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I. INTRODUCTION

Early this year, *Advertising Age* magazine named "the consumer" as its 2006 "agency of the year."[1] This was days after *Time* magazine had selected the consumer as "person of the year."[2] With these exaltations of the amateur creator, the editors acknowledged the burgeoning of "peer-generated" media content in the form of wikis, blogs, video sharing, podcasts, and other media genres. What impressed the press was the tremendous communicative power that individuals can wield through digital networks and the impact of this power on industrial economies. Scholars and other commentators too have celebrated what is known

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1. Matthew Creamer, *John Doe Edges out Jeff Goodby: The '06 Explosion of Video, Blogs, and Websites Confirmed What We Knew All Along—Consumer Is King*," ADVERTISING AGE at S-4, Jan. 8, 2007.

2. Lev Grossman, *Person of the Year: You*, TIME, Dec. 25, 2006, at 38 (explaining that the "you" are the founders of Web 2.0 and what *Time* argues is a new digital democracy); *see also* Jeff Howe, *Your Web, Your Way*, TIME, Dec. 25, 2006, at 60 (giving brief overview of peer-generated content, using the term, "crowdsourcing").

as "Web 2.0" as a transformational force in communications.[3]

The *Advertising Age* story featured a short video, created by two "geeks" from Maine, that bested brand managers at their own businesses. The men—one a juggler and the other a lawyer—produced a video of themselves dropping Mentos mints into Diet Coke bottles, setting off foamy geysers of carbonated drink majestically timed to spout like an Italian fountain.[4] The men posted the clip on the Revver social media web site, where viewers downloaded it millions of times.[5] Mentos mint sales spiked 15%.[6] Coca-Cola, though initially frowning on the demonstration as inconsistent with its brand image, eventually posted the video on its website.[7] Coca-Cola and Mentos then both exploited the video by sponsoring contests that solicited yet more explosive videos.[8]

There are several interesting aspects to this story. Most obviously, it shows that the power to disseminate brand-related messages is now widely distributed. Advertisers understand that consumers may sometimes be able to connect each other to brands and to outperform professionals in delivering positive brand messages. The power of the peer-to-peer model of production is changing the way advertisers think about communications and how much control they are willing to yield over brand management.[9] As consumers express their devotions to brands in

3. For academic commentary, see, for example, YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (describing the impact of peer networks and shared digital projects, like *Wikipedia*, on individual and political freedoms); CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 148–49 (2006) (describing the ability of any individual to edit content on wiki web sites); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 979–89 (2004) (describing instances of "unauthorized amateur authorship" and "new forms of collaborative creativity"). *See also infra* notes 10–13.

4. Creamer, *supra* note 1, at S-4.

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Mentos Gesyer Videos Contest, http://www.mentosgeysers.com/ (last visited June 4, 2007) (posting winners of Mentos contest); The Coca-Cola Company, Products and Packaging Myths and Rumors, http://www.thecoca-colacompany.com/contactus/myths_rumors/packaging_mentos.html) (last visited June 4, 2007) (detailing corporate approach to contests).

9. At the annual conference of the Association of National Advertisers in 2006, Procter & Gamble Co. urged companies to "let go" of their brands. Creamer, *supra* note 1, at S-5 (describing this event as "the equivalent of a then-still-very-folky Bob Dylan plugging in an electric guitar at the Newport Jazz Festival in 1965"). For an evangelism of the power of the people to transform marketing, see BEN MCCONNELL & JACKIE HUBA, CITIZEN MARKETERS: WHEN PEOPLE ARE THE MESSAGE (2007).

blogs,[10] wikis,[11] video-sharing sites like YouTube,[12] and social networking sites like MySpace and Facebook,[13] brand owners monitor, exploit, and sometimes imitate the genre.[14] These forms of decentralized and collaborative communications have become so important for brand owners that the Nielsen rating service is scrambling to come up with new ways of calibrating online brand "buzz."[15]

Web 2.0 phenomena challenge the structure and application of advertising law as they have challenged other branches of information law. The regulation of false advertising, like copyright law, was designed to manage information flows in relatively controlled environments where few speakers were capable of mass communication. Also like copyright law, false advertising law assumes a model in which authorship is singular or several, not massively composite. In the environment of peer production, by contrast, all are capable of mass communication and authorship is frequently cumulative as users remix and mash up information provided by others.[16] As many have observed, changes in the production and use of copyrighted works stress copyright doctrine.[17] The very same technologically-propelled cultural shifts stress false advertising law.

This Essay offers some tentative thoughts on how peer promotions fit into the

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10. *See, e.g.*, IkeaHacker, http://ikeahacker.blogspot.com/ (last visited June 4, 2007); McChronicles, Chronicling the McDonald's Brand Experience from the Customers' Point of View, http://mcchronicles.blogspot.com/ (last visited June 4, 2007); Me and My Diet Coke, http://meandmydietcoke.blogspot.com/ (last visited June 4, 2007).

11. A wiki is a collaborative work of many authors who may add, delete, and edit without attribution. Cunningham & Cunningham, Inc., *Wiki Philosophy*, http://c2.com/cgi/wiki?WikiPhilosophy (last visited June 4, 2007); *see also* Abbey Klaassen, *Forget Message Boards. Wikis Are Where It's At*, ADVERTISING AGE, Feb. 5, 2007, at 26 (discussing the wiki that T-Mobile created for its Sidekick mobile phone, through which consumers can comment on "how to pimp out the inside of the phone and [provide] a wish list of improvements the community would like to see").

12. *See, e.g.*, Fast Love, Posting of JoshFlowers to YouTube, http://www.youtube.com/watch?v=ihhEp3uTZck (January 31, 2007) (filming interviews with fast food drive-thru patrons about what they love); I Love McDonalds, Posting of Carlosloco1 to YouTube, http://www.youtube.com/watch?v=fC--ULW7vRQ (October 16, 2006) (rapping love song to McDonald's).

13. *See, e.g.*, McDonalds Double Cheese Burger, http://www.myspace.com/mdsdoublecheeseburger (last visited June 4, 2007) (user-generated page for McDonald's with over 2,000 friends, although these "friends" also include advertisements); ADIDAS: All Day I Dream About Soccer, http://rutgers.facebook.com/group.php?gid=2212326770 (last visited June 4, 2007) (Adidas fan site with over 2,000 members, but only accessible through Facebook account).

14. *See, e.g.*, Adidas Soccer, http://www.myspace.com/adidassoccer (last visited June 4, 2007) (official friend site of Adidas Soccer).

15. *See* Nielsen BuzzMetrics, History, http://www.nielsenbuzzmetrics.com/history.asp (last visited June 4, 2007).

16. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 10–13 (2004) (describing the digital media "cultural bricolage" of "glomming on" with examples such as blogs and Fan Fiction sites, "which are devoted to the creation of stories about particular movies, books, and television shows").

17. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 928–29 (2005) (acknowledging the strain on copyright values by the "digital distribution of copyrighted material"); *see also* WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET (2001); NEIL W. NETANEL, COPYRIGHT'S PARADOX: PROPERTY IN EXPRESSION/FREEDOM OF EXPRESSION (forthcoming 2008).

structure of federal false advertising law. It is important to emphasize that most peer promotions, which are spontaneous commentary on a product with no connection to the brand owner, are not advertising at all. The noncommercial speaker's commercialization of her speech is a matter of indifference to advertising law. The story is quite different, however, where brand owners have themselves created "peer" promotions or adopted these communications for marketing purposes. In these cases, there is commercial speech which, depending on its content, may be regulated.

It is the gray area between brand control and no control where peer promotions most challenge the application of advertising law and its efficacy. Where brand owners sponsor peer promotions but conceal their involvement, the resulting communication mixes the commercial speech of the sponsor with the noncommercial speech of the peer. The borders of commercial speech have shifted with each innovation in modern marketing, particularly as advertising has become more image-based and integrated into other forms of media content. Mixed peer-advertiser promotions take the blurring of commercial and noncommercial speech one step further and pose more insistently the central question of advertising law: how do we balance the desirability of regulating for transparent commercial communications with the free speech dangers of regulating at the commercial-expressive interface?

