

User or Not, Forever an Endorser: FTC Regulation of Online Endorsement and Content Control

Matthew T. Bray
Colorado State University
United States
mattbray31t@gmail.com

Abstract

This study aims to explore possible shortcomings and future applicability of the FTC Revised Guides Concerning the Use of Endorsements and Testimonials in Advertising. The Federal Trade Commission issued the Guides in 2009 to address issues surrounding online endorsement in an effort to maintain standards of advertising practice in new media. This study reviews the original purpose of the Guides and how well that purpose has been upheld in accordance with the cases and rulings the Guides have been applied to. This study concludes that the FTC has yet to clarify ambiguities surrounding the concept of a bona fide user, message appropriation, and content control.

Keywords

advertising; commercial speech; ftc; online; endorsement

Online Regulation of Advertising

Launched in 1994, internet advertising has grown near twenty-five percent each year (Cross, 2010). This rapid expansion has blurred the lines of commercial speech in ways that would have been unimaginable to previous generations of media professionals and researchers. Not only has the internet opened up and expanded new methods for reaching an audience, it has fundamentally changed the way consumers and advertisers interact. Sparked by the open nature of the web and consumers having the ability to create content, “the editorial power of advertisers is radically smaller than in traditional media” (Lessig, 2008, p.63). Due to the proliferation of online use by consumers and advertisers, in 2009 the Federal Trade Commission updated its guidelines concerning endorsement and testimonial that had remained unchanged since 1980.

The FTC Revised Guides Concerning the Use of Endorsement and Testimonials in Advertising (hereinafter Guides) was an attempt to gain a modicum of control over online commercial speech. This study aims to evaluate the validity of the attempt by addressing the followings: (1) how the FTC has addressed the issue of control over messages concerning a bona fide user, (2) who is in control of commercial speech content online, and (3) how well the original purpose of the Guides has been served. Furthermore, the study is designed to explore the implications of the Guides on regulation of commercial speech online.

This study uses traditional qualitative legal analysis of cases and rulings from January 2010 to February 2013 where the revised FTC Guides have been applied. A LexisNexis search was conducted as well as reviewing past cases and rulings from the FTC website. The included cases may not represent all of the actions taken by the FTC during the time period described, nor is it the goal of this paper to describe each of the rulings and compliances. Rather, the goal of this study is to analyze the instances where ambiguities in the Guides have, or have not, been resolved.

The study findings suggest that based on the low number of cases the Guides have been applied to, the ambiguities surrounding the issues of bona fide users and control of content online, now that users are able to appropriate new meaning from messages, have yet to be resolved.

First, there is an issue regarding the legitimacy of the Guides. Was it or is it necessary to regulate online commercial speech with the Guides? The 2009 Guides were updated under the assumption that

given new technologies enabling advertisers and their endorsers to disseminate messages to the public, the public should be protected from deceptive and misleading advertisements online (Federal Trade Commission, 2010). The Guides were created with zero prior complaints, issued by consumers or the FTC, concerning online endorsements and testimonials (Cross, 2010). The Guides were a preventative measure to account for adapting technologies where the line can be blurred in terms of what content is commercial and what is actual opinion generated by consumers. Due to the low number of cases in which it has been applied to suggests that the Guides may not be effective in regulating online endorsement and commercial speech.

The Bona Fide User, Message Appropriation and Control of Content

One issue that has yet to be dealt with concerns the “bona fide user”. Historically speaking, mandating that endorsers were bona fide users throughout the use of the advertising message worked fairly well. In this sense, television advertisements, and the like, were composed of “fleeting” messages that could be pulled from use when the endorser was no longer a bona fide user. From an advertising perspective, this gave the creators of these messages more control over, and more readily compliance with, the FTC guides stipulating that the endorser must be a bona fide user throughout the life of the message; simply because they could stop running the advertisement.

This study argues that applying that same rationale concerning the bona fide user online **no longer makes sense** because of the loss of control over the messages and the nature of linking and permanent content online. Mandating that an advertiser must stop benefiting from an endorsement message after the endorser is no longer a bona fide user of the product, brand or service cannot be enforced because the advertiser and the endorser do not control their content online. They can comply in the sense that the advertiser can stop posting material with the endorser attached, but that only covers messages that are produced after the endorser is no longer a bona fide user. Previous online messages cannot be deleted, nor can they be stopped from spreading from user to user; the messages themselves become appropriated to where the consumer now has the control over the content. As online users appropriate the commercial speech, “the importance of the original message changes” (Lessig, 2008, p.60) in a way that cannot be anticipated, nor controlled online. Up to this point, the FTC has yet to address this ambiguous issue; thus it is still up for debate regarding where the primary responsibility lies for these messages.

The FTC has made it clear that if a blogger, who is classified as an endorser under the Guides, makes a deceptive or unsubstantiated claim, both the blogger and advertiser could be held responsible for the statements made (Cross, 2010). In this case, advertisers have little control over the actual content of the ‘advertisement’ itself; yet they are held to the same standard as the person who made the claims. In this view, the advertiser still controls the message from a regulatory standpoint but according to online culture, the advertiser has very little control over what statements have been made. Classifying bloggers or online content creators as an endorser propels them from private to public; the statements they make are held to the same standard as the advertiser. Here again, ambiguities still surround the issue of who is control of the content and who is ultimately held accountable.

Implications

The importance of this work stems from continuing ambiguities in the 2009 Guides. The fact that the Guides were somewhat vague concerning the issues described above is not inherently a shortcoming of the Guides themselves. As the FTC investigated claims surrounding online endorsement, the Guides should have become clearer by evaluating the rulings and sanctions placed on the specific cases or compliances. However, this study finds many of the ambiguities that were originally questioned in 2009 still persist. This means, although the Guides themselves are not “rules” in the sense that there is no automatic fine for violation (Digital Media Law Project, 2010), the ambiguities may continue to have a negative impact on advertising practices and online consumers.

This study contributes to the field of internet research by providing a deeper understanding of the legal stipulations placed on both advertisers and endorsers and their current trends. The study also sheds

additional light on the concept of control in online speech regulation by exploring the interplay between the social practices of online speech and the government attempt to regulate them.

Acknowledgments

A special thank you and debt of gratitude is owed to Dr. Minjeong Kim of Colorado State University. It was with her encouragement and guidance that this research was possible.

References

- Lessig, L. (2008). *Remix, making art and commerce thrive in the hybrid economy*. (pp. 60-63). New York: Penguin Press.
- Digital Media Law Project. (2010, April 29). *Publishing product or service endorsements*. Retrieved from <http://www.dmlp.org/search/node/publishing-product-or-service-endorsements>
- Federal Trade Commission. (2010, June). *The ftc's revised endorsement guides: What people are asking*. Retrieved from <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking>
- Cross, L. B. (2010). "Results not typical": The impact of the federal trade commission's new guidelines for endorsements and testimonials. . *Whittier Law Review*, 32(1),
- Federal Trade Commission. (2010-2013). *Commission actions*. Retrieved from <http://www.ftc.gov/os/actions.shtm>

License

This article is ©2013 Authors, and licensed under CC 3.01