actual

⁵ Endorsement and Testimonials in Advertising; Promulgation of Final Guides Concerning Use: 45 Fed. Reg. 13, 3870 (Jan. 18, 1980) (to be codified at 16 C.F.R. pt. 255).

⁶ Id. at § 255.2.

⁷ Id.

consumers really need to be actual consumers that purchased, and used the product. Those that are not actual consumers need to be clearly identified accordingly.

A prime example of a case that is representative of the *FTC's* intolerance for deceptive advertising practices is *FTC v. Grant Connect LLC*.⁸ The landing pages of Grant Connect websites' used pictures of President Barack Obama and Vice President Joe Biden or pictures of a woman holding cash.⁹ To give the website credibility, it included quotes from news sources such as Fox, NBC, and CBS.¹⁰ Additionally, it claimed that it gave away billions of dollars in grants, and suggested that individual consumers could obtain these grants for their personal financial needs.¹¹ Furthermore, individuals who had never actually used the website gave testimonials on its landing pages.¹² Following a seven day trial membership of the website, which cost consumers \$2.78, consumers credit cards were charged \$39.95 monthly.¹³

In that case, the court agreed with the reasoning of David G. Bauer ("Bauer"), who has been working in the field of grants for over thirty years, and was of the opinion that the website was misleading because it referred to assisting individuals' financial situation, yet most grants in the Grant Connect database related to grants aimed at achieving a public purpose.¹⁴ Furthermore, Bauer concluded that the database misled consumers who believed that they were

⁸ *FTC v. Grant Connect, LLC*, 2009 U.S. Dist. LEXIS 94201 (D. Nev. Sept. 22, 2009).

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 10.

¹⁴ *Id.* at 13.

likely to obtain a loan, and contained outdated data.¹⁵ The court granted the FTC's motion for injunctive relief.¹⁶

Another case where the FTC brought an action for unfair claims is in *FTC v. National Urological Group*.¹⁷ The FTC alleged violations of sections 5 and 12 of the FTC Act for misleading customers that Thermalean and Lipodrene cause substantial weight loss, thirty pounds in two months, and one hundred and twenty five pounds, respectively.¹⁸ The court held the three companies jointly and severally liable for making these misleading claims, including that the product has been tested in bona fide research labs.¹⁹ Additionally, the companies corporate executives and medical doctor were personally liable.²⁰ The doctor failed to rely on scientific studies when making his endorsement of Thermalean.²¹ Injunctive relief and monetary restitution were found to be proper.²²

Finally, an example of where the FTC attempts to hold a celebrity athlete, a retired first baseman for the Los Angeles Dodgers, liable for his statements is exhibited in *FTC v. Garvey*.²³ Harvey and his wife were both given a bottle of the weight loss formula called Enforma.²⁴ He lost eight pounds, and she lost approximately twenty seven pounds.²⁵ To hold an individual liable for restitution under "direct participation" liability, the "FTC must also show that the

¹⁵ *Id.*

¹⁶ *FTC v. Grant Connect, LLC*, 2009 U.S. Dist. LEXIS 94201 (D. Nev. Sept. 22, 2009).

¹⁷ *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008).

¹⁸ *Id.* at 81.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 95.

²² *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008).

²³ *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004).

²⁴ *Id.*

²⁵ *Id.* at 895.

individual had actual knowledge of the material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.”²⁶ The court found that in light of Garvey and his wife’s personal success with the product, Garvey did not have actual knowledge of any material misrepresentations, and that he was not recklessly indifferent to any representations he made.²⁷ Furthermore, he was neither aware of a high probability that he was making fraudulent representations nor intentionally avoiding the truth regarding the efficacy of the Enforma product.²⁸

While many of the older cases included claims made on infomercials, these same type of claims are being diverted to the online world, through methods such as blogging, and even the irritating pop-ups. As more individuals are seeking to use the internet as additional, or even their sole source of income, a number of regulatory agencies have stepped up to assist the FTC in monitoring online advertising.

III. Overview of the Internet Advertising Landscape and Regulatory Agencies

There are a number of large and powerful regulatory bodies that help shape the standards that advertisers must comply with. The most well-known authority is the Federal Trade Commission²⁹ that takes action through the traditional court system as well as conducting its own agency hearings. The public comments that can be submitted by attorneys on behalf of

²⁶ *Id.* at 901.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Federal Trade Commission, <http://www.ftc.gov/> (last visited March 2, 2010).

themselves or the corporations that they represent can play a significant role in shaping the current regulations and adopting new regulations.

In addition to the Federal Trade Commission, the National Advertising Review Council's (NARC)³⁰ mission is to foster the truth and accuracy in national advertising through voluntary self-regulation. The NARC sets the policies for the National Advertising Division (NAD)³¹, and the Electronic Retailing Self-Regulation Program. (ERSP).³² The NARC focuses on three goals which are to minimize governmental involvement in the advertising business, to maintain a level playing field by settling disputes between competing advertisers, and increasing brand loyalty by increasing public trust in the credibility of advertising.³³ Furthermore, the organization will review certain advertiser claims and make appropriate recommendations. If an advertiser fails to follow these recommendations, the NARC will bring this to the attention of the FTC for enforcement action.³⁴ For example NAD recommended that the company Lifes2Good discontinue its claims that Viviscal is "doctor recommended," and that it discontinue its "before and after" photo comparison.³⁵ For many companies, referring a matter to the NAD is a low cost alternative to litigation, that is a quicker and more private process.³⁶ Written decisions are given within sixty days, and unlike a judicial file, all data is kept private when reviewing a case.³⁷

³⁰ National Advertising Review Council, <http://www.narcpartners.org/> (last visited March 2, 2010).