Part II shows how American commercial speech jurisprudence and federal false advertising law developed to secure the consumer benefits of truthful informational advertising in the mass media. Successive generations of marketing strategies departed from this straightforward advertising model, reaching the consumer in new ways and reducing the informational content of advertising. These new techniques, particularly when they combined commercial and noncommercial speech, required that commercial speech doctrines balance the goal of consumer protection with free speech values. Part III shows how peer promotions fit into this history of marketing development and classifies such promotions into pure peer, fake peer, and mixed peer promotions. Especially where brand owners conceal their involvement in what are mixed peer/sponsored promotions, there is a danger that the resulting communication will deceive credulous consumers. Whether false advertising law can or should discipline such communications will depend on the sponsor's role in the communication and evolving consumer responses.

II. MARKETING EVOLUTION AND THE LAW

The use of peer-to-peer communications to advertise is part of a larger innovation in marketing called "integrated marketing communication" (IMC). Brand owners inaugurated the era of modern marketing by using the national media to transmit promotional information, moving shortly thereafter to the transmission

of image advertising by the same means.[18] IMC departs in both message and means from the mass media advertising strategies of the previous generations. Where traditional advertising campaigns transmit messages from headquarters to consumers, IMC campaigns often seek messages that originate with consumers themselves. Where traditional campaigns rely heavily on "old media" like television and print media, IMC campaigns use a variety of consumer contacts, including public relations, sales, editorial content, and online networks.[19]

Courts and regulators have developed the federal law of false advertising in response to marketing innovations, always struggling to balance consumer protection goals with free speech goals. The basic premise of the law is that the regulation of (false) information is important for consumers and poses acceptable risks to free speech, but the regulation of (false) images is unacceptably risky. This is because truth and falsity are easier to untangle in informational advertising. Moreover, non-informational, or image, advertising often mixes noncommercial with commercial expression, the regulation of which could compromise protected speech. Below, we see the close relationship between the informational value of advertising and the rationales for regulation.

A. Informational Advertising

The first phase of modern marketing involved the mass communication of information about product and price. In its classic form, informational advertising asserts factual claims about a product or service in an organized campaign designed to reach a large portion of the relevant market.[20] It is this kind of advertising that has by and large been the subject of advertising law and commercial speech jurisprudence, starting with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[21]

Consideration of informational advertising led the Supreme Court, in *Virginia State Board of Pharmacy*, to hold for the first time that advertising merits some

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18. *See* Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 700 (1993) ("The history of modern advertising is the story of the general movement from product-information to image and lifestyle advertising.").

19. *See infra* notes 60–61 and accompanying text.

20. *See* CHARLES GOODRUM & HELEN DALRYMPLE, ADVERTISING IN AMERICA: THE FIRST 200 YEARS 37–38 (1990) (discussing informational advertising in the 1920s); *see also* STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE 100–01 (1976) (discussing the movement from informational to image advertising).

21. 425 U.S. 748 (1976); *see, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (pharmaceutical advertising); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (tobacco product advertising); United States v. United Foods, Inc., 533 U.S. 405 (2001) (mushroom advertising); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) (casino advertising); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (liquor price advertising); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (beer alcohol content labeling); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (attorney soliciting); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (attorney price advertising). For a list of commercial speech cases and the categories of advertising that they address, see First Amendment Center, Commercial Speech, http://www.firstamendmentcenter.org/faclibrary/libraryexpression.aspx?topic=commercial_speech&subheading=y (last visited June 4, 2007).

limited degree of First Amendment protection.[22] The Court conceptualized advertising as the "dissemination of information as to who is producing and selling what product, for what reason, and at what price."[23] Where such speech is truthful, it is constitutionally protected on the instrumental grounds that factual commercial information benefits consumers.[24] The "consumer's interest in the free flow of commercial information," the Court wrote, "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[25] False commercial speech, by contrast, does not benefit consumers and can be regulated on the same instrumental grounds without offense to the First Amendment.[26]

Virginia State Board of Pharmacy changed the course of commercial speech jurisprudence thirty years after the Court had first concluded that "the Constitution imposes no . . . restraint[s] on government as respects purely commercial advertising."[27] This change was due in part to economic research that emphasized the role of informational advertising in facilitating welfare-enhancing market exchanges.[28] According to this theory, which remains the conventional wisdom, informational advertising generates social welfare by reducing search costs and improving market transparency.[29]

The essentially informational function of advertising in the first part of the twentieth century shaped federal false advertising law, the object of which is to sanction the false—and encourage the truthful—communication of commercial information. The Federal Trade Commission Act, section 5, provides for agency action against the dissemination of "false advertisements"[30] that constitute "unfair or deceptive acts or practices in or affecting commerce."[31] The Lanham Act, section 43(a), creates a private right of action for those injured by "commercial advertising or promotion, [that] misrepresents the nature, characteristics, qualities, or geographic origin of [the advertiser's] or another person's goods, services, or

22. *Va. State Bd. of Pharmacy*, 425 U.S. at 773.

23. *Id.* at 765.

24. *Id.* at 773.

25. *Id.* at 748; *see also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 653 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."); Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

26. *Va. State Bd. of Pharmacy*, 425 U.S. at 773.

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

28. *See* JOHN E. CALFEE, FEAR OF PERSUASION 8–18 (1997) (describing the development of economic theory underlying contemporary commercial speech doctrine and trade regulation); Fred S. McChesney, *De*-Bates *and Re*-Bates*: The Supreme Court's Latest Commercial Speech Cases*, 5 SUP. CT. ECON. REV. 81, 86–90 (1997) (noting that the commercial speech doctrine relied on economic theory and empirical research supporting benefits of advertising on competition).

29. *See, e.g.*, Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 663 (1977) (stating that advertising reduces consumer search costs); RICHARD A. POSNER, REGULATION OF ADVERTISING BY THE FTC 3 (1973) ("For markets to operate effectively, buyers must have accurate information about the quality and other characteristics of the products offered for sale.").

30. 15 U.S.C. § 52 (2000).

31. 15 U.S.C. § 45(a) (2000).

commercial activities."[32] State law provides for similar private and public rights of action against false advertising.[33]

Since the purpose of false advertising laws is to ensure that consumers receive accurate information about products and services being advertised, an action will lie only where advertisers have made express or implied claims of fact.[34] The Federal Trade Commission (FTC) pursues only objective misrepresentations that are likely to materially harm the consumer.[35] The Lanham Act too requires that advertising be demonstrably false or misleading and the plaintiff materially harmed.[36] Under either law, appeals devoid of actual or implied facts are generally not actionable and often are dismissed as mere opinion or puffery.[37]

Commercial speech law recognizes that advertising regulation threatens the production of truthful commercial speech. In the noncommercial sphere, the concern about these chilling effects led the Supreme Court to accord false speech

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32. Trademark Law Revision Act of 1988, sec. 132, § 43(a), 15 U.S.C. § 1125(a)(1)(B) (2000) (originally enacted as Act of July 5, 1946, 60 Stat. 427) ("Any person who, in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.") (Unless otherwise noted, textual reference to the Lanham Act denotes title 15, section 43 of the United States Code, which discusses false advertising.). Courts have understood this cause of action to be limited to competitors. *See* Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 836–37 (1999).

33. *See, e.g.*, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 1:26, at 1-181 (4th ed. Thomson/West 2003) (describing state agencies similar to the FTC and judicial interpretations of state laws based on interpretations of the Federal Trade Commission Act).

34. *See generally* Burns, *supra* note 32, at 867–68.

35. 15 U.S.C. § 45(n) (The FTC may only take action against activity that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."). An act or practice is deceptive only if there is a representation or omission of information that is likely to materially mislead a reasonable consumer—that is, to mislead in a way that "affect[s] the consumer's conduct or decision with regard to a product or service." FED. TRADE COMM'N, DECEPTION POLICY STATEMENT 3 (1983), *appended to* Cliffdale Assoc's, Inc., 103 F.T.C. 110, 175 (1984); *see also* Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (citation omitted).

36. 15 U.S.C. § 1125(a); *see also* Logan v. Burgers Ozark Country Cured Hams Inc., 263 F.3d 447 (5th Cir. 2001) (citing Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 178 F.3d 1035, 1042 (8th Cir. 1999)) (setting forth elements required in a Lanham Act false advertising claim, including (1) "that the defendant made a false statement of fact about its product in a commercial advertisement; (2) that the statement actually deceived or has a tendency to deceive a substantial segment of its audience; [and] (3) the deception is likely to influence the purchasing decision"). Literally false ads are presumed to be materially deceptive, while the plaintiff must prove that a misleading ad was materially deceptive. Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 502 (5th Cir. 2000); Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62 (2nd Cir. 1992).

