

FTC Endorsement and Testimonial Guide Updates and the First Amendment

Marianne McGoldrick

Kent State University

Author Note

Correspondence concerning this article should be emailed to mmcgoldrick2@gmail.com.

Abstract

In 2009, the Federal Trade Commission (FTC) revised their Endorsement and Testimonial Guides (Guides) to cover consumer-generated media, including bloggers. The new Guides require bloggers to disclose any material connections with producers of products endorsed on their blogs. The concern with the new Guides is that they are in violation of the First Amendment, as they are too broad and cover noncommercial speech. This paper will discuss two particular precedent cases, *Bolger v. Youngs Drug Products Corp.* and *SEC v. Wall Street Publishing Institute, Inc.*, which demonstrate the updated FTC Guides unfairly cover noncommercial speech. It will also review the strict scrutiny doctrine and establish the Guides are in violation of the First Amendment and should be struck down. It will be concluded that the updated FTC Guides should be re-written so that disclosure is only enforced if the blogger is economically motivated and the speech is commercial.

Introduction

In 2009, the Federal Trade Commission (FTC) revised their Endorsement and Testimonial Guides (Guides) to cover consumer-generated media, including bloggers. The new Guides require bloggers to disclose any material connections with producers of products endorsed on their blogs, as positive reviews of such products may be considered “sponsored” or an “advertising message.” What is considered when deciding whether or not a positive product review by a blogger is an advertising message? Circumstances that will be considered by the FTC include (Guides Concerning the Use, 2009, p. 53126):

Whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received.

Commercial speech does not afford the same First Amendment protection as noncommercial speech, and there is a fine line between the two in online product reviews. If bloggers are receiving free products but no compensation for their positive reviews, their writing should be considered noncommercial speech and be protected by the First Amendment (and therefore not subject to FTC regulation). However, those that are receiving compensation for positive reviews should have to disclose their material connections so as not to mislead the public. The new FTC Guides violate the First Amendment in that they are too broad and cover noncommercial speech, and they should be re-written so that disclosure is only enforced if the blogger is economically motivated and the speech is commercial.

This paper will discuss two particular precedent cases, *Bolger v. Youngs Drug Products Corp.* and *SEC v. Wall Street Publishing Institute, Inc.*, which demonstrate the updated FTC Guides unfairly cover noncommercial speech. It will also review the strict scrutiny doctrine and establish the Guides are in violation of the First Amendment and should be struck down. It will be concluded that the updated FTC Guides should be re-written so that disclosure is only enforced if the blogger is economically motivated and the speech is commercial.

The *Bolger* Test

In 1983, the Court set forth a limited-purpose test for categorizing commercial speech in *Bolger v. Youngs Drug Products Corp.* The Court held that informational pamphlets sent with contraceptive ads in unsolicited mailings represented commercial speech based on three factors (Mazur, 2005, para. 11):

1. The pamphlets were a form of advertisement.
2. The pamphlets referenced a specific product.
3. The pamphlets were created with economic motivation.

Justice Marshall pointed out in an analysis footnote that the Court “does not mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.” Despite this, I have chosen to apply the *Bolger* test to two examples listed in the updated Guides to prove that not all blogger endorsements are commercial.

In the updated Guides, example seven from the FTC discusses a college student who runs a gaming blog. It states (Guides Concerning the Use, 2009, p. 53143):

As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement.

When the *Bolger* test is applied to example 7, it fails. The favorable blog review could simply be considered editorial content; it references a specific product; and it was not created with economic motivation. The blogger did not sign a contract stating he would write a favorable review in exchange for the product, and he was not paid to do so. In fact, if the student had not liked the system, he had the option to write a negative review or no review at all. In short, FTC example seven fails the first and third prongs of the *Bolger* test and proves that unpaid endorsements should fall under noncommercial speech and have First Amendment Protection.

Example four in the updated Guides states (Guides Concerning the Use, 2009, p. 53143):

An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the

endorsement.

When the *Bolger* test is applied to example four, the ad stands as commercial speech. The ad is clearly a form of advertisement; it features a specific anti-snoring product; and the speaker is economically motivated as he is receiving a percentage of gross sales. In this case, the speech is commercial and, therefore, is subject to regulation by the FTC.

SEC v. Wall Street Publishing Institute, Inc.

In *SEC v. Wall Street Publishing Institute, Inc.*, the D.C. Circuit ruled that articles positively discussing various publicly traded companies published in a financial magazine did not constitute commercial speech. This was despite the fact that those companies themselves drafted the article text, paid the magazine's editors "writers' fees," or purchased advertising in other issues in which they were not featured (FTC Extends Endorsement, n.d., p. I545).

According to the Harvard Law Review, without firm proof that speech is essentially premised on a direct financial exchange between speaker and advertiser, courts have held that such speech is not commercial (FTC Extends Endorsement, n.d., p. 1545). "An unpaid blogger's economic interest in publishing a positive endorsement is even less direct than that in *Wall Street Publishing*. Even where a blogger's positive endorsement might yield a benefit in the form of free products in the future, the blogger's speech is not 'fundamentally premised on a direct economic relationship between the company and the promoter'" (FTC Extends Endorsement, n.d., p. 1545). Again, this case proves that unpaid endorsements should fall under noncommercial speech and be afforded First Amendment protection.

Strict Scrutiny Doctrine

If the strict scrutiny doctrine is applied to the updated FTC Guides, it is evident that the Court should strike them down. “Content-based speech restrictions, the Court says, are constitutional if they are narrowly tailored to serve a compelling state interest” (Volokh, 1997, para. 1).

According to Volokh, most cases striking down speech restrictions according to strict scrutiny “rely primarily on the narrow tailoring prong, which, according to the Court, contains four components” (Volokh, 1997, para. 13-18):

1. Advancement of the Interest
2. No overinclusiveness
3. Least restrictive alternative
4. No underinclusiveness

The Guides fail prongs two and three. The Guides are over-inclusive in that they are not narrowly tailored and they restrict a significant amount of noncommercial speech that doesn't implicate the government interest. This is related to prong three in that the Guides are not the least restrictive alternative when trying to regulate endorsements. The Guides should be rewritten so that only commercial speech, or endorsements that are economically motivated, must be disclosed by bloggers.

Conclusion

In conclusion, the updated FTC Guides are more broad than necessary and violate the First Amendment. It is evident through the *Bolger* test that some of the regulations cover noncommercial speech (unpaid blogger endorsements), which affords more constitutional protection than commercial speech (paid blogger endorsements). The *SEC v. Wall Street Publishing Institute, Inc.*, case proves that there must be a direct financial exchange between the

speaker and advertiser in order for speech to be held as commercial, and there is no such direct connection in unpaid blogger endorsements. Last, the updated regulations fail the strict scrutiny doctrine in that they are overinclusive and the least restrictive alternative, as they cover what should be considered noncommercial speech. Therefore, it can be deduced that the updated FTC Guides should be rewritten so that disclosure is only enforced if the blogger is economically motivated and the speech is commercial.

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