³¹ National Advertising Division, <http://www.nadreview.org/> (last visited March 2, 2010).

³² Electronic Retailing Self-Regulation Program, <http://www.narcpartners.org/index.aspx> (last visited March 2, 2010).

³³ National Advertising Review Council, <http://www.narcpartners.org/> (last visited March 2, 2010).

³⁴ Id.

³⁵ Linda Bean, NAD FINDS LIFES2GOOD CAN SUPPORT CERTAIN ADVERTISING CLAIMS FOR 'VIVISCAL,' RECOMMENDS ADVERTISER MODIFY CERTAIN CLAIMS, NAD, Jan. 25, 2010, <http://www.nadreview.org/DocView.aspx?DocumentID=7869&DocType=1>.

³⁶ <http://www.nadreview.org/AboutNAD.aspx>

³⁷ Id.

In addition to the NAD, the ERSP provides a quick and efficient process to review egregious advertising claims.³⁸ The ERSP is administered by the Council of Better Business Bureaus, and the NARC provides oversight to the program.³⁹ The ERSP reviews advertising campaigns that have been discovered through its own monitoring efforts, that have been referred for review by a consumer or advocacy site, or that is one of its member's campaigns.⁴⁰ If the ERSP feels that campaign is noncompliant with its guidelines, it will then refer the campaign to the appropriate governmental agency, most likely the FTC.⁴¹ While a positive review is definitely a step in the right direction, the FTC has made clear that its members will not receive a "free pass."⁴² In other words, a favorable response from the ERSP, does not give an advertiser immunity from claims brought by the FTC or any other type of regulatory agency. Recent action brought against fake blogs occurred on August 11, 2009, when the ERSP issued an opinion following a competitor's challenge of Urban Nutrition's website.⁴³ ERSP found that rather than the website being an unbiased resource for consumers regarding weight loss as it claimed, Urban Nutrition owned several of the weight loss and diet websites that it was reviewing.⁴⁴ "When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement... such connection must be disclosed."⁴⁵ The ERSP recommended that Urban Nutrition clearly and conspicuously disclose

³⁸ <http://www.narcpartners.org/ersp/faq.aspx>

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Liisa Thomas, Comment, Social Networking and Blogging: The New Legal Frontier, 9 J. Marshall Rev. Intell. Prop. L. 500, 517 (2010).

⁴⁴ *Id.*

⁴⁵ *Id.*

the relationship between Urban Nutrition and the products being reviewed to consumers through additional disclosure and modifications.⁴⁶

Another prime example of failure to disclose was evidenced in 2006 when Sony Computer Entertainment America launched an online viral marketing campaign known as “All I Want for Christmas.”⁴⁷ While the website purported to contain videos and blogs created by two teenagers that were lobbying their parents, in actuality the marketing effort was created by Sony’s advertising company.⁴⁸ Sony was widely criticized for misleading consumers on the internet.⁴⁹

Besides relying on these regulatory agencies, the FTC has become more aggressive this past year in the enforcement of its guidelines. Some of the enforcement actions in 2009 involved *John Beck/Mentoring of America*, *Cash Grant Institute*, *Google Money Tree*, and *Classic Closeouts*.⁵⁰ One of the cases that stands out as illustrating recent trends in deception in online advertising is Google Money Tree that claimed that by using its money making kit, a stay at home mom made \$108,000 in six months just filling out forms and doing searches on yahoo and google.⁵¹ In many instances, consumers that signed up for the product received no shipment.⁵² Furthermore, the company created a false aura of legitimacy by using “google” in its business name, its domain name, and its logos.⁵³ In numerous instances, consumers were unaware that

⁴⁶ *Id.* at 518.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn. FTC website, July 1, 2009, <http://www.ftc.gov/opa/2009/07/shortchange.shtm>.

⁵¹ FTC v. Infusion Media, Inc. also d/b/a Google Money Tree. Official Complaint, Case 2:09-cv-01112-RJ-LRL, June 22, 2009.

⁵² *Id.*

⁵³ *Id.*

their credit card was going to be charged a monthly fee.⁵⁴ The FTC is sending out a message to advertisers that it will no longer turn its head to deception and misrepresentation in online advertising.

IV. Proposals and Adoption of New Guidelines

1. Testimonials and “Disclaimers of Typicality.”

After thirty years, and much debate the FTC decided that it was finally time to adopt revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).⁵⁵ In January 2007, the Commission published a Federal Register⁵⁶ seeking comment on several specific issues, the most noteworthy being the use of “disclaimers of typicality” accompanying testimonials that are not reflective of what consumers can generally achieve with the advertised product. Following much commentary, the FTC announced its adoption of the rules that became effective on December 1, 2009.⁵⁷

Under section a of consumer endorsements,

an advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly,

⁵⁴ Id.

⁵⁵ Guides Concerning the Use of Endorsement and Testimonials in Advertising; Notice of Adoption of Revised Guides: 74 Fed. Reg. 198, 53124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

⁵⁶ Invitation to Submit Comments in Reference to Project No. P034520: 72 Fed. Reg. 11 (Jan. 18, 1980) (to be codified at 16 C.F.R. pt. 255).