37. *See, e.g.*, FED. TRADE COMM'N, DECEPTION POLICY STATEMENT, *supra* note 35, at 14 & n.41, *appended to Cliffdale Assoc's*, 103 F.T.C. at 181 (defining puffery as a form of opinion, not fact, that is not deceptive as a matter of law). *See generally* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1396 (2006).

full First Amendment protection from regulation lest speakers self-censor.[38] In the commercial sphere, by contrast, the Court held that information "more likely to deceive . . . than to inform" could be regulated without constitutional concern.[39] The speech-chilling effects often produced by regulation would not plague commercial expression, the Court deemed, because commercial speakers may more easily avoid falsehoods.[40] This confidence in the commercial speaker assumes that the difference between what is true and what is false is knowable and relatively clear, as it often is with factual claims.

We see, thus, the centrality of informational advertising to advertising law and underlying commercial speech jurisprudence. Advertising facts deserve constitutional protection, if true, because they educate consumers. And unlike other kinds of speech, these facts are permissibly regulated, if false, because they are without value and easily identified.[41]

B. Image Advertising

What of advertising that contains no facts and where truth and falsity are hard

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38. While finding "no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), the Court has protected false noncommercial speech "to eliminate the risk of undue self-censorship and the suppression of truthful material," *Herbert v. Lando*, 441 U.S. 153, 172 (1979), and to give speech the "breathing space" it needs to thrive, *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). *But see N.Y. Times*, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate.").

39. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 463; *see also* Edenfield v. Fane, 507 U.S. 761, 768 (1993) ("[T]he State may ban commercial expression that is fraudulent or deceptive without further justification."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("We foresee no obstacle to a State's dealing effectively with" false commercial speech and even speech that "is not provably false, or even wholly false, but only deceptive or misleading."). *See generally* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 458 (1971) (recognizing that courts had not protected false advertising).

40. *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24 (positing that the commercial speaker is particularly well positioned to verify the truth: "[T]he advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."); *see also id.* at 777 (Stewart, J., concurring) ("[T]he commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them."). *But see* Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception,* 78 VA. L. REV. 1, 14 (1992) (unintentional false statements are as inevitable in advertising as in noncommercial speech); Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 385, 386 (1979) ("[P]olitical speech is often quite verifiable by the speaker," while "[t]here may well be uncertainty about some quality of a product.").

41. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J. concurring) (False commercial speech "lacks the value that sometimes inheres in false or misleading political speech."); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977) ("[L]eeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena."); *see also* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 156 (1996) (asserting that false advertising is particularly harmful because the consumer is unable to assess "information needed to question the advertiser's claim").

to discern? Is such speech worth protecting, and is it possible to regulate?

The claims of fact that false advertising law covers came to be a diminishing share of all commercial messages with the maturation of the second phase of modern marketing: image and lifestyle advertising.[42] The sales pitch in an image ad, such as the Marlboro Man, appeals not to the rational, but to the emotional, the libidinal, or the subconscious. Neither Lanham Act nor FTC false advertising claims can reach such images in the absence of at least implied claims of fact.[43]

This exemption seems odd in light of *Virginia State Board of Pharmacy*'s justification for elevating the First Amendment status of commercial speech in the first place: that it provides consumers with useful information about product and price. If, as the Court has said, "the elimination of false and deceptive claims serves to promote the one facet of commercial [speech] that warrants First Amendment protection," then commercial speech devoid of truthful claims of fact would seem to warrant none.[44] Since factual information is what makes advertising valuable, the lack of factual content in image advertising might have led economists to conclude that image advertising lacks value.[45] They avoided this conclusion by theorizing value in image advertising unrelated to the content of the speech. Even non-informational advertising promotes market efficiency, economists argued, by signaling to consumers that the advertiser stands behind her product. The idea is that an advertiser's willingness to devote resources to promotional campaigns tells consumers that the advertised product is worthy of their purchase.[46]

This signaling theory of value depends on the contestable assumptions that (1) image advertising campaigns are expensive, (2) advertising expenditures are proportional to product investments, and (3) consumers are aware of facts one and

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42. *See generally* RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 71–77 (1996) (discussing the shift from informational to image advertising); JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA 246 (1994) (discussing the advent of "identity" promotions).

43. Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 783 (N.D. Ill. 1974) (setting forth Lanham Act, section 43(a) elements, including that there be a claim of fact that is false). *See generally* Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1040–49 (1990) (discussing elements of Lanham Act and FTC false advertising claims); FED. TRADE COMM'N, DECEPTION POLICY STATEMENT, *supra* note 35, at 14, *appended to Cliffdale Assoc's*, 103 F.T.C. at 181 (distinguishing falsifiable claims of fact, which may be actionable, from unfalsifiable opinion).

44. *Va. State Bd. of Pharmacy*, 425 U.S. at 781; *see also Bates*, 433 U.S. at 383 ("[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.").

45. *See* R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 9 (1977) ("Persuasive advertising, which conveys no information about the properties of the goods and services being advertised but achieves its effect through an emotional appeal, is commonly disapproved of by economists.").

46. *See* Howard Beals et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 506 (1981) (citing Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970)) (noting that advertising provides "signaling" function); Phillip Nelson, *The Economic Value of Advertising*, *in* ADVERTISING AND SOCIETY 43, 50 (Yale Brozen ed., 1974) (advertising signals that the brands are "winners rather than losers").

two.[47] Even if these assumptions are correct, signaling theory values communications only indirectly as a proxy for product investment, rather than directly for their power to speak. In the hierarchy of free speech values, speech as signal ranks lower than speech as communication since speech itself is only incidental to the signaling.[48] It would not matter if a brand owner decided to signal its investment by holding product-related contests or giving away money in connection with product purchases. Any of these actions, no less than advertising, would signal a willingness to spend in connection with the product.

Notwithstanding its questionable utility as communication, image advertising should still lie beyond the reach of false advertising law if it cannot materially deceive. To materially deceive, the message contained in an image must be both influential and false. Federal regulators and courts have concluded that obvious exaggerations—such as "xxx will make you feel a decade younger"—are of little persuasive value to consumers.[49] Marketers themselves do not share the view that exaggerated claims of the kind that images project fail to influence consumer behavior, or they would not invest in expensive campaigns to wield just such influence. Indeed, marketing experts know that images may be far more persuasive than informational claims like "four out of five people prefer Marlboros."[50] If economists value image advertising for its signaling function, marketers value it for its communicative function. Indeed, it is the potency of image advertising, some have argued, that should make it a target for advertising regulation.[51]

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47. If the only function of image advertising is to signal product value, then such advertising can be false only if assumptions (1) and (2) above are wrong. In other words, if the promotional campaign costs little, or the product investment is disproportionately small in comparison to marketing, and yet the consumer believes the contrary, the advertising may be false.

48. *See* Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1037–38 (2003) (discussing the liberty theory of free speech and how the First Amendment protects speech that an individual intends to express, not unintended messages based on "interpretation of words or symbols or conduct or stimuli that might be understood expressively by an audience").

49. FED. TRADE COMM'N, DECEPTION POLICY STATEMENT, *supra* note 35, at 14, *appended to Cliffdale Assoc's*, 103 F.T.C. at 181 (stating that "ordinary consumers do not take seriously" puffery and other exaggerated statements); *see also* Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390 (8th Cir. 2004) (distinguishing factual claims, on which consumers rely, from puffery); Cook, Perkiss and Liehe, Inc. v. N. California Collection Serv. Inc., 911 F.2d 242, 245 (9th Cir. 1990) (recognizing that puffery is not actionable in part because "consumer reliance will be induced by specific rather than general assertions").

50. The rise of image advertising drew on cognitive research suggesting that consumers are as likely to be moved by a product's image and their emotions as by its price and performance. *See generally* Sarah C. Haan, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1299 & n.91 (2000) (describing the effect of "pictures and animation [as] evok[ing a] greater consumer response"); Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 WHITTIER L. REV. 435, 440–41 (2005) (describing study results showing that, among other techniques, "attractive photography and animation can "create such positive emotional response"). New studies reinforce these findings. *See, e.g.*, Sandra Blakeslee, *If You Have a 'Buy Button' in Your Brain, What Pushes It?*, N.Y. TIMES, Oct. 19, 2004, at F5 (discussing recent studies of susceptibility of the human brain to images).

