
RECENT REGULATION

INTERNET LAW — ADVERTISING AND CONSUMER PROTECTION — FTC EXTENDS ENDORSEMENT AND TESTIMONIAL GUIDES TO COVER BLOGGERS. — 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

Recently, the Federal Trade Commission (FTC) revised their Endorsement and Testimonial Guides (Guides) to cover “consumer-generated media” such as blogs and other internet media forms.¹ In the interest of providing consumers with full disclosure, the Guides require bloggers to disclose any “material connection[s]” they have with producers of any products that they “endorse” on their blogs.² A “material connection” includes not only monetary compensation, but also any free good received by the blogger — even if that good was provided unsolicited, with no conditions attached, for the purpose of allowing the blogger to review the product.³ Yet a constitutional analysis of unpaid blogger endorsements shows that such endorsements are not commercial speech — which receives reduced constitutional protection — but rather noncommercial speech entitled to full First Amendment protection. Not only do the Guides burden bloggers’ protected speech, they also create an unfair double standard by exempting legacy media⁴ from the Guides’ disclosure requirements. Therefore, the Guides should be ruled unconstitutional as applied to bloggers.

The Guides, first published in 1975,⁵ are an official interpretation of section 5 of the Federal Trade Commission Act⁶ (FTCA), which states: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”⁷ The Guides apply section 5, which forms the basis of the FTC’s authority to regulate advertising, specifically to “the use of endorsements and testimonials in advertising.”⁸ The FTC defines “endorsement” to mean “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”⁹ While

¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) [hereinafter 2009 Guides].

² *Id.* at 53,142.

³ *Id.* at 53,143 ex.7.

⁴ “Legacy media” refers to pre-internet media forms such as print and television.

⁵ Guides Concerning Use of Endorsements and Testimonials in Advertising, 40 Fed. Reg. 22,127 (May 21, 1975) [hereinafter 1975 Guides].

⁶ Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).

⁷ *Id.* § 45(a)(1).

⁸ 2009 Guides, 74 Fed. Reg. at 53,138.

⁹ *Id.*

the Guides are “advisory in nature,”¹⁰ they may form the basis for an enforcement action under the FTC Act,¹¹ and noncompliance may result in a civil penalty of up to \$10,000 per violation.¹² Before the 2009 revision, the Guides had last been updated in 1980¹³ — before the advent of consumer-generated media — and regulated celebrity and consumer endorsements appearing in traditional print and television advertisements.¹⁴

In January 2007, as part of its ongoing regulatory review process, the FTC sought comment on “the overall costs, benefits, and regulatory and economic impact of the Guides.”¹⁵ Although it did seek comment on the impact of “email and the Internet,”¹⁶ the FTC’s core concern seems to have been the use of consumer testimonials in traditional advertisements for dietary supplements.¹⁷ Still, a few commenters asked the FTC to consider whether the Guides should be revised to address online media.¹⁸ In November 2008, the FTC issued a proposed expansion of the Guides to cover consumer-generated media.¹⁹ Several commenters objected to this expansion.²⁰

Notwithstanding those objections, the FTC’s final statement of the new rules, issued in October 2009, states: “Advertisers are subject to liability . . . for failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements.”²¹ The Guides go on to explain: “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 . . . such connection must be fully disclosed.”²² Extensive examples make clear that bloggers, as well as companies providing free products, will be subject to the Guides.²³ Example 7 is particularly instructive, as it shows how a blogger whose

¹⁰ *Id.* at 53,124 n.2.

¹¹ *Id.* at 53,138.

¹² 15 U.S.C. § 45(l)–(m).

¹³ *See* Guides Concerning the Use to [sic] Endorsements and Testimonials in Advertising, 72 Fed. Reg. 2214, 2215 (Jan. 18, 2007) [hereinafter 2007 Notice].

¹⁴ *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 45 Fed. Reg. 3872 (Jan. 18, 1980); 1975 Guides, 40 Fed. Reg. at 22,127–28.

¹⁵ 2009 Guides, 74 Fed. Reg. at 53,124.