⁵⁷ Guides Concerning Use of Endorsements and Testimonials in Advertising. 16 C.F.R. § 255 (2009).

i.e. without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.⁵⁸

Section b of consumer endorsements states,

An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely upon adequate substantiation for the representation.⁵⁹

Furthermore, the Commission addressed advertisements that clearly and prominently disclosed either "Results not typical" or "These testimonials are based on the experiences of a few people and you are not likely to have similar results." Based on the results of its research, the FTC believes that these type of disclaimers are unlikely to be effective in getting the message across to consumers regarding the limited applicability of the testimonials.⁶⁰ However, the commission states that it is not "ruling out the possibility" that a strong disclaimer of typicality could be effective in a particular advertisement.⁶¹ Nonetheless, an advertiser possessing reliable empirical testing demonstrating the net impression of its advertisement with such a disclaimer is non-deceptive will avoid being slammed with a lawsuit in the first place.⁶²

When comparing the language of the current Guides with the 1980 Guides, one of the most striking differences is that the current Guides eliminate the safe harbor that the 1980 Guides

⁵⁸ *Id.* at § 255.2

⁵⁹ *Id.* at § 255.2

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

extended to non-typical testimonials accompanied by “results not typical disclaimers.”⁶³ The current Guides require advertisers to meet the same substantiation requirements that would apply if they made that performance claim directly, rather than the claims being made through a testimonial.⁶⁴ In other words, advertisers are responsible to the same degree as if they were the ones making the claim. This definitely serves to place an extra burden on the advertiser and increases the breadth of advertiser liability. The commission, for approximately thirty years before revising the Guidelines, as well as other federal agencies, have long relied on typicality disclaimers.⁶⁵ For example, the FDA relies on disclaimers to communicate detailed information regarding prescription drugs and side effects when directly advertising products to consumers.⁶⁶ Additionally, the Securities and Exchange Commission requires certain disclosures in advertising mutual funds.⁶⁷ If these type of “typicality disclaimers” are acceptable in most other situations, including even medicinal products, then why are they unacceptable when used in the context of online advertising? I believe that consumers who are comfortable searching the internet for products, and acquiring information on those products are at least as savvy as consumers that decide to purchase via other forms of advertisement.

Many different organizations including the American Association of Advertising Agencies, the American Advertising Federation, the Direct Marketing Association, and the Electronic Retailing Association have strongly opposed the current guidelines based on a number of grounds. One of the major concerns voiced is that the Guides requirement of non-typical testimonials be accompanied by disclosure of the results consumers generally achieve with the

⁶³ Id.

⁶⁴ Id.

⁶⁵ Public Comments of Electronic Retailing Association and Council for Responsible Nutrition, Project No. P035420, Counsel of Record: Jeffrey D. Knowles, Venable LLP., Nov. 21, 2008.

⁶⁶ Id.

⁶⁷ Id.

advertised product would increase costs for those advertisers who have not previously tracked consumers' experience with their products.⁶⁸ This might force the advertisers in that situation to eliminate testimonials completely. More significantly, requiring this type of disclosure requirement would be impracticable for products that do not lend themselves to conventional performance study because the manner in which the product is used can largely impact the consumer's experience.⁶⁹ For example, the results one achieves from using exercise equipment will largely depend on the manner in which it is used. Factors such as how vigorously, how frequently, and how much time each session the equipment was used will have an impact on results.⁷⁰ Unlike a controlled lab setting where a researcher can monitor his subjects and measure the results, real consumers will not all act in the same manner and may even report their results inaccurately, whether purposefully or accidentally.⁷¹ In situations where consumers act unpredictably, an advertiser would be subject to liability for his testimonials, unless he could substantiate what the "typical" consumer would achieve.

While performing these studies may not be as great of a burden for a large, well-established company that has a significant amount of data, for many entrepreneurs and smaller advertisers the economic burden is unreasonable.⁷² For companies to come up with accurate data on the "typical" consumer would require comprehensive studies, which can be quite costly.⁷³ This is especially true for new companies with a very tight budget that are just trying to get off the ground. While their costs will increase substantially, their profits will drop accordingly.

While I am not advocating that new and small companies should get a "free pass," and should be

⁶⁸ Public Comments Joint Submission American Association of Advertising Agencies, Project No. P034520, Counsel of Record: Edward F. Glynn, Jr., Venable LLP., Nov. 21, 2008.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

able to deceive customers, the economic situations of most small companies must be considered since they play such a vital role in the well-being of the company.

Another argument that has been made is that truthful, inspirational testimonials serve to motivate consumers to make healthy lifestyle changes, such as exercising more frequently, and eating healthier.⁷⁴ Who hasn't been motivated upon hearing the story of a person who completely changed his or her life around by making positive change? The commission argues that the costs of data collection are

no different from what the advertiser would incur if it made the performance claim directly, rather than through a testimonial, and there is no reason why the substantiation requirements should differ between the two forms of advertising if the message conveyed to consumers is the same. Nor is there any reason why a new company that might not yet have data showing how well its product performs should be allowed to convey a performance claim through testimonials that it would not be able to substantiate if it made that claim directly.⁷⁵

While I agree with the FTC that the testimonial section of an advertisement should not be a free-for-all where advertisers can make whatever unsubstantiated claims that they can imagine, I do however believe that there is a substantial and material difference between claims that a company is making directly, and testimonials that specific individual users of the product make. While any claims about a product should be based on a valid study, I believe when a particular consumer reports his results, it is understood by the public that the results are personalized to him. Everyone knows that companies are in business to make profit. Therefore, one or two positive testimonials are unlikely to be understood as representative of what the general population could expect to achieve with a specific product. However, I do agree that many positive testimonials combined in the aggregate could have the effect of misleading a

⁷⁴ Public Comments Submitted for the Endorsement Guides Review for American Association of Advertising Agencies, Project No. P034520, Counsel of Record: Ronald R. Urbach, Davis & Gilbert LLP., Nov. 21, 2008.

⁷⁵ Id.

consumer into thinking that certain results from using a product can be expected. In those circumstances, either limiting the number of testimonials or requiring an advertiser to back up the testimonials with performance studies makes sense. However, the FTC should have taken into greater consideration, the positive impact and motivational role that testimonials can play in the lives of many consumers. Furthermore, consumers are unlikely to blindly give automatic credibility just because a claim is made in one or two testimonials.