51. *See, e.g.*, Collins & Skover, *supra* note 18, at 697 (supporting image advertising regulation because such advertising promotes "fantasized decisions by the consumer").

The bigger obstacle to the regulation of image advertising is not that it is impotent, but that images convey plural statements simultaneously that are not susceptible to judgments of truth or falsity. As Michael Madow has put it, "such advertisements do not involve 'deception' or 'misrepresentation' . . . [because they have] no truth-value."[52] This is not to say that an image can never be false in at least one of its meanings. Marlboro cigarettes, for example, do not actually promote masculine vigor, and yet consumers may be influenced by such images to make purchases because they seek to gain or express such vigor.[53] But the Marlboro Man image says many other things at once. In addition to what it says about the effect of smoking Marlboro cigarettes, it says something about men in the American West and even may refer to the image of smoking in films.[54] This is commentary beyond the commercial. The element of the ad that may be materially false advertising cannot be separated from the elements of the ad that have little to do with the product being advertised.

Any attempt to sift the complex communicative structure of image advertising might well have upset the balance between consumer protection and speech interests that commercial speech jurisprudence seeks to accomplish. As discussed above, the Supreme Court has posited that commercial speech is more immune to the chilling effects of regulation in part because commercial speakers have the incentive and ability to verify their utterances.[55] This assumption has some merit when speakers are communicating product facts, but not when they are projecting product images which lack clear meaning and are difficult to falsify.[56] Given this,

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52. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 237 (1993) (citing Sam Murumba, *Character Merchandising in Australia—Welcome Home Wanderer*, INTELL. PROP. FORUM, Nov. 1990, at 10).

53. It was the influential quality of image advertising portraying "youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations" that rendered such advertisements the legal equivalent to literal "statements" on a public issue. Banzhaf v. FCC, 405 F.2d 1082, 1086–87 (D.C. Cir. 1968). As a result such image advertising triggered broadcaster obligations to permit contrasting views. *Id.*

54. *See generally* ROBERT SOBEL, THEY SATISFY: THE CIGARETTE IN AMERICAN LIFE 128–31 (1978) (quoting a Philip Morris executive as saying "[t]he image of the man that we projected was one of the successful up-the-hard-way sort of guy, who got himself tattooed somewhere along the line. Gray, mature, rugged . . . . The consumer who lights up the product—we've conditioned him."); Michael E. Starr, *The Marlboro Man: Cigarette Smoking and Masculinity in America*, J. OF POP. CULTURE 17, 45–56 (1984) (discussing the portrayal of the cigarette-masculinity nexus in films and cigarette advertising).

55. *See supra* note 40.

56. The other justification the Court has used to downplay the risk of chilling commercial speech would seem to apply equally to image and informational advertising: because commercial speakers have commercial motivations to speak, their speech is hardier than noncommercial speech. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) ("[A]dvertising . . . is hardy and unlikely to be deterred by incidental state regulation."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) ("Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and for[e]gone entirely."). For criticism, see Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982), arguing that we would not tolerate regulation of the commercial media, such as magazines and newspapers although it may be just as "hardy" as commercial advertising.

the regulation of false image advertising would likely chill all image advertising, making regulation too costly from a free speech perspective.[57]

C. *Integrated Advertising*

This same kind of balancing between the benefits of advertising regulation and its speech costs is evident in the law's approach to integrated marketing communications, the third phase of modern marketing.[58] IMC has been defined as the use of "all forms of communication and all sources of brand or company contacts as prospective message delivery channels . . . [with the] goal [of] influenc[ing] buying behavior through directed persuasive communication targeted to a broad range of stakeholders that influence brand image and organizational reputation."[59] To a large extent, this program began in the early 1990s[60] with what marketing theorists have called "one voice marketing communications," whereby companies attempt to unify the message transmitted in brand advertising, public relations, and point of sale promotions.[61] The first stage of the integration effort is internal to the corporation to ensure that public relations, marketing, and sales departments coordinate their messages.[62]

Ultimately, the purpose of "one voice marketing" is integration not only within the corporate communications departments, but between the corporate message and the consumer's consciousness. This kind of integration requires marketing messages that the consumer can easily absorb. Product integration into editorial content like film and television programming is a time-tested way to infiltrate

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57. Indeed, some commentators point to the seamless mix of commercial pitch and noncommercial commentary in image advertising as reason to jettison the commercial speech category as unworkable. *See, e.g.*, 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 20:43, at 20–141 (2006) ("Commercial speech, *as speech*, should presumptively enter the debate with full First Amendment protection."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631–38 (1990) (criticizing arguments for less protection of commercial speech).

58. *See* TERENCE A. SHIMP, ADVERTISING, PROMOTION, & SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS 8 (6th ed. 2003); Kathy R. Fitzpatrick, *The Legal Challenge of Integrated Marketing Communication (IMC): Integrating Commercial and Political Speech*, 34 J. ADVERTISING 93, 99–101 (2005) (explaining the implications of corporate IMC messages and the likelihood of increased government regulation of corporate communications). For one of the very few pieces of legal scholarship to address the commercial speech implications of IMC, see Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 402–08 (2006).

59. Fitzpatrick, *supra* note 58, at 94.

60. *Id.* at 93.

61. Glen J. Nowak & Joseph Phelps, *Conceptualizing the Integrated Marketing Communications Phenomenon: An Examination of Its Impact on Advertising Practices and Its Implications for Advertising Research*, J. CURRENT ISSUES & RESEARCH IN ADVERTISING 16, 49–66 (1994) (identifying "one voice marketing communications," "coordinated marketing communications campaigns," and "integrated communication" as related corporate communications phenomena); *see also* James C. Reilly, *The Role of Integrated Marketing Communications in Brand Management*, THE ADVERTISER 32 (1991).

62. *See* Philip J. Kitchen et al., *The Emergence of IMC: A Theoretical Perspective*, 44 J. ADVERTISING RES. 19, 21 (2004).

consumer consciousness with promotional messages.[63] Companies are now taking integration further with branded entertainment, where the sponsor itself controls the editorial content and conforms that content to the product's needs.[64] Buzz marketing[65] and viral marketing[66] are other tools of integrated marketing.[67] These techniques work by getting consumers to spread sponsor-generated messages, often without any evidence of the source of the messages.

As IMC evolved, marketers began to turn their attention from their own communications agenda to the consumer's, looking for peer-generated cues to shape the one-voice marketing messages.[68] The brand owner may use this consumer information to improve a traditional, centralized advertising campaign, or the owner may give the consumer significant control over the marketing message as part of a more decentralized approach. In either case, what makes the consumer cues valuable is the marketer's "access to consumer databases and computational resources."[69] IMC has evolved into a technologically sophisticated, data-driven effort on the part of advertisers to engage consumers with the marketing message

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63. *See* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 93–95 (2006) (discussing the history and prevalence of product placement); *see also Digital Future of the United States: Hearing Before the Subcomm. on Telecommunications & the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. (May 10, 2007) (statement of Philip Rosenthal, Writers Guild of America), *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.051007.Rosenthal-testimony.pdf (describing the process of product integration in which the product becomes "*a part* of the storyline with characters required to talk about the product" and claiming that "product integration occurred more than 4000 times on network primetime television" in 2006).

64. *See* Goodman, *supra* note 63, at 95–96 (discussing the movement of brand owners into the media content production business).

65. Buzz marketing is the practice of building excitement around a brand through individual word-of-mouth referrals. *See* MICHAEL J. WOLF, THE ENTERTAINMENT ECONOMY: HOW MEGA-MEDIA FORCES ARE TRANSFORMING OUR LIVES 266–71 (1999) (describing buzz marketing practices such as Audi's use of celebrities to drive a new model vehicle as a form of endorsement in order to generate buzz).

66. Viral marketing involves the dissemination of online messages entertaining enough to induce consumers to pass them along like a virus. *See* Theresa Howard, *'Viral' Ads Are So Fun You Pass 'Em Along*, USA TODAY, May 19, 2005, at 1B.