¹⁶ 2007 Notice, 72 Fed. Reg. at 2215.

¹⁷ *See id.* at 2215–16.

¹⁸ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72,374, 72,376 (Nov. 28, 2008).

¹⁹ *Id.* at 72,374.

²⁰ *See* 2009 Guides, 74 Fed. Reg. at 53,125–26.

²¹ *Id.* at 53,139 (citation omitted).

²² *Id.* at 53,142.

²³ *See, e.g., id.* at 53,138 ex.8, 53,139 ex.5, 53,143 ex.7.

only material connection to a company is the receipt of a free product must disclose that connection:

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system [The student] writes a favorable review. . . . [He] should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him . . . that this connection should be disclosed, and [the manufacturer] should have procedures in place to try to monitor his postings for compliance.²⁴

The reaction in the blogosphere to the FTC's announcement of these rules was unsurprisingly negative.²⁵ Bloggers expressed particular concern that the rules were overbroad, exceedingly vague, and expressly did *not* apply to legacy media.²⁶

Bloggers are right to be upset; the Guides violate the First Amendment. The Guides treat blogger endorsements as advertisements and attempt to regulate them as such. Unlike other speech, advertising is considered commercial speech and thus receives reduced First Amendment protection.²⁷ However, under 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. Courts should therefore apply strict scrutiny to the Guides and hold them unconstitutional as applied to unpaid bloggers. The burden the Guides impose, as well as

²⁴ *Id.* at 53,143 ex.7. Another helpful example illustrates: A woman who purchases a bag of dog food with a free coupon, then writes about the food on her blog, would not be considered an endorser; but she would be considered an endorser if she received the dog food for free as part of a network marketing plan. *Id.* at 53,138–39 ex.8.

²⁵ See, e.g., Megan McArdle, *Our Lips Are Sealed*, ATLANTIC.COM, Oct. 8 2009, http://meganmcardle.theatlantic.com/archives/2009/10/our_lips_are_sealed.php; Walter Olson, *Required FTC Blogger Disclosure*, OVERLAWYERED, Oct. 8, 2009, <http://overlawyered.com/2009/10/required-ftc-blogger-disclosure/> (collecting sources); Jack Shafer, *The FTC's Mad Power Grab*, SLATE, Oct. 7, 2009, <http://www.slate.com/id/2231808/>. But see Kayleen Schaefer, *Fessing Up About Freebies*, N.Y. TIMES, Oct. 15, 2009, at E6 (“Some [bloggers] say the rules may help identify them as serious journalists.”). Traditional news media may be biased against bloggers because they are competitors. See Daniel Kalder, *The US Government Is After Me — And You, If You're a Book Blogger*, THE GUARDIAN BOOKS BLOG, Oct. 19, 2009, <http://www.guardian.co.uk/books/booksblog/2009/oct/19/us-government-book-blogger>.

²⁶ See sources cited *supra* note 25; see also 2009 Guides, 74 Fed. Reg. at 53,136.

²⁷ Restrictions on commercial speech receive only intermediate scrutiny, while restrictions on noncommercial speech receive strict scrutiny. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion). A particularly onerous restriction on commercial speech, such as an advertising ban, may receive strict scrutiny, see *id.* at 501, but a mandatory disclosure requirement likely would not. Other commentators have previously examined whether blogs are commercial speech. See, e.g., Anthony Ciolli, *Are Blogs Commercial Speech?*, 58 S.C. L. REV. 725 (2007). However, previous analyses have not examined the specific nature of blogger *endorsements* in depth.

the unfairness of holding bloggers to a higher standard than legacy media, supports this result.²⁸

The Supreme Court has long held that the First Amendment does not prevent the government from regulating commercial speech. Commercial speech is speech that “propose[s] a commercial transaction.”²⁹ Although commercial speech doctrine arose in the context of “purely commercial advertising,”³⁰ not all advertising constitutes commercial speech,³¹ and not all commercial speech takes the form of traditional advertisements like print ads or television commercials. In *Bolger v. Youngs Drug Products Corp.*,³² the Supreme Court laid out a rough test for determining 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.³³ Even if one of these three elements is absent, the speech might still be classified as commercial depending on the unique circumstances of the case.³⁴