Through analysis of the language of the current Guides, it is understandable how advertisers may be confused by the high degree of ambiguity. According to the FTC, the statements “Results not typical,” or “These testimonials are based on the experience of a few people and are ineffective in many circumstances,” are not sufficient in most circumstances.⁷⁶ While it is clear that the commission seems to be generally opposed to typicality disclaimers, it does not clearly set forth how an advertiser can determine if the disclaimer will suffice in a particular circumstance. If there is the possibility that a strong disclaimer will suffice, an advertiser should be able to obtain the knowledge in what particular instances this will apply. In other words, under the current Guides, an unguided advertiser must either engage in costly research or run the substantial risk that a strong disclaimer is inadequate to prevent liability.⁷⁷

Another area of ambiguity is in the language that

An advertisement containing an endorsement relating to the experience of one or more consumers on a central or key attribute of the product or service will *likely* be interpreted as representing that endorser’s experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use.⁷⁸

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 16 C.F.R. § 255 (2009).

The use of the word “likely” is confusing and ambiguous because it leaves the advertiser with no guidance in figuring out in what particular circumstances the advertisement will likely be interpreted as representing what consumers will generally achieve. Advertisers should be given some objective standards to make a determination of the perceived impact of their advertisement.

2. *Reliance on flawed studies*

“It is ironic that the two studies that have been put forth by the Commission as providing empirical basis for the proposed new Section 255.2(b) would not meet the standards that have been applied to advertising substantiation by the Commission.”⁷⁹ In addition to the serious flaws in the studies, they are too narrow in scope to be applicable to all advertising in all media.⁸⁰ Although the studies have been criticized by several commenters in response to the Commission’s January 18, 2007 *Federal Register* notice concerning the Guides, Professor Thomas J. Maronick, who was the Director of the BCP’s Office of Impact Evaluation for over sixteen years, and the FTC’s in-house expert on consumer survey research responsible for designing and/or implementing over 300 consumer research studies, provided an in depth critique of the studies.⁸¹ The Commission conceded that the two studies were flawed.⁸² The first issue with the study was that the sample consisted of only 200 dietary supplement users, which is a limited number of users.⁸³ The second issue, is that 80% of the respondents were sixty years of age or older.⁸⁴ Younger audiences may process testimonials and disclosures differently from

⁷⁹ Public Comments of Electronic Retailing Association and Council for Responsible Nutrition, Project No. P035420, Counsel of Record: Jeffrey D. Knowles, Venable LLP., Nov. 21, 2008.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

older audiences.⁸⁵ Third, the results were based on a single product, a dietary supplement.⁸⁶ The effectiveness of testimonials in advertising may depend on the specific product.⁸⁷ Finally, the respondents were subjected to a high number of testimonials (eighteen), and a smaller number of testimonials may have a different impact.⁸⁸

Study two suffers from many fundamental flaws as well.⁸⁹ For example, in the weight loss part of the study, potential participants were screened so that only consumers who had used a weight-loss product, plan, or program in an attempt to lose weight within the last twelve months were allowed to be participants.⁹⁰ It did not make sense to exclude the millions of Americans who are overweight, but have not used a weight loss product in the past twelve months because advertisers would still view this group as potential customers for its weight loss product.⁹¹ For the business opportunity part of the study, only those operating or interested in operating a small business were allowed to be participants.⁹² This criterion may have excluded those who intend to keep their full time job, but would be open to the idea of making extra income.⁹³ Furthermore, subjects that were in the accounting/financial services field were excluded from the study.⁹⁴ These are only a couple of the many biases that Professor Maronick has highlighted that likely had an impact on the FTC's results in the study. If the FTC expects advertisers to do legitimate and impartial studies, should the FTC not have to abide by the same guidelines when setting its rules for advertisers?

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

3. *First Amendment Issues*

The new Guides raise First Amendment issues because advertisers no longer will be able to use typicality disclaimers to qualify non typical testimonials, and therefore will not be able to use these testimonials at all in their advertising.⁹⁵ “Disclaimers are constitutionally preferable to outright suppression.”⁹⁶ Since advertisers will no longer be able to use the safe harbor of “results are not typical” in reference to non typical testimonials and it may not be feasible to construct a reliable study that indicates in what situations consumers will get non typical results, an advertiser must suppress consumers non typical endorsements.⁹⁷ The issue is whether the advertisers and endorsers First Amendment rights are stronger than the rights of the FTC to decrease the chances that potential consumers will be misled. I believe that advertisers have a right to include any truthful testimonial that accurately reflects the individual’s results from using the product in their advertising, as long as the testimonial is not implemented in a way to intentionally mislead consumers that all consumers can expect to get the same results as attested to.

As highlighted in the Guides, “Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.”⁹⁸ One example that emphasizes this concept is Example 6 which provides the example of

⁹⁵ Public Comments Submitted for American Association of Advertising Agencies, Project No. P034520, Counsel of Record: Edward F. Glynn, Jr., Venable LLP., Nov. 21, 2008.

⁹⁶ Pearson v. Shalala, 164 F.3d 650, 657 (D.C. Cir. 1999).

⁹⁷ Public Comments Submitted for American Association of Advertising Agencies, Project No. P034520, Counsel of Record: Edward F. Glynn, Jr., Venable LLP., Nov. 21, 2008.

⁹⁸ 16 C.F.R. § 255.2 (2009).

