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Emerald Article: From puffery to penalties: a historical analysis of US masked marketing public policy concerns

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From puffery to penalties: a historical analysis of US masked marketing public policy concerns

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Abstract

Purpose – This article aims to examine the US history of practices that mask the marketing content of messages to consumers and of the public policy approaches taken towards such practices.

Design/methodology/approach – This research examines both primary sources such as legal challenges and contemporary writings as well as secondary sources.

Findings – The US legal/regulatory system has been examining practices that mask the marketing content of communications for over 125 years. Fully masked messages were initially regulated under postal service laws and publisher self-regulatory codes. Partially masked messages, e.g. testimonials, were examined first by courts and later by regulatory and industry self-regulatory agencies. These diverse sources of regulation led to diverse approaches and in part explain the modern preference for information disclosure over prohibiting the masking of marketing messages.

Originality/value – Modern analysis of these practices ignores their history and the historical evolution of their regulation. This article not only reveals a rich regulatory history, but also suggests that modern policy should treat the broad array of masking practices consistently and correct current policy approaches that are based on historical development rather than modern public policy analysis and concerns.

Keywords Testimonials, Reading notices, Misleading advertising, Advertising regulation, Covert marketing, Advertising history, Marketing history, Advertising control, United States of America

Paper type Research paper

Introduction

Marketing theory suggests there are several methods of enhancing the believability of a marketing message. For example, the believability of a message about the performance of an advertised product can be enhanced by explicitly stating or implicitly suggesting that the performance claims are supported by objective tests. This paper examines a second method of believability enhancement, called masked marketing, where the marketer suggests that a message is not from it but rather from a disinterested third party. The marketer hopes to cloak its marketing message in an aura of third party objectivity that is likely to enhance the message's believability for potential consumers to whom the message is targeted. This technique can be accomplished by disguising a marketing message so it appears to be some other sort of message (full masking) or by including information within a recognizable marketing message that appears to be from an impartial third party when it is not (partial masking).

The masking of the marketing message may be permanent in situations where consumers never realize the communication they perceived as being from an objective third party was actually sponsored by a marketer. For example in the early 1900s, a *Printers' Ink* article found that most if not all automobile dealers would pay a

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"handsome commission to impecunious members of the 'smart set' and men who have social entrée into the moneyed class, to push the sale of a certain make of machine in a disinterested, conversational manner" (Dabo, 1904, p. 23). Presumably these "posers" (Petty and Andrews, 2008, p. 8) never reveal their current economic challenges or the fact that they recommended a particular car for money.

The masking of the marketing nature of the message also may be temporary so that the marketer breaks through marketing clutter to get the attention of consumers, but later reveals the true marketing purpose of the communication. A classic example involves sales agents gaining entrance to homes by purporting to only deliver a free prize or booklet. In one case consumers were told that because of their community stature, they were selected for a free set of encyclopedia. The sales agent would then try to sell them a ten-year update service. At this point, consumers understood they were the target of a marketing message. In affirming the Federal Trade Commission's (FTC) condemnation of this practice as an unfair method of competition, the Supreme Court found that not only had consumers been deceived into talking to the agents. It also decided that some consumers might believe the encyclopedia was actually free and the price of the ten-year update service was just a reasonable price for the service and not a price that covered both the service and the encyclopedia (*FTC* v. *Standard Education Society*, 1937).

Some commentators suggest the important policy question is whether messages about a product or service are accurate rather than whether such messages deceptively appear as objective third party information rather than information from the seller (Rotfeld, 2008). Others argue that the masking of marketing messages raises important policy concerns regardless of the accuracy because masking increases the likelihood consumers will pay attention to the message and deceptively enhances message believability. According to Petty and Andrews (2008), while most consumers are skeptical of advertising, they are less skeptical about information that appears to be independent from marketers (Balasubramanian, 1994; Darke and Ritchie, 2007). In fact, many consumers have developed methods to cope with *overt* attempts at persuasion (e.g. "schemer schemas," Friestad and Wright, 1994). However, consumers would not apply these persuasion defenses to communications they believe are objective information rather than commercial advertising intended to persuade. In addition some forms of masked marketing appear as personal communications and may target groups that are more susceptible to interpersonal influence than typical consumers (Bearden *et al.*, 1989; Churchill and Mochis, 1979; Phillips and Sternthal, 1977).

In short, the public policy concern of masked marketing *per se* is not that consumers are factually misled about the product or its performance. Rather the concern is that consumers are misled to consider an apparently objective message that they would have ignored had its marketing nature been identified. Some consumers might even purchase the featured product or service when they otherwise would not have purchased it if the marketing message had been identified as such. Masked marketing interferes not only with consumer sovereignty but also constitutes a method of unfair competition over marketers who identify their messages as marketing messages. Of course in many cases, masked marketing not only misleads consumers about the objectivity of the message but the message might be factually misleading about the product as well.