Some types of blogger endorsements are clearly commercial speech under the *Bolger* test — for example, an endorsement by a blogger employed by the product manufacturer to blog about the manufactur-

²⁸ Other potential challenges to the Guides, beyond the scope of this piece, include: (1) the requirement that manufacturers “monitor” bloggers makes them impermissibly liable for the conduct of third parties over which they have no control; (2) the Guides are overly broad and impermissibly vague, *cf.* Olson, *supra* note 25; (3) companies providing free products to bloggers are immunized by section 230 of the Communications Decency Act, *see* Eric Goldman, *A Fuller Explanation of Why the FTC Endorsement/Testimonial Guidelines Violate 47 USC 230*, TECH. AND MARKETING LAW BLOG, Oct. 12, 2009, http://blog.ericgoldman.org/archives/2009/10/a_fuller_defens.htm; (4) the Guides create an impermissible “chilling” effect on legitimate internet speech; and (5) the FTC’s statutory authority under section 5 of the FTCA does not extend to regulation of noncommercial speech appearing on blogs.

²⁹ *Bd. of Trs. v. Fox*, 492 U.S. 469, 473–74 (1989) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (internal quotation marks omitted). The Court has, at times, used an arguably broader definition: commercial speech is that which “relate[s] solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980). However, more recent cases have tracked the *Fox* definition more closely. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422–23 (1993).

³⁰ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

³¹ *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964) (holding that advertisements promoting civil rights were entitled to full First Amendment protection).

³² 463 U.S. 60 (1983). In this case, defendant condom manufacturer distributed informational mailings describing techniques for preventing sexually transmitted infections, with reference to defendant’s products. *Id.* at 62–63. The Court ruled the mailings commercial speech. *Id.* at 68.

³³ *Id.* at 66–67.

³⁴ *See id.* at 67 n.14 (“[W]e [do not] mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.”).

er's products in a positive light.³⁵ Other types of blogger endorsements are obviously *not* commercial speech — for example, an endorsement by a blogger who purchased the endorsed product with her own money, independent of any interaction with the product manufacturer. The more difficult question is whether an unpaid blogger endorsement by a blogger who receives a free sample product should be classified as commercial speech. Although no court has answered this question directly, several have applied the *Bolger* test in analogous situations. While court opinions in this area differ slightly from one another in the weight they assign each prong of the *Bolger* test,³⁶ in aggregate they demonstrate that unpaid blogger endorsements should *not* be classified as commercial speech since they fail the first and third prongs: they are not conceded to be advertising and do not have a sufficient “economic motivation” to justify classification as commercial speech.

Courts applying *Bolger* have not found the first prong — whether the speech is conceded to be advertising — dispositive.³⁷ When it is not conceded to be advertising, 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 product's manufacturer.³⁸ For example, the Sixth Circuit held that an ostensibly objective trade journal article lavishing praise upon a certain company's products was commercial speech — even though the article's author did not concede it was advertising — because the author owned the featured company.³⁹ Similarly, the Tenth Circuit found a stock recommendation in a financial newsletter to be commercial speech because the writer was compensated in stock by the company he endorsed.⁴⁰ Thus, the “direct economic relationship between the company and the promoter” led the courts to find commercial speech in both cases.⁴¹

³⁵ Cf. 2009 Guides, 74 Fed. Reg. at 53,139.

³⁶ Compare, e.g., *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001) (focusing on “economic motivation” as the determinative factor), with *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365 (D.C. Cir. 1988) (focusing on whether the speech was conceded to be advertising).

³⁷ See, e.g., *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008) (short film on the making of a video game produced by parent company of filmmaker); *Am. Future Sys. v. Pa. State Univ.*, 752 F.2d 854 (3d Cir. 1984) (Tupperware parties hosted by students on college campus); *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *vacated on other grounds*, *Wash. Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000) (distribution of clinical trial results by pharmaceutical companies at continuing medical education seminars). The speech at issue in each case was found to be commercial despite the fact that it was not conceded to be advertising.