An advertisement that purports to portray a hidden camera situation in a crowded cafeteria at breakfast time. A spokesman for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. "Even though the words "hidden camera" are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual consumers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed."⁹⁹

I am in agreement with this example, and with the principle that those being represented to be "actual consumers" should in fact be "actual consumers" because of the varying degrees of impact that it will have on the consumer. If a consumer sees an actual consumer in a hidden camera situation give a positive response, he may be influenced to purchase the product, whereas the influence that a paid actor will have on a consumer will likely be significantly less.

4. Disclosure of Material Connections

Everyone knows that the relationship between the endorser and the seller of advertised product can have a strong influence on the credibility that the consumer assigns to the advertisement. "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e. the connection is not reasonably expected by the audience), such connection must be fully disclosed."¹⁰⁰

In §255.5, Example 7, there is the example of a college student who has a "blog" and readers of his blog frequently seek his opinion about videogame hardware and software.¹⁰¹ As it had previously done, the manufacturer of a previously released video gaming system gives him a

⁹⁹ *Id.*

¹⁰⁰ *Id.* at § 255.5

¹⁰¹ *Id.*

free copy of the videogame asks him to write a review on his blog.¹⁰² The blogger in this situation should clearly and conspicuously disclose that he received the gaming system free of charge because it would be deceptive for him not to.¹⁰³ I believe that this example creates a substantial amount of confusion to bloggers. First, does the giving of all samples and all advance copies of products constitute a “material connection” between the seller and the blogger?¹⁰⁴ Do the samples have to have a certain value for the seller and blogger to have a “material connection?”¹⁰⁵ What if the seller promises that will give the blogger games for free in the future, instead of currently? Next, should it matter that seller is the one that sought out the blogger, rather than the opposite?¹⁰⁶ When would consumers reasonably come to conclusion without a disclaimer that the blogger received the videogame for free?¹⁰⁷ For example, maybe the blogger is so popular that all consumers automatically assume a connection between the seller and the blogger. Finally does it matter who is hosting the blog site?¹⁰⁸ I believe that this example provided in the FTC Guidelines raises more questions, than it provides answers to. Bloggers are left with a great amount of uncertainty as to when they must disclose their relationship with the seller.

Another important example is in §255.5, Example 7, which involves an employee of a leading playback device manufacturer posting messages on an online message board designated for discussions of new music download technology that is frequented by MP3 player

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Public Comments of Association of National Advertisers, Project No. P035420, Counsel of Record: John P. Feldman, Reed Smith., Nov. 21, 2008.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

enthusiasts.¹⁰⁹ The members of the message board community are unaware that the individual posting messages works for a certain employer, which would likely affect the weight or credibility of his endorsement. If the poster of the messages does not disclose the relationship to the manufacturer, the manufacturer may be held liable for the non-disclosure by its employee.¹¹⁰ However, the Commission has made clear that if a company establishes appropriate procedures that would be a consideration as to whether law enforcement action should be taken against the company.¹¹¹ However, employers are still open to potential liability, and the Guides fail to specify what are the appropriate procedures that employers can take to eliminate potential liability completely.

The Commission does not believe however, that it needs to spell out the procedures that companies should put in place to monitor compliance with the principles set forth in the Guides; those are appropriate subjects for advertisers to determine for themselves, because they have the best knowledge of their business practices, and thus of the processes that would best fulfill their responsibilities.¹¹²

What the FTC appears to be saying is that it is the businesses themselves that are in the best position to develop the processes that would fulfill their responsibilities in monitoring their employees because they are the ones knowledgeable in that industry. However, while the FTC appears to give the advertiser much flexibility in developing its monitoring system, if that system is not up to FTC standards, then the advertiser will be subject to liability. I believe that guidance in the form of monitoring suggestions, and some examples of appropriate monitoring steps would be helpful to advertisers. The steps necessary to be FTC compliant are not always inherently obvious to advertisers. In other words, an advertiser may have different views on

¹⁰⁹ 16 C.F.R. § 255.5 (2009).

¹¹⁰ Public Comments of Association of National Advertisers, Project No. P035420, Counsel of Record: John P. Feldman, Reed Smith., Nov. 21, 2008.

¹¹¹ Guides Concerning the Use of Endorsement and Testimonials in Advertising; Notice of Adoption of Revised Guides: 74 Fed. Reg. 198, 53136 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

¹¹² Id.

what constitutes sufficient monitoring than the FTC, and the level of monitoring that advertisers should strive to meet needs to be clearly laid out to increase the probability of compliance.

Furthermore, with the with the rapid increase of online advertisers, affiliate marketers, and affiliate networks, each party should have a clear understanding as to how far its liabilities extend. For example, suppose that an advertiser that is trying to sell a product that it produces uses an affiliate network (which acts as a broker), such as NeverBlue to locate affiliate marketers to sell its product. How far does the advertiser's liability extend? How far does the affiliate network, or broker's responsibility extend? For example, is an advertiser responsible for locating and monitoring all of the affiliate marketers that advertise its product, even though it may be extremely burdensome and costly to do so? Is the advertiser liable if an affiliate marketer misleads consumers into thinking that the product has certain attributes that it does not, when the advertiser did not even contract directly with the affiliate marketer, but rather used an affiliate network? Furthermore, should an affiliate network be responsible for monitoring the landing pages of the affiliate marketers that sign up with the network? All of these questions need clear answers, so that each party knows its potential liability, and takes active steps to comply with the regulations. With the way the current Guide now reads, each party can claim, although probably not successfully, that they were under the impression that it was another party's responsibility to ensure compliance with the Guides. For example, the affiliate networks will blame the advertiser and the affiliate marketers, whereas the advertiser will blame both the affiliate networks, and the affiliate marketers for failing to advertise its product in a manner that it approved. Although ignorance is not a defense, by specifying clearer guidelines, it will make it more difficult for all the parties involved to say "I didn't know."