67. *See* Maria Flores Letelier et al., *Strategies for Viral Marketing*, *in* KELLOGG ON INTEGRATED MARKETING 90 (Dawn Iacobucci & Bobby Calder eds., 2003) (analyzing different types of buzz and viral marketing). *See generally* Letter from Mary K. Engle, Assoc. Dir. for Advertising Practices, FTC, to Gary Ruskin, Executive Dir., Commercial Alert (Dec. 7, 2006), *available at* http://www.ftc.gov/os/closings/staff/061211staffopiniontocommercialalert.pdf (discussing buzz, viral, and word-of-mouth marketing and deciding to review instances of alleged violation of the FTC rules on a case-by-case basis); Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Donald Clark, Sec'y, Fed. Trade Comm'n (Oct. 18, 2005), *available at* http://www.ftc.gov/os/closings/staff/061211commercialalertrequest.pdf (petitioning the FTC to declare certain buzz and viral marketing techniques to be illegal).

68. *See* Kitchen et al., *supra* note 62, at 22; Shu-pei Tsai, *Integrated Marketing as Management of Holistic Consumer Experience*, 48 BUS. HORIZONS 431, 434 (2005) ("[T]he outside-in database[] helps to determine consumer perceptions and market trends, and is at the center of IMC.")

69. Kitchen et al., *supra* note 62, at 20 (citing several studies). For excellent treatments of the development of integrated marketing techniques, see KENNETH E. CLOW & DONALD BAACK, INTEGRATED ADVERTISING, PROMOTION, AND MARKETING COMMUNICATIONS (2002); JOSEPH TUROW, NICHE ENVY: MARKETING DISCRIMINATION IN THE DIGITAL AGE (2006).

based on individual tastes and habits.[70] According to media commentator Jeff Chester, it has become "a ubiquitous system of micropersuasion."[71]

Even more so than image advertising, IMC stresses the boundary between commercial and noncommercial speech because it weaves promotional messages through diverse kinds of communications, including press releases, letters, and mass advertising. While each of these communications presents a different mix of commercial and noncommercial speech, advertising regulation applies only to commercial speech. The FTC regulates only that advertising it deems to be commercial speech.[72] Moreover, courts have held that the "commercial advertising or promotion" that is actionable under section 43(a) of the Lanham Act must be commercial speech.[73] Under the most widely adopted test, a communication is actionable advertising or promotion under the Lanham Act if it is "(1) commercial speech; . . . ([2]) for the purpose of influencing consumers to buy [an advertiser's] goods or services"; and (3) "disseminated sufficiently to the relevant purchasing public."[74] Since the first factor—whether the speech is commercial—is so often

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70. *See generally* TUROW, *supra* note 69, at 76–98 (discussing the development of consumer behavior databases from Internet traffic and marketers' use of this data to customize advertising and integrate promotional messages into online contacts).

71. Jeff Chester, Commentary, *The Dark Side of Interactive Marketing*, ADVERTISING AGE, Jan. 9, 2007, *available at* http://adage.com/digital/article?article_id=114177; *see also* JEFF CHESTER, DIGITAL DESTINY: NEW MEDIA AND THE FUTURE OF DEMOCRACY 128–30 (2007) (discussing examples of digital micropersuasion).

72. *See, e.g.*, *In re* R.J. Reynolds Tobacco Co., 111 F.T.C. 539, 541 (Mar. 4, 1988) (interlocutory order) (reviewing an advertisement with editorial comment and explaining that, "unless the . . . advertisement can be classified as commercial speech, it is not subject to the Commission's jurisdiction"); Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 159, 163 (7th Cir. 1977) (affirming FTC ruling that generic advertisements of eggs by a trade association constituted commercial speech subject to the FTC's jurisdiction under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2000)).

73. *See* Sports Unlimited, Inc. v. Lankford Enters., Inc., 275 F.3d 996, 1003 & n.7 (10th Cir. 2002) (recognizing the district court's application of the four-part analysis that requires actionable "commercial advertising or promotion" be commercial speech); First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 803 (7th Cir. 2001) (explaining that the language of section 43(a)(1)(B) indicates that "commercial advertising or promotion" is a category of commercial speech). The statute itself is not explicit and the legislative history is ambiguous. *See* 134 CONG. REC. 31852 (1988) (remarks of Rep. Kastenmeier) (explaining that the false advertising provision "should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material"); *see also* Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1533–34 (S.D.N.Y. 1994) (treating Kastenmeier's remarks as representing the views of Congress). *But see* 134 CONG. REC. 32053 (1988) (remarks of Sen. DeConcini) (noting that "commercial" excludes only political speech; any "misrepresentation relating to goods or services" qualifies as commercial advertising).

74. *See Gordon & Breach Sci. Publishers*, 859 F. Supp. at 1535–36 (including a fourth element of the defendant and plaintiff being in commercial competition with each other); *see also* Proct[e]r & Gamble Co. v. Haugen, 222 F.3d 1262, 1273–74 (10th Cir. 2000) (adopting the *Gordon & Breach* test); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999) (adopting the *Gordon & Breach* test); Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1384 (5th Cir. 1996) (adopting the *Gordon & Breach* test). The original *Gordon & Breach* test had a fourth factor—that the defendant be in commercial competition with plaintiff—which the Second Circuit did not adopt in a subsequent case. *See* Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 58 (2d Cir. 2002)

dispositive, a central definitional question for advertising law is whether the defendant was engaging in commercial speech.[75]

It would be hard enough to sift commercial from noncommercial speech elements within a single communication if the definition of commercial speech were clear. But the Supreme Court's definition is notoriously plastic. Narrowly conceived, commercial speech is a communication "that does no more than propose a commercial transaction."[76] Broadly conceived, it is a communication that is primarily economic in motivation.[77] In the end, the Court has abandoned definitions in favor of "common sense" understandings of the differences between commercial and noncommercial speech.[78] As Robert Post has noted, "[t]he judgments of common sense ultimately revolve around questions of [the] social meaning" of the speech, not its actual content.[79]

The social meaning, or commonsense understanding, of speech is hardly self evident when speech serves both commercial and noncommercial functions. Even advertisements for commercial products may be considered noncommercial for First Amendment purposes when mixed with noncommercial messages.[80] The Supreme Court has used two heuristics to identify commercial speech in cases of mixed speech. First, it has distinguished noncommercial elements that are "inextricably intertwined" with commercial ones, rendering the speech noncommercial,[81] from those that have been unnecessarily grafted onto commercial speech so as to "link[] a product to a current public debate."[82] Second, it has looked

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(noting "that the requirement is not set forth in the text of Section 43(a) and express[ing] no view on its soundness"). *But see First Health Group*, 269 F.3d at 803 (noting that a characteristic of commercial advertising or promotion is that it is distributed "to anonymous recipients, as distinguished from face-to-face communication").

75. STEVEN G. BRODY & BRUCE E. H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE § 9:2, at 9-3 to -4 (2d ed. 2006).

76. United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 776 (1976)).

77. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" (citations omitted)).

78. Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (relying on "commonsense" distinctions between commercial and noncommercial speech (quoting *Central Hudson*, 447 U.S. at 562)); *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (noting there are "commonsense differences" between commercial and noncommercial speech).

79. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 18 (2000) (arguing that the distinction between commercial and noncommercial speech turns on whether the speech is an "effort to engage public opinion or instead simply to sell products").

80. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) ("The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.").

81. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988) (finding that, because the two categories of speech were "inextricably intertwined," charitable solicitations remained fully protected noncommercial speech even when state law required fundraisers include speech of a commercial nature in their solicitations).

82. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474, 475 (1989) (citing *Central Hudson*, 447 U.S. at 563 n.5) (finding that speech promoting the purchase of Tupperware products was not inextricably intertwined with noncommercial speech about home economics because

to economic motivation and advertising format. Thus, there is "strong support" for characterizing speech as commercial when it promotes a specific product, is published as a paid advertisement, and is economically motivated.[83]

Application of this mixed speech jurisprudence drew widespread attention when applied in the IMC context in the California Supreme Court case of *Kasky v. Nike, Inc.*[84] This case arose from the efforts of Nike to defend its brand against the growing perception that Nike shoes were produced in off-shore plants that exploited child workers.[85] Following the precepts of IMC, Nike refuted these allegations with "one voice" at multiple points of customer contact in "press releases, in letters to newspapers, [and] in a letter to university presidents and athletics directors."[86]

A consumer activist sued Nike, alleging that these communications were false under California's false advertising law.[87] The threshold question for the California Supreme Court was whether Nike's speech was commercial, and the court held that it was under a new, "limited-purpose" commercial speech test.[88] This test, which focused on the identity of the speaker, the content of the speech, and the intended audience,[89] faithfully applied the Supreme Court's mixed speech precedents, with one notable exception. The test was unconcerned with the format of the communication—that is, whether it takes the form of a traditional advertisement. In adopting this test, the California court was acknowledging the realities of IMC and the diversity of corporate marketing strategies. It was also potentially expanding liability for false advertising.