Occasional studies support the effectiveness of masked marketing. For example, a recent study found that an ad received with an apparently hand-written sticky note that said "Try this. It works! (signed) J." was effective in persuading consumers to request free samples when the ad contained strong claims of product performance. This was true both generally and for those who could not identify a likely "J." among their friends (Howard and Kerin, 2004). This practice was prohibited in an FTC consent agreement because the solicitation deceptively appears to be from an independent magazine review and the note deceptively appears to be from a friend or acquaintance whereas both were really advertising (Georgetown Publishing House, Ltd, Inc, 1996). The FTC frequently settles cases with consent agreements where the marketer does not admit to any wrongdoing but agrees not to do the challenged conduct in the future.

Discussions of masked marketing recently have appeared in both management journals as stealth marketing (e.g. Kaikati and Kaikati, 2004) and a special issue of the *Journal of Public Policy & Marketing* on covert marketing (Sprott, 2008). These discussions often include passive messages such as the placement of a product in the background of a movie or television show. While this practice also has an extensive history (Newell *et al.*, 2006; Kielbowicz and Lawson, 2004; Balasubramanian *et al.*, 2006, pp. 115-116), the discussion here is limited to active marketing messages that present apparently objective information about product attributes or performance.

This recent interest in masked marketing may suggest to marketers and policy makers that this is a new commercial practice. By examining both primary sources such as legal challenges and contemporary writings as well as secondary sources, this paper demonstrates that masked marketing has been conducted for centuries with regulation starting at the end of the 1800s but coming into its own in the first half of the twentieth century. It first examines fully masked and then partially masked marketing and then concludes.

Fully masked marketing

Fully masked marketing where an entire communication appears to be from an independent third party rather than from a marketer started at least by 1879 with the creation of the significantly less expensive second class postage rate that combined with improved printing led to the national circulation of newspapers and magazines. These publications were eager for advertising revenue. To help satisfy their desire for revenue, publishers and advertisers created the "reading notice" – advertisements disguised as editorial content. Editorial content was believed to be more likely to be read and more likely to influence public opinion. *Printer's Ink,* an advertising trade journal, attributes the first reading notice to "Dr Warner" – a patent medicine seller. The headline and copy looked like newspaper type but buried within the story was the advertised product – "Warner's Safe Cure" (Lawson, 1993, p. 26). By 1900, books like *Fowler's Publicity* touted the value of this technique: "The direct puff, which everyone knows is a puff, has value but not so much as the puff so mixed with news and information as to appear to be genuine reading matter" (Fowler, 1900, pp. 454-455). The book included several pages of examples (Fowler, 1900, pp. 459-469).

Early advertising agencies such as N.W. Ayer & Son and Geo. P. Rowell & Co. also promoted reading notices as more effective than regular advertising. Advertisers often placed reading notices along with regular advertising in the same issue, but the former were more expensive (in one example twice the price) and made up the majority of most publishers' advertising revenue. Some publishers did criticize the practice. Indeed in November 1894, Cyrus Curtis announced that *Ladies' Home Journal*, which had helped introduce Crisco with paid-for stories, would no longer accept ads disguised as content. However by 1900, the practice had become widespread. Around this time, many publications featured news notices in the form of telegrams. Reading notices then quickly adopted this format as well (Lawson, 1993, pp. 32-33).

Masked marketing and the post office

The post office struggled with reading notices not because of consumer concerns but because second-class postage was not available to publications designed primarily for advertising purposes. Disguising advertising could disguise a publication's true purpose and save thousands of dollars in annual postage. As a result, by 1905, the post office had 40 clerks answering questions and reviewing publications. Despite this effort, in 1906, the Third Assistant Postmaster General estimated that "more than 60 per cent of the newspapers and up to 80 per cent of the magazines receiving the subsidy were not entitled to it" (Lawson, 1993, pp. 109-110). The post office struggled with this task in part because advertising during this period was increasing substantially. In 1880, advertising accounted for only 44 per cent of newspaper revenue, but by 1919 it amounted to two thirds of newspaper income (Stole, 2006, p. 5). The growth of advertising revenue was enormous – estimated to be from $30 million in 1880 to $850 million in 1920 (Frederick, 1925). Borden (1942, p. 48) estimates that advertising revenues of periodicals and newspapers in America increased from 78 cents per capita in 1899 to over $5 per capita in 1919.

The masked marketing practice of reading notices did not become a consumer protection issue until raised by the truth-in-advertising movement of the early twentieth century. Eager to respond to the controversy, Congress enacted the Newspaper Publicity Act of 1912 that required that all "editorial or other reading material . . . for the publication of which money or other valuable consideration is paid . . . shall be plainly marked as 'advertisement'" (Kielbowicz and Lawson, 2004, p. 335, n. 22). Not only would this protect consumers but it also would prevent publishers from wrongfully enjoying the financial benefits of both postal subsidies and paid advertising support.