The FTC should take into consideration that some forms of advertising are easier for its advertisers to regulate than others. For example, it is impossible for a producer of a popular product that has hundreds or even thousands of affiliate marketers promoting his or her product via blogs, posting messages on discussion boards, through email, and via pop-ups, to regulate all of those advertisements. What the FTC has done in the current Guides is that it came up with a one-size fits all approach that fails to consider the unique characteristic of alternative media channels, such as the internet.

5. Application of Guidelines to other forms of Media

One important consideration regarding the new Guides is the extent of its coverage. For example, do the current regulations span across more traditional forms of advertising such as print, or is its application limited to the sphere of internet advertising? While much of the commentary discussed, and the focus for analysis in this paper is internet advertising, the current Guides are applicable to all forms of advertising. When examining the language, “the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements in advertising,” there is no indication that its application is limited to internet advertising.¹¹³ Referring then to Section 5 of the FTC Act¹¹⁴, the FTC has the power to prevent “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” The Guides interpretation of the FTC Act, provide the FTC with the power to prevent consumer deception and unfair practices, despite the medium which is used for the transmittal of the message.

¹¹³ 16 C.F.R. § 255 (2009).

¹¹⁴ 15 U.S.C.A. § 45 (2006).

The intent of the Guides to apply beyond the realm of internet advertising is further illustrated by the use of examples provided by the FTC. The examples, which are illustrative of procedures to satisfy the FTC requirements concerning endorsements and testimonials, provide examples involving both bloggers, as well as examples involving more traditional forms of advertising, such as brochures.¹¹⁵ The Guides also provide illustrations regarding infomercials.¹¹⁶ While the rampant fraud occurring on the internet likely served as a catalyst for the FTC to enact the Guides, the Guides are applicable to traditional forms of media as well. Whether the FTC will focus the majority of its time and effort on consumer deception on the internet will develop in the near future. Regardless, all advertisers are now subject to the higher standards laid forth in the Guides, and must strive to make their advertisements more transparent, and less likely to deceive consumers in order to escape liability. For many advertisers, this will be a challenging task.

V. First Amendment: Statutory Jurisdiction and Regulation of Commercial Speech

1. Defining Commercial Speech

The first step to understanding the FTC's power to adopt and implement these changes is to have a clear definition of the term "commercial" speech. The Supreme Court has struggled with coming up with a clear definition of the term.¹¹⁷ While the Court has sometimes articulated that there exists a "common sense difference" between commercial speech and noncommercial

¹¹⁵ 16 C.F.R. § 255 (2009).

¹¹⁶ *Id.*

¹¹⁷ Joshua A. Marcus, Comment, Commercial Speech on the Internet: Spam and the First Amendment, 16 *Cardozo Arts & Ent LJ* 245, 258 (1998).

speech,¹¹⁸ the Court has not always found this distinction to be so definitive. Furthermore, this definition is not very helpful. What may be common sense to one person, may not be so readily understood by another. Commercial speech has also been defined as “speech which does no more than propose a commercial transaction.”¹¹⁹ Shortly after this definition of commercial speech was articulated, in a highly influential case, *Central Hudson Gas & Electric*¹²⁰, the Court defined commercial speech as “expression solely related to the economic interests of the speaker and its audience.” While the former tests appears to be basing the definition of commercial speech on the content of the message, the latter tests gives weight to the economic intent of the speaker.

Finally, the test in *Bolger v. Young Drug Product Corp.*,¹²¹ has articulated a useful method in defining commercial speech. The case showed that commercial speech is not easily distinguishable from noncommercial speech.¹²² The issue in this case was whether the distribution of unsolicited advertisements of its products through the U.S. postal service, where some of the materials contained information about prophylactics, is commercial or noncommercial speech.¹²³ This was an issue because federal law prohibited the unsolicited advertisements of contraceptives through the mail.¹²⁴ The court looked at four elements in holding that: 1) the pamphlets proposed a commercial transaction; 2) the pamphlets were considered advertisements; 3) the pamphlets referred to a specific product; and 4) the speaker

¹¹⁸ Virginia State Bd. Of Pharm. V. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1975).

¹¹⁹ 425 U.S. 748 (1975).

¹²⁰ Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York, 447 U.S. 557, 562 (1980).

¹²¹ Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

¹²² 16 Cardozo Arts & Ent LJ 245 at 259.

¹²³ Youngs Drug Prods. Corp., 463 U.S. 60 at 66.

¹²⁴ Id. at 61.

had an economic motivation for mailing the pamphlets.¹²⁵ While the court found that there existed strong support that the pamphlets were commercial speech, if only one of the listed four factors were present the speech would not necessarily be rendered commercial.¹²⁶ For an encyclopedic definition of commercial speech, *Corpus Juris Secundum*¹²⁷ informs us:

Commercial speech is expression which proposes a commercial transaction,[1] which is related solely to the economic interests of the speaker and his or her audience,[2] or which is likely to influence consumers in their commercial decisions.[3] It usually involves advertising products for sale,[4] but is not restricted to advertising; for instance, communication directed solely to the collection of a debt is purely commercial.[5] Speech is not rendered commercial by the mere fact that it relates to advertisement,[6] that the speaker is a corporation,[7] or that it criticizes a product.[8]

Although the exact definition of commercial speech is difficult to articulate, when a solicitation is motivated by a strong economic motivation, which is the primary or one of the primary goals of the speech, then the speech can be appropriately classified as commercial in nature. Under the articulated definitions of commercial speech, internet marketing that is designed to promote the sale of products for profit would be appropriately classified as commercial speech.