The Supreme Court granted Nike's petition for certiorari, but then dismissed the writ as improvidently granted.[90] Justice Breyer dissented from this dismissal, arguing that the California Supreme Court's expansive definition of commercial speech would unduly chill corporations from speaking on public issues.[91] It would have been very useful to have a decision on the merits that defined advertising in

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"[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares"); *Bolger*, 463 U.S. at 68 ("[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. . . . Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (internal citations omitted)).

83. *Bolger*, 463 U.S. at 66–67.

84. 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003).

85. *See id.* at 248.

86. *Id.* For excellent background on the case, see Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case that Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965 (2004).

87. *Nike*, 45 P.3d at 249 (citing CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 1996), *amended by* CAL. BUS. & PROF. CODE § 17500 (West Supp. 2007)).

88. *Id.* at 256.

89. *Id.*

90. Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

91. *Id.* at 680–81 (Breyer, J., dissenting); *see also Kasky*, 45 P.3d at 272 (Brown, J., dissenting) (arguing that the majority's test for commercial speech, if "taken to its logical conclusion, renders all corporate speech commercial speech").

the new marketing environment. Lanham Act courts have already extended the class of regulable "commercial advertising or promotion" well beyond traditional mass advertising campaigns, exhibiting flexibility when it comes to advertising format.[92] In its Supreme Court brief supporting Kasky's position in part, the United States urged the Court to disregard considerations of format in its commercial speech determinations, arguing that "if a manufacturer who markets rain-forest-friendly coffee falsely extols the virtues of its environmental practices in an Earth Day op-ed, there is no reason those statements should be off-limits to a fraud action that otherwise meets the requirements of the common law."[93]

Peer promotions add another layer to the question *Nike* posed of where the advertising boundary lies, and how that line-drawing implicates free speech. Like the marketing techniques at issue in *Nike*, peer promotions engage consumers in new ways by linking commercial and noncommercial speech. They go one step beyond by obscuring authorship to further entangle the promotional and the expressive.

III. PEER PROMOTIONS AND ADVERTISING LAW

Coca-Cola's change of heart about the Diet Coke-Mentos geyser video reflected its own migration to a more consumer-driven brand of IMC. At first, the company insisted that it, and not a couple of geeks from Maine, should control its publicity. The company's ultimate acquiescence in, and exploitation of, peer-generated publicity represents a significant shift in marketing strategy and raises questions for advertising regulation. Once Coca-Cola begins directing traffic to and otherwise promoting the video, is the company responsible under false advertising law for any false claims in the video? What if, for example, it turns out that Mentos mints do not actually have such a stirring effect on Diet Coke?

Peer promotions with advertising elements will raise the same issues we have seen before in advertising law, such as the mixed speech problem and image advertising. But they also pose the new complication of mixed authorship of commercial messages. Justice Breyer was troubled by the difficulty of sifting commercial from noncommercial speech in *Nike* where speaker identity was clear. Peer promotions hide speaker identity. The determination of "commercialness" requires examination not only of the content and context of speech, but also who is speaking and why. In other words, the first prong of the *Nike* test, which focuses on the identity of the speaker, becomes a matter of interpretation and investigation.

While some peer promotions constitute or are allied with commercial speech,

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92. *See, e.g.*, Proct[e]r & Gamble Co. v. Haugen, 222 F.3d 1262, 1276 (10th Cir. 2000) (finding that an email message suggesting a competitor's profits supported devil worship constituted commercial advertising or promotion); Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1382, 1386 (5th Cir. 1996) (finding evidence of dissemination sufficient where statements were made to eleven out of seventy-four potential customers).

93. Brief for the United States as Amicus Curiae Supporting Petitioners, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 899100, at *28 n.13 (arguing that "[t]he forum for [false or misleading] statements is simply not dispositive")

others clearly are not. Below, I sort peer promotions into pure peer, fake peer, and mixed peer and explore the relationship between message control and false advertising law.

A. Pure Peer

A pure peer promotion is a spontaneous celebration, or denigration, of a brand produced by parties unrelated to, and not in competition with, the brand owner. The Diet Coke-Mentos geyser video started out as a pure peer promotion. Such consumer commentary on favorite or most reviled brands abounds on Internet social networking and media sharing web sites. Examples include a blog for Apple Macintosh with ads and spoof ads[94]; a sneaker connoisseur's video describing a Converse and Nike shoe collection[95]; and a film detailing a woman's love story with her Jack in the Box ball.[96]

Whether it intentionally or unintentionally promotes (or disparages) a product, a pure peer promotion is not commercial speech under any of the Supreme Court's tests. It does not propose a commercial transaction, nor does it promote sales for commercial purposes.[97] If it is not commercial speech, the communication is not actionable under section 43(a) of the Lanham Act[98] or the Federal Trade Commission Act.[99] Thus, the Diet Coke-Mentos geyser video, so long as the brand owner has nothing to do with the speech, is unregulable noncommercial speech no matter what its content.

This does not mean that peer promotions cannot harm. They can easily contain misstatements that persuade consumers to buy a product. But even more than with image advertising, regulating this kind of false speech would impose too high a cost. It would chill not only commercial speech, but noncommercial speech—not only speech by advertisers, but by unrelated individuals.

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94. Mac Fanatic, http://www.macfanatic.net/blog/ (last visited June 4, 2007).

95. V-Blog Episode 4-Shoes and an Interview with Ghostface, Posting of lildrummer1987 to YouTube, http://www.youtube.com/watch?v=Eha0VeewtmM (Nov. 16, 2006).

96. Jack and Jill, Posting of JasonEppink to YouTube, http://www.youtube.com/watch?v=JU-70-lFv9l (Mar. 8, 2006).

97. *See supra* notes 76–79 and accompanying text.

98. *See, e.g.*, Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130, 141 (S.D.N.Y. 1990) (holding that section 43(a) is inapplicable to an individual using portions of plaintiff's artwork in a pamphlet criticizing public funding of the arts and noting that the Lanham Act "has never been applied to stifle criticism of the goods or services of another by one, such as a consumer advocate, who is not engaged in marketing or promoting a competitive product or service"); *see also* Mark A. Lemley & Stacey L. Dogan, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. (forthcoming July 2007) (arguing that "the 'use in commerce' and 'in connection with' requirements have been widely understood to impose infringement liability only on those who created confusion in the process of selling, marketing, or advertising their own products").

99. *See supra* notes 30–31.

B. Fake Peer

Some promotions that appear to be peer-generated are actually generated by the brand owner who has masked its sponsorship. Critics have called such promotions, when they take the form of a blog, a fake blog or "flog."[100] An example is Sony's campaign over the 2006 holiday season for its PSP (PlayStation Portable) handheld game console. Sony's advertising agency Zipatoni created a blog called "All I want for Christmas is a PSP."[101] The blog featured a hip man who is helping his friend acquire the coveted device.[102] These characters were so ostentatiously cool that they raised the suspicions of enterprising viewers who discovered that Sony's advertising firm owned the domain name.[103] Sony stopped allowing readers to comment on the site once its agent's involvement was publicized.[104] Future "floggers" will undoubtedly be more careful to disguise their involvement.[105]

From the advertising law perspective, advertiser-created content designed to appear as a peer promotion is no different from an "old media" advertising campaign. Such communications should constitute commercial speech and "advertising or promotion" under the Lanham Act, regardless of whether the promotion looks like it is peer-generated. However, the format of the promotion may influence the degree to which false statements are credible, and therefore materially deceptive, as discussed below.

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100. Stephen Baker & Heather Green, *Blogs Will Change Your Business*, BUS. WK., May 2, 2005, at 56, 64 (defining "flog" as "fake blog"); *see also* Stuart Elliott, *How to Lose Cadillac and Other Lessons on Madison Ave. in 2006*, N.Y. TIMES, Dec. 18, 2006, at C8 (claiming that Tom Siebert of MediaPost coined the term "flog").

101. *See* Shankar Gupta, *Sony Confesses to Creating 'Flog,' Shutters Comments*, ONLINE MEDIA DAILY, Dec. 14, 2006, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=52541 (describing the phony blog of Sony Computer Entertainment America, which used the advertising agency Zipatoni to develop alliwantforxmasisapsp.com to promote its Sony PSP using "faux hip-hop and Internet lingo" and filtering out marketing-related words, such as "viral," "advertisement," and "campaign," in readers' comments).