When publishers challenged this law as interfering with the freedom of press, the Supreme Court disagreed saying the law encouraged circulation of the legitimate press with lower postal rates and the disclosure requirements were incidental to distinguish publications that should enjoy low rates from those that should not. Publications that refused to comply with the act could still circulate by paying higher postal fees (*Lewis Publishing Co.* v. *Morgan*, 1913). Many publishers accepted the new statute or its affirmation by the Supreme Court announcing that they would no longer publish reading notices. They also found that the new statute allowed them to better resist requests from large advertisers to be given free favorable publicity in the form of editorial content.

The post office could not review all 26,000 publications available at this time, but did investigate complaints (mostly from competitors) and then attempted to determine whether the "story" in question had legitimate news or informational value. Distinguishing between the two became even more institutionalized when the War Revenue Act of 1917 called for a two part mailing fee: a low flat postal rate for the editorial content combined with a higher rate for the advertising in the same publication. The higher postal rate for advertising also increased with the distance the publication was mailed. The local postmaster would review applications for postage and ultimately decide how much to charge for each mailing (Lawson, 1993, pp. 118-120).

Masked marketing beyond the post office

When radio broadcasting began, the Newspaper Publicity Act served as a model for radio regulation. The Radio Act of 1927 was enacted requiring broadcasters disclose the role of sponsors in broadcasting. At least one representative wanted broadcasters to label advertising as such like the Newspaper Publicity Act, but the industry convinced Congress only to require the disclosure that broadcast content was paid for or furnished by a particular party. In the early years of radio, sponsors generally craved recognition so identifying sponsorship was routine. One possible exception was the sponsors of some politically oriented messages who wanted the message to appear to be from an objective source. The statute finally became commercially important during the music payola and quiz show scandals of the 1950s. This led to 1960 statutory amendments that both allowed the routine use of free records or props such as quiz show prizes (product placement) without disclosure and required disclosure if music or props were also given to broadcasters for their private use in exchange for broadcast time (Kielbowicz and Lawson, 2004). The Federal Communications Commission (FCC) currently is considering whether its rules should be changed to require additional disclosures, sometimes to run concurrently with programming (Cain, 2011, p. 226).

Reading notices and their on-the-air equivalent – the mentioning of sponsoring products in programming may never be recognized by at least some readers or listeners as paid-for advertising. More suspicious readers/listeners may suspect content is paid for advertising when details about where to purchase the featured product are mentioned. Some other fully masked marketing techniques are necessarily only temporary disguises as sellers try to close the sale. Door-to-door sales agents are the classic example as noted in the Introduction with the FTC case against the Standard Education Society. Two particularly egregious examples involve FTC actions against furnace repair companies whose agents posed as inspectors offering free furnace inspections. Once the consumer accepted the "free" inspection, the agent would disassemble the furnace but refuse to re-assemble it until a service contract was purchased (Davis Furnace Co., 1961; Holland Furnace Co., 1958). Clearly by that time, consumers realized they were not only targets but actually pawns in a marketing scheme.

In direct mail cases, consumers may be deceived about the marketing character of a message only until they read the particulars. At that point, they may simply discard the marketing message if they are not interested (*Florida Bar* v. *Went For It, Inc*, 1995, pp. 629-632). However, this minimal harm of misleading consumers to pay attention to a message may be multiplied by thousands of individuals to justify FTC intervention. The FTC has pursued cases where the marketing solicitations appeared to be from the government such as government check (A.A. Friedman Co., 1968), or prize/sweepstakes awards (National Housewares Inc, 1977).

The classic FTC case is its 1971 settlement with *Readers' Digest* involving solicitations for sweepstakes and subscriptions that looked like checks. After opening the letter containing an apparent check, most consumers probably realized the check was actually a sweepstakes that they had to enter by return mail. Certainly when trying to cash or otherwise redeem the apparent check, consumers would learn that it was not redeemable. Consumers may think buying a subscription would increase their chances of winning the sweepstakes. *Reader's Digest* did not admit it did anything wrong, but promised in a formal FTC consent agreement not to do the challenged conduct again. When it continued using this marketing tactic, a court of appeals later upheld a $1.75 million dollar civil penalty for violating the consent agreement (*United States* v. *Reader's Digest Association*, 1981).

A more recent and infamous example of fully masked marketing is the case of television "infomercials" – paid for advertising, typically 30 minutes in length, that appear to be objective programming. They originated in the 1950s to promote products to children but were regulated out of existence by the FCC in 1974 through limits on the amount of commercial advertising that would be permitted within an hour. However, ten years later a deregulatory FCC eliminated advertising restrictions assuming that the free market could address the problem because unhappy consumers would simply choose not to watch programming that contained too much commercial content. As a result, the number of monthly infomercials broadcast in the US increased from 2,500 in 1985 to 21,000 in 1991 (Balasubramanian, 1994, p. 35; Kertz and Ohanian, 1991, pp. 616-617).