³⁸ See, e.g., sources cited *supra* note 37.

³⁹ *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (false advertising suit brought by defendant's competitor under the Lanham Act).

⁴⁰ *United States v. Wenger*, 427 F.3d 840, 843 (10th Cir. 2005) (criminal prosecution for securities fraud under the Securities Act of 1933).

⁴¹ *Id.* at 848; see *Semco*, 52 F.3d at 112.

But courts have not found speech to be commercial where the speaker's economic motivation is significantly less direct.⁴² For example, in *SEC v. Wall Street Publishing Institute, Inc.*,⁴³ the D.C. Circuit held that articles published in a financial magazine that discussed various publicly traded companies in "glowing" terms did not constitute commercial speech — even though those companies had drafted the text of the articles themselves, paid the magazine's editors "writers' fees" for writing the articles, or purchased advertising in other issues in which they were not featured.⁴⁴ Applying *Bolger*, the court reasoned that "[t]he articles are not 'conceded' to be advertisements, and in fact, are not in an advertising format. . . . [T]hey are indistinguishable from run-of-the-mill newspaper or magazine stories."⁴⁵ Without a clear showing that speech is fundamentally premised on a direct financial exchange between speaker and advertiser, courts have refused to designate such speech as commercial.⁴⁶ And for good reason: classifying such speech as commercial would risk defining commercial speech too broadly, thereby threatening noncommercial speech with reduced constitutional protection.⁴⁷

An unpaid blogger's economic interest in publishing a positive endorsement is even less direct than that in *Wall Street Publishing*. Even where a blogger's positive endorsement might yield a benefit in the form of free products in the future, the blogger's speech is not "fundamentally premised on a direct economic relationship between the company and the promoter."⁴⁸ While a blogger may sell advertising space on his site to a company whose products he reviews, this sort of economic relationship is no more direct than the relationship between a newspaper and the companies that buy ads in the paper — a link that has never been thought to justify reduced scrutiny of gov-

⁴² See, e.g., *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001) (communications sent by Amway to potential customers linking Procter & Gamble with Satanism and mentioning specific products produced by both companies); *Bracco Diagnostics, Inc., v. Amersham Health, Inc.*, 627 F. Supp. 2d 384 (D.N.J. 2009) (article published in medical journal portraying defendant's products in a positive light, using data provided by defendant); *Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719 (S.D. Cal. 1995) (book written by defendant included promotion of a product in which defendant had a significant financial interest). The speech in these cases, unlike the cases described *supra* note 37, was not directly or primarily economically motivated.

⁴³ 851 F.2d 365 (D.C. Cir. 1988). This case was an SEC suit under the Securities Act of 1933 for an injunction requiring defendant publisher to disclose in its articles any consideration received from companies in exchange for publishing those articles. *Id.* at 366. The court held in defendant's favor on the commercial speech issue but remanded on other grounds. See *id.*

⁴⁴ *Id.* at 371–72.

⁴⁵ *Id.* at 372.

⁴⁶ See sources cited *supra* note 42.

⁴⁷ See *Wall St. Publ'g*, 851 F.2d at 371–72.

⁴⁸ *United States v. Wenger*, 427 F.3d 840, 848 (10th Cir. 2005).

ernment restrictions on newspapers' product reviews.⁴⁹ Thus, under the *Bolger* test, courts should find that unpaid blogger endorsements are noncommercial speech.

A determination that unpaid blogger endorsements are not commercial speech would mean that the Guides would have to satisfy strict scrutiny — a standard that is usually fatal to speech restrictions.⁵⁰ Even if a court found the consumer's interest in disclosure compelling, there are several ways the FTC could tailor the Guides more narrowly. For example, it could require the existence of an actual quid pro quo between the endorser and the advertiser,⁵¹ rather than treating the mere fact that a free product was given as sufficient grounds for enforcement. Or it could require intent to deceive. In light of these and many other potential alternatives, a court would almost certainly find the Guides unconstitutional as applied.