102. *See* All I Want for Xmas Is a PSP, http://consumerist.com.8045/pspflog/www.alliwantforxmasisapsp.com/blog/default.html (last visited May 22, 2007) (displaying a copy of the original PSP flog); *see also* Posting by Monologue to YouTube, http://www.youtube.com/watch?v=tX_3GEvF8RQ (Dec. 14, 2006) (displaying rap video originally posted on the PSP flog and posting history of the original site).

103. Gupta, *supra* note 101.

104. *See id.*

105. In some cases, the sponsor hides itself so thoroughly that it does not even mention its brand, at least not initially. Unilever, for example, in early 2007 posted "[a] profanity-laced video of a screaming bride who cuts chunks from her hair in a fit over her style." Jack Neff, *Unilever, P&G Battle Hits YouTube*, ADVERTISING AGE, Feb. 12, 2007, at 4. The video drew 12 million views on YouTube as well as television publicity. *Id.* Amid charges of a hoax, Unilever came forward to claim responsibility for the video, saying that it intended in later installments to make the link with its hair care product and "hair wig outs" explicit. *Id.* Whether Unilever always intended to claim authorship is unclear.

C. *Mixed Peer*

The application of advertising law to peer promotions becomes trickier when it comes to mixed peer content. Peer promotions are mixed with sponsorship when a brand owner solicits or adopts a pure peer promotion for its own publicity purposes. In such cases, the sponsor's involvement may be manifest or it may be hidden—a difference which I will suggest is important for advertising law. As discussed above, advertising law makes particular assumptions about the value of advertising to consumers and the likelihood that false communications will harm them. These assumptions may not hold where authorship is masked. If an advertiser is speaking, but the consumer does not know it, false statements may be less misleading because they lack the authority of the sponsor. Or they may be more misleading because they carry the credibility of an unbiased peer communication. Depending on assumptions about the credibility of peer communications, the harm that false stealth promotions pose to market transparency may be greater or less than that of traditional false advertising. Moreover, the informational value of commercial speech contained in the peer promotion may be more or less worthy of protecting.

1. *Manifest Sponsor Involvement*

Sponsor involvement is manifest in a peer promotion when the sponsor either adopts or solicits peer-generated speech for its use in an advertising campaign. Coca-Cola followed the adoption model when it chose to exploit the geyser video. What had been a pure peer promotion then became a mixed peer promotion with manifest endorsement by the sponsor.

Alternatively, a sponsor may solicit a peer promotion, hoping to engage those consumers who make the ads and create buzz around the brand for everyone else. Chevrolet tried this approach in 2006 with its Tahoe SUV by providing video and audio on its web site and inviting users to create their own promotions.[106] When users returned with polished spots that used Chevy's materials to mock the Tahoe for its gas consumption, Chevy executives defended their actions, asserting that this loss of control over the brand was the price to be paid for the benefits of peer involvement.[107] Hoping to have it both ways—achieving buzz and engagement without losing control—Chevy and others held a contest in 2007 for peer-generated ads, the winner of which received a $2.6 million Super Bowl spot, as well as repeated play on dozens of web portals.[108]

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106. *See* Julie Bosman, *Chevy Tries a Write-Your-Own-Ad Approach, and the Potshots Fly*, N.Y. TIMES, Apr. 4, 2006, at C1.

107. *Id.* (quoting company spokeswoman, "You do turn over your brand to the public, and we knew that we were going to get some bad with the good. But it's part of playing in this space.")

108. Brian Steinberg, *Super Bowl Advertisers Hand Amateurs the Ball*, WALL ST. J., Jan. 12, 2007, at B1 (describing contests run by Doritos, Chevrolet, and the National Football League "inviting average people to submit ideas—or in the case of Doritos, the actual ads—for the game"). The NFL contest drew over 1,700 entries. *Id.* While Doritos invited completed ads and received more than 1,000

Once a brand owner adopts the peer promotion as its own, featuring the promotion on its web site or distributing it by other means, this speech should be considered the brand owner's advertisement. That the sponsor has chosen to use an amateur instead of an agency to produce its advertisements should not change the analysis. Moreover, under the Lanham Act case law, it should not make a difference whether the brand owner initially solicited the ads or simply adopted them later.[109] In either case, the brand owner is sponsoring speech for promotional purposes.

As brand owners become more involved in the production of editorial content, it may be more difficult to determine when they are speaking as sponsors. When a brand owner displays peer promotions on its web site or buys a Super Bowl spot, it is acting solely as a sponsor. But brand owners may also take on the role of media producer or distributor to promote their brands indirectly.[110] An example is Anheuser Busch's web "television" channel called Bud.TV.[111] The purpose of Bud.TV is to promote the Budweiser brand, as is clear from its exclusion of underage viewers.[112] But much of the content that Bud.TV hosts and plans to host has no obvious connection with the brand. Indeed, the channel may ultimately become a video distribution service that displays peer productions Anheuser Busch does not control.[113] In such an environment, the display of a peer promotion for Budweiser that the brand owner did not adopt or solicit would remain a pure peer promotion, while another that involved more sponsor control would fall into the mixed peer category with potential exposure to advertising regulation.

2. *Hidden Sponsor Involvement*

Another form of mixed peer promotion involves the brand owner as hidden sponsor. These are stealth peer promotions, exemplified by the erstwhile blog, "Walmarting Across America."[114] This blog recorded the adventures of a couple

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entries, Chevrolet required that ideas be submitted in a professional layout to be selected by the company and its agency. *Id.* The NFL invited ideas to be judged by the NFL marketing staff with input from an online voting public. *Id*; *see also* Suzanne Vranica, *Super Bowl Advertisers Play It for Laughs*, WALL ST. J., Feb. 5, 2007, at B1 (reviewing advertisements viewed by approximately 90 million viewers and costing advertisers as much as $2.6 million).

109. *See, e.g.*, Semco, Inc. v. Amcast, Inc., 52 F.3d 108, 113–14 (6th Cir. 1995); Gordon & Breach Sci. Publishers v. Am. Inst. of Physics, 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994) (finding that articles were protected when initially published, but not when promotional copies were distributed for purpose of selling authors' work).

110. *See* Goodman, *supra* note 63, at 102–03.

111. Welcome to Bud.TV, http://www.bud.tv/default.aspx (last visited June 20, 2007).

112. *Id.*

113. T.L. Stanley, *Star-Studded Bud.TV Launches with a Splash*, ADVERTISING AGE, Feb. 5, 2007, at S-4. Bud.TV is a "TV network-like web destination" with multiple channels of original entertainment programming, "focusing on stand-up and sketch comedy, filmmaking contests, commercials shot by consumers, talk shows, sports, and parody newscasts." *Id.*

114. *See* Pallavi Gogoi, *An RV that Runs On Wal-Mart*, BUS. WK., Oct. 23, 2006, at 13; Wal-Marting Across America, http://walmartingacrossamerica.com/ (last visited June 4, 2007); *see also* Pallavi Gogoi, *Wal-Mart's Jim and Laura: The Real Story*, BUS. WK., Oct. 8, 2006, http://www.businessweek.com/bwdaily/dnflash/content/oct2006/db20061009_579137.htm?chan=

who set off in April 2006 to travel across America in an RV and sleep in Wal-Mart parking lots.[115] One of the travelers, Laura St. Claire,[116] thought she should get permission from Wal-Mart to publish the reports. She got more than permission. A Wal-Mart-backed organization, Working Families for Wal-Mart, said it would actually sponsor the trip.[117] The content of the blog, recounting the stories of happy and grateful Wal-Mart employees, set off criticism that the author of the blog was a shill for Wal-Mart.[118]

These kinds of stealth peer promotions, where sponsor involvement is hidden, mix commercial and noncommercial speech and at times conceal the true identity of the speaker. The kinds and degree of sponsor involvement will determine the character of the speech. In theory, the sponsor may simply fund the creation of noncommercial speech, much as newspaper advertisers do. Or the sponsor may direct the content of the speech, like an infomercial, rendering it commercial. Most likely, the communication will be a mix of the two, making the application of false advertising law difficult from a practical and normative perspective.