Consumers may not realize that the modern infomercial is advertising because often the infomercial format appears to be a television show that mimics talk or news shows including advertising breaks for the same product that is the subject of the show and the airing of credits at the end of the show (Lewis, 1992, pp. 865-866). Early FTC settlements in the 1990s required disclosure that the programming was paid for advertising at the beginning and the end of the infomercial (Kertz and Ohanian, 1991, pp. 621-623). Industry self-regulation also sought disclosure of the paid-for nature whenever an 800 telephone number was flashed on the screen (Lewis, 1992, p. 867).

Partially masked marketing

Partially masked marketing messages appear to be paid-for advertising that appears to contain objective third party information. The classic example of partially masked marketing messages is the use of apparent third party testimonials that, like reading notices, initially were found not to be illegal. Such testimonials date back to at least the 1600s and co-evolved with the sale of celebrity artifacts and later celebrity trade cards sold with products and products sold using the name/image of celebrities (Madow, 1993, pp. 149-158). After the American Civil War, testimonials became popular with patent medicines and were common practice generally during the 1890s. The practice became so popular that some brokers offered to sell "thousands" of testimonial letters sorted by particular maladies that could be inserted into patent medicine advertising to suggest consumers, doctors, clergy etc had obtained successful results:

> To be sure, they have all tried one remedy or more; but that is all right; they will keep on trying new remedies until they die. Buy or rent a few thousand of those letters from me, at a few dollars a thousand, and tackle them with a new proposition – something new, something with a new name – jolly 'em along a little, and they'll come up with the money for a new treatment (*Boston Medical and Surgical Journal*, 1906, p. 244).

The association between patent medicines and testimonials caused other advertisers to disfavor testimonials in the early 1900s. This changed in the 1920s with the public's fascination with movie stars (and their availability to appear in advertising for a price) caused movie star testimonials to regain popularity (Segrave, 2005, pp. 4-10). Consumers likely presume that the testimonials are objective third party approval of the product and in the case of celebrities reflect product usage that they might want to emulate.

Cramp (1929) reported that based on his 20 years of investigation most testimonials were genuine and sincere, but edited. However, he also reported an interesting example where a stomach remedy prepared newspaper ads with testimonials and instructed the newspaper editor to insert his city's name in the copy: "Old _____ Resident Given Up by Physicians." In Chicago the testimonial involved an old Chicago resident, while in Austin, it was an old Austin resident. This obviously dishonest practice required the complicity of newspaper editors. The practice continues today with online advertising enabled by smart software rather than third party cooperation.

Early legal analysis of endorsement rights

Despite the obvious fraud of fabricated testimonials or applying a genuine testimonial to a different product, the Supreme Court of Georgia held in 1872 that similar conduct was not actionable because there was no injury to a property right as there would be in a case of passing off (confusingly similar packaging or trade name) or trademark infringement. That decision involved an advertisement claiming that a committee of the Georgia State Agricultural Society decided that advertiser's family sewing machine was the best. In fact, the committee had awarded the diploma for best family machine to a competitor who then brought the lawsuit (*Singer Manufacturing Co.* v. *Domestic Sewing Machine Co.*, 1872). The court decided the rightful award winner did not have a property right in the award and therefore could not prevail in the lawsuit. This decision was interpreted by marketers to deny the right of competitors to sue to stop a rival's false testimonials. A court finally confirmed this interpretation in 1899, although the bogus testimonials were a relatively minor issue in the passing off dispute (*Centaur Co.* v. *Marshall*, 1899). It only would be much later that courts would finally prohibit false claims about awards as unfair competition when requested to by a competitor/actual award winner (*Friedman* v. *Sealy*, 1959).

In 1899, the Supreme Court of Michigan allowed a cigar marketer to use the name and image of a deceased lawyer/politician despite the protests of his widow. Thus neither rival marketers nor people whose names were used in false endorsements had much hope of winning a lawsuit at this time. However, the Michigan Supreme Court did note the possibility of a successful lawsuit if the use of another's name or image was so outrageous as to damage the reputation of the person whose identity was being exploited (*Atkinson* v. *John E. Doherty & Co.*, 1899).

The law at the end of the nineteenth century left open the possibility of two narrow situations where use of a bogus testimonial might be prohibited:

(1) when consumer confusion regarding source, passing off, was likely; or

(2) when injury to reputation was likely.

Passing off was found when a federal court prohibited further use of the name "Franz Josef Beneficial Association" as well as use of a portrait of the Emperor because people would think the association was connected to the Emperor of Austria-Hungary when it was not (*Von Thodorovich* v. *Franz Josef Beneficial Association*, 1907). Such personal name use could be prohibited as passing off even if it was not trademark infringement (*Thomas A. Edison* v. *Shotkin*, 1946).