2. *Statutory Jurisdiction of the FTC*

The statutory authority of the FTC is derived from 15 U.S.C.A. § 45: Unfair methods of competition unlawful; prevention by Commission.¹²⁸ “Unfair methods of competition in or

¹²⁵ 16 Cardozo Arts & Ent LJ 245 at 259.

¹²⁶ *Id.*

¹²⁷ *Corpus Juris Secundum*, 16B C.J.S. Constitutional Law § 812 (2009).

¹²⁸ 15 U.S.C.A. § 45 (2006).

affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”¹²⁹ Furthermore,

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], *from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce* (emphasis added).¹³⁰

The FTC has broad statutory authority, which is limited by its inapplicability to certain entities such as banks, savings and loan institutions. The act also does not apply to commerce with other nations (other than import commerce) with certain exceptions listed.¹³¹ Therefore, in some situations the FTC will even have authority to regulate commerce with foreign nations.

The FTC has extensive procedures in formulating its rules. The procedures involved in formulating a rule are:

(A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B) of this section), together with a statement of basis and purpose.¹³²

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² 15 U.S.C.A. § 57a (2006)

As mentioned, part of the procedure in formulating rules is to allow interested parties to submit written data and argument in support of their views. This is a good policy because it allows for the consideration of viewpoints from different perspectives that the FTC may not have previously considered when it proposed a rule. In the case of formulating the current FTC Guides, a plethora of written comments were submitted. However, this procedure is only effective when the FTC fully considers the written submission before enacting rules. Some would argue that this failed to occur when formulating the current Guides.

3. *Regulation of Commercial Speech*

Norms and rules governing how one should use the Internet is sometimes referred to as “Netiquette.”¹³³ An action taken may not fall under proper Netiquette, but may still be protected commercial speech under the First Amendment. The Court’s view of protection under the First Amendment of commercial speech is summed up by the statement, “we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing mode of regulation that may be impermissible in the realm of noncommercial expression.”¹³⁴ While the court clearly held that commercial speech would be afforded less First Amendment protection as opposed to the protection afforded for noncommercial speech, it did not articulate a clear standard that would govern the protection of commercial speech.

A clear standard of commercial speech was laid out in the influential *Central Hudson* case. In that case, the Public Service Commission of the State of New York, ordered electric

¹³³ 16 Cardozo Arts & Ent LJ 245 at 247.

¹³⁴ Bates v. State Bar of Ariz., 433 U.S. 350, 456 (1977).

utilities in the state of New York to cease all advertising promoting the use of electricity.¹³⁵ It did so because the state's interconnected utility system did not have sufficient sources of supply to meet all customer demands for the winter.¹³⁶ However, the Commission wished to continue the ban, three years later, once the fuel shortage had ceased.¹³⁷ The commission argued that it is in the state's interests to conserve electricity and to ensure fair and effective rates.¹³⁸ However, Central Hudson challenged the restriction on its promotional efforts as violating its right to commercial speech under the First Amendment.¹³⁹ In dealing with this issue, the Court formulated a four part test: 1) The commercial speech must concern lawful activity and not be misleading.¹⁴⁰ 2) Whether the governmental issue is substantial.¹⁴¹ 3) If the answer to the first two parts are positive, it must be determined whether the regulation directly advances the governmental interest asserted¹⁴², and 4) whether it is not more extensive than is necessary to serve that interest.¹⁴³ While the first three elements were met in this case, and the State's interest in energy conservation is directly advanced by the Commission's order, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.¹⁴⁴ In other words, the Commission has not shown that that a more limited regulation of appellant's commercial expression would fail to accomplish its goals. The burden was on the Commission to establish that a more limited regulation would not accomplish the State's goals.¹⁴⁵ The Commission fell short in its proof.¹⁴⁶

¹³⁵ 447 U.S. 557 at 558.

¹³⁶ *Id.* at 557.

¹³⁷ *Id.* at 559.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 566.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 570.

¹⁴⁵ *Id.*

The court in *National Urological Group* challenged the standards the FTC used as in violation of the First Amendment.¹⁴⁷ In that case, the court determined that the defendants, who marketed dietary supplements have misapplied the *Central Hudson* test because rather than attacking any particular regulation regulating speech, the defendants attacked the guidelines used to determine whether speech is protected.¹⁴⁸ This case is particularly instructive because it shows that one challenging the FTC's Guides must attack a particular regulation, rather than the process the FTC uses to determine whether speech is protected.¹⁴⁹

An interesting case that involves commercial speech under the First Amendment involves a book writer who claimed that the Sixteenth Amendment was never ratified.¹⁵⁰ He claimed that because it was not ratified, individuals are justified in not paying taxes because the federal income tax system is unconstitutional according to the Supreme Court.¹⁵¹ As expected, under the *Central Hudson* test, the book writer, who marketed his book over the internet failed in his defense because his actions did not involve lawful protected activity, but rather misled consumers.¹⁵² While Benson is not prohibited from selling his book, *The Law that Never Was*, he is prohibited from making false statements in connection with the product.¹⁵³

Applying the *Hudson test* to the FTC current Guides, we must first examine prong one, which is whether the speech sought to be protected is lawful activity, and not misleading. The satisfaction of this prong will vary by circumstance, and will depend if the specific advertisement being evaluated communicates its message to consumers in a non-misleading manner. Prong

¹⁴⁶ *Id.* at 559.

¹⁴⁷ FTC v. Nat'l Urological Group, Inc., 645 F. Supp. 2d 1167 (N.D. Ga. 2008).

¹⁴⁸ *Id.* at 1185.