The burden on speech that the Guides impose supports this result. A blogger who does not wish to disclose receipt of free products may seem an unsympathetic case, but there are nonetheless important free speech principles at stake. The Guides require disclosure of the mere fact that the product was provided for free, whether or not an endorsement was written in exchange for free products. This required disclosure directly interferes with the content of the speaker's expressive message. Disclaimers have an "inherently pejorative connotation"⁵² that reduces the effectiveness of the message, even if the speaker is acting in good faith. In addition, restricting a blogger's receipt of free products makes it more difficult for the blogger to write any product reviews at all.⁵³ Thus, in the name of protecting consumers, the Guides would deprive consumers of information.

More importantly, the Guides unfairly hold bloggers to a higher standard than legacy media. Newspapers — and other media outlets

⁴⁹ Cf. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (applying full First Amendment protection to a review of a Bose sound system). Of course, most bloggers blog as a hobby rather than as a job. Unlike newspapers, they are motivated by the "consumption value" they derive "from expressing their views and communicating them to others." Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 195 (2006). Hence, the potential conflict of interest confronting most bloggers is actually far less than that confronting newspapers, which rely on advertising to survive.

⁵⁰ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844–56 (2006).

⁵¹ Cf. *Wall St. Publ'g*, 851 F.2d at 374 (holding that the government may require a publisher to disclose consideration received by the publisher *in exchange for* publishing an article).

⁵² *Id.* at 376.

⁵³ Cf. *id.* at 375 (holding free text provided to *Wall Street Magazine* by the companies it covered could not constitutionally be considered "consideration" because restricting the receipt of text "inevitably implicates interference with fully protected journalistic activity"). While the receipt of free text and the receipt of free products are different in form, both are types of "news gathering" that shape the content of the speaker's message. See *id.*

that ostensibly exercise “independent editorial responsibility” — are explicitly exempted from the Guides.⁵⁴ The FTC asserts that knowing whether a blogger received a product in exchange for consideration “might affect the weight consumers give to his review,” whereas knowing whether a newspaper paid for an item would not.⁵⁵ But this distinction is unfounded. The material relationship between an endorser and a manufacturer includes not only the value of the free product, but also any other transactions in which they engage, like the purchase of advertising space in a newspaper. Paid advertising is a far more serious conflict of interest, both because its value is likely to be far more than the value of a free product, and because legacy media, unlike blogs, depend on it for their very survival.

Consumers should be wary of government policies that favor one form of media over another. Government discrimination among media forms based on “editorial independence” is unprecedented.⁵⁶ The Court has already ruled that the government may not legally prescribe editorial standards for newspapers;⁵⁷ to do so would violate the First Amendment by interfering with newspapers’ “exercise of editorial control and judgment.”⁵⁸ Yet the principle underlying the Guides is that the FTC may distinguish between blogs and newspapers based on its perceptions of “editorial responsibility.” Even if bloggers are, on average, less “editorially responsible” than print media, allowing the government to favor certain media forms would allow it to manipulate the “marketplace of ideas”⁵⁹ just as direct interference with editorial content would. Worse, favoritism may encourage favored media to moderate their criticism of the government.⁶⁰ As consumer-generated media gain an increasingly important role in our society, they should receive the same robust speech protections enjoyed by legacy media.

⁵⁴ 2009 Guides, 74 Fed. Reg. at 53,136 & n.101.

⁵⁵ *Id.* at 53,136.

⁵⁶ Although the Court has held that the government may treat broadcast media differently, this holding is justified by the broadcast spectrum’s physical scarcity. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660 (1994); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399–400 (1969). The internet, by contrast, “can hardly be considered a ‘scarce’ expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The Court has thus found “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.*

⁵⁷ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

⁵⁸ *Id.* at 258. The Court reached this conclusion *despite* its acknowledgment that the modern press “has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.” *Id.* at 249.

⁵⁹ *Id.* at 248.

⁶⁰ *Cf. id.* at 257.