In an earlier case, a New York trial court followed the injury to reputation theory and issued an injunction prohibiting a throat medicine company from using the name and purported testimonial letters of a well-known London physician (*Mackenzie* v. *Soden Mineral Springs Co.*, 1891). The court felt these actions would likely injure the physician's reputation. This legal theory has also been followed in later cases (e.g. *Foster-Millburn Co.* v. *Chinn*, 1909).

The attorneys for the London physician cited a new but already well known article in the *Harvard Law Review* entitled "The Right of Privacy" by two of the greatest jurists of the day, Samuel Warren and Louis Brandeis (1890). One of the four rights of privacy the authors proposed was that people should have the right to control the commercial use of their personae. The article may have influenced the judge but he did not reference it in his opinion (*Mackenzie* v. *Soden Mineral Springs Co.*, 1891).

The concept of a right to privacy to prevent unauthorized commercial exploitation did gain traction. In 1905, the highest court in New York denied relief to a non-celebrity whose picture was used on a package of flour without her permission. The next year, the New York legislature passed a statute protecting anyone's "right of publicity" during their lifetime (Madow, 1993, p. 167; Petty and D'Rozario, 2009). In 1907, a New Jersey court enjoined the use of Thomas Edison's name and likeness by holding a person did have a property right in his or her name (*Edison* v. *Edison Polyform Manufacturing*, 1907).

This slowly growing movement against unauthorized testimonials contributed to the increase in the use of permission-based testimonials largely from Hollywood studios selling rights for movie star testimonials in the 1920s (Segrave, 2005, pp. 10-15). Madow (1993, p. 159) suggests celebrities had become less tolerant of the unauthorized commercial use of their identities than in the eighteenth century because society shifted from admiring strong character traits such as honesty and integrity to admiring the uniqueness of individuals. Celebrities tried to develop unique personae and sought to capture the right to control and financial benefits from their unique personae. By the 1980s, celebrities also were successfully challenging the use of look-a-likes and sound-a-likes in advertising (Kertz and Ohanian, 1992, p. 18). However, because movie studios often sold star testimonials without considering whether the specific stars actually used the product or believed in the truthfulness of their statements about the product, the problem of masking the message of product marketers to appear as objective third party information would continue.

Truth-in-advertising

At the same time the right of publicity was developing to protect the private interest of celebrities (and others) not to have their name used in advertising without their authorization, a truth-in-advertising movement started. This movement was started by reformers and supported by some advertising practitioners who were attempting to "professionalize" and gain some respect for their profession. Hess (1922) suggests that interest in truth-in-advertising started around 1893, but solidified in 1911 when legal expert H.D. Nims explained why proving damages under existing laws made it difficult to control false advertising through either the civil common law or existing criminal law of false pretenses. Nims proposed a model statute (commonly known as the *Printer's Ink* Model Statute) to be adopted by states that would prohibit "any assertion, representation or statement of fact in advertising that is untrue, deceptive or misleading." Violation of the statute would be a misdemeanor. At this point the Better Business Bureau and National Vigilance Committee of the Associated Advertising Clubs of the World were trying informally to address consumer complaints and encourage truth-in-advertising (Pease, 1958, p. 46).

This led to over 30 states passing laws before 1916 to address untruthful advertising. The majority of those statutes contained the broad language quoted above that while focused on factual product claims could be interpreted to also cover fabricated testimonials. Other statutes however, expressly limited their coverage to false statements about the product itself. While those latter statutes might cover false statements about the product made in the form of testimonials, they would not prohibit the fabrication of testimonials that contained truthful claims about the product (Davies, 1915). Some statutes also required proof that the false statements were made intentionally with knowledge of their falsity. A few states specifically prohibited false statements about prizes or awards to address the old Singer Sewing Machine decision in Georgia. These statutes were largely enforced by local advertising clubs and Better Business Bureaus with the threat of possible prosecution providing the club to cooperate with these self-regulatory entities (Hansen and Law, 2008, p. 254; Pease, 1958, p. 46).

These statutes illustrate the two distinct interests in truthfulness in endorsement. The first and focus of this article is whether the person identified as an endorser actually existed and did make the endorsement. The second truthfulness issue is whether the statements purportedly made in an endorsement or testimonial accurately describe the advertised product or its performance. This latter issue embraces the truth-in-advertising issue about product claims that was the primary focus of that movement.

The requirement that testimonial statements about product performance or attributes be truthful regardless of whether the testimonial was genuine or fabricated was first established by a court decision under the 1906 Food and Drug Act. The court was clear that a marketer of a worthless drug could not escape responsibility for curative and effectiveness claims by hiding behind the phrase "the doctors say" (*United States* v. *John J. Fulton Co*, 1929). The FTC followed this ruling when it ordered a radio advertiser not to read purported testimonial letters that made false claims that the advertiser would not be allowed to make in its own words (Pepsotalis Co., 1936).

The FTC takes action

Eight years after Congress enacted the Food and Drug Act it passed the Federal Trade Commission Act creating the FTC. The Commission immediately began pursuing false advertising as an unfair method of competition (Tedlow, 1981). In the mid-1920s, a series of far-fetched testimonial advertisements appeared for products as diverse as Pond's skin care products, Fleischmann's yeast, Simmons beds and Lucky Strike cigarettes. For example, American Tobacco used testimonials from certain actresses that smoking Lucky Strikes – "that's how we stay slender" (Segrave, 2005, p. 55). In fact, those actresses did not smoke at all. The use of such blatantly false testimonials led to debate about the propriety and credibility of paid-for endorsements. A majority of the advertising profession condemned this practice, but several prominent authorities argued that as long as the endorsements were truthful and genuine, the compensation issue was immaterial (Pease, 1958, pp. 52-55).

Inevitably, the relatively new FTC became involved. The most straight forward cases were its condemnation of fabricated testimonials (e.g. Theronoid Inc, 1933). One of the earliest FTC examples identified by Pease (1958, p. 58) is a stipulation by American Tobacco responding to the Lucky Strike testimonial controversy. American Tobacco agreed with the FTC not to use endorsements by non-smokers or statements that the purported endorser had not seen or approved. The company further agreed to only use genuine, authorized and unbiased testimonials and disclose when the endorsers had been compensated for their testimonials (13 F.T.C. 435 (1929)). Later a similar stipulation was reached between the FTC and Standard Brands, the seller of Fleischmann's yeast (Pease, 1958, p. 58; 16 F.T.C. 561 (1932)). In 1937, the Supreme Court upheld the FTC condemnation of bogus testimonials as an unfair method of competition (*FTC* v. *Standard Education Society*, 1937).

These early stipulations demonstrate the FTC's interest in informing consumers that endorsers receive compensation so that consumers could question their objectivity, regardless of whether the endorsement statements were accurate product descriptions or not. However, a court of appeals overturned a 1931 FTC order (15 F.T.C. 389) against the maker of Cutex products that prohibited the use of paid endorsements and testimonials without disclosing the fact of payment. The court held it was doubtful that consumers were sufficiently gullible to believe such testimonials were given without compensation. Therefore consumers were not deceived by the practice of paid for testimonials (*Northam Warren Corp.* v. *FTC*, 1932).

After this setback, the FTC only pursued cases where the advertising falsely suggested the endorsers were not paid for making endorsements (Inecto Co, 1932). A later case was brought against the makers of Tide detergent who claimed that appliance manufacturers had voluntarily selected Tide free samples for their machines and recommended Tide. In fact, P&G solicited exclusive sample agreements and paid money in exchange for the "selection" of Tide samples (Proctor & Gamble Co, 1960).

The Better Business Bureau's Review Committee issued a Copy Code in 1932 that provided limited support for the FTC's endorsement policies. The Code was quickly adopted by advertising trade associations. It denounced pseudoscientific advertising that distorted the meaning of statements made by professionals or scientists and testimonials that did not reflect the real choice of the authors as being "unfair to the public and tend to discredit advertising." Unfortunately, advertisers were reluctant to appear before advertising review tribunals and the Code was soon denounced as "scraps of paper" (Pease, 1958, pp. 70-71).

After heated debates about strengthening the Food and Drug Act to broadly define false advertising to include misleading impressions created by ambiguity or inference, Congress in 1938 augmented FTC authority to also pursue "unfair or deceptive acts and practices" that quickly became the FTC's primary authority against deceptive advertising (Stole, 2006; Washburn, 1981; Tedlow, 1981). It used this authority to prohibit implied fabricated endorsements such as "contractors all over the world would testify that maintenance cost of advertised machine 50 per cent lower than any other," "Howe's Hollywood, favorite of the stars" and a home study course offered by an organization called the "Weavers Guild of America" that was a for-profit firm rather than a non-profit guild representing weavers (*Moretrench Corp.* v. *FTC*, 1942; *Howe* v. *Federal Trade Commission*, 1945; *Goodman* v. *Federal Trade Commission*, 1957).

While most FTC actions pursued deceptive advertising about the product, some actions condemned the use of genuine good faith testimonials to make deceptive or false product claims (American Chemical Paint Co., 1948). In a later case, an appellate court affirmed the FTC's authority to regulate false product claims made by endorsement but also held the FTC could not require that testimonials be factually true in all respects. The court noted that some aspects of falsity might be immaterial to consumers and therefore not actionable by the FTC (*R.J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 1951).

Perhaps the most well-known FTC action against false product claims made through endorsements was its 1939 challenge against Good Housekeeping magazine for using its "Tested and Approved" seal for its advertisers. The FTC had previously pursued a number of Good Housing seal-approved advertisers for misleading advertising copy. The FTC argued Good Housekeeping had a financial interest in advertising revenues and that its tests were insufficient to verify the claims made by most of the advertisers were true and estimated that about 80 seal-approved national advertisers were guilty of deceptive practices. After two years of hearings (and accusing the FTC action of being a Communist plot), the publisher settled the case and changed its seal to a Replacement or Refund guarantee (Hearst Magazines Inc, 1941; Stole, 2006, pp. 164-165). However even this change still represented to consumers that the magazine carefully tested products that were awarded the seal according to a court decision nearly 30 years later.

In that court decision, a California court held that the publisher of Good Housekeeping magazine could be held liable for consumer injuries if it did not exercise ordinary care in testing and certifying products (*Hanberry* v. *Hearst Corp*, 1969). The possibility of such endorser liability dates back at least to the 1940s when cowboy actor Gene Autry endorsed "Gene Autry Cowboy pants" that were made of rayon and quite flammable (Segrave, 2005, p.88). Occasional cases since then have held celebrity endorsers liable for personal or financial injuries from products they endorsed that were defective or not as advertised (Kertz and Ohanian, 1992, pp. 16-17).

Organizations like Good Housekeeping that appear to have appropriate expertise can offer very credible endorsements because of their apparent expertise. One of the earliest private lawsuits to address this issue prohibited the use of an endorsement by an apparently independent certification organization ("The Bureau of Feminine Hygiene Inc") that was not financially independent from the advertiser (*Gynex Corp.* v. *Dilex Inst. of Feminine Hygiene*, 1936). A more recent case involved a settlement with the Food and Drug Administration that prohibited claims that Nutrilite food supplement was useful in the treatment of some 54 diseases but allowed some other claims and FDA review and approval of future claims. The FTC became involved when the company started advertising that the FDA had approved its advertising and no other firm enjoyed similar treatment. The FTC's order prohibiting such government endorsement claims was upheld by the court of appeals (*Mytinger and Casselberry Inc* v. *FTC*, 1962).

The complexity of this developing area of law led the Council of Better Business Bureaus to issue a bulletin on "The Use of Testimonials in Advertising" in 1948. The BBB offered eight general principles for valid testimonials and endorsements. The primary guidance of the bulletin was that endorsements should be genuine and reflect the honest and sincere opinion of the endorser as well as his or her current beliefs whether the endorsement was done for compensation or just "free will." If edited for advertising, the edited version should accurately reflect the spirit and content of the entire endorsement. If models (rather than the actual endorsers) were used to illustrate testimonials, that fact should be disclosed in the advertisements Like the FTC, the BBB also was interested in truthful product claims so its bulletin asserted the endorser should not make a misstatement of fact and should be competent and qualified to make the endorsement (Segrave, 2005, p. 106).

The FTC finally decided to issue detailed endorsement guides including numerous hypothetical examples in 1980 after first proposing guides in 1972 and again in 1975 (Washburn, 1981; Segrave, 2005, pp. 89-92, 146-148). These guides were updated in 2009 to include online communications and practices outside of traditional advertising (16 C.F.R. §255). The 1980 guides urge that endorsements and testimonials represent the honest opinion of the endorser (including actual use if use is claimed) but not state factual claims about the product that the advertiser could not make in its own words. If consumers honestly claim unusual results from product use, the advertiser should disclose the results are not typical (the 2009 update requires that generally expected results be disclosed and substantiated). Endorsements can be accurately paraphrased but cannot be distorted or taken out of context (*Country Tweeds* v. *FTC*, 1964). Advertisers should have good reason to believe endorsements by celebrities and experts are still accurate before when they use them (National Dynamics Corp, 1973). Experts and organizations must base their endorsements on their expertise and objective procedures.

The FTC's continuing interest in disclosing compensation for endorsements is illustrated by the Guide's statements that experts and celebrities should disclose material connections to the advertiser that consumers would not expect. This requirement is consistent with a 1979 consent agreement with astronaut Gordon Cooper that required him to disclose he was paid a commission on each unit that was sold rather than the traditional and expected up-front fee (Leroy Gordon Cooper, 1979). Consumer endorsers are presumed by the FTC to be unpaid, so any material benefit received by them must be disclosed. In addition if anyone other than the actual consumer (such as a family member) is used to depict a consumer testimonial that fact must be disclosed.

Despite the 1941 settlement with Good Housekeeping and a 1978 consent agreement settling a dispute with singer Pat Boone that required him to make a reasonable inquiry into the truthfulness of claims before he endorsed a product (Cooga Mooga, Inc, 1978), the 1980 guides appear to hold only advertisers not endorsers themselves potentially liable for not following the guides. The 2009 amendments clarify that advertisers and endorsers both may be held liable for the truthfulness of endorsements and both may be liable for not disclosing unexpected material connections. Thus under the 2009 amendments consumer or celebrity bloggers and tweeters as well as celebrities appearing on talk shows should disclose any material connections they have to the product they are promoting or they may be held liable for failing to do so.

Conclusion

The twenty-first century interest in masked or covert marketing caused by news revelations of a variety of practices, many of which are related to internet marketing, made it appear like these were new phenomena that raised new public policy considerations (Sprott, 2008). Indeed, perusal of the FTC's website (www.ftc.gov) demonstrates the FTC has been busy pursuing deceptive masked marketing practices used for web-based marketing efforts in the past few years. It has challenged several firms whose employees have provided online testimonials as consumers, PR firms who offer rewards for testimonials but fail to advise the reward seekers that they should disclose their rewards and even an affiliate marketers for a guitar-lesson DVD marketer for appearing as ordinary consumers and independent reviewers. The FTC even is seeking federal court orders to stop an acai berry weight loss product marketer from continuing ten fake news websites that appeared to be independent news operations (Federal Trade Commission, 2011). Similarly, the National Advertising Division of the Council of Better Business Bureaus requested that Nutrisystem disclose typical consumer results and that the atypical consumer testimonials it posted on the social media site Pinterest were compensated (Long, 2012).

Although many of these modern challenges involve the internet, this article demonstrates that law makers and reformers have been discussing public policy issues related to such masked marketing practices for over a century. As is often the case, initial legal inquiries generally found these practices to be outside existing legal doctrine. In addition, one of the earliest concerns was the regulatory distinction between ads and content in print media for calculating mailing rates. This early historical focus led down the path of allowing the practice rather than prohibiting it for being deceptive to consumers.

Later, the so called truth-in-advertising movement in the early twentieth century included masked marketing, both in terms of disguised advertising and fabricated testimonials, in its calls for reforms. The general remedy for the long standing practice of disguising advertising was disclosure that apparent editorial content was actually paid-for advertising. Disclosure also was the preferred remedy for apparently independent testimonials and endorsements that were actually compensated in a way not expected by consumers. Only bogus testimonials and those that contained factually false statements about the product were prohibited since disclosure would not cure their misleading nature.

By the twenty-first century, the legal preference for disclosure remedies over prohibitions is well established by history. Had the concern for disguised advertising in particular started as a consumer protection issue, perhaps prohibiting such disguises would be more generally accepted today. The disclosure approach is relatively deferential to marketers and is consistent with both caveat emptor legal approaches in the nineteenth century and with the consumer sovereignty approach championed by the FTC in the late twentieth century.

This historical and current day emphasis on disclosure rather than prohibition raises policy and marketing research questions whether there are some circumstances where a disclosure remedy is inadequate. For example, if for some communications, consumers form favorable impressions almost instantly, disclosure after that point would appear not to address the problem of deceiving consumers into noticing what appears to be a non-marketing communication. Similarly, if young children have less developed defenses of skepticism against commercial communications, perhaps communications such as video games promoting particular brands or products should be prohibited for those targeting young children rather than requiring disclosure of their commercial connection.

The long history of a disclosure rather than prohibition approach that is deferential to advertisers is not what is necessarily best for consumers or society more generally. Consumers would likely prefer that all advertising/selling communications be immediately identifiable as such rather than disguised as objective third party communications. Perhaps it is time for policy makers to break from the past and consider prohibiting attempts to mask the nature of marketing communications. Since the format of masked marketing is inherently deceptive and provides no benefit to consumers, the format itself should not be protected by the First Amendment, even if the message content is protected. Like other forms of deceptive advertising, if a substantial percent of consumers are deceived about the marketing nature of communication or testimonials within an obvious marketing communication, then the deception should be prohibited.

One step in this direction is he FTC's Telemarketing Rule requires immediate disclosure of the marketing nature of the call and the identity of the caller as a salesperson (16 C.F.R. 310.4). In other words, the marketing communication is prohibited until it is identified as such (and the targeted consumer has the option to refuse). In other cases where the communication is less intrusive or more easily terminated such as direct mail, some amount of initial deception as to the nature of the communication is often allowed provided disclosure is made at some point. It is too early to tell if the FTC's federal court actions against the fake news websites operated by tan acai berry weight loss marketer will result in prohibitions of the fake news websites or merely require the website to disclose they are not affiliated with any news organizations and the website stories are advertising that emulates news reports. History suggests a preference for disclosure, but consumer protection public policy suggests some consumers will miss the disclosures (or notice them too late to effectively evoke skepticism defenses) and prohibiting news website emulation altogether would be more effective in preventing deception. It seems it is time for a break with the history of masked marketing regulation to maximize the effectiveness of consumer protection policy.

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