¹⁴⁹ *Id.*

¹⁵⁰ United States v. Benson, 941 F.2d 598, 607 (7th Cir. 1991).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

two, which is whether the governmental interest is substantial is easily met when it comes to internet marketing. The government has a strong interest in ensuring that consumers are not deceived by unscrupulous advertisers that are offering illegitimate products. Next, the regulations enacted in the current Guides advance this governmental interest by creating tighter regulations that advertisers must abide by. The tighter regulations decrease the probability that consumers will be misled. The final prong, which is whether the Guides are not more extensive than necessary to serve that interest can be argued both ways. On the one hand, when the prior Guides governed, consumer deception was a rampant problem on the internet, and something had to be done to combat this problem. However, consumer deception is still a major problem in internet marketing. Furthermore, is there really no less restrictive way to regulate internet marketers than the regulations that have been enacted in the current Guides? Many would argue that the current Guides go too far by eliminating the safe harbor that extended to non-typical testimonials accompanied by “results not typical” disclaimers, and by extending liability to advertisers in situations that they cannot control. I believe that the FTC has not met the burden of showing that the current regulations are not more extensive than is necessary to serve the governmental interest of reducing consumer deception.

The specific form of media can have an impact on how the court will determine the protection of commercial speech under the First Amendment. The Court stated in *Metromedia, Inc. v. City of San Diego*¹⁵⁴, “Each method of communicating ideas is a law unto itself and that the law must reflect the differing natures, values abuses, and dangers of each method.” This case recognizes the unique properties of different mediums of communications, and the unique dangers inherent in them. For example, the court has given the broadcast media less First

¹⁵⁴ Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

Amendment protection because of the finite number of frequencies available to radio and television.¹⁵⁵ Not everyone that wishes to broadcast can be given a channel to do so.¹⁵⁶ However, the court in *Reno v. ACLU*¹⁵⁷, differentiated the internet from broadcast media. Unlike broadcast media, the internet provides relatively unlimited, low cost capacity for all kinds of communication.¹⁵⁸ Furthermore, in *FCC v. Pacific Found*¹⁵⁹, the court held that the First Amendment protection does not extend as far in broadcast media as in the print media because broadcast media has a “pervasive presence” on the lives of all Americans. What the court seems to be articulating is that because broadcast media has the potential to be more intrusive than print media, it should be afforded less First Amendment protection. However, the court in *Reno*¹⁶⁰ held that the internet was not as “invasive” as radio or television. The court’s reasoning is that “communications over the Internet do not invade an individual’s home or appear on one’s computer screen unbidden.¹⁶¹ Users seldom encounter content by accident... Almost all sexually explicit images are preceded by warnings as the contents ... odds are slim that a user would come across a sexually explicit sight by accident.”¹⁶² This argument is logical in that users on the internet normally have complete control over the content that appears on their screen, with the exception of pop-ups and misdirected links. However, the tremendous number of users on the internet, and the ease of access by children, does create the potential for widespread abuse. The government has a strong interest in protecting the public, but must walk a fine line in not

¹⁵⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

¹⁵⁶ *Id.*

¹⁵⁷ *Reno v. ACLU*, 117 S. Ct. 2324, 2344 (1997).

¹⁵⁸ *Id.*

¹⁵⁹ *FCC v. Pacific Found.*, 438 U.S. 726, 748 (1977).

¹⁶⁰ *Reno v. ACLU*, 117 S. Ct. 2324, 2343 (1997).

¹⁶¹ *Id.*

¹⁶² *Id.*

exceeding its boundaries and impinging on protected commercial speech under the First Amendment.

VI. My Personal Recommendations

While the FTC devised the current Guides in an attempt to decrease the amount of online deception and misrepresentation, I believe that some sections of the Guides only consider the interests of one side of the equation, the consumer. Both sides of the equation, the consumer and the advertiser, need to be considered in developing effective guidelines that the online community will strive to meet. The three biggest problems that I see with the current Guides are that they are too ambiguous, they impose limitless liability on advertisers, even in situations that they cannot possibly control, and they were devised in reliance on two flawed studies.

The first step that I would recommend the FTC to take is to spend the time to do a legitimate and accurate study of the effect of “disclosures of typicality,” which can be broadly applied to the online advertising landscape. In other words, do not mold the study and choose participants that are likely to yield the desired results. Performing an unbiased study that lives up to the FTC’s own performance based study guidelines, is the only way that those in the industry will respect the result. The next step that I recommend is that the FTC work closely with the major players in the industry, such as Electronic Retailing Self-Regulation Program (ERSP) division of the National Advertising Review Council (NARC) to come up with guidelines that are specific to the internet advertising landscape. In other words, the FTC, together with these different organizations, including the advertisers, the affiliate marketers, and the affiliate networks that serve as brokers between the advertiser and the affiliate marketers should develop guidelines that recognize the unique characteristics of the industry. If advertisers see that those

in the industry had an input in shaping the regulations, then the Guides are more likely to be respected and followed. The Guides will only be effective if they are accepted as reasonable and practicable. Finally, after devising new Guides, I believe that the FTC should run the Guides through a trial period in which it strives to identify problems with the Guides, and then make improvements. These improvements should take into consideration the views of both the advertisers, who are striving to make profit, and the FTC, which is striving to protect the consumer. After these improvements are made, the FTC should introduce its final Guides, which clearly and unambiguously set forth the rules that advertisers must abide by. While this may seem like a long and arduous process, I believe that the internet advertising landscape has unique characteristics compared to other forms of advertising, and these characteristics must be fully taken into consideration when developing the final Guides. Unfortunately, the current Guides mean more worries for online advertisers, more legal bills, increased uncertainty, and more difficulty economically for smaller companies and entrepreneurs. Only with the cooperation and input of those in the industry, by looking at the impact of the regulations from all angles, and through diligent research and analysis which strives to recognize and improve any flaws, will the Guides achieve the maximum level of effectiveness in regulating internet advertising.