As in all areas of advertising law, regulatory policy must balance the harm to consumers of false advertising against the risk of regulation to free speech. The ambiguity of authorship in stealth peer promotions changes the relative weights in this assessment. Recall the theory that much advertising derives utility from its ability to signal product investment.[119] Campaigns using peer promotions are unlikely to signal anything about product value and advertiser investment. This is because consumers—the targets of the signaling—may not know that the brand owner has sponsored the promotions. Moreover, campaigns relying on peer production and internet distribution are often inexpensive, undermining the central premise of the signaling theory that advertising is costly.[120] Advertising that informs neither through facts nor signals is less worthy of protection under commercial speech doctrine.[121]

On the other side of the scales, while stealth peer promotions may lack utility as advertising, they may have more value as speech. Peer promotions surpass image advertising in noncommercial content. Whereas image advertising features *advertiser* speech on lifestyle issues, peer promotions mix in *citizen* speech on such issues. The manipulation of brands and promotional speech is increasingly becoming a vehicle for individual self expression.[122]

Especially given their noncommercial expressive value, the benefits of

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search.

115. *Supra* note 114.

116. *See* Posting of Anita French to Bizbits, http://bizbits.nwablogs.com/2006/10/ clearing_the_ air.html (Oct. 17, 2006, 01:22 PM) (identifying the other blogger as Jim Thresher, a freelance photographer who works for the *Washington Post*).

117. *See* Wal-Marting Across America, *supra* note 114.

118. *Id.*

119. *See supra* note 46 and accompanying text.

120. *See supra* note 47 and accompanying text.

121. *See supra* note 49 and accompanying text.

122. *See, e.g.*, Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1732–33 (1999) (discussing the prevalence of brands in everyday expression).

regulating mixed peer promotions may not warrant the risks of speech-chilling effects. This would be true where consumers are likely to be harmed from stealth peer promotions because falsehoods in this context have little influence on consumer decisionmaking.

The usual presumption in Lanham Act cases is that false statements are presumptively materially deceptive.[123] But falsehoods in peer promotions are less likely to be deceptive if the consumer discounts the reliability of such promotions. Consumers exposed to information from unattributed or composite sources, often casually supplied, may not believe what appear to be peer promotions. Every statement is seen as contingent and vulnerable. False statements that are disbelieved fail the materiality tests of the Lanham Act, the FTC Act, and other false advertising laws.[124] If peer promotions lead to such a credibility deficit, false statements would seem to pose little prospect of consumer harm.

Marketing theory predicts the opposite result—that consumers will be more inclined to believe promotions when they are not clearly sourced by the brand owner. Marketing authorities instruct sponsors to keep a low profile in Web 2.0 promotions because speech that is or seems to be pure peer is more credible.[125] If this is true, then peer promotions would seem to be highly credible and therefore potentially harmful if misrepresenting the facts. Even more so than traditional advertising, consumers would be at risk of "uninformed acquiescence" to the advertiser's promotional scheme.[126]

Indeed, it is because consumers are more likely to believe independent voices of promotional speech that sponsorship disclosure is central to American information policy.[127] The FTC, for example, promulgated Endorsement Guidelines to protect consumers from giving apparently independent promoters unjustified credence. The Guidelines state that "[w]hen 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 fully disclosed."[128] In a recent decision, the FTC made clear that these guidelines applied

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123. *See, e.g.*, Coca-Cola Co. v Tropicana Prods., Inc., 690 F.2d 312, 317–18 (2d Cir. 1982) (citations omitted) (finding orange juice ad was facially false and did not require "reference to the advertisement's impact on the buying public" to prove a Lanham Act violation).

124. *Supra* notes 35–37 and accompanying text.

125. *See* Letelier et al., *supra* note 67, at 121–25 (prescribing brand promotion strategies that "avoid the appearance of mass marketing" to "taste-maker communities").

126. Edenfield v. Fane, 507 U.S 761, 774–75 (1993) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465–66 (1978)).

127. For more than a century, newspapers have been required to identify sponsored material. Act of Aug. 24, 1912, ch. 389, 37 Stat. 539, 554 (budget proviso, later enacted by Act of Sept. 2, 1960, Pub. L. No. 86-682, § 7, 74 Stat. 578, 705 (codified at 18 U.S.C. § 1734 (2000))); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 313–16 (1913) (upholding disclosure law). Broadcast stations are subject to similar rules. Act of June 19, 1934, Pub. L. No. 416, § 317, 48 Stat. 1064, 1089 (codified as amended at 47 U.S.C. § 317(a) (2000)) (requiring broadcasters to disclose the identity of sponsors).

128. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2006). The same emphasis on disclosure can be found in marketers' self-regulatory codes. *See, e.g.*, WOMMA ETHICS CODE: HONESTY OF RELATIONSHIP (Word of Mouth Marketing Assoc., Draft 2005), http://www.womma.org/ethics/code/read (disapproving of "undercover" marketing in which the person

to "buzz" or "viral" marketing efforts.[129]

IV. CONCLUSION

Peer promotions arise at the confluence of two rapidly moving information trends. One is the Web 2.0 spontaneous circulation of peer-generated information through affinity groups and ad hoc social networks. The other is the evolving strategy of integrated marketing communications which seeks to engage consumers in the brand owner's promotional message and to weave that message into all consumer contacts.

This Essay has examined the phenomenon of peer promotions in the context of previous innovations in marketing and the associated development of federal false advertising law. Where peer promotions involve brand owners and contain falsehoods, the law will need to balance the danger to consumers of false commercial information with the danger to expression of speech regulation. This is the balance with which false advertising law has long struggled. Peer promotions complicate the assessment by obscuring speaker identity and possibly reducing both the power of false claims to harm and the power of truthful claims to inform.

In sum, the status of peer promotions under federal false advertising law looks something like this:

1. Pure peer promotions which do not involve the brand owner either initially or after first distribution are noncommercial speech.
2. Fake peer promotions that are wholly controlled by the brand owner should be considered advertising under federal law, although whether or not false statements in such contexts should be subject to ordinary presumptions that they are materially deceptive is another question.
3. Some mixed peer promotions (involving the brand owner to some extent) are noncommercial speech because the sponsor is sufficiently remote from the communication.
4. Other mixed peer promotions have enough sponsor involvement to constitute advertising.
5. When the sponsor's involvement is manifest, these promotions are not meaningfully different from conventional advertising.
6. When the sponsor's involvement is hidden, we need to better understand what effect the communication has on consumers before we can know whether stealth promotions have the same informational effects as ordinary advertising.

As Web 2.0 marketing strategies evolve (and turn into Web 3.0, etc.), courts

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endorsing a product does not make clear his relationship with the sponsor). Although the guidelines are not compulsory, failure to make such disclosure may amount to false and deceptive advertising. TrendMark, Inc., 126 F.T.C. 375, 378 (1998) (consent order).

129. *See* Letter from Mary K. Engle, *supra* note 67, at 2–3.

and policymakers will have to re-examine whether advertising laws built to address centralized, tightly controlled marketing messages are effective. Perhaps even more importantly, the self-regulatory institutions that are so important in advertising law must go through the same process. For example, brand owners submit many false advertising claims to the National Advertising Division (NAD) of the Council of Better Business Bureaus.[130] The NAD only investigates "national advertising," which it defines as a nationally distributed "paid commercial message."[131] Many, if not most, Web 2.0 campaigns will not involve payment to place peer promotions. Payments, if any, will more likely go to drive traffic to the promotions through the purchase of search terms or links.[132] The meanings of advertisement, commercial campaign, commercial speech, and "peer-generated" in this porous information environment remain fluid and worth pondering.

130. NAT'L ADVERTISING REVIEW COUNCIL, COUNCIL OF BETTER BUS. BUREAUS, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION, POLICIES AND PROCEDURES (2005), http://www.nadreview.org/05_procedures.pdf; *see also* Jeffrey S. Edelstein, *Self-Regulation of Advertising: An Alternative to Litigation and Government Action*, 43 IDEA 509, 516 (2003) (discussing the NAD's history "as a self-regulatory mechanism for the advertising industry").

131. *See* NAT'L ADVERTISING REVIEW COUNCIL, *supra* note 130, at § 1.1(A) (defining "national advertising" as any nationally distributed "paid commercial message, in any medium . . . , if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service . . . and if the content is controlled by the advertiser").

132. *See, e.g.*, Google AdWords, http://adwords.google.com (last visited June 4, 2